# Appellate Tribunal for Electricity
# (Appellate Jurisdiction)

## Appeal No. 97 of 2011

## Dated: 28th August, 2012

**Present: MR. JUSTICE P. S. DATTA, JUDICIAL MEMBER**
**MR. V J TALWAR, TECHNICAL MEMBER,**

**IN THE MATTER OF:**

Hindustan Chemicals Company,
GIDC Industrial Estate,
Olpad, Dist: Surat. (Gujarat) .....Appellant

Versus

1 Dakshin Gujarat Vij Company Ltd.
Nana Varachha Road, Kapodara Char Rasta,
Surat-395 006.

2. Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidhyut Bhavan,
Race Course, Vadodara.

3 Gujarat Electricity Regulatory Commission
1st Floor Neptune Tower
Ashram Road, Ahmedabad
Gujarat ...Respondents

Counsel for the Appellant : Mr Sumit Pushkar
Mr Ajay Bhargava

Counsel for the Respondent : Mr Anand Ganeshan for R-1
Mr M G Ramachandran for R-2

## JUDGMENT

## PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant is an industrial consumer having a manufacturing unit in South Gujarat. 1st Respondent Dakshin Gujarat Viz Company Limited (Distribution Company) is one of the distribution licensees in the state of Gujarat having Southern Gujarat as its area of supply. The 2nd Respondent Gujarat Urja Vikas Nigam Limited (GUVNL) is the holding company and trading licensee responsible for procuring power from all the sources and for bulk supply to state owned four distribution licensees in the state of Gujarat. Gujarat Electricity Regulatory Commission (Commission) is the 3rd Respondent herein.

2. Aggrieved by the impugned order dated 13.4.2011 of the Commission the Appellant has filed this Appeal before the Tribunal.

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

   a. In the year 2007 the Government of Gujarat had notified Wind Power Policy-2007 to promote setting up wind energy farms in the state of Gujarat and nominating Gujarat Energy Development Agency (GEDA) as “Nodal Agency” for implementation of this policy.

   b. The Appellant had been running a manufacturing unit in the name and style of M/s Cyanides and Chemical Company in

Olpad, Surat falling under area of supply of 1st Respondent Distribution Company.

c. On 21.7.2009 The Appellant applied for change of name of their manufacturing unit from Cyanides & Chemical Company to M/s Hindustan Chemical Company as a consumer of 1st Respondent Distribution Company. In its said communication to 1st Respondent the Appellant had also stated that the name of the unit had already been changed with various other authorities namely, Central Excise, Sales Tax, BSNL and Bank A/Cs and submitted necessary documents in support of its claim. Subsequently, quite a bit of correspondences took place between the Appellant and 1st Respondent with regard to the same and the name of the unit was changed on 23.3.2010.

d. On 22.08.2009 the Appellant made an application to Gujarat Energy Development Agency (GEDA) for setting up 1.650 MW Wind Turbine Generator at Vandhiya, Dist. Kutch mentioning its intention to wheel the power generated by the Wind Turbine Generator to its manufacturing unit at Surat. In response to the Application of the Appellant, GEDA granted permission for transferring 1.650 MW Wind Turbine Generator capacity to the Appellant from M/s Vestas Wind Technology India Pvt. Ltd., one of the Wind Farm Developers operating in the state of Gujarat, through the letter dated 14.9.2009.

e. The certificate of commissioning was issued on 22.10.2009 by the GEDA certifying that the Wind Turbine Generator of the Appellant had been commissioned on 24.9.2009.

f. In the mean time, the Gujarat Urja Vikas Nigam Ltd. (GUVNL) on 23.9.2009 wrote a letter to all the distribution companies unbundled from the erstwhile GEB stating that in accordance with the Government policy, 2007 and the Commission's order dated 11.8.2006 for wind power tariff the concerned distribution licensee are required to execute agreements with Wind Turbine Generator owner for wheeling of energy generated by Wind Turbine Generators for the captive use prior to commissioning of Wind Turbine Generators to avoid grievances of set-off.

g. The Transmission Agreement was executed on 5.12.2009 between the Appellant and the Transmission Licensee (GETCO) for transmission of power generated by Wind Turbine Generator of the Appellant to its manufacturing unit situated at Surat falling under the area of supply of 1st Respondent Distribution Company. Subsequently, a Wheeling Agreement between the Appellant and the Distribution Company DGVCL was also signed on 20.03.2010. One of the clauses viz., clause 6 of the said wheeling agreement required that the wheeling agreement has to be executed prior to commissioning of the Wind Turbine Generator and Setting off of the energy generated by the Wind Turbine Generator shall be with effect from commissioning of the Wind Turbine Generator or date of signing of the wheeling agreement whichever is later.

h. However, the Appellant reserved its right to set-off of backlog units generated from its Wind Turbine Generator from the date of commissioning till the date of signing of this agreement vide letter dated 20.3.2010 to the 1st Respondent Distribution Company.

i. The Distribution Company (R-1), however, did not allow setting off of the energy generated by the Wind Turbine Generator for the period between date of Commissioning and date of signing of the wheeling agreement.

j. Although the Transmission Agreement between the Appellant and the Gujarat Energy Transmission Corporation Ltd. (GETCO) was executed on 5.12.2009, the Gujarat Energy Transmission Corporation Ltd. has recovered the transmission charges from the Appellant for the period 24.9.2009 to 31.3..2010 for utilization of the grid for injection of the energy generated by the wind turbine generators of the Appellant and wheeling to its manufacturing unit at Surat.

