

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)
(Chennai Circuit Bench)**

Appeal Nos. 218 & 219 of 2013

Dated: 15th April, 2014

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

Appeal No. 218 of 2013

In the matter of:

Ramgad Minerals & Mining Limited,

Baldota Enclave,
Abhiraj Baldota Road,

HOSPET-583 203

(Represented by its Vice-President-Power)

... Appellant (s)

Versus

1. **Karnataka Electricity Regulatory Commission,**

6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road, Bangalore-560 001
(Represented by its Chairman)

2. **Bangalore Electricity Supply Co. Ltd.,**

Having its registered office at K.R. Circle,
Bangalore-560 001

(Represented by its Managing Director)

...Respondent(s)

Counsel for Appellant(s) :

Mr. Shridhar Prabhu,
Mr. Anantha Narayan M.G.

Counsel for the Respondent(s):

Mr. Sriranga S.
Ms. Sumana Naganand,
Mr. A.M. Shodhan Babu for R-2

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JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

These Appeals have been filed by Ramgad Minerals & Mining Limited against the two separate orders in O.P. no. 26 of 2012 and 27 of 2012 both dated 7.3.2013 passed by Karnataka Electricity Regulatory Commission (“State Commission”) disallowing the prayer of the Appellant for grant of higher tariff for their two wind energy projects.

2. The Appellant has set up two wind energy projects from which they have been supplying electricity to the Distribution Licensee. The State Commission is the first Respondent. Bangalore Electricity Supply Company ('BESCOM'), the Distribution Licensee, is the second Respondent.

3. The brief facts in Appeal no. 218 of 2013 are as under:

- a) The Appellant has established a wind energy power project with a capacity of 1.25 MW in the State of Karnataka. The project achieved commercial operation on 27.8.2009.
- b) On 4.2.2011, a Power Purchase Agreement ("PPA") was executed between the Appellant and BESCOM, the Respondent no.2. As per the PPA, BESCOM is liable to pay

Rs. 3.40 per unit for the energy delivered to BESCO from the commercial operation date of the project. The rate of Rs. 3.40 per unit agreed to in the PPA was the rate that was determined by the State Commission by its order dated 18.1.2005.

- c) Even though the PPA was signed on 4.2.2011, the Appellant had been supplying electricity from its wind energy project to BESCO from the date of commercial operation of its project i.e. 27.8.2009.
- d) In the meantime, on 11.12.2009, the State Commission passed an order fixing the generic tariff for wind energy at Rs. 3.70 per unit made applicable to all PPAs submitted to the State Commission for approval on or after

1.1.2010 for a period of 10 years from the date of signing of PPA.

- e) Subsequent to entering into the PPAs on 4.2.2011 between the Appellant and BESCOM, it was submitted for approval to the State Commission on 8.2.2011. The State Commission accorded its approval to the PPA on 11.3.2011.

- f) Subsequently on 16.11.2011, the Appellant addressed a letter to BESCOM asking for revision of tariff in the PPA from Rs. 3.40 per unit to Rs. 3.70 per unit in consonance to the order of the State Commission dated 11.12.2009. In response to the same, BESCOM addressed a letter to the Appellant on 2.12.2011 informing that the rate of

Rs. 3.40 per unit is the rate that was prevalent as on the date of commissioning of the plant and the said rate alone would be applicable.

- g) On 27.1.2012, the Appellant again submitted a representation to BESCO for revision of the rate to Rs. 3.70 per unit as per the order dated 11.12.2009 of the State Commission.
- h) On 4.5.2012, the Appellant raised supplementary invoices for the period August 2009 to March 2012 at the tariff determined by the State Commission in its order dated 11.12.2009.
- i) BESCO by letter dated 9.5.2012 rejected the claim of the Appellant.

- j) Thereafter, on 14.6.2012, the Appellant filed a petition before the State Commission seeking directions to BESCO for payment @ Rs. 3.70 per unit.
- k) The State Commission rejected the claim of the Appellant by the impugned order dated 7.3.2013 stating that the rate of Rs. 3.40 as per PPA would prevail.
- l) Aggrieved by the impugned order dated 7.3.2013, the Appellant has filed this Appeal in Appeal no. 218 of 2013.

4. In Appeal no. 219 of 2013 also, the facts are similar except that the capacity of wind energy project is 2.5 MW and the Commercial Operation Date of the Project is 31.3.2009.

5. As the issues involved in these two Appeals are similar and the parties are also same, a common judgment is being rendered. However, for the sake of brevity we shall be referring to the PPA and other documents relating to Appeal no. 218 of 2013.

