

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

Appeal no. 85 of 2013

Dated: 23rd September, 2013

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

In the matter of:

**Parrys Sugar Industries Limited
1/2, 3rd Floor, Venus Building
Kalayanamantapa Road
Jakkasandra
Bangalore – 560 094**

....Appellant(s)

Versus

- 1. Karnataka Electricity Regulatory
Commission
6th & 7th Floor, Mahalaxmi Chambers
No. 9/2, M.G. Road
Bangalore – 560 001**
- 2. Hubli Electricity Supply Company Limited
Nava Nagar, P.B. Road
Hubli – 580 025**
- 3. State Load Dispatch Centre – Karnataka
Cauvery Bhavan, K.G. Road
Bangalore – 560 009**

Counsel for the Appellant (s): Mr. Shridhar Prabhu
Counsel for the Respondents (s): Mr. Sriranga S.
Ms. Sumana Naganand

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by M/s Parrys Sugar Industries Ltd. against the order dated 7.2.2013 passed by the Karnataka Electricity Regulatory Commission (“State Commission”) determining the variable charges payable to the Appellant for the energy supplied to the grid in compliance with the directions of this Tribunal in the judgment dated 27.9.2012 in Appeal no. 140 of 2012.

2. The Appellant is a sugar plant having co-generation facility. The State Commission is the Respondent no.1. The distribution licensee is the Respondent no.2. The State Load Despatch Centre is the Respondent no.3.

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

- (a) The Appellant approached the State Commission praying for a direction to the Respondents to grant open access and to pay Rs. 5.50 per unit for the electricity generated and injected into the grid upto the date of grant of No Objection Certificate ('NOC') by the State Load Dispatch Centre.
- (b) The State Commission rejected the petition of the Appellant and did not allow any payment for the energy injected into the grid by the Appellant by its order dated 24.5.2012.
- (c) Against the above order dated 24.5.2012, the Appellant filed an Appeal no. 140 of 2012.

- (d) This Tribunal by the judgment dated 27.9.2012 allowed the Appeal in part with directions that the Appellant be paid for at the variable charges of generation by the distribution licensee as determined by the State Commission on the basis of price of bagasse and specific fuel consumption as per its Regulations and in the absence of the State Commission's Regulations, as per the Central Commission's Regulations for the energy injected during the period from 3.11.2011 till the date on which the Appellant was granted NOC for open access.
- (e) The State Commission passed the consequential order dated 7.2.2013 allowing payment of variable charges at the rate of Rs. 1.87 per unit to the Appellant for the period from 3.11.2011 till the date of grant of the NOC calculating the variable charges based on its earlier order dated 11.12.2009.

(f) Aggrieved by the computation of the variable charges in the impugned order dated 7.2.2013 of the State Commission, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

(a) The direction of the Tribunal in judgment dated 27.9.2012 was a limited remand wherein the State Commission was directed to determine the variable cost on the basis of price of bagasse and specific fuel consumption as per its Regulations and in the absence of its Regulations, as per the Central Commission's Regulations.

(b) There was no direction to the State Commission to apply the generic tariff. The variable cost is not determined under any of the regulation, either the

- repealed 2004 Regulations or the current 2011 Regulations.
- (c) The generic tariff is fixed in the context of determination of tariff for 10 to 20 years and the same cannot be applied in the present case. Hence, the State Commission ought to have followed the Central Commission's Regulations and not applied the generic tariff as though it was an open remand.
 - (d) The Central Commission's Regulations specifically determine the variable cost. Even the Regulations of the State Commission provide that they shall be guided by the Central Commission's Regulations.
 - (e) The 2004 Regulations of the State Commission have been repealed in March 2011, well before the energy was delivered by the Appellant in November 2011. It is

- not denied that the orders passed as per the repealed regulations are saved but such orders are applicable to the concluded contracts and PPA and non-applicable in the present case. The repealed regulations cannot be the basis for fresh determination of variable cost.
- (f) The Appellant had sought inter-State open access and, therefore, the Central Commission's Regulations were more relevant.
5. The distribution licensee (R-2) in support of the impugned order has submitted that the impugned order is in conformity with the directions of the Tribunal in judgment dated 27.9.2012. The State Commission has referred to order dated 11.12.2009 in terms of its 2004 Regulations which was affirmed by the Tribunal in Appeal no. 148 of 2010 by order dated 5.4.2011 and has determined the variable charges as per this order.

The Respondent no.2 has further contended that order dated 11.12.2009 had a control period of 5 years i.e. upto December 2014 and, therefore, covers the period when the energy was injected into the grid by the Appellant. The 2011 Regulations of the State Commission clearly indicate that notwithstanding the repealing of the 2004 Regulations, any order issued under the repealed Regulations so far as it is not inconsistent with the provisions of the 2011 Regulations will be valid. Thus, according to the Respondent no.2, the charges determined by the order dated 11.12.2009 were valid and correctly decided by the State Commission.

