In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 132 of 2015

Dated: 1st March, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

Atria Brindavan Power Ltd.
No. 1, Palace Road
Bangalore- 560001

... Appellant

Versus

1. **Karnataka Electricity Regulatory Commission**
9/2, Mahalaxmi Chambers,
M G Road,
Bangalore- 560001 **...Respondent No.1**

2. **Chamundeswari Electricity Supply Corporation Ltd.**
No. 927, L J Avenue,
New Kantharaj Urs Road,
Mysore- 570009 **...Respondent No.2**

3. **State Load Despatch Centre Karnataka**
Ananda Rao Circle,
Race Course Road,
Bangalore- 560001 **...Respondent No.3**

4. **Karnataka Power Transmission Corporation Ltd.**
Kaveri Bhavan, K G Road
Bangalore- 560001 **...Respondent No.4**

Counsel for the Appellant(s): **Mr. Sridhar Prabhu**
Mr. Anantha Narayana M.G.
Mr. Tarun Gulia

Counsel for the Respondent(s): **Ms. Swapna Seshadri**
Ms. Neha Garg
Mr. Sandeep Rajpurohit ...for R-1

Mr. Sandeep Grover
Mr. Mohit Chadha
Ms. Trisha Ray Chandhuri
Ms. Pankhuri Bharadwaj
Mr. Ishwar Upneja
Mr. V S Raghavan ...for R-2

Mr. Anand K Ganesan
Mr. Sandeep Rajpurohit
Mr. Ishaan Mukherjee
Ms. Swapna Seshadri
Ms. Mandakini Ghosh ...for R-3 & R-4

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Atria Brindavan Power Ltd. (herein after referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 challenging the Order dated 13.11.2014 ("**Impugned Order**") passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the **'State Commission'**) passed in OP No. 26 of 2013, in the matter regarding termination notice of PPA dated 20.1.2005 between Respondent No. 2 on account of default in payment and consequential grant of intra state open access for sale of power to third parties.

2. The Appellant, Atria Brindavan Power Ltd. is a Generating company registered under Companies Act, 1956 within the meaning of sub section 28 of section 2 of the Electricity Act, 2003.

3. The Respondent No.1 i.e. Karnataka Electricity Regulatory Commission (KERC) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. The Respondent No.2 i.e. Chamundeswari Electricity Supply Corporation Ltd is the Distribution Licensee in the State of Karnataka.

5. The Respondent No. 3 is the State Load Despatch Centre established under section 31 of the Electricity Act, 2003.

6. The Respondent No. 4 i.e. Karnataka Power Transmission Corporation Ltd. is the State Transmission Utility under Section 39 of the Electricity Act, 2003.

7. **Facts of the present Appeal:**

a) The Appellant owns and operates a 12 MW mini hydro based power project established on left bank of Krishnaraja Sagar Dam, Mandya District in the State of Karnataka. The Appellant had executed Power Purchase Agreement (PPA) dated 20.01.2005 with Respondent No. 4, which was assigned to Respondent No. 2 on 10.06.2005. This PPA is approved by the State Commission. The tariff, payment and other terms and conditions are regulated as per the PPA. The State Commission vide order dated 18.8.2005

approved standardised PPA for procurement of power from Non-Conventional Sources of energy (NCEs) including min-hydel projects.

b) The whole issue between the Appellant and Respondent No. 2 is due to raising HT bills on the Appellant for imported energy when there is no generation/ importing energy more than 10% of the installed capacity and deduction of 115% of the imported energy from energy pumped into the grid instead of that specified in PPA.

c) The Appellant invoked Article 9.3 of the PPA and issued a payment default notice dated 11.07.2013. The Respondent No. 2 did not agree to the payment default and asked for the details vide letter dated 22.07.2013. Correspondences took place between the Appellant and the Respondent No. 2 for claims and counter claims. Reconciliation meeting was also held between the parties, but no outcome came forth.