k. The Appellant wrote letters dated 6.4.2010, 12.5.2010, 29.6.2010 and 18.11.2010 to the Respondent No.1 to get credit for units generated by its Wind Turbine Generator from September 2009 to March, 2010. But the Respondent No.1 neither gave any set off against the energy injected from the Wind Turbine Generators of the Appellant nor allowed any amount for surplus energy available after set off. The 1st Respondent vide their letter dated 16.8.2010 denied to give set off against the injected units from Wind Turbine Generators of the Appellant for the period 24.9.2009 to

20.3.2010 stating that they shall go by the wheeling agreement.

l. Aggrieved by the refusal of the Respondent No.1 either to give credit or to purchase as surplus power the units injected during the disputed period, the Appellant filed a petition before the Commission with prayer seeking direction to the respondent to give set off for the energy injected from the date of commissioning i.e. 24.9.2009 of their 1.650 MW Wind Turbine Generators to the date of signing of wheeling agreement and to direct respondent No.1 to pay for surplus energy available after set off at the rate of 85% of the tariff rate determined by the Commission as per Order dated 31.1.2010 with interest @ 24% per annum on the amount due till date of payment.

m. The Commission in its impugned order dated 13.4.2011 partly allowed the petition directing the 1st Respondent Distribution Company to give set off with effect from 5.12.2009, the date of signing of Transmission Agreement instead of 24.9.2009 the date of commissioning of Wind Turbine Generator.

n. Being aggrieved by the impugned order of the Commission dated 13.4.2011 to the extent that set off for the energy generated by its Wind Turbine Generator from the date of its commissioning i.e. 24.9.2009 has not been allowed, the Appellant has filed this Appeal.

4. The learned Counsel for the Appellant made elaborate submissions in favour of its claim which are summarised below:

a. The Commission has wrongly denied to the Appellant set off/ payment for surplus energy for the period 24th September 2009 to 4th December 2009 inasmuch as there was no requirement/ negligence on part of the Appellant in informing the 1st Respondent about commissioning of the Appellant's Wind Turbine Generator and its intention to wheel energy. The Appellant had clearly mentioned its intention to wheel energy to its captive user unit in 1st Respondent's area of supply in its application dated 22nd August, 2009 to the GEDA, the nodal agency created by the Government of Gujarat under its Wind Power Policy – 2007 for implementation of the Policy.

b. The disallowance of set off to the Appellant for the period 24th September 2009 to 4th December 2009 is only on the ground that the energy accounting done in respect of the two distribution licences (i.e. one in which the Wind Turbine Generators are situated and the other in which the captive user is situated) would have been distorted. The Commission has taken a wrong view. There would be no difference in energy accounting for the two periods viz., the period between 5.12.2009 to 24.3.2010, where setting off has been permitted, and the period between 24.9.2009 and 4.12.2009 for which the setting off has been denied.

c. As per Clause 2 and 3.4 of the Wheeling Agreement dated 20th March 2010 between the Appellant and the Distribution Company (R-1), the Distribution Company (R-1) is obligated upon to allow set off/ sale of surplus energy from the date of commencement of operation of Wind Turbine Generators

which prescribe the date of generation as the critical date for availing the benefit prescribed under the Contract.

d. The setting off has been denied by the Distribution Company on the plea that Clause 6 of the Said Agreement permits setting off only from the date of wheeling agreement or the commissioning date whichever is later. The Clause 6 of the said Agreement, has been held to be void by the Commission in cases of Ruchi Soya Industries and Kutch Salt and Allied Industries. The findings of the Commission in these cases have also been upheld by this Tribunal in its Judgment in Appeal no. 194 of 2010 and 2 of 2011 dated 2nd December 2011. The Judgment of this Tribunal in Appeal Nos. 194 of 2010 & 2 of 2011 has attained finality and so accepted both by the Distribution Company (R-1) and the GUVNL (R-2), and cannot therefore be read at all to determine the rights and obligations of the parties under the Contract. The said Clause 6 is void *ab initio*.

e. On literal interpretation of the Contract, sans the said Clause 6, Distribution Company (R-1) has agreed to give set off/ sale of surplus energy from the date of generation of electricity and injection into the GETCO Grid System as per the Clause 3.5 of the wheeling Agreement and also as per Clause 3.4 of the Transmission Agreement with GETCO dated 5th December 2009.

f. Further, the Wheeling Agreement does not require any specific notice to Distribution Company (R-1) and to read such a clause into the Contract is not permissible in law.

g. The distinction drawn by the Commission on the basis that the captive user being in a different distribution licensee network from the captive production unit may give rise to accounting problem is an artificial distinction and is not reasonable classification to permit discrimination by creating two classes namely, on the one hand, where the captive user and captive producer are in the same distribution licensee network – thus entitled to the benefit of set-off from the date of commissioning as in *Ruchi Soya Case* - and, on the other hand, where the captive user and the captive producer are in different distribution licensee networks – thus not entitled to the benefit of set-off from the date of commissioning on the assumption that there may be accounting problems.

