

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

Appeal nos. 31 of 2013 & 8 of 2013

Dated: 12th August, 2013

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

Appeal No. 31 of 2013

In the matter of:

M/s. IL&FS Wind Farms Limited,

The IL&FS Financial Centre,
Plot C-22, 'G' Block,
Bandra-Kurla Complex,
Bandra (East),
Mumbai-400 051.

Rep. by its Authorised Signatory

... Appellant (s)

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
11-4-660, 4th & 5th Floors, Singareni Bhavan, Red Hills,
Khairatabad, Hyderabad.
Andhra Pradesh-500 004.
2. **Central Power Distribution Company of Andhra Pradesh Ltd.,**
APCPDCL Corporate Office,
6-11-50, 2nd Floor, Mint Compound,
Hyderabad-500 063
3. **Transmission Corporation of Andhra Pradesh Limited,**
Vidyut Soudha, Khairatabad,
Hyderabad-500 082,
Andhra Pradesh
4. **Andhra Pradesh Co-ordination Committee,**
Vidyut Soudha, Khairatabad,
Hyderabad-500 082,
Andhra Pradesh

5. **New & Renewable Energy Development Corporation of Andhra Pradesh,**
Office: 5-8-207/2, Paigah Complex,
Nampally, Hyderabad-500 001.

...Respondent(s)

Counsel for the Appellant (s): **Mr. Sanjay Sen, Sr. Advocate**
Mr. Anurag Sharma
Ms. Sampada Narang
Ms. Shikha Ohri

Counsel for the Respondent(s): **Mr. K.V. Balakrishnan,**
Mr. K.V. Mohan,
Mr. Rambabu

Appeal No. 08 of 2013

In the matter of:

M/s. NILE Limited,
Plot No. 149A, OLD MLA COLONY,
Road No. 12, Banjara Hills,
Hyderabad-500 034

... Appellant (s)

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
4th & 5th Floors, Singareni Bhavan, Red Hills,
Hyderabad -500 004.

2. **Central Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
6-11-50, 2nd Floor, Mint Compound,
Hyderabad-500 063

...Respondent(s)

Counsel for the Appellant (s): **Mr. Challa Gunaranjan**
Mr. Gopal Chaudhury

Counsel for the Respondent(s): **Mr. K.V. Balakrishnan,**
Mr. K.V. Mohan,
Mr. Rambabu

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal nos. 31 of 2013 and 8 of 2013 have been filed by IL&FC Wind Farms Ltd. and Nile Ltd. respectively against the interim orders dated 19.11.2012 and 16.11.2012 of the Andhra Pradesh Electricity Regulatory Commission deciding interim rate for supply of electrical energy from the wind energy generators of the Appellants to the distribution licensee on the applications of the distribution licensee filed in the year 2006.

2. The State Commission is the Respondent no. 1. Central Power Distribution Company of Andhra Pradesh Limited, the distribution licensee, is the 2nd Respondent.

3. The facts of the case in Appeal no. 31 of 2013 are as under:

- (a) The Appellant commissioned a wind power project of 6.5 MW capacity at Ramagiri, Anantpur District on 7.11.1995 on the basis of the Investment Promotion Policy of the Government of Andhra Pradesh. Prior to this, on 15.9.1995, the Appellant entered into a Wheeling Agreement with the erstwhile A.P. State Electricity Board for wheeling of energy delivered from the wind energy project as per the provisions of Government order prevailing at that time.
- (b) On 3.4.1999, the State Commission was constituted pursuant to the AP Electricity Reforms Act, 1998.

- (c) On 20.6.2001, the State Commission in O.P. no. 1075 of 2000 issued orders directing the renewable energy generators to sell power only to APTRANSCO/Distribution Licensees of Andhra Pradesh thereby banning third party sale and to finalize agreements relating to supply of power to the Distribution Licensees prior to 24.7.2001.
- (d) In pursuance of the order passed by the State Commission in O.P. no. 1075 of 2000, the Appellant executed a Power Purchase Agreement ("PPA") with APTRANSCO superseding the Wheeling & Banking Agreement dated 15.9.1995 and accepting the terms and conditions set out in the State Commission's order dated 20.6.2001. According to the terms and conditions of the

PPA, the Appellant had to sell power to APTRANSCO at Rs. 2.25 per unit with escalation at 5% per annum with 1994-95 as base year. Beyond FY 2003-04 the purchase price had to be decided by the State Commission. The purchase price was further to be reviewed on completion of ten years from the date of commission of the project when the price would be reworked on the basis of Return on Equity, O&M expenses and the variable cost.