d) The Appellant vide letter dated 21.08.2013 issued termination notice of the PPA and requested the Respondent No. 2 to grant "No Objection Certificate" (NOC) for intra state open access for sale of power to third parties. Respondent No. 2 vide letter dated 24.8.2013 rejected the termination of PPA by the Appellant.

e) The Appellant filed petition, O.P. No. 26 of 2013 on 11.10.2013 with the State Commission seeking direction to declare the valid termination of PPA and grant of NOC for intra state open access. During the course of hearings the Respondent No. 2 vide letter dated 13.08.2014 requested Appellant to execute supplementary

PPA for charging HT industrial tariff from the Appellant. In July, 2013 the Respondent No. 2 also sought clarifications from the State Commission regarding 115% of imported energy deduction vs 105% (in other PPA dated 19.06.2006 of the Appellant) of imported energy deduction. The State Commission clarified in July, 2013 that 115% of imported energy deduction is valid.

f) The State Commission vide Impugned Order dated 13.11.2014 rejected the claims of the Appellant.

8. Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present appeal on following grounds:

i. Whether the 2nd Respondent had bonafide reasons for raising HT bills on the Petitioner for the imported energy, when there was no generation?

ii. Whether 2nd Respondent could have arbitrarily raised HT bills amounting to Rs. 24 per kWh?

iii. Whether 1st Respondent Commission's clarifications entitled the 2nd Respondent to deduct 115% energy can be deducted in respect of billing of import energy by NCEs?

iv. Whether the Appellant could terminate the PPA in the event of default?

9. **QUESTIONS OF LAW**

The Appellant has raised the following questions of law in the present appeal:

a. Whether a regulatory commission can supplant reasoning and rationale to a contract or correspondence when there exists none?

b. Whether a Regulatory Commission can amend the contract without notice or intimation to a contracting party?

c. Whether a generator can be charged as a HT Consumer without following the regulations, codes and license conditions prescribed for billing consumers for energy by a licensee when a PPA specifically defines the charges to be levied for import the import of energy?

d. Whether a Commission is justified in permitting a levy of charges when it does not consider that as an item of cost recovery in deciding the tariff?

e. Whether the quantum of claims is a material consideration in terminating contract and for adjudication of dispute between a generating company and a distribution licensee?

10. We have heard at length the learned counsel for the parties and considered their arguments and written submissions. Gist of the same is discussed hereunder;

11. The learned counsel for the Appellant has made following arguments/submissions for our consideration:

a) The Appellant's PPA was executed on 20.1.2005 before the approval of the standardised PPA by the State Commission on 18.8.2005. Thus, the provision regarding HT tariff deductions in case of imported energy was not incorporated in it. Even this order dated 18.08.2005 does not contain provisions related to charging of HT tariff when there is no generation from the Appellant's station. During the course of hearings with the State Commission, the Respondent No. 2, vide letter dated 13.08.2014 requested the Appellant to sign supplementary PPA for providing HT rate deductions which implies that the payment of the HT tariff is not called for.

b) Any charges to be levied on the generator are to be in accordance with the PPA, Act, regulations and tariff orders. The HT bills do not have any such backing. The predominant charges are demand charges which are arbitrarily fixed at 10% of the plant capacity. The State Commission has overlooked these aspects in passing the Impugned Order.

c) As per PPA the Respondent No. 2 is obligated to pay only for the Delivered Energy i.e. net energy after deduction of energy supplied by the Appellant and there is no question of applying HT rates or 115% of the energy. PPA provides for 1:1 or 100% deductions and not HT bill rates or 115% of deduction. Adjudicating authority should rely on contracts/ documents prior to beginning of litigation. Respondent No. 1 built its logic on documents produced by the Respondents when arguments were in progress in the State Commission.