h. The said classification neglects the fact that there is no direct feeding of electricity from the captive production unit into the distribution licensee network. Thus, even where the captive user/ producer is in the same distribution licensee network the captive producer has to first inject energy into the network of the transmission licensee by paying the transmission charges. It would make no difference insofar as the actual transportation of electricity from the captive producer to user is concerned, as also the presumed accounting problems are concerned, whether or not captive producer/ user is in the same distribution licensee network or different licensee networks, as in both cases necessary facilities of the transmission licensee have to be used. Therefore, the supposed accounting problems would arise in both cases or in neither. To allow set off from the date of

commissioning, without actual written notice, when the captive producer/ user is in the same distribution network (as in *Ruchi Soya Case*) and disallow when the captive producer/ user is in different distribution networks is discriminatory and not in accordance with the purpose of the Act as also being contrary to the terms of the Contract.

i. The argument advanced by the Distribution Company (R-1) that an actual written notice ought to have been given to the Distribution Company (R-1) , since the captive producer is not situated within Distribution Company (R-1) network, is misplaced apart from being alien to the contractual terms between the Distribution Company (R-1) and the Appellant. It is pertinent to point out that Distribution Company (R-1) has admitted during the course of arguments that the said requirement of written notice of commissioning may not be applicable where the captive user and producer are in the same distribution licensee network. Thus, it only logically follows that even when captive user is in different DISCOM network, no notice is required under the Act or Regulation.

j. This Tribunal in *Ruchi Soya Appeal* has itself affirmed that information to the GEDA is sufficient for permitting set off by the Distribution licensee from the date of commissioning of WTG. In view of the Tribunal's judgment in Ruchi Soya Case that the application to GEDA being sufficient and GUVNL being duly informed, there was no requirement in the Wheeling Agreement dated 20th March 2010 executed between the Appellant and the Distribution Company (R-1) that Distribution Company (R-1) ought to have been

informed in writing before commissioning of Wind Turbine Generators by the Appellant inasmuch as the Distribution Company (R-1) itself treated information to GEDA and subsequent permission as sufficient for grant of the benefit of set-off.

5. In reply to the above grounds urged by the Appellant, Learned Counsel for the Respondents would make the following submissions:

a. On 22.8.2009, the Appellant applied to the Gujarat Energy Development Agency (**GEDA**) for establishment of the Wind Turbine Generating. A copy of the application made by the Appellant was not sent by the Appellant to the Distribution Company (R-1) or the Gujarat Urja Vikas Nigam Ltd (R-2).

b. At no point of time prior to 5.12.2009 was there any communication sent by the Appellant to either the Distribution Company (R-1) or to the Gujarat Urja Vikas Nigam Limited (R-2) regarding the option of wheeling of electricity exercised by the Appellant or of its intention to wheel the electricity from the place of generation to the place of consumption within the area of operation of the Distribution Company (R-1).

c. The Appellant, setting up the wind generating unit has the option to either sell electricity to GUVNL or to wheel electricity for its captive consumption. This was an option to be exercised by the Appellant and not to be dictated either by the Distribution Company (R-1), the GUVNL or any other third party.

d. The Distribution Company (R-1) had no actual knowledge prior to 5.12.2009 regarding the intention of the Appellant to wheel electricity to its place of consumption. The Distribution Company (R-1) had undertaken purchase of electricity, supply to its consumers, energy accounting etc. and had arranged its affairs without any knowledge of the Appellant about its intention to wheel electricity to its place of consumption.

e. The contention of the Appellant that in terms of Agreement dated 28.3.2010, since clause 6 of the said Agreement has been declared void ab-initio by the State Commission, the Appellant has a right to have set-off from the date of commissioning is misconceived. The above contention is contrary to the provisions of the Agreement and also the conduct of the parties which needs to be taken into account while deciding on the rights and obligations of the parties.

f. The Agreement entered into between the Appellant and the Distribution Company (R-1) was only for the future period and not from the date of the commissioning of the generating station. Further, the Agreement being only with reference to the future period as is evident from various clauses of the Agreement which deals only in future tense and not with retrospective effect. On the other hand, there is no reference to the date of commissioning of the generating station in the Agreement between the parties.

g. The contention of the Appellant that upon the deletion of Clause 6 in the Agreement, the Agreement automatically

applies with retrospective effect from the date of commissioning is misconceived. Any Agreement can be given retrospective effect only if the same is specifically and expressly provided for in the Agreement. The Distribution Company (R-1) is not seeking to read clauses into the Agreement as contended by the Appellant. On the other hand, it is the Appellant who is seeking to create a retrospective clause in the Agreement to provide for set-off from the date of commissioning, even though admittedly there was no actual notice given by the Appellant to the Distribution Company (R-1) or the commissioning of the generating station or its intention to wheel electricity to its place of consumption.

h. The contention of the Appellant has been based relying upon the decision of the State Commission and the Hon'ble Tribunal in the case of *Ruchi Soya* wherein the State Commission had held and also confirmed by the Hon'ble Tribunal that the generator in the said case was wrongfully denied set-off from the date of generation on account of the delays on the part of the distribution licensee in executing the Agreement and such action on the part of the distribution licensee cannot prejudice the generator who has generated and supplied electricity to the distribution licensee and which has actually been consumed and utilised by the distribution licensee. The above decision in the case of Ruchi Soya cannot be applied as it is in the present case to give the set off to the Appellant as there was no fault on the part of the

Distribution Company (R-1) in delaying the execution of the Agreement in the present case.

i. The Distribution Company (R-1) was never aware of the fact that the Appellant had established a Wind Turbine Generator at a different place (Kutch) in the State of Gujarat till the communication dated 5.12.2009 of the transmission licensee.

j. The Distribution Company (R-1) was at no point of time prior to 5.12.2009 made aware of the fact that the Appellant was generating electricity at a location outside the area of operation of the distribution licensee with the intention of wheeling electricity to the consumption premises of the Appellant which was within the area of operation of the Distribution Company (R-1).