- (e) Thereafter, on 20.3.2004, the State Commission passed another order in O.P. no. 1075 of 2000 regarding purchase price for energy for Non-Conventional Energy Projects. The State Commission fixed tariff for wind energy project at Rs. 3.37 per kWh. The

State Commission also reiterated in this order that the review of tariff for individual projects would be undertaken on completion of 10 years from the date of commissioning of the project.

- (f) On 20.3.2006, the Respondent no. 2, the Distribution Licensee, filed a Petition being OP no. 15 of 2006 before the State Commission seeking reduction of tariff in respect of the wind energy generators of the Appellant on completion of 10 years of operation of the project. The Appellant filed its reply in the said OP no. 15 of 2006 stating that the tariff needs to be revised upwards.

- (g) From July 2011 onwards the Respondent no. 2 stopped releasing payments to the

Appellant and thereafter released the payment on 7.12.2011 and continued paying for the subsequent month at half the rate of Rs. 3.37 per kWh i.e. Rs. 1.69 per unit.

- (h) On 23.7.2012, the Appellant filed a petition with the State Commission under Sections 142, 146 and 129 of the Electricity Act, 2003 against the Distribution licensee for violating the orders of the State Commission. This petition is pending before the State Commission.
- (i) At this stage, on 19.11.2012 the State Commission passed an interim order in the O.P. no. 15 of 2006 filed by the Respondent no. 2, the Distribution Licensee, deciding the ad-hoc rate of Rs. 1.69 per unit for power

supplied by the Appellant to the Respondent no. 2 beyond 10th year, pending fixation of the final tariff applicable beyond 10th year.

(j) Aggrieved by the impugned interim order dated 19.11.2012, the Appellant has filed the present Appeal.

4. The facts of the case in Appeal no. 8 of 2013 are similar and for the sake of brevity they are not being repeated.

5. As the issues involved in both the Appeals are similar, a common judgment is being rendered.

6. Shri Sanjay Sen, learned Senior counsel for the Appellant has argued that the State Commission should not have passed the impugned interim order which has resulted in 50% reduction of tariff payable to the Appellant and other wind energy generators

when the main Petition in O.P. 15 of 2006 was pending with the State Commission since 2006. According to him, the interim order of the State Commission failed to consider the material made available on record and submissions of the Appellant and to apply its independent mind on the matter.

7. We also heard Shri Challa Gunaranjan, the Learned Counsel for the Appellant in Appeal no. 8 of 2013 who also made similar arguments.

8. We have also heard the learned counsel for the Respondent no. 2 who stated that the Appeals were only against the interim orders subject to the final order of the State Commission and therefore, no prejudice had been caused to the Appellants. He further submitted that it is a settled law that unless the interim arrangement is found to be illegal or without taking into consideration of the claims of the

aggrieved party, normally the Appellate Court would not interfere. Thus, the Appeal is liable to be dismissed on this ground.

9. The only question that arises for our consideration is that whether the impugned interim order passed by the State Commission deciding the ad-hoc tariff at 50% rate for energy supplied by the Appellants' wind energy generator without considering the submissions of the Appellants with reference to the contents of the Petition filed by the Distribution Licensee (R-2) for determination of the tariff after 10 years of operation of the Projects is valid?

10. Let us now examine the sequence of events that led to the impugned interim order.

- a) The Distribution licensee (R-2) filed a petition on 20.3.2006 being O.P. no. 15 of 2006

before the State Commission seeking determination of tariff for the Appellants' wind energy generators after 10 years of operation in terms of the PPA and the earlier order of the State Commission dated 20.3.2004. The Appellant's wind energy generator in Appeal no. 31 of 2013 completed 10 years of operation on 6.11.2005. Prior to this, the Appellant was being paid at a tariff of Rs. 3.37 per unit decided by the State Commission by its order dated 20.3.2004.

- b) The Appellant filed its reply in the above O.P. no. 15 of 2006 stating that the tariff needs to be revised upwards.
- c) The State Commission conducted a hearing in the pending petition of the Distribution

licensee on 6.9.2011 and directed the Appellant to submit financial and operational performance details to decide on the revision of tariff. The Appellant submitted its response along with details as desired by the State Commission on 15.2.2012 seeking upward revision.

- d) In the meantime, the Distribution licensee (R-2) from July, 2011 unilaterally decided to reduce the tariff of the Appellant's wind energy generator to Rs. 1.685 per unit (50% of Rs. 3.37 per kWh) from Rs. 3.37 per kWh.
- e) On 23.7.2012, the Appellant filed a petition before the State Commission under Section 142, 146 and 129 of the Electricity Act, 2003 against the Distribution licensee as it had

unilaterally reduced the tariff in violation of the orders of the State Commission when the matter was pending adjudication in O.P. no. 15 of 2006 before the State Commission. This Petition filed by the Appellant is pending before the State Commission.