d) The State Commission vide letter dated 12.7.2013 issued clarifications sought by Respondent No. 1 vide its letter dated 4.7.2013. Based on these clarifications, deduction of 115% energy for drawl by the Appellant was made valid by the State Commission without giving any chance of hearing to the Appellant. The Impugned Order of the State Commission is bad in law as the clarification issued by the State Commission cannot supplant the terms and conditions / tariff as per terms of the PPA.

e) On the issue of termination of PPA, the State Commission ignored that provision for sale to third parties by executing Wheeling and Banking Agreement (WBA) implies termination. As per intra state open access regulations, the company to avail open access should not have valid PPA. It means for signing WBA as provided in PPA, the PPA needs to be terminated. There is error in the conclusion of the State Commission that issue of PPA termination provisions for the Appellant are not provided in the PPA.

f) The State Commission has held that Respondent No. 2 has right to set off the amounts. The State Commission has overlooked that as per PPA, the amounts to be paid first as per the bills raised by the Appellant and if required the Respondent No. 2 can raise dispute subsequently. HT bills for January, 2013 to May, 2013 were raised by Respondent No. 2 for first time in June, 2013. These HT bills were raised to avoid payment under PPA. Therefore, the State Commission has wrongly held that Respondent No. 2 has set off the energy.

g) Respondent No. 2 has not cured the event of default nor supported the contentions that there is no outstanding amount due to Appellant. Hence, the rejection of termination letter by the Appellant is not tenable and illegal.

h) The State Commission has also not specified in the regulation/ orders that what minimum amount shall not be considered as dispute.

i) The Appellant has sought the following reliefs:

i. Issue an order/ direction quashing final order dated 13.11.2014, passed by the 1st Respondent in OP No. 26 of 2013, consequently be pleased to pass an order.
ii. Declaring that PPA dated 20.1.2005 has been validly terminated by the Appellant vide Termination Letter dated 21.8.2013.
iii. Quash the letter dated 24.8.2013 issued by 2nd Respondent.
iv. Issue an order/ direction to the Respondents to grant No Objection Certificate / Standing Clearance enabling grant of Open Access to the Appellant.
v. Grant the cost of this appeal to the Appellant.
vi. Pass any other order/s in the interest of justice and equality.

12. The learned counsel for the Respondents have made following arguments/submissions on the issues raised in the present Appeal for our consideration:

a) The Petition OP No. 26 of 2013 was filed on the grounds of alleged continuous defaults in payments by the Respondent No.2. The

State Commission in the Impugned Order has held that the Appellant has failed to provide details establishing payment defaults on behalf of Respondent No. 2 for continuous period of three months as alleged.

b) The Appellant at no point of time shared the details that how the bills were raised under PPA, accounting of delivered/ start up power/ imported energy/ overdrawn power and therefore did not co-operate with the Respondent No.2. Hence, it is not entitled to terminate the PPA.

c) The issues regarding raising of HT Bills on the Appellant when there was no generation and arbitrary raising of HT bills amounting to Rs 24/ kWh were not the facts in issue originally when petition OP No. 26 of 2013 was filed. The Appellant has also never questioned deductions made at the time of payments and have not made specific ground in the Original Petition. The Appellant cannot be permitted to raise these points in the appeal.

d) As per the standard PPA approved by the State Commission vide order dated 18.8.2005, the generating company can draw upto 10% of the installed capacity for start up purposes and for this 115% of the energy provided by the ESCOM will be deducted from the energy pumped into the grid for determining payment to be made by the ESCOM to the company. For over drawls beyond 10% of the installed capacity, the tariff applicable to the HT industries will be applicable. This order is applicable to all the PPAs entered into after June, 2004 which includes the Appellant's PPA. The Appellant was a party to the public hearing conducted for approval of the standard

PPA. The Appellant was also aware of the State Commission's clarification letter dated 12.7.2013 in response to the Respondent No. 2's letter dated 4.7.2013. The Respondent No. 2 was raising bills deducting 115% of energy supplied by it and raising HT bills where excess energy was used at the time of making payments for the last five years. The Appellant after a period of 5 years alleged that the deductions made are illegal. The averment that the State Commission is substituting the terms of PPA with standard PPA and clarification letter is false and denied.