k. The Distribution Company (R-1) had acted, planned and managed its affairs during the relevant time in the months of September, October and November, 2009 without any knowledge of the fact that the quantum of electricity generated by the Appellant at another place was intended by the Appellant to be wheeled to its consumption premises in the area of operation of the Distribution Company (R-1).

l. The power procurement and energy accounting of the Distribution Company (R-1) during the relevant months, namely September 2009 to November, 2009 was on the basis that the total consumption of all the consumers in the area of operation was to be met by the Distribution Company (R-1). In case, the Distribution Company (R-1) had the

knowledge that certain quantum of electricity was to be wheeled by the Appellant from a distant place and to that extent the Distribution Company (R-1) was not required to procure and supply electricity to its consumers, the Distribution Company (R-1) could have managed its power procurement and consequent cost to be paid for the power purchase in a different manner. This option was not made available to the Distribution Company (R-1) on account of the default on the part of the Appellant. Though the quantum of electricity sought to be wheeled by the Appellant is small, but the prejudice to the Distribution Company (R-1) will always be there if the wheeling is to be accounted for with retrospective effect.

m. It was under the above circumstances that the State Commission has come to the finding that on account of the default on the part of the Appellant, the set-off cannot be given from the date of commissioning as the Distribution Company (R-1) was not aware of the intention of the Appellant and providing set off would lead to problems in energy accounting.

n. In the present case, there was no knowledge whatsoever of the establishment of the generating unit by the Appellant to the Distribution Company (R-1) prior to 5.12.2009, the above was on account of default on the part of the Appellant and the retrospective revision of the energy accounting would cause prejudice to the Distribution Company (R-1).

o. The further contention of the Appellant that since the system of the transmission licensee is used in both cases, namely, the case of the Appellant and for *Ruchi Soya* and consequently there will not be any difference in the energy accounting methodology is misconceived. As submitted hereinabove, in the case of *Ruchi Soya,* there is a clear acknowledgement of the fact that the distribution licensee was in fact aware of the injection of electricity for the purposes of wheeling it to the place of consumption of the same distribution licensee, there was no revision of energy accounting and the distribution licensee inspite of being aware wrongfully delayed the date from which the set-off was to be given. The generator was situated within the area of operation of the distribution licensee in the *Ruchi Soya* case. In the present case, there was no knowledge whatsoever of the establishment of the generating unit by the Appellant to the Distribution Company (R-1) prior to 5.12.2009, the above was on account of default on the part of the Appellant and the retrospective revision of the energy accounting would cause prejudice to the Distribution Company (R-1). The use of the transmission system is irrelevant with regard to the revision of energy accounting and to the consequent prejudice to be caused to the Distribution Company (R-1).

p. The contention of the Appellant that the GUVNL or the Distribution Company (R-1) was to be imputed notice, namely constructive notice, of the intention of the Appellant to wheel the electricity from generating unit to the place of consumption at any time prior to 5.12.2009 is misconceived.

q. That reliance on the part of the Appellant on the decision of the State Commission and this Tribunal in the case of *Ruchi Soya* that application to Gujarat Energy Development Agency is sufficient notice to the GUVNL/the Distribution Company (R-1) is misconceived. Notice is always a question of fact and is to be considered in the facts and circumstances of the said case, it is not a question of law to be universally applied. The observation by the State Commission and the Hon'ble Tribunal in the said judgment was in relation to the facts of the said case. In the said case, there was no issue raised of constructive notice or that there was no actual notice. There was no general law laid down and there cannot be any such general law laid down that knowledge to GEDA would automatically imply knowledge to GUVNL/the Distribution Company (R-1).

r. It is also well settled principle of law that no person can take advantage of his own wrong. Reference in this regard may be made to the decisions of the Hon'ble Supreme Court in the case of Kusheshwar Prasad Singh v. State of Bihar, (2007) 11 SCC 447 and Ashok Kapil v. Sana Ullah & Others, (1996) 6 SCC 342. The claim of the Appellant in the present case would also be contrary to the above settled principle.

6. We have heard the Learned Counsel for both the parties on these issues and given our thoughtful consideration to their submissions. Since the Appellant has fully relied on the Judgment of this Tribunal rendered in Appeal no. 194 of 2010 and 2 of 2011 and also the Respondents have stated that the said judgment has no

application in the present case, we have given our anxious consideration to the records of those cases as well.

7. In the light of the rival submissions, the following questions may arise for consideration:

   i. Whether explicit notice about the intention of the Appellant to wheel power to its manufacturing unit at Surat falling in the area of supply of 1st Respondent was required?

   ii. Whether the Commission has erred in holding that there would be accounting problem if set off is provided to the Appellant from the date of commissioning of Wind Turbine Generator instead of from the date signing of Transmission Agreement.

   iii. Whether the Distribution Company (R-1) would put to loss if set off is permitted from the date of Commissioning of the Wind Turbine Generator.

8. We shall now deal with each of the above questions one by one. The first question for our consideration is as to whether any explicit notice about the intention of the Appellant to wheel power to its manufacturing unit at Surat falling in the area of supply of 1st Respondent was required?