6. The main contention of the Appellant is that the State Commission's order dated 11.12.2009 in respect of Renewable Sources of Energy including wind fixing wind energy tariff at Rs. 3.70 per unit has been made applicable to all PPAs submitted to the State Commission for approval on or after 1.1.2010. It is undisputed that BESCO submitted the PPA for approval on 8.2.2011. Therefore, the tariff of Rs. 3.70 as decided by the State Commission by order dated 11.12.2009 would be applicable to them from the COD of the Projects. When the BESCO submitted the PPA for approval to the State

Commission it was aware of the operation of the order dated 11.12.2009 w.e.f. 1.1.2010 and, therefore, it should have submitted the PPA with tariff of Rs. 3.70 per unit as approved by the State Commission in the order dated 11.12.2009. Further, the State Commission has ignored its own clarification dated 27.4.2010 while approving the PPA in respect of one M/s. Savitha Chemicals Limited and CESC with another Distribution Licensee that the order dated 11.12.2009 would be applicable only from the date of submission of the PPA to the State Commission, provided the PPA is submitted on or after 1.1.2010.

7. On the other hand, BESCO (R-2) has contended that the Appellant's plants were commissioned on 27.8.2009 and 31.3.2009, much before the passing of the generic tariff order dated 11.12.2009 for Renewable Energy Sources including wind. On the

date on which the COD of Appellant's plant was achieved, the tariff order dated 18.1.2005 was in vogue and therefore, the tariff of Rs. 3.40 would be applicable as per the tariff order dated 18.1.2005.

8. On the above issue we have heard Mr. Sridhar Prabhu, learned counsel for the Appellant and Mr. S. Sriranga, learned counsel for BESCO (R-2).

9. On the basis of the contentions of the rival parties, the following questions would arise for our consideration:

i) Whether the State Commission has erred in deciding that tariff of Rs. 3.40 per unit as per PPA and its order dated 18.1.2005 would be applicable to Appellant's wind energy generator even though the PPA was submitted to State Commission for approval after 1.1.2010 when the tariff of Rs. 3.70

per unit as decided by the State Commission by order dated 11.12.2009 had become applicable?

ii) Whether the tariff applicable to the wind energy projects of the Appellant would be as prevailing on the date of Commercial Operation of the Projects since when the supplies had been made effective to the distribution licensee and on the basis of which PPA was entered into and invoices raised and payment received by the Appellant?

10. Since both the above issues are interconnected, we shall be dealing with them together.

11. Shri Sridhar Prabhu, learned counsel for the Appellants has argued that when BESCO signed the PPA on a particular date it ought to have thought that tariff of Rs. 3.70 per unit was to be applied from the

date of signing of the PPA and if they did not want this tariff to be paid, then they should not have signed the PPA at all. Once having signed, it cannot renege. In the PPA dated 10.11.2009 executed by the Appellant with another distribution company viz. Gulbarga Electricity Supply Co. the correct tariff as per order dated 11.12.2009 was applied and the same was approved by the State Commission. According to the order dated 11.12.2009, the new tariff determined under the said order is applicable to all the PPAs submitted to the State Commission on or after 11.12.2009 irrespective of the Commercial Operation Date of the Project. The State Commission has ignored that the mutual agreement of the parties on tariff is superseded by the orders passed by the State Commission.

12. According to Shri Sriranga, learned counsel for BESCOM, from the date of commissioning of the Project till the date of signing of the PPA, the Appellant has continued to supply power and the Appellant has been paid at the rate of Rs. 3.40 per unit for the energy supplied from the date of commissioning of the project. Therefore, in all respects, the arrangement under the PPA has come into force from 27.8.2009 itself although the PPA was signed on 4.2.2011 and submitted for approval to the State Commission on 8.2.2011 and thereafter the PPA had been approved on 11.3.2011. The Appellant is trying to take undue advantage of the delay caused by it in signing the PPA and is seeking a higher tariff without any rhyme and reason. The Appellant is seeking upward revision of tariff to make an unjust enrichment at the cost of a public enterprise. The clause in PPA clearly establish

the fact that the intention of the parties was to give effect to an arrangement for supply of power and payment of tariff for the same with effect from the Commercial Operation Date of the project which is 27.8.2009 for one project and 31.3.2009 for the other Project. Further, the Appellant has raised the issue of revised tariff only on 27.1.2012 after a lapse of one year of approval of the PPA and supplementary invoices for differential in tariff have also been raised subsequently, on 2.4.2012 for the period from the COD of the project to March 2012 which clearly indicates that the entire claim is an afterthought and is contrary to the intention of the parties at the time of entering into the PPA.

13. Let us now examine the findings of the State Commission in order dated 7.3.2013 in O.P. No.

26/2012, the impugned order in Appeal no. 218 of 2013.

