

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 272 OF 2014

Dated: 5th May, 2016

Present : Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member

In the Matter of:

- 1. Karnataka Power Transmission Corporation Ltd. (KPTCL),**
A Company incorporated under the Companies Act, 1956.
KPTCL Building Cauvery Bhavan,
Bangalore-560009
Through Executive Engineer (Regulatory Affairs)
- 2. Hubli Electricity Supply Company Ltd.(HESCOM),**
A Company incorporated under the Companies Act, 1956
P.B.Road, Navanagar, Hubli-580029,
Through Executive Engineer (Regulatory Affairs)

...Appellant(s)/Petitioner

Versus

- 1. M/s Global Energy Private Limited (GEPL),**
1st Floor, Hotel Shangri La's, Eros Corporate Plaza,
19, Ashoka Road, Connaught Place,
New Delhi-110 001
(Through its Director)

....Respondent Petitioner

- 2. Karnataka Electricity Regulatory Commission (KERC),**
6th & 7th Floor, Mahalaxmi Chambers, No. 9/2,
M.G.Road, Bangalore-560 091
(Through its Secretary)

....Respondent

APPEAL UNDER SECTION 111(1) OF THE ELECTRICITY ACT, 2003

Counsel for the Appellant(s) : Mr. Balaji Srinivasan
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Mr. Tarbez Malawat
Mr. Matrugupta Mishra
Ms. Meghana Aggarwal
Mr. Tushar Nagar for R-1
Ms. Shikha Ohri

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

This is an appeal being Appeal No. 272 of 2014, filed by the Appellants under Section 111 of the Electricity Act, 2003 against the **Impugned Order**, dated 19.06.2014, passed by the Karnataka Electricity Regulatory Commission (State Commission), in **Original Petition No. 20 of 2013**, the relevant part of which is quoted as under:

"ORDER"

- (a) *The 2nd Respondent (HESCOME) shall pay Rs.5.72 (Rupees Five and Paise Seventy Two only) per Unit for the energy supplied by the Petitioner to*

the 2nd Respondent, for the period from 1.4.2010 to 30.06.2010, as per the directions issued under Section 11 of the Electricity Act, 2003, after adjusting the amount already paid towards the same,

- (b) The 2nd Respondent (HESCOM) shall pay simple interest at the present base lending rate of the State Bank of India:*

 - (i) On the amount due to the Petitioner towards the electricity supplied by the Petitioner during the month of June, 2010, calculated at the rate of Rs.5/- per Unit, from the due date of payment till the actual date of payment, and,*
 - (ii) On the difference amounts due to the Petitioner towards the electricity supplied by the Petitioner for the months of April, 2010, May, 2010 and June, 2010 from the date of the Petition till the actual date of payment;*
- (c) The 2nd respondent (HESCOM) is at liberty to file separate proceedings against the Petitioner in respect of the amount claimed by way of set-off towards the energy imported to the generating station of the Petitioner,*
- (d) The rate fixed at Rs.5.72 per Unit in this case is subject to the final outcome of the Appeal before the Hon'ble ATE against the Order dated 14.02.2013 in OP No. 40/2010 and OP No. 41/2010. The rights and liabilities of the parties shall be accordingly adjusted after disposal of the said Appeal;*
- (e) The amounts that become due to the Petitioner, as per the reliefs given at (a) and (b) above, shall be paid by the 2nd Respondent (HESCOM) to the Petitioner within two months from the date of this Order.*

2. The Appellant No. 1, Karnataka Power Transmission Corporation Ltd. (KPTCL), is the State Transmission Utility (STU) and the Appellant No.2, namely, Hubli Electricity Supply Company Ltd. (HESCOM), is a Government owned Distribution Licensee. The Respondent No.1, M/s Global Energy Private Limited (GEPL), is a 5 Mega watt (MW) Biomass-based Power Plant located at Belgaum. The Respondent No. 2, Karnataka Electricity Regulator Commission (KEREC), is the State Regulator which is empowered to discharge various functions under the provisions of the Electricity Act, 2003.