9. The learned Counsel for the Appellant has made very elaborate submissions of this issue. The gist of his submissions are as under:

   i) Neither the Wind Power Policy -2007 of the Government of Gujarat nor the application form for setting up Wind Turbine

Generator to GEDA, or the Transmission Agreement signed with GETCO or Wheeling Agreement executed with the 1st Respondent stipulates that the Appellant was required to inform the Distribution Company about its intention of setting up Wind Turbine Generator for its own captive use.

ii) In fact, copy of the letter dated 14.9.2009 from GEDA granting permission for setting up the Wind Turbine Generator was also forwarded to GUVNL, the holding company, clearly indicating the intention of the Appellant to wheel the power generated from its Wind Turbine Generator to its manufacturing unit. Thus, the 2nd Respondent GUVNL was very well aware of the fact and it was up to the GUVNL, which is a holding company 100% shares of 1st Respondent Distribution Company, to do the needful. In support of this argument, the Appellant has raised the doctrine of 'lifting of Corporate Veil' supported by certain authorities.

iii) The issue of 'no notice' to the Distribution Licensee about the intention of wheeling was also raised in Ruchi Soya Case and this Tribunal in its Judgement in Appeal number 194 of 2010 and 2 of 2011 dated 2nd December 2011 has clearly held that mention of intention to wheel energy and the captive user network in the application to the Nodal Agency i.e. GEDA was sufficient.

10. While assailing the above contentions of the Appellant, the learned Counsel for the Respondent made very elaborate submissions which can be condensed as under:

i. The Distribution licensee is under universal obligation to supply power to its consumer on demand. Therefore, the distribution licensee has to plan its requirement and procure power from various sources to meet its universal obligation. Retrospectively Setting off of energy would jeopardise its accounting and would be prejudicial to the interest of the Distribution Licensee. Accordingly, the prior intimation to the distribution licensee about the intention of the Appellant to wheel the power over the network of the Distribution Licensee is essential.

ii. The *'ratio'* of Ruchi Soya case cannot be applied to present case as in that case both the locations of generation and usage fall within the area of supply of the concerned distribution licensee i.e. Paschim Gujarat Viz Company Limited. The Distribution Licensee in that case was aware of the setting up of the Wind Turbine Generator in its area and its intended captive use.

11. The Contention of the Respondents that the distribution licensee in Ruchi Soya case was aware of the intention of Wind Turbine Generator owner for its intended captive use is not correct. The Appellant in both the Ruchi Soya Industry case in Appeal no 2 of 2011 and in Kutch Salt and Allied Industries case in Appeal no 194 of 2010 was the Distribution Licensee i.e. Paschim Gujarat Viz Company Limited. In these cases the same issue about requirement of prior intimation to the distribution licensee was also raised and one of the contentions of the Appellant therein was that it was unaware of the intended captive use of the WTG and this Tribunal has held that intimation to GEDA, the Nodal Agency

established by the Government of Gujarat for implementation of Wind Power Policy – 2007 was adequate. The relevant portion of the judgment of this Tribunal dated 2nd December 2011 is reproduced below:

> *"39....According to the Appellant it was not aware of the intention of the R-2 to wheel the power or sell the power till the signing of the agreement as this was not intimated to them. This cannot be countenanced since the R-2 had made its intention of wheeling energy clear in its application for promotion (sic permission) to set up the wheeling farm to Gujarat Energy Development Agency (GEDA). That apart such intention of wheeling of R-2 also finds mention in permission letter of GEDA."*

12. In the instant case, the application to the GEDA by the Appellant was made on 22nd August 2009 wherein the Appellant had clearly indicated at Item 20 of the application that the proposed end use of the electricity was wheeling to its unit situated in 1st Respondent Distribution Company's area of supply. The permission letter of the GEDA dated 14.9.2009 also mentioned the intention of the Appellant for wheeling.

13. From the records, we have noted that the 1st Respondent Distribution Company in its letter dated 16.8.2010 to the Appellant denying the set off from the date of Commissioning of the Wind Turbine Generator has relied only on the clause 6 of the wheeling agreement and it did not at that stage mention about prior intimation about intended captive use to the 1st Respondent. The relevant portion of the letter dated 16.8.2010 from the 1st Respondent to the Appellant is reproduced below:

> *"With reference to above, you have made an agreement with DGCVL on dated 20.3.2010 for Wind Turbine Generator VW*

*-6 located at survey no. 266/P-1, village Vandiya, Taluka-Baruch, District Kutch.*

*In respect of your letters dated 6-4-2010 & 12-5-2010, it is to clarify that DGVCL can give set off of energy generated by your Wind Turbine Generators as per the terms and conditions of the wheeling agreement. After signing of the wheeling agreement with DGVCL, it is not appropriate to take the stand that you were not aware of GUVNL's letter dated 23.9.2009 and also that your understanding that set-off has to be given from the date of commissioning of Wind Turbine Generators, is also not appropriate.*

*As such, the set-off of wind units given to you from the date of signing of the agreement with DGVCL is as per clause no. 6.0 of the agreement and is in order."*

14. In this letter, the only basis for denying the set-off was clause 6 of the wheeling agreement. The Respondent has no where mentioned about non-issuance of prior notice of intended captive use of power as a reason for disallowing the se-off from date of commissioning of the Wind Turbine Generator.