14. The summary of the findings of the State Commission are as under:

i) PCKL (R-1) allotted the Project to BESCO (R-2) on 17.8.2009. The Project was commissioned on 27.8.2009 and processing of PPA was started on 23.9.2009. The agreement with Government of Karnataka was entered into on 22.9.2009. The payments have been made for electricity supplied from the COD i.e. 27.8.2009. All these events took place prior to the Tariff order dated 11.12.2009. Thus, the Appellant entered into the PPA for supply of energy at the rate of Rs. 3.40 consciously and with the knowledge that new tariff order had been issued by the State Commission on 11.12.2009.

ii) Even though the PPA was signed on 4.2.2011 and approved by the State Commission on 11.3.2011, the Respondent has been making payment from the date of COD @ Rs. 3.40 per unit. In effect, the PPA had been brought into force by the parties with retrospective effect. This is clear from Article 5.1 of the PPA read with definition of the COD.

iii) When the COD of the Project was achieved, the order dated 11.12.2009 was not in force and the earlier order dated 18.1.2005 was holding the field. Thus, the rate incorporated in the PPA is correct and valid.

iv) This case cannot be compared with the other case involving PPA signed by the Appellant with GESCOM, the other distribution licensee. The PPA of GESCOM is for 10 years from the date of signing of the PPA i.e. 22.3.2010 and not from the COD. On the

other hand, the PPA in question is for 10 years from the COD of the Project. Further, in the present case the COD had been achieved prior to signing of the PPA, whereas in the PPA with GESCOM, it was not so.

Thus, the State Commission rejected the claim of the Appellant for upward revision in tariff and consequential modification in the PPA.

15. Let us now examine the PPA dated 4.2.2011 entered into between the Appellant and BESCO.

16. Article 5.1 of the PPA is reproduced as under:

“5.1 Monthly Energy Charges:

- a. The BESCO shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date, at the rate of Rs. 3.40 (Rupees Three and forty paise only)*

per kilowatt-hour without any escalation for energy delivered to the BESCO at the Metering Point.”

17. Thus, according to the PPA, BESCO has to pay for energy supplied by the Appellant from the COD of the Project for a period of 10 years at the rate of Rs. 3.40 per/kWh without any escalation.

18. The term of agreement as stipulated in Article 9.1 of the PPA is as under:

“9.1 Term of the Agreement: This Agreement shall become effective upon the execution and delivery thereof by the parties hereto and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Commercial Operation Date and may be renewed for such further period of ten (10) years under such terms and conditions as may be mutually agreed upon between the Parties subject to approval by

the Commission ninety (90) days prior to the expiry of the said period of twenty (20) years”.

19. Thus, the PPA shall continue to be in force for 20 years from the COD of the Project. Thus, even though the PPA was signed on 4.2.2011, it was made in force from the COD of the project. The rate agreed to in the PPA was also made effective from the COD.

20. Let us now examine the tariff order dated 18.1.2005 of the State Commission for renewable energy sources. The tariff for wind energy project was determined by the State Commission as Rs. 3.40 per kWh without any escalation for the first 10 years period from the year of Commercial Operation of the plant. The order also states that the tariff would be reviewed by the State Commission after 5 years.

21. We shall now examine the Tariff order dated 11.12.2009 in which the State Commission reviewed the tariff earlier determined by the order dated 18.1.2005.

22. We find that in the tariff order dated 11.12.2009, the State Commission has determined the tariff for wind energy projects at Rs. 3.70 per unit without any escalation for the first 10 year period from the date of signing of PPA.

23. Thus, in the tariff order dated 11.12.2009, the State Commission has made a modification to the extent that the tariff has to be made effective from the date of signing of the PPA instead of COD of the project.

24. The reason for change in approach has been explained in the applicability of tariff for bio-mass

projects and bagasse project in the tariff order dated 11.12.2009 where different rate of energy has been determined for different years from 1st year to 10th year. The reason has been given in the tariff order for biomass projects as under:

“J) Applicability of the revised Rates to new PPAs: As per the existing approved Model PPA, the approved tariff for the first year is applicable from the date of commercial Operation (COD) for a ten year period, irrespective of the date of signing of PPA, as a result they will not get the benefit of increase in rates during the period from the date of signing of PPA to the date of Commercial Operation. This was challenged by some of the generators before the Hon’ble ATE in Appeal No. 129/2005 and the Hon’ble ATE has held that such an approach is not reasonable because the entrepreneurs will be denied legitimate escalation upto the year of commissioning.