3. The following are the facts which have given rise to the instant appeal:
 - (i) That the Global Energy Pvt. Ltd. (GEPL), a 5 MW Biomass Power Generating Company filed the Impugned Original Petition being O.P. No. 20 of 2013 before the State Commission with the following prayers:
 - (a) directing Appellant-HESCOM to pay a sum of Rs.56,76,000/- for supply of power by the Respondent Petitioner No.1/GEPL in the month of June, 2010;
 - (b) directing the Appellant to pay a sum of Rs.22,85,154/- towards offsetting the adverse financial impact suffered by the Petitioner (GEPL) on account of the orders of the Government of Karnataka issued under section 11(1) of the Electricity Act, 2003.
 - (c) directing the Appellants to pay the interest at 18% per annum on the principal amount under (a) and (b) above, for

the period commencing from the due date of payment till the actual payment thereof; and

- (d) pass such other orders as the Commission may deem fit and proper in the facts and circumstances of the case.
- (ii) That the Global Energy Pvt. Ltd.(GEPL), a 5 Mega Watt (MW), Biomass-based Power Plant Generation unit in the State of Karnataka had supplied its generation output to intending buyers on mutually agreed terms & conditions. Thus, GEPL was selling power by availing the interstate open access to third party. In the meanwhile, the State of Karnataka issued directions under Section 11 of the Electricity Act, 2003 making it mandatory for all electricity generating companies operating within the State to sell the entire surplus output after meeting their captive requirement, to the State own Distribution Companies and fixed the provisional tariff of Rs.5 per unit for Biomass projects without having a Power Purchase Agreement (PPA) subject to approval of the State Commission.
- (iii) That the GEPL supplied electricity to the HESCOM from 01.04.2010 to 30.06.2010. It is averred that the GEPL received the payment for the electricity supplied for the months of April and May, 2010 at the rate of Rs.5/kwh but it did not receive any amount towards the electricity supplied for the month of June, 2010.
- (iv) That the GEPL contended that it was supplying the electricity to M/s Reliance Infrastructure Ltd.(R-Infra) a distribution licensee in

the city of Mumbai, at an mutual agreed tariff of Rs.5.79 per unit and due to the invocation of Section 11 of the Electricity Act, 2003 by the Government of Karnataka, the GEPL was forced to supply electricity to Appellant HESCOM during the aforesaid period and prayed for offsetting the adverse financial impact by allowing the price of electricity at Rs.5.79 per unit.

- (v) That the Appellant HESCOM filed its objections before the State Commission contending that Rs.5 per unit provisionally fixed by the Government of Karnataka, was the reasonable and proper tariff for the electricity supplied by the GEPL during the period in question and that there were no reasons for payment of Rs.5.79 per unit or any other rate to the GEPL. Further, that certain payments were due from GEPL towards the Energy imported by the HESCOM to the GEPL from February, 2009 to February, 2012 and the said amount had been set off against the payment due to the GEPL for the electricity supplied during the month of June, 2010. However, the HESCOM, did not quantify the exact amount that was due to it from the GEPL in respect of the electricity imported to the generating station of the GEPL during the aforesaid period.
- (vi) That the GEPL has not dispute the right of the HESCOM to claim set off component that the liability to pay for the electricity supplied as per the Section 11 of the Act has a general liability of the HESCOM and KTPCL and the liability, if any, of the GEPL to pay towards the imported energy is only against the GEPL. Further, the GEPL has not denied its liability to pay the amount claimed under the set off.

- (vii) That the State Commission, after noticing that in similar other matters namely in O.P. No. 40 of 2010 and O.P. No. 41 of 2010 decided on 14.02.2013, had awarded Rs.5.72 per unit as against the provisional rate of Rs.5 per unit fixed by the Government of Karnataka and the said decision had become final because the appeal preferred by the Appellants was dismissed by this Tribunal on the ground of delay in filing the appeal.
- (viii) That the question for consideration before the State Commission during hearing of Impugned Petition was regarding fixing of rates for the energy supplied under Section 11 of Electricity Act, 2003 and passed the Impugned Order having observed that the said issue had already been settled. The State Commission suggested the parties to the case that let the HSECOM prefer separate proceedings in regard to the set off amount claimed by the HESCOM and that the GEPL to accept the rate of Rs.5.72 already fixed by the State Commission.
- (ix) During the hearing of the Impugned Petition before the State Commission, it was submitted by the HSECOM that an application had been filed before the Appellate Tribunal for recalling the order, dismissing the appeal on ground of delay and subject to the outcome of the review application before the Appellate Tribunal, seeking review of the order of the Appellate Tribunal, the HESCOM had no objection for fixing the rate at Rs.5.72 per unit. The said Petition had been disposed of by the State Commission. The said Impugned Petition filed by the GEPL had been dismissed by the State Commission by the Impugned Order which we have narrated above.