15. Interestingly, majority of wind power potential lies in the Sourashtra and Kutch Regions of Gujarat which falls in the area of supply of Paschim Gujarat Viz Company Limited and there is hardly any wind power potential in the Respondent's area of supply i.e. the Western Gujarat. Visualising that there could be instances where a consumer in its area of supply could set up a Wind Turbine Generator in the area of PGVCL, the 1st Respondent Distribution Company issued a circular dated 23.10.2007 to all the wind farm developers informing them of the documents to be attached with Wheeling Agreement. In this circular the Respondent did not indicate any requirement of prior notice to be served upon the Respondent Distribution Company. The circular dated 23.10.2007 read as under:

*"Sub:- Documents to be attached with Wheeling Agreement.*

*Dear Sir,*

*With reference to the above subject, under the new Wind Power Policy Dated 13th June 2007, Wind farm owners will have to enter into wheeling/purchase of energy agreement with GETCO for wheeling of energy through Transmission network, whereas they have to enter into a separate agreement for wheeling of wind energy through distribution network since power is to be wheeled through transmission as well as distribution networks.*

*After execution of agreement with GETCO, you are requested to approach this office along with following documents for execution of agreement with DGVCL.*

*(1) Copy of agreement executed with GETCO*

*(2) Agreement typed as per draft format sent to your firm by GUVNL vide letter no. GUVNL/COM/WF/1199 dated 22.8.2007 on non-judicial stamp paper of Rs 100/-.*

*(3) GEDA certificate*

*….*

*(8) Last six months energy bills*

*(9) No dues certificate of local DGVCL Subdivision*

*…*

*(13) Electrical Inspector Certificate*

*Please ask your clients to get in touch with this office along with above documents in 4 sets and 3 copies of agreement. They may be advised to inform and confirm in advance the date and time from the Add. C E (C&R), DGVCL……."*

16. Perusal of the above circular would reveal following two propositions:

Firstly, the Respondent did not indicate any requirement of prior notice about intended captive use and wheeling of power from

generation site to captive unit. The Respondent has taken this stand only after the Impugned Order of the Commission.

Secondly, after commissioning of the Wind Turbine Generator a certificate from Electrical Inspector would be required. the GEDA would issue commissioning certificate only after obtaining the certificate from Electrical Inspector. Commissioning certificate from the GEDA was essential requirement to execute agreement with the GETCO. Wheeling agreement with distribution licensee could be signed only after agreement with the GETCO had been executed. Thus, there would be some gap between commissioning of Wind Turbine Generator and signing of Wheeling agreement. This situation existed since 2007. Surprisingly, there has not been any dispute regarding non-payment of energy purchases by the licensee or non-setting off for wheeled energy from the date of commissioning of WTG till 23.9.2009 when the disputed clause 6 was inducted in the wheeling agreement. Once the Clause 6 of the wheeling agreement has been set aside as void by the Commission and also by this Tribunal, the situation prior to 23.9.2009 should prevail.

Thirdly, the claim of Respondent that in the present case that it was not responsible for delay in signing of wheeling agreement is not correct. From 1st Respondent's own circular it is clear that the wheeling agreement could never be signed prior to commissioning of the WTG.

GUVNL, the bulk supplier had knowledge that WTG of the Appellant had been commissioned and was injecting power in to the grid. It also had knowledge that the power is meant for

wheeling to the Appellant's unit in the Distribution Company (R-1) area of supply. Still it did not inform 1st Respondent and supplied energy generated by WTG to distribution licensees without giving set-off thereby unduly enriching itself.

17. In view of the above and the findings of this Tribunal in its Judgment in Appeal no. 194 of 2010 and 2 of 2011 to the effect that intimation to GEDA, the Nodal Agency established by the Government of Gujarat for implementation of Wind Power Policy – 2007 was adequate and there was no requirement of giving prior notice to the 1st Respondent, this question is answered in favour of the Appellant.

18. the second question for consideration is as to whether the Commission has erred in holding that there would be accounting problem if set off is provided to the Appellant from the date of commissioning of Wind Turbine Generator instead of from the date signing of Transmission Agreement?

19. The learned Counsel for the Appellant has stated that the only ground on which the Commission did not permit the set-off from the date of commissioning of the Wind Turbine Generator is that the energy accounting of two distribution licensees could have been distorted. Let us examine the findings of the Commission which are quoted below:

> *"[9.6] The petitioner relied on the judgment of the Commission in petition no. 1030 of 2010 filed by M/s. Ruchi Soya Industries Limited v/s. Paschim Gujarat Vij Company Limited.* ***In the said case, the Wind Turbine Generators are installed in the area of PGVCL and the place of captive consumption is also situated in the area of PGVCL. Hence, there is no impact on the energy***

***accounting.*** *In the present case, the generation of the electricity is in the area of PGVCL and the proposed place of consumption i.e. the recipient unit of the petitioner is in the DGVCL distribution licensee area. In the absence of any intimation to the two distribution companies, it was not possible to give effect of this wheeling in energy accounting. Under such circumstance, it is also not correct to assume that the energy has been consumed in the license area of the respondent. It is a default on the part of the petitioner that they had not informed the respondents that they wanted to utilize the energy for captive use. The DGVCL came to know the facts only on receipt of the letter dated 5.12.2009 of GETCO, that electricity generated from 1.650 MW of Wind Turbine Generator of the petitioner situated in PGVCL area was to be wheeled in DGVCL license area and was required to give effect of the same in the energy accounting when the energy accounting was done after 5.12.2009 onwards. Thus the principle decided in the petition No. 1030 of 2009 can only be partly applied to the present case, i.e. only for the period from 5.12.2009 to 20.03.2010.*