13. **After having a careful examination of all the issues brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows: -**

a) The present case pertains to decision of the State Commission that the PPA cannot be terminated as there is no default in payment by the Respondent No. 2 and consequentially denial of intra state open access to the Appellant.

b) On question no. 9(a) i.e. **Whether a regulatory commission can supplant reasoning and rationale to a contract or correspondence when there exists none?, we decide as follows:**

i) The State Commission vide order dated 18.1.2005 on determination of tariff for various categories of NCE projects, directed the Respondent No. 4 to file standard draft PPAs for

various NCE projects. The PPA of the Appellant was signed on 20.1.2005. The State Commission's vide order dated 18.8.2005 approved the standard PPAs for various NCE projects which also include mini hydel projects. These standard PPAs were finalised after public hearing and duly considering the views of the developers and procurers. Thus the provisions of the PPA are applicable to the Appellant's projects also.

ii) The State Commission's order dated 18.08.2005 on the standard PPA, at para m) provides as below:

"In Clause 5.5, 'there is a provision permitting developers to use 10% of the installed capacity for startup for which 115% of such energy provided by the ESCOM for startup purposes will be deducted from the energy pumped in to the grid. If energy over and above the above entitlement is drawn, then the same would be charged under the tariff applicable to HT industries. Developers of Mini-Hydel projects have represented that the charges applicable to HT industries should be made without insisting on payment of demand charges."

Keeping in view the same and the variance in the Appellant's PPA provision of deducting 100% energy for import of energy from the energy pumped into the grid, the Respondent No. 2 vide letter dated 04.07.2013 sought clarification on the above provision of the State Commission's order dated 18.08.2005.

The State Commission vide its letter dated 12.07.2013 clarified that it should be 115% instead of what has been specified in

the relevant PPA in tune with the standard PPA approved by it in 2005. The relevant extract is reproduced below;

"I am directed to request the clarification of the Hon'ble Commission whether the percentage of energy imported by the NCEs to be deducted from the energy pumped into the grid should be taken as 115% or as per the percentage in the relevant clause of the PPA."

The relevant provisions in respect of the subject PPA dated 20.01.2005 are reproduced below

"Delivered Energy" means the kilowatt hours of Electricity actually fed and measured by the energy meters at the Delivery Point in a Billing Period after deducting therefrom, the energy supplied by Corporation to the Project, as similarly measured during such Billing Period."

.....

.....

"5.4 In case Induction Generators are used for generation of energy, for each KVARH drawn from the grid, the company shall pay at the rate of 40 paise for each KVARH drawn."

While approving the standardised PPA vide order dated 18.08.2005 of the State Commission after hearing all the generators etc. including the Appellant, the provisions regarding import of electricity were spelt out and the same would govern even in the case of the Appellant.

iii) The clarification issued by the State Commission vide letter dated 12.7.2013 is in line with its order dated 18.8.2005. The

order dated 18.8.2005 of the State Commission also provide for charging at HT tariff circumstances when import of energy by the Appellant is more than 10% of the installed capacity. Hence there is no case of supplant which can be made by the Appellant.

iv) Even in the tariff order dated 18.01.2005 in respect of Renewable Sources of Energy of the State Commission, it was directed by the Commission to submit standard PPA for its approval which would govern the terms and conditions of renewable projects upon approval. This order of the State Commission was issued prior to signing of the subject PPA dated 20.01.2005.

v) In view of the above, the issue is decided against the Appellant.