4. We have heard and gone through the written submissions filed by the rival parties. We have also gone through the record of this case including in the Impugned Order.
5. **The only question for consideration is whether the directions given in the Impugned Order by the State Commission are correct, just and legal one, and, if so, its effect?**
6. According to the Appellants, they are aggrieved on the following two aspects.
 - A. Entitlement of all the Appellants to adjust the amount payable to GEPL relating to back up and energy drawl.
 - B. The rate of tariff payable to the GEPL for supply made by the GEPL to the Appellants as per the directions given by the State Governments under Section 11 of the Electricity Act, 2003.
7. It appears from the record that the Government of Karnataka issued the orders/directions under Section 11 of the Electricity Act, 2003 making its mandatory for all electricity generating companies operating within the State for the months of April, May and June, 2010 to supply electricity to the State grid only. Thus, the GEPL had supplied power to the State grid under directions issued by Government of Karnataka under Section 11 of the Electricity Act, 2003. It is clear from the record and also from the submissions made by the rival parties that the GEPL

had no PPA with the HESCOM, a distribution licensee and its provisional tariff was fixed at Rs.5 per unit.

8. According to the Appellants, there were two categories of the power generating companies at the relevant time. One category was of those who had PPAs and second category was of those, who had no PPAs. Those, having existing PPA at that time, were given tariff as per PPA.
9. The Original Petition No. 20 of 2013 (**Impugned Petition**) was filed by the GEPL who is Respondent No. 1 herein, seeking to off-set the adverse financial impact suffered by it by paying a sum of Rs.22,85,154/-and seeking for directions to the Appellant No.2, herein to pay a sum of Rs.56,76,000/- for the power supplied to it in the month of June, 2010 and further directions to pay interest at the rate of 18% per annum on the principal amounts claimed from the due date of payment until actual payment of the same.
10. The learned State Commission, by way of the impugned order, has directed the Appellants to pay for the power supplied by GEPL under the Government orders issued under Section 11 of the Electricity Act 2003 at the rate of Rs 5.72 per unit. The entire basis for fixing the said tariff was primarily the order dated 14.02.2013 passed by the State Commission in O.P. No.40 & 41 of 2010, which was assailed by the Appellants before this Hon'ble Tribunal in DFR 279/2014, which was dismissed on the ground of delay, by this Appellate Tribunal and hence the said order of the State Commission passed in O.P. No. 40 & 41 of 2010 was challenged by way of Review Petition before this Tribunal which Review Petition was subsequently dismissed by this Appellate Tribunal. According to the Appellants, the issue of dismissal of Appeal, though on

the ground of delay is now pending in adjudication before the Hon'ble Supreme Court in Civil Appeal No.3577-3578 of 2015.

11. The main contention of the Appellants is that the directions to pay to the Respondent No. 1 (GEPL) at the rate of Rs.5.72 is wholly untenable as the State Commission has failed to consider the fact that the generators who were before the State Commission in O.P. No.40 and 41 of 2010 are not on the same footing as the Respondent No. 1/GEPL and also that the Order passed in O.P. No. 40 & 41/2010 was passed after taking into consideration the facts and circumstances of that case. Instead of considering the same, the State Commission has vide, order dated 14.02.2013, directed; payment to be made at Rs.5.72 per unit, subject to the outcome of proceedings of the Appellate Tribunal. Hence, the Impugned Order suffers from legal infirmities and the approach of the State Commission to adopt the very same tariff is untenable.

12. This Tribunal had, vide order dated 03.10.2012 in Appeal Nos. 141 and 142 of 2011 and Appeal No.10 of 2012 directed the State Commission to determine the actual discount on account of marketing expenses and transmission charges and thereafter determine the rate for supply of energy, to be paid for the months of April, 2010 to June, 2010. The State Commission instead of determining the two components has reached the wrong conclusion that the transmission charges are not payable at all by the generator. On remand, the State Commission was only required to determine the same and the State Commission by the Impugned Order has determined the tariff at Rs.5.72 per unit in spite of the fact that the civil appeal challenging the dismissal of appeal on the ground of delay by this Appellate Tribunal is pending adjudication before the Hon'ble Supreme Court and the earlier order of the State Commission has not attained finality.

13. According to the Appellants, the State Commission has failed to consider the fact that there is a clear distinction between the generating companies involved therein and the present GEPL. While in O.P. No. 40 & 41 /2010, the generating companies namely, (M/s JK Cements Ltd and M/s Himatsingka Seide Ltd.) expressed before State Commission that they were "embedded entities" and that they were not required to pay any transmission charges, whereas, in the case, in hand, the Respondent No. 1 (GEPL), has admittedly been supplying power to a buyer in Mumbai, Maharashtra through interstate open access. Hence, the question of applying the very same tariff of Rs 5.72 per unit which includes additional components pertaining to marketing expenses and transmission charges, would not arise. Hence, the tariff payable to the Respondent No. 1 could not have possibly been Rs 5.72 per unit but should be less.