- f) At this stage, on 19.11.2012, i.e. after more than 6½ years of the filing of the Petition by the Distribution Licensee, the State Commission in IA No. 6 of 2006 in O.P. no. 15 of 2006 passed the impugned interim order deciding the ad-hoc tariff of Rs. 1.69 per unit which is 50% of the rate for the 10th year and at the same level as was being paid on ad-hoc basis by the Distribution licensee unilaterally since July, 2011.

11. Let us now examine the impugned interim order.

The relevant portion is reproduced as under:

“9. As can be seen from the above, there is no dispute that, upon completion of 10 years from the date of commissioning of the project, the tariff of the same is to further reviewed, basing on the factors like O & M expenditure, Return on Equity, Variable Cost and residual depreciation if any. The rationale for further reviewing the tariff after completion of 10 years basing on the factors like O & M expenditure, Return on Equity, Variable Cost and residual depreciation is that, by the end of 10 years the developer would have substantially repaid the loan. It is therefore, abundantly clear that, once the loan corresponding to 70% of the project cost is substantially repaid (through interest and depreciation components of the tariff), the tariff after 10 years would substantially come-down, since, it would include O & M expenditure, Return on Equity and residual depreciation, if any. The variable costs are any way, not applicable to the Wind Power Projects. It is a matter of fact, that the

DISCOMs are presently paying an ad-hoc tariff of 50% of Rs.3.37 per unit (the tariff determined in 20-03-2004 order) working out to around Rs.1.69 per unit. The prayer of the petitioner, to fix an interim rate of Rs.1.43 per unit is not reasonable since it is lesser than the rate of Rs.1.69 per unit, which is 50% of the rate paid for the 10th year (Rs.1.69 per unit is being presently paid on ad-hoc basis by the petitioner). The petitioner is therefore directed to pay Rs.1.69 per unit for the power supplied to them by the developer, beyond 10th year, pending fixation of final tariff applicable beyond 10th year”.

12. Thus, the State Commission decided the ad-hoc tariff at Rs. 1.69 per unit, 50% of the rate for the 10th year which is the same tariff that was being paid by the Distribution licensee since July, 2011 on its own without any approval of the State Commission. Though the State Commission has recorded the submission of the Appellant, it is noticed that it has

not considered the same while deciding the ad-hoc rate.

13. The State Commission has also not given any reason for deciding the ad hoc rate of Rs. 1.69 per unit i.e. 50% of the rate for the 10th year. Thus, it is not clear as to how the State Commission came to the conclusion that tariff has to be reduced to 50%. The State Commission seems to have regularized the ad-hoc rate at which the Distribution licensee by its unilateral decision has been paying the Appellants since July 2011. This approach may not be proper.

14. We also find it strange that the State Commission has disposed of the Interim Application no. 6 of 2006 in O.P. no. 15 of 2006 filed in the year 2006 after more than 6½ years of filing of the Petition, that too when the Appellant had filed its submissions with the details

sought by the State Commission for determination of the tariff applicable from 11th year of operation of the wind energy generators of the Appellant in the main matter. The State Commission has not recorded any reason for the urgency for hurriedly passing the impugned order.

15. Thus, we find that the State Commission has decided the ad-hoc rate applicable for the 11th year of operation of the wind energy plant at 50% of the rate for the 10th year arbitrarily without giving any reason and without considering the submission of the Appellants. Hence, we feel that the impugned interim order of the State Commission cannot be sustained.

16. As rightly pointed out by the learned counsel for the Respondent no. 2, it is a settled law that unless the interim order is found to be illegal or without

taking into consideration of the claims of the aggrieved party, the Appellate Court would not normally interfere. However, in the present case the State Commission has decided the interim rate arbitrarily without considering the submission of the Appellants and without giving any reason for reducing the rate to 50% that too in the interim application filed 6½ years ago. Therefore, we deem it fit to set aside the impugned interim orders dated 19.11.2012 and 16.11.2012 of the State Commission in the above Appeals. Accordingly, the same are hereby set aside.

17. The State Commission is directed to pass the final order in the matter considering that the Petition has been pending since March 2006, after hearing the concerned as early as possible, at any rate not later than 6 months from the date of communication of this Judgment. Till the tariff effective from 11th year of

operation of the wind energy plants of the Appellants is determined by the State Commission, the Appellants will be liable to be paid by the Distribution licensee (R-2) for the energy supplied from their wind energy generators at Rs. 3.37 per unit, subject to adjustment on determination of the tariff by the State Commission.

18. With the above directions, the Appeals are allowed and the impugned interim orders are set aside. No order as to costs.

19. Pronounced in the open court on this **12th day of August, 2013.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/NON-REPORTABLE

vs