c) On question no.9 (b) i.e. **Whether a Regulatory Commission can amend the contract without notice or intimation to a contracting party?, we decide as follows:**

i) The changes applicable to all the PPAs of Non-Conventional Energy Sources **("NCEs")** were brought by the State Commission through a specific order for standardisation of the PPAs from NCEs in which the Appellant was also a party. The same is explained at para 13 b) above. Hence any changes brought out through specific order or regulations are applicable to the Appellant also. Hence there is no case of amending the contract without notice / intimation to the contracting party as the order is equally applicable to the Appellant. The letter dated 12.07.2013 of the State Commission is a mere clarification w.r.t article 5.5 of the standard PPA for mini hydel projects and the

State Commission has just re-iterated the same what is already there in the order dated 18.08.2005.

ii) This issue is decided against the Appellant.

d) On question no. 9(c) i.e. **Whether a generator can be charged as a HT Consumer without following the regulations, codes and license conditions prescribed for billing consumers for energy by a licensee when a PPA specifically defines the charges to be levied for import of energy?, we decide as follows:**

i) Since the HT charges were brought in by the State Commission vide order dated 18.08.2005 in its Standardised PPA and it also became applicable to the Appellant. Accordingly the Respondent No. 2 charged HT tariff based on the approved conditions in the standardised PPA by the State Commission. In view of the applicability of the standard PPA on the Respondent No. 2, the Appellant's PPA conditions to that extent became redundant.

ii) However, it is important to mention here that this Tribunal's Judgement dated 24.5.2011 in Appeal No. 166 of 2010 (herein after referred as the 'Judgement'). In this judgment at para 59 in summary of findings this Tribunal has held as below:

II. Question no 2: Whether a generating company can also be termed as a consumer only because it would be drawing 'startup power' from grid occasionally?

Our answer is this: A generator requiring 'startup up power' from the grid occasionally cannot be termed as a consumer.

The above conclusion drawn by this Tribunal is well reasoned and detailed from para 30 to 49 of the Judgement.

iii) The Judgement dated 24.5.2011 came when the generators were rarely put under Reserve Shut Down (RSD) due to high demand conditions in the grid with respect to available capacity in the country. Presently the conditions are entirely different and many generators are put under RSD. We would like to further elaborate the position in present scenario where the generators are put under reserve shutdown by the procurers for longer periods or under forced shutdown or planned shutdown condition, in these circumstances, generators are required to draw power from the grid for keeping the machines/ auxiliaries in hot standby or readying the machine/auxiliaries for the generation along with other requirements for power drawl. These cases are to be treated similar and require start-up power drawl from the grid. The power so drawn by them from the grid is to paid as per the regulations/orders of the appropriate commission from time to time. The appropriate commission while deciding the payment of start-up power shall not consider the generator as a consumer as per the Judgement.

iv) In view of the above since generator is not a consumer, the HT Tariff along with demand charges which are applicable to the consumers of a distribution licensee are not applicable to it.

v) Having decided as above, we are of the considered opinion that the Respondent No. 2 has acted according to the provisions of the PPA, Regulations/ Orders/ Impugned Order of the State Commission from time to time. Since the execution of

the subject PPA and the order dated 18.08.2005 of the State Commission came prior to the above referred judgement of this Tribunal, we do not interfere with the consequential decision/ effects till 31.05.2011 as decided in the preceding paragraphs.

vi) However, it is directed that from 1.6.2011 the start-up power used by the generator may be deducted only @115% of the imported energy as decided by the State Commission vide order dated 18.8.2005/ Impugned Order or at some other rate as decided by the State Commission from time to time. The HT tariff and demand charges shall not be applicable on the Appellant from 01.06.2011. For convenience of the parties, the settlement may be carried out on cumulative annual basis till it is decided by the State Commission in future.

vii) The Judgement of this Tribunal was not agitated by any of the parties at the proceedings before the State Commission or this Tribunal. After this judgement, there is likely payment shortfall by the Respondent No. 2 which may also stretch for a continuous period of three months arising out of refund by the Respondent No. 2 to the Appellant.