6. We have heard the Learned Counsel for the Appellant and Learned Counsel for the Respondent no. 2. Keeping in view the rival contentions of the parties, the question that would arise for our consideration is

“whether the State Commission was correct in determining the variable charges on the basis of its generic tariff order dated 11.12.2009 based on its 2004 Regulations which have since been repealed by the 2011 Regulations and in the absence of determination of variable charges in the 2011 Regulations should the State Commission have not determined the variable charges on the basis of the Central Commission’s Regulations?”

7. Let us first examine the direction of the Tribunal in judgment dated 27.9.2012 in Appeal no. 140 of 2012.

The relevant extracts are as under:

“In the circumstances of the present case, the claim of compensation by the Appellant could not outrightly be rejected on the technical ground that the period of injection of power was a few days after the end of the period for which NOC was sought and the Appellant should have again applied for open access despite no action on its previous application. We feel that the ends

of justice would be met if the Appellant is paid for at the variable price of generation by the distribution licensee as determined by the State Commission on the basis of price of bagasse and specific fuel consumption as per its Regulations and in the absence of its Regulation as per the Central Commission's Regulations, for the energy injected during the period from 3.11.2011 till the date from which it was granted NOC for open access."

8. The direction of the Tribunal was to determine the variable price of generation on the basis of price of bagasse and specific fuel consumption as per the State Commission's Regulations and in the absence of the State Commission's Regulations, the charges have to be determined as per the Central Commission's Regulations.

9. In pursuance to the directions of the Tribunal, the State Commission initiated the proceedings and issued notice to the parties. The Appellant before the State Commission claimed the variable cost computed on the

basis of the Central Commission's Regulations, 2012. The Distribution Licensee had contended that the variable cost should be as per the tariff order dated 11.12.2009 passed by the State Commission.

10. Let us now examine the findings of the State Commission in the impugned order. The relevant extracts of the order are reproduced below:-

“8) The variable cost of Co-generation Plants using Bagasse has already been determined by this Commission in its Order dated 11.12.2009 while determined the overall tariff payable for Co-generation Plants. The said order has been affirmed by the Hon'ble ATE in Appeal No.148/2010, vide its Order dated 5.4.2011, except regarding the Capital cost adopted by this Commission. Pursuant to the said order of the Hon'ble ATE in the above-said Appeal, this Commission has re-determined the Capital cost and has re-fixed the Tariff payable to the Co-generation Plants from Rs.3.59 per Unit to Rs.3.9 per Unit.”

“10) In the above Order, while determining the variable cost, this Commission has approved the fuel price of the Bagasse at Rs.1025/- per MT with 5% per

annum escalation. Further, this Commission has specified the specific consumption of Bagasse at 1.6 Kg per Unit and the auxiliary consumption at 8%.

- 11) *Taking the above parameters adopted by the Commission which have been approved by the hon'ble ATE, the variable cost for the period November, 2011 and December, 2011 works out to Rs. 1.87 per Unit, including the auxiliary consumption of 8% $[(1.025 \times 1.6 \times 1.05) / 0.92] = \text{Rs. } 1.87 \text{ per Unit.}$*
- 12) *Accordingly, this Commission directs Respondent No.1 to pay to the Petitioner the variable cost at Rs. 1.87 (Rupee One and Paise Eighty Seven only) per Unit for the energy pumped into the Grid between 3.11.2011 and 20.12.2011.*
- 13) *As this Commission has already determined the variable charge payable to the Co-generation Plants, in our view, it is not necessary for us to go into the calculations filed by the Petitioner on the variable cost or the Regulations of the CERC.*
- 14) *Accordingly, in modification of the Order dated 24.5.2012 of this Commission, we direct Respondent No.1 to pay to the Petitioner, for the energy delivered during the period from 3.11.2011 till the date of grant of 'NOC' for Open Access, at the rate of Rs. 1.87 (Rupees One and Paise Eighty Seven only) per Unit, within 4(four) weeks from the date of this Order."*

11. Thus, the State Commission determined the variable charges according to its order dated 11.12.2009 in which it had decided the generic tariff for bagasse based co-generation plants. The State Commission did not find it necessary to go into the calculations filed by the Appellant or the Central Commission's Regulations as it had already determined the variable charges payable to the co-generation plants.

12. We find that the State Commission had notified the 2004 Regulations for Power Procurement from Renewable sources by the Distribution Licensees on 27.9.2004. According to the 2004 Regulations, the State Commission has to determine the tariff for electricity from renewable sources and while determining the terms and conditions of tariff, it shall be guided as far as possible by the principles and

methodologies specified by Central Commission, National Electricity Policy and Tariff Policy.

13. In pursuance of the 2004 Regulations, the State Commission determined the tariff in respect of renewable sources of energy vide its order dated 18.1.2005 for the control period of 5 years. According to the 2004 Tariff Regulations, the tariff was required to be reviewed after a period of 5 years. Accordingly, the State Commission reviewed the tariff renewable sources of energy by its order dated 11.12.2009 after holding public hearing for a period of 5 years w.e.f. 1.1.2010, i.e. from 1.1.2010 to 31.12.2014. In this order while determining the tariff, the State Commission also considered the Central Commission's Regulations, 2009 for renewable sources of energy.