*…*

*9.11* ***Although the petitioner commissioned its Wind Turbine Generator on 24.9.2009 it did not inform the distribution licensees about its intention to wheel the power for captive use. As a result, the energy accounting done in respect of the two distribution licensees could have been distorted.*** *However, the DGVCL & GUVNL were aware that the energy generated from the Wind Turbine Generators of the petitioner was to be utilized for captive use as per GETCO letter dated 5.12.2009. The action of the respondent no.1 in not allowing captive use of energy generated by 1.650 MW Wind Turbine Generators of the petitioner from 5.12.2009 to 20.03.2010 is illegal, unfair and against the objective of the Electricity Act, 2003 regarding promotion of renewable energy sources and establishment of captive generating plant and open access.*

*9.12 Considering the above, we decide that the petitioner is not entitled for set off of energy generated by their 1.650 MW Wind Turbine Generator for the period 24.9.2009 to*

*4.12.2009 as there was default/negligence on the part of the petitioner in not informing the DGVCL about the commissioning of its Wind Turbine Generator and its intention to wheel energy. However, the petitioner is entitled to get set-off from 5.12.2009 to 20.03.2010 as indicated in para 9.11 above. The petitioner is also entitled to receive payment for the surplus energy available after set off, if any, at the rate of 85% of the tariff rate determined by the Commission as per Order No. 1 of 2010 dated 30.01.2010 of the Commission. The respondent No.1 is directed to give set off and tariff for the surplus energy as stated above. So far as interest on the payment receivable is concerned, it is clarified that the delay in the payment of the surplus energy after set off is mainly due to change of name of the recipient unit of the petitioner for which there is no default on the part of respondent No.1. We therefore, decide that no interest is to be allowed on such amount.*

*[10] In view of above, we decide that the petition partly succeeds. The actions taken by the respondent No. 1 based on the first para of clause No. 6 of the Wheeling Agreement dated 20.3.2010 are set aside. The respondent No. 1 is directed to give set off against the injected energy in the grid by the Wind Turbine Generators of the petitioner and also pay for the surplus energy, if any, available after set off at the rate decided by the Commission in order No 1 of 2010 dated 30.1.2010 for the period of 5.12.2009 to 20.3.2010. The petitioner is not entitled to receive set-off for energy injected by their Wind Turbine Generators for the period from 24.9.2009 to 4.12.2009."*

20. The Commission in its impugned order dated 13.4.2011 has held that in the Ruchi Soya case, the Wind Turbine Generators are installed in the area of PGVCL and the place of captive consumption is also situated in the area of PGVCL. Hence, there is no impact on the energy accounting. It also observed that in the present case where Wind Turbine Generator is situated in the area of PGVCL and point of consumption is in the area of DGVCL, the energy accounting done in respect of the two distribution licensees could have been distorted.

21. We do not agree with both the observations of the Commission. Firstly, it is not correct to say that there would not be any impact on the energy accounting of PGVCL as both the point of generation and point of consumption falls within the area of PGVCL. Even in this case where the point of injection and the point of consumption fall within the area of PGVCL, in providing set off from the date of commissioning of the Wind Turbine Generator retrospectively, the accounting of GUVNL and PGVCL would have to be redone. Similarly, in the present case, where the point of generation falls in area on one licensee i.e. PGVCL and the point of consumption lies in area of another licensee viz., DGVCL, the energy accounting of GUVNL and DGVCL would have to be settled and there would not be any impact on energy accounts of PGVCL. This can be illustrated by the following example:

> Example: Before we proceed to illustrate the above proposition, it would be desirable to mention two important characteristics of electricity. (i) Electrons do not have any colour. It cannot be said that such and such electron has been produced by such generator. Once energy generated by any generator is injected in to the grid it follows the laws of physics i.e. the least impedance path. (ii) Electricity flows by method of displacement. For example, Gujarat has share in Vindhayachal STPS; however, the Power generated by this power station would be consumed in the states of Chhatisgarh and MP and Gujarat would get its share in Vindhyachal from Central Sector generating stations in and around Gujarat. Adjustments of shares of various states are carried out in Regional Energy Accounts.
>
> GUVNL is a trading licensee and bulk supplier. It procures power from various sources viz., NTPC, NPC, IPPs and state's own generating stations etc. It supplies this procured power to 4 state owned distribution licensees at bulk supply

rate fixed by the Commission. It also trades surplus power on bilateral agreements or through UI mechanism.

For the sake of simplicity and for better understanding let us assume that there are no system losses. Now let us consider following cases:

**Case 1: No injection of wheeling power by Wind Turbine Generator.** Let us assume GUNVL procures 'P' units from all the sources and supplies p1, p2, p3, p4 units to Paschim, Uttar, Dakshin and Central Distribution Companies respectively. Therefore P= p1+p2+p3+p4 in a loss less system. GUVNL recovers the cost from all the four licensees at bulk supply rate. Accordingly, GUVNL gets revenue for P units of power it had procured.

**Case 2: Injection of wheeling power by Wind Turbine Generator but no set-off given**: A Wind Turbine Generator in PGVCL area injects W units into the GETCO's grid but no set-off is given. Thus, GUVNL has P+W units of power to supply to distribution licensees. At this stage it cannot be said that additional W units has been supplied to a particular distribution licensee. No doubt, in all probability, it would be consumed within the area of generation point i.e. PGVCL, but against which distribution licensee this additional energy has been adjusted in energy account cannot be said for any amount of certainty. There could be a case where the demand PGVCL is not changed from previous case and additional W units have been supplied to some other licensee.

Now, pn1+pn2+pn3+pn4 = P+W. GUNVL recovers the cost for P+W units from the licensee at bulk supply rate but pays only for P units to the various generators from whom it has procured power. Thus GUVNL has been unduly enriched by the cost W units.