14. One more contention of the Appellant that the State Commission has completely failed to consider these two aspects pertaining to marketing expenses and transmission losses and has instead merely adopted the tariff determined in O.P. No. 40 and 41/2010, without considering or computing the marketing expenses and transmission charges, based on the nature of its supply arrangement, etc. Without conducting that exercise as required under Section 11(2) of the Electricity Act 2003, the State Commission has adopted the same yardstick as in the case of other generators and levied the same standard tariff. This approach of the State Commission is opposed to the very intent of Section 11(2) of the Electricity Act 2003, which requires that the actual loss suffered by a generator is to be compensated. In the present case, the Respondent is

being over compensated, at the cost of the Appellants which in turn will cast a burden on the general public by affecting the distribution tariff.

15. The next contention of the Appellant is that the Order of this Appellate Tribunal passed in Appeal Nos. 141 and 142 of 2012 was qua the Appellants of the instant appeals and the directions of the Appellate Tribunal in the limited remand was for computation of marketing expenses and transmission charges. The same Judgment was a Judgment in personam and not in rem.
16. That the State Commission has failed to consider the fact that the Appellants have made payments for the months of April and May to the Respondent No.1 and the payment for the month of June was offset against the dues that the Respondent No.1 company owed the Appellant No.2 for importing power from the grid from February, 2009 until February, 2012.
17. One more contention of the appellant is that owing to the abnormal recording of transmission loss which was unduly high during certain periods, it was decided that as per standards for arriving at the transmission loss, the transmission loss be considered at 15% for the energy imported by the Respondent No.1 as is considered in generic tariff. Since, the Respondent No.1 itself requested for adjustment vide their letter dated 09.04.2012, it was not open to it to complain about set off and adjustment by the Appellants. In spite of having the benefit of the said communications, the State Commission has granted liberty to the Respondent No. 1 to raise the said issues in the independent proceedings.

18. The Appellants have by way of a single transaction, set off the sums due towards the imported energy and the question of making any payment, much less the sum claimed of Rs.56,76,000/- for the month of June, 2010 which has been set off against the payments due from the Respondent No.1 towards the energy imported during the period February, 2009 to February, 2012, would not arise.
19. The learned counsel for the Respondents have justified the Impugned Order submitting that the cogent and sufficient reasons are recorded in the Impugned Order. Thus, they have vindicated the Impugned order.

20. Our consideration and Conclusion:

- 20.1 According to the Appellants, the Respondent GEPL had made a request in letter dated 09.04.2012 to get the amount of dues adjusted and even after the said request, the Respondent/GEPL filed the Impugned Petition which has been allowed by the Impugned Order.
- 20.2 It is evident from the arguments of the parties and from the record also that the Respondent No.1, namely GEPL commenced a 5MW biomass based generating unit in the State of Karnataka, and supplied its generating output to the intending buyers at the mutually agreed terms and conditions.
- 20.3 The Government of Karnataka in exercise of its powers under Section 11 of the Electricity Act, 2003 vide Notification dated 03.04.2010 and its Addendum, dated 27.04.2010, made it mandatory for all electricity generating companies operating within

the State of Karnataka to sell the entire surplus output after meeting their captive requirement, to the State owned distribution companies. Thus, all the generators were directed to supply all exportable electricity generated by them to the State Grid until further orders, in view of the extraordinary circumstances, and the rates to be paid by the distribution companies for the powers supply to them under Section 11 directive by the private producers will be notified separately.

These directions were directed to come into effect immediately and to be in force till June, 2010 or until further Orders whichever is earlier.

- 20.4 The Government of Karnataka vide G.O dated 06.04.2010, as modified vide Corrigendum dated 03.05.2010, fixed a provisional tariff of Rs. 5/kwh for power supplied by biomass projects during the period 01.04.2010 to 30.06.2010, the said tariff was subject to approval by the State Commission.
- 20.5 The facts as emerged from the record, indicate that prior to invocation of Section 11 by the State Government, GEPL was supplying electricity to Reliance Infrastructure Ltd.(R-Infra), a distribution licensee in the city of Mumbai, in terms of their bilateral contract dated 25.06.2009 at an agreed tariff of Rs.5.79/kwh for the period 01.09.2009 to 30.06.2010.
- 20.6 Following the Government's aforesaid directive to supply power to the state-owned distribution companies, GEPL had to abandon its contract with R-Infra and commenced supply of powers to

HESCOM at the provisional tariff rate of Rs. 5/ Kwh. While GEPL received payment for supplies made in April and May, 2010 at the provisional rate of Rs.5/kwh, it did not receive any payment in respect of power supplied during June, 2010. Furthermore, GEPL was, admittedly not paid, the differential of 72 paise/kwh after final determination of Rs.5.72/kwh as tariff for power supplied by biomass generators pursuant to State Government Orders under Section 11 of the Electricity Act, 2003.