14. The order dated 11.12.2009 was challenged in Appeal no. 148 of 2010. The Tribunal vide its judgment dated 5.4.2011 affirmed the order except regarding capital cost adopted by the State Commission. Pursuant to the judgment dated 5.4.2011, the State Commission redetermined the capital cost and refixed the tariff. However, there was no change in the variable cost as determined by the order dated 11.12.2009.

15. In the order dated 11.12.2009, the components of variable cost have been determined as under:

- i) Bagasse price : Rs. 1025/MT for first year of the control period
- ii) Fuel Cost Escalation : 5% per annum over the base year
- iii) Specific Fuel Consumption : 1.60 kg/unit
- iv) Auxiliary consumption : 8%

16. Subsequently, the State Commission has notified 2011 Regulations for power procurement from renewable sources by the distribution licensee on 16.3.2011. The 2011 Regulations also provide that while determining the tariff the State Commission shall be guided by the principles and methodologies specified by the Central Commission, National Electricity Policy and Tariff Policy. However, the State Commission has not determined the tariff of the renewable sources of energy subsequent to order dated 11.12.2009, as the tariff determined by order dated 11.12.2009 was valid till 31.12.2014.

17. According to the Learned Counsel for the Appellant, the 2004 Regulations have been repealed by the 2011 Regulations of the State Commission and therefore the tariff as determined by the order dated 11.12.2009 is

not valid for determining the variable charges of the Appellant's co-generation plant.

18. Let us now examine the Repeal and Savings clause of the 2011 Regulations.

“13. Repeal & Savings. – (1) The KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations 2004, along with amendments thereto are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken including any notification, inspection, order or notice made or issued, or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted under the repealed Regulations shall, in so far as it is not inconsistent with the provisions of these Regulations be deemed to have been done or taken under the corresponding clauses of these Regulations.”

19. In view of Regulations 13 of the 2011 Regulations, the tariff as determined by the State Commission vide its order dated 11.12.2009 under the 2004 Regulations

would be valid if it is not inconsistent with the 2011 Regulations.

20. The 2011 Regulations stipulate that the Commission shall be guided by the principles and methodologies specified by the Central Commission, National Electricity Policy and Tariff Policy.

21. The 2004 Regulations also provide that as the State Commission as far as possible be guided by the principles and methodology specified by the Central Commission, National Electricity Policy and Tariff Policy. The State Commission has passed the tariff order dated 11.12.2009 in accordance with the 2004 Regulations for a control period of 5 years w.e.f. 1.1.2010. The State Commission while deciding the tariff has also considered the Central Commission's

Regulations of 2009. The tariff determined by the order dated 11.12.2009 is valid till 31.12.2014.

22. Thus for the period for which the variable charges are payable to the Appellant is covered in the control period for which the tariff was determined by the State Commission's order dated 11.12.2009. The order dated 11.12.2009 is not inconsistent with the 2011 Tariff Regulations of the State Commission. Therefore, the order dated 11.12.2009 based on the 2004 Regulations is valid for determining the variable charges from renewable energy resources supplied to the distribution licensee (R-2) for the period 1.1.2010 to 31.12.2014. The State Commission has correctly determined the variable charges after applying escalation of 5% to the bagasse price determined for the base year and applying auxiliary consumption and specific fuel

consumption as determined in the order dated 11.12.2009.

23. According to the Learned Counsel for the Appellant, since the Appellant had sought inter-State open access, the Central Commission's Regulations were more relevant. We are not able to agree with the contention of the Appellant. The order of the Tribunal clearly stated that the variable charges have to be paid according to the State Commission's Regulations and in the absence of its Regulations as per Central Commission's Regulations. Thus, the Central Commission's Regulation had to be applied only in the absence of State Commission's Regulations for determination of variable charges. Further the energy has been supplied by the Appellant to the distribution licensee during the period when it did have NOC for open access. The energy has been injected into the

Karnataka grid and consumed by the distribution licensee (R-2). Therefore, the rates decided by the State Commission according to its Regulations for procurement of power by the distribution licensee from bagasse based generating station will be applicable.

24. In view of above we do not find any infirmity in the impugned order of the State Commission in determining the variable charges payable to the Appellant in accordance with its order dated 11.12.2009, as the same is in conformity with the remand order of this Tribunal.

25. Summary of our findings

The State Commission correctly determined the variable price in accordance with its order dated 11.12.2009 valid for the control period from 1.10.2010 to

31.12.2014 based on its 2004 Regulations in compliance with the remand order of the Tribunal.

25. In view of above, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

26 Pronounced in the open court on this 23rd day of September, 2013.

**(Rakesh Nath)
Technical Member**

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

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REPORTABLE/NON-REPORTABLE

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