In view of the above the Commission has now decided that the first year tariff shall be applicable

with reference to the date of signing of PPA and to allow the relevant escalated rate as on the date of Commercial Operation. Consequently, the relevant clause of the model PPA approved by the Commission earlier, stands modified”.

25. Thus, the first year tariff for biomass project would be applicable from the date of signing of the PPA so as to allow the rate of energy to a project as applicable on the date of Commercial Operation. Accordingly, the relevant clause of the modal PPA as approved by the State Commission was also modified. However, the PPA signed by the Appellant was not based on the modified PPA but was based on the earlier PPA.

26. Let us illustrate the above clause about the applicability of tariff in respect of biomass project as per order dated 11.12.2009. The first year and second

year tariffs determined for biomass projects are Rs. 3.66 per unit and Rs. 3.69 per unit respectively. Supposing the PPA is entered into during the first year and the biomass plant attained COD during the second year, then the tariff applicable to the biomass plant would be Rs. 3.69 per unit i.e. second year tariff as applicable on the date of Commercial Operation.

27. However, for the wind energy, the State Commission has determined a uniform tariff of Rs. 3.70 without any escalation for the 10 year period and therefore, the tariff will remain the same even if the PPA is signed during the first year and the COD takes place during the second year or in the following year.

28. The tariff order dated 11.12.2009 stipulates that the tariff determined in the order would be applicable

to all PPAs submitted to the Commission for approval on or after 1.1.2010 for a period of 10 years from the date of signing of the PPA. The intent of the making the modification in the order was that the tariff as applicable during the year of the COD of the project is made effective for the first year i.e. from the COD. We feel that we have to interpret the order as per the intent of the order.

29. We feel that generator and the Distribution Licensee should enter into a PPA and obtain the approval of the State Commission before the commissioning of the Project so that the energy from the generating project is supplied to the Distribution Licensee against a valid PPA immediately after the synchronization of the generating unit.

30. In the present cases the Appellant commenced construction of the wind energy projects and commissioned the same in March 2009 and Sept., 2009 respectively knowing fully well that the tariff of Rs. 3.40 per unit as per the order dated 18.1.2005 was applicable from the COD of the projects. The Appellant started supplying energy to the distribution licensee from the COD of the Projects and raised bills and received payment at Rs. 3.40 per kWh, i.e. at the tariff determined by the State Commission by order dated 18.1.2005.

31. The Appellant and the Respondent Company should have entered into the PPA before the COD of the Project. However, for reasons best known to the parties the PPAs were signed on 4.2.2011 i.e. more than after 1½ years of the COD of the wind energy generators and the same were approved on 11.3.2011

by the State Commission. In the PPA the tariff of Rs. 3.40 per unit from the COD of the plant for 10 year period without escalation was agreed to.

32. Even though the PPA was entered into on 4.2.2011, the arrangement as agreed in the PPA came into effect from the COD of the projects. Thus, the parties started acting upon the terms and conditions of the PPA from the COD of the project i.e. from 31.3.2009 and 27.8.2009 respectively. The Appellant raised the issue of revised tariff only on 27.1.2012 i.e. after about two and half years after the COD of the projects. It is not open for the Appellant to seek higher tariff which was determined after the COD of the projects by tariff order dated 11.12.2009 effective from 1.1.2010.

33. Learned counsel for the Respondent no. 2 has alleged that the delay in signing of the PPA was due to the Appellant not providing the required information necessary for entering into the PPA. This is refuted by the Appellant. We do not want to go into this controversy as the facts to establish cause of delay in entering into the PPA were neither placed before the State Commission not before us. However, for the delay in entering into the PPA by the lapse of the parties should not adversely affect the consumers who have to ultimately bear the burden of the increased tariff and result in undue enrichment of the Appellant.

34. In view of above, we feel that the State Commission has correctly decided that the tariff of Rs. 3.40 per unit as agreed in the PPA and as prevailing on the COD of the projects would be applicable for the energy supplied to the Respondents

from the COD of the projects. Accordingly, we confirm the impugned orders of the State Commission.

35. **Summary of our findings:**

Even though the PPA was entered into on 4.2.2011, the parties started acting upon the terms and conditions of the PPA with effect from the COD of the two projects of the Appellant i.e. on 31.3.2009 and 27.8.2009 respectively. The tariff prevailing on the COD of the projects was Rs. 3.40 per unit as decided by the State Commission in its order dated 18.1.2005 and the same was agreed to in the PPA from the COD of the projects. Hence, we do not find any merit in the claim of the Appellant for higher tariff as per the tariff order dated 11.12.2009.

36. In view of the above findings, the Appeals are dismissed as devoid of any merit. No order as to costs.

37. Pronounced in the open court on this 15th day of April, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/NON-REPORTABLE

Vs