viii) In view of the above, we are of the considered opinion that Respondent No. 2 cannot be held responsible for this situation who has acted in accordance to the provisions of the PPA, regulations and the orders of the State Commission. Accordingly, the payment shortfall, if any is not to be treated as the default in terms and conditions of the PPA or otherwise which may attract penal provisions.

ix) The issue is decided accordingly.

e) On question no. 9(d) i.e. **Whether a Commission is justified in permitting a levy of charges when it does not consider that as an item of cost recovery in deciding the tariff?, we decide as follows:**

i) The tariff of the generator is determined by the State Commission after consultative process with all the stakeholders based on specific regulations/ guidelines. Hence tariff determination is a separate process. The State Commission has levied the said charges after due consultative process where the Appellant was also a party through a separate process. The act of the State Commission is justified while deciding the levy of the said charges. If the Appellant was aggrieved by the same, it was at liberty to take up the same with the State Commission for inclusion of the same in tariff.

ii) Accordingly, the issue is decided against the Appellant.

f) On question no. 9 (e) i.e. **Whether the quantum of claims is a material consideration in terminating contract and for adjudication of dispute between a generating company and a distribution licensee?, we decide as follows:**

i) The State Commission in the Impugned Order at para 9 e) has held that the small amount related to dispute has emerged from the analysis and the clarification issued by the State Commission. This amount is a result of adjustments due to 1.8% rebate on Monthly Bills for keeping the Letter of Credit in force, adjustment on account of 115% of imported energy and billing by Respondent No. 2 on HT tariff. Had the parties reconciled the statements amicably as per the provisions of the

PPA/ regulations/ orders of the State Commission, the situation would not have arisen.

ii) The State Commission at para 9 (b) of the Impugned order has held that Article 6.3 of the PPA does not confer any right on the Appellant to terminate the PPA.

The relevant provisions of the PPA is reproduced below:

"6.3 Disputes : In the event of a dispute as to the amount of any bill, Corporation shall notify the Company of the amounts in dispute and Corporation shall pay the Company the total bill, including the disputed amount. The parties shall discuss within a week from the date on which Corporation notifies the Company of the amount in dispute and try and settle the dispute amicably. If the dispute is not settled during such discussion then the payment made by Corporation shall be considered as a payment under protest. Upon resolution of the dispute, in case the Company is subsequently found to have overcharged, then it shall return the overcharged amount with an interest of SBI medium term lending rate per annum for the period it retained the additional amount."

iii) The State Commission has rightly analysed the issue and has held that the Appellant was not able to establish the payment default by the Respondent No. 2 for continuous period of three months, the issue regarding grant of NOC for intra state open access does not arise. The Appellant also does not have any right to terminate the PPA as per terms and conditions of the PPA.

In view of the above, we are of the considered opinion that the PPA cannot be terminated as sought by the Appellant.

iv) The State Commission has rightly held that "the *minor infraction, that too arising out of a clarification issued by this Commission, does not entitle the Petitioner either to issue Termination Notice or to claim open access under Article 9.3 of the PPA, which in any case, is not provided for under the PPA."*

v) In view of the above, the issue is decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present appeal except the applicability of HT rate for generator's start up power on this Tribunal's findings as discussed above, are devoid of merit. Hence the Impugned Order dated 13.11.2014 passed by the State Commission is hereby upheld on all the issues excepting the applicability of HT rate for generator's start up power.

However, in light of the Judgment dated 24.05.2011 deciding therein the generator is not a consumer and the HT tariff along with the demand charges are not applicable to the generators, we have decided the non-applicability of the same to the Appellant with effect from 01.06.2011. To this limited extent, this issue is remanded back to the State Commission.

The Appeal is disposed of in the above terms.

No order as to costs.

Pronounced in the Open Court on this **1st day of March, 2017.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/NON-REPORTABLE

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