20.7 It is depicted from the pleadings as well as from the record that the State Commission's order dated 24.03.2011, passed in O.P. Nos.16, 17, 19, 23,41,45 & 49 of 2010 and other connected Petitions, the State Commission approved the Tariff of Rs. 5/kwh. The State Commission directed the power supply in compliance of the State Government's aforesaid Order by the cogen power generators including sugarcane cogen generators and biomass based generators and also others who do not have PPA governing supplies during the said period shall be paid for at Rs.5/kwh. Thus, the tariff of Rs.5/kwh was made applicable to all generators that had supplied power pursuant to the aforesaid directive of the State Government and the said rate of 5/kwh was premised upon short term market rates for sale of power through trading licensees, subject to such transmission and marketing expenses as are borne by a generator while selling power on bilateral terms to a trading licensee.

20.8 It is evident from the Judgment dated 03.10.2012, of this Appellate Tribunal that being aggrieved by the aforesaid Order dated 24.03.2011, of the State Commission, certain renewable energy

generators preferred Appeal Nos.141 and 142 of 2011 and 10 of 2012 before this Appellate Tribunal and this Appellate Tribunal vide its Judgment dated 03.10.2012, upheld the methodology adopted by State Commission for fixation of tariff on the basis of short term market rates for the period April to June, 2010.

20.9 It was in compliance of this Tribunal's Judgment dated 03.10.2012, passed by this Appellate Tribunal, the State Commission revived the proceedings in order to determine the net amount that a generating company can realise after deducting any expenses, which are incurred by the generators, incidental to the sale of electricity based on the above mentioned average short term marketing system during April to June, 2010. The State commission arrived at a weighted average rate of Rs.5.28/kwh in the said period. Furthermore, the State Commission determined the expenses incurred by the generators towards marketing and transmission of electricity including trading margin at 10 paise per unit. Accordingly, the State Commission concluded that the said generators like GEPL are entitled to Rs.5.72 per unit instead of Rs.5 per unit. Thus, the State Commission fixed a tariff at Rs.5.72/kwh for power supplied pursuant to the State Government's directives under Section 11 of Electricity Act, 2003.

20.10 In order to test the legality and correctness of the Impugned Order dated 19.06.2014, we think it proper to reproduce the relevant part thereof, which is as under:

"7- The Commission has noticed that in similar other matters, viz., in O.P. No. 40/2010 and O.P. No.41/2010, decided on 14.02.2013, this Commission had awarded Rs.5.72 per Unit, as against the

provisional rate of Rs.5/- per Unit fixed by the Government of Karnataka, and that this decision has become final, as the Appeal preferred by the Respondents therein was dismissed by the Hon'ble Appellate Tribunal for Electricity (ATE) on the ground of delay in filing the Appeal. In the present Petition, the main question that would arise for consideration is fixing of rate for the energy supplied under Section 11 of the Act. As already noted, this issue has been finally settled. Therefore, this Commission suggested the parties concerned in the case that let the 2nd respondent prefer separate proceedings in regard to the set-off amount claimed by it and that the Petitioner to accept the rate of Rs.5.72 already fixed by this Commission. The learned counsel for the 2nd respondent submitted that an Application has been filed before the Hon'ble ATE for recalling the Order dismissing the Appeal on the ground of delay. He submitted that subject to the outcome of the Application and the Appeal before the Hon'ble ATE, the 2nd respondent has no objection for fixing the rate at Rs.5.72 per Unit".

- 20.11 In view of the above discussion and considering the facts recorded in the Impugned Order, we do not find any merits in the contentions of the Appellants. The Impugned Order appears to be just reasonable, legal and correct one requiring no interference at this stage by this Appellate Tribunal. We agree to the findings recorded by the State Commission in the Impugned Order. The sole issue is hereby decided against the Appellants, hence the appeal merits dismissal.

ORDER

21. The instant appeal being Appeal No.272 of 2014, is hereby dismissed and the Impugned Order dated 19.06.2014, passed by the State Government in O.P. No. 20 of 2013, is hereby upheld.

No order as to Costs.

Pronounced in the Open Court on this **5th day of May, 2016.**

**(T Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

Dated: 5th May, 2016



REPORTABLE / ~~NON-REPORTABLE~~