**Case 3: Setoff has been provided retrospectively by PGVCL**. In this case PGVCL would have to adjust the bills of consumer by giving set off for W units. PGVCL would adjust

these W units from the bills of GUVNL and would get credit for W units at applicable bulk supply rate. Thus the energy accounts of PGVCL and GUVNL would be affected without affecting the accounts of other licensees.

**Case 4: Setoff provided by DGVCL retrospectively**. In this case DGVCL would have to adjust the bills of consumer by giving set off for W units. DGVCL would adjust the W units from the bills of GUVNL and would get credit for W units at applicable bulk supply rate. Thus the energy accounts of DGVCL and GUVNL would be affected without affecting the energy accounts of other licensees.

22. From the above it is clear than in both the cases the energy accounts of GUVNL and the licensee in whose area the consumption point falls would be affected.

23. Again, the Commission has permitted setting-off from 5.12.2009 to 20.3.2010 retrospectively and did not permit setting-off for the period 24.9.2009 to 4.12.2009. To a specific quarry as to whether there would be any difference in energy accounting for the two periods, the learned Counsel for the Respondents confirmed that adjustments in energy accounting for both the period would be same. Thus, if energy accounts can be revisited and re-settled for the period 5.12.2009 to 20.3.2010 without distorting the accounts of the distribution licensees, it can also be revisited and resettled for the period 24.9.2009 to 4.12.2009 also.

24. Accordingly, the second question is also answered in favour of the Appellant.

25. The third question for consideration is as to whether the Distribution Company (R-1) would put to loss if set off is permitted

from the date of Commissioning of the Wind Turbine Generator retrospectively?

26. The learned Counsel for the Respondent submitted that providing set-off from the date of Commissioning of WTG retrospectively would cause prejudice to the 1st Respondent. He made the following submission in this regard:

a. The Appellant is misquoting the decision of the State Commission so as to mean that the State Commission has held that it was impossible to revise the energy account and, therefore, the Appellant ought not to be entitled to the set off from the date of the commissioning. The issue is not whether it is possible or impossible to revise the energy account. The issue is whether energy accounting ought to be revised which will cause prejudice to the Distribution Company (R-1) on account of a circumstance which has been caused on account of the default on the part of the Appellant. It cannot be denied that revision of energy accounting will cause a prejudice to the Distribution Company (R-1).

b. It is submitted that the State Commission has directed energy account to be revised from 5.12.2009 onwards on account of the fact that the Distribution Company (R-1) was aware of the fact that energy was generated by the Appellant to be set-off against the consumption made by the Appellant and the Distribution Company (R-1) did not act in a proper manner in not providing the set-off. There is an element of fault found with the conduct of the Distribution Company (R-1) with effect from 5.12.2009. Consequently, any prejudice that was caused to the Distribution

Company (R-1) on account of revision of such energy accounting from 5.12.2009 was because of the wrongful conduct on the part of the Distribution Company (R-1) and was to be borne by the Distribution Company (R-1).

c. However, for the period prior to 5.12.2009, there is a clear finding that the Appellant was at fault in not informing the Distribution Company (R-1) about its option to wheel the electricity. In such circumstances there was no justification or rationale to call upon the Distribution Company (R-1) to revise the energy accounting for default of the Appellant. This is the precise reason given by the State Commission for disallowing the claim of the Appellant for revision in the energy accounting for the period from the commissioning of the wind generating unit till 5.12.2009.

27. The above contention of the Respondent is misconceived and is liable to be rejected for the reason that in the present regulatory regime, the distribution licensee gets only Return of Equity and all other expenses prudently incurred. In case of setting-off retrospectively, its power purchase cost from the GUVNL at bulk supply rate would also be adjusted and the 1st Respondent would get credit for the units it has set-off at bulk supply rate fixed by the Commission. In addition, it would also be entitled to the wheeling charges from the Wind Turbine Generator owner. It is to be noted that retail tariff comprises of (i) power purchase costs, (ii) wheeling charges and (iii) cross subsidy, if any. Of the three components, the 1st Respondent would be compensated for power purchase cost and wheeling charges. Loss of cross subsidy would not affect the revenues of the licensee as this would have to be

compensated for by the Commission in true up exercise in future. Thus, retrospective set-off would not prejudice the 1st Respondent.

28. However, as explained in the above example, retrospective set-off would have impact on the revenues of the GUVNL. The GUVNL has been unduly enriched by not providing set-off to the Wind Turbine Generator owner and supplying additional units injected by the Wind Turbine Generator in to the grid to the distribution licensee at bulk supply rates fixed by the Commission. Retrospective setting-off would offset the undue gain of the GUVNL.

29. The third question is also answered in favour of the Appellant.

30. In view of the above findings, we find that the impugned order suffers from infirmity and hence the impugned order is liable to be set aside. Accordingly, the Appeal is allowed. The impugned order is set-aside. The 1st Respondent Distribution Company is directed to give set off for the energy injected from 24.9.2009 to 4.12.2009. The 1st Respondent is also directed to pay for surplus energy available after set off at the rate of 85% of the tariff rate determined by the Commission as per order dated 31.1.2010.

**31.** However, there is no order as to costs.

**(V J Talwar)**
**Technical Member**

**(Justice P. S. Datta)**
**Judicial Member**

Dated: 28th August, 2012

REPORTABLE/~~NOT REPORTABLE~~