

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 378 of 2018

Dated : 19th December, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

Assam Power Distribution Company Limited

Bijulee Bhawan, Paltanbazar,
Guwahati, Assam - 781001

... Appellant

Versus

1. Assam Electricity Regulatory Commission

Through its Secretary
ASEB Campus, Dwarandhar,
G.S Road, Sixth Mile,
Guwahati, Assam - 781022

2. Suryataap Energies and Infrastructure Private Ltd.

Through its Chairman and Managing Director
House No. 331, Usha Building,
A.T. Road, Machkhowa,
Guwahati, Assam - 781009

... Respondent (s)

Counsel for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Parichita Chowdhury for App.

Counsel for the Respondent(s) : Parinay Deep Shah Res. 1

Hemant Sahai
Apoorva Misra
Shryeshth Ramesh Sharma
Puja Priyadarshini

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Assam Power Distribution Company Ltd. (in short "APDCL"), a Government of Assam undertaking responsible for distribution and retail supply of Electricity in the State of Assam has filed this appeal assailing the order dated 29th November, 2017 passed by the 1st Respondent Assam Electricity Regulatory Commission (hereinafter referred to as "Commission") whereby the Commission has determined the final project specific tariff for the solar power project of 2nd Respondent @Rs.8.78 per kwh for a period of 25 years from the date of commercial operation of the project.

2. The 2nd Respondent, Suryataap Energies and Infrastructure Pvt. Ltd. (SEIPL) has set up a 5 MW solar PV project at IGC, Balipara, District Sonitpur, Assam which is in commercial operation since 20th August, 2016. The power generated from the plant is sold to Appellant, APDCL on the basis of power purchase agreement dated 10th November, 2014 executed between the parties.

3. Vide Order dated 9th April, 2015 passed by the Commission in Petition Nos. 10 of 2013 and 22 of 2014 of the 2nd Respondent, provisional tariff was allowed to the 2nd Respondent. At the same time, the Commission had directed the 2nd Respondent to file a fresh petition for determination of final tariff immediately after commercial operation of the power project. Accordingly, the 2nd Respondent filed a fresh tariff petition bearing No. 03 of 2017 on 30th January, 2017 before the Commission for determination of regularized project specific tariff of its aforementioned 5 MW grid connected PV solar power plant. This petition has been disposed of by the Commission vide impugned order dated 29th November, 2017 determining the final regularized tariff of Rs.8.78 per KWH for the power plant of 2nd Respondent for a period of 25 years from the date of its commercial operation.

4. The Appellant is aggrieved by the said impugned order of the Commission on two main grounds which are stated hereinbelow :-

- (i) The Commission has adopted the benchmark capital cost norm determined by the Central Electricity Regulatory Commission (CERC) for the financial year 2015-16 instead of benchmark determined by CERC for the financial year 2016-17 in which year the plant of 2nd Respondent was commissioned;

(ii) The Commission has erroneously applied the generic tariff order in determination of project specific tariff.

5. Needless to mention here that the Appellant had, by way of Petition No. 02/2018 sought review of the said impugned order of the Commission but the review petition was dismissed by the Commission vide order dt. 02/05/2018.

6. The Commission has noted in paragraph No. 5 of the impugned order as under :-

5. Determination of tariff :

The Petitioner has prayed before the Commission for determination of final tariff seeking a levellised tariff of Rs.10.76/kWh (without subsidy). The detailed tariff calculations are submitted in the specified formats along with the tariff petition.

After scrutiny and analysis of the technical and financial data and information submitted by the Petitioner and the material and information available on record, the Commission decided for determination of final levellized tariff as per the terms and conditions of the AERC (Terms and Conditions for Tariff determination from Renewable Energy Source) Regulations, 2012, Determination of generic levellised generation tariff for the FY 2015 - 16 under Regulation 8 of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 and Determination of Benchmark Capital Cost Norm for Solar PV power projects and Solar Thermal power projects applicable during FY 2015-16 dated 31.03.2015.

In absence of the original documents/ invoices submitted by the Petitioner, the Commission deems it appropriate to adopt relevant operating and financial norms of CERC regulations for FY 2015-16 for determination of tariff for the reasons that the Commission has so far not issued any generic tariff order for RE projects and secondly the AERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources), 2012, is in line with CERC (Renewable

Energy) Regulations, 2012 based on which the above CERC generic tariff order is notified.”

7. Thus, since the Commission had not by that time issued any generic tariff order for renewable energy projects, it proceeded to determine the final regularized tariff for the project of 2nd Respondent as per the provisions of AERC, (terms and conditions for tariff determination for renewable energy source) Regulations, 2012 read with CERC (Renewable Tariff) Regulations, 2012 on the basis of which the CERC had issued generic tariff order for the financial year 2015-16 titled as “Determination of generic levelized determination tariff for the financial year 2015-16”.

8. In the order dated 2nd May, 2018 vide which the Commission has dismissed the Review Petition bearing No. 2 of 2018 filed by the Appellant herein, it has clarified as under:-

“6. Consideration of CERC Benchmark 2015-16 instead of 2016-17

In absence of the original documents/invoices submitted by the Petitioner, the Commission deems it appropriate to adopt relevant operating and financial norms of Determination of Benchmark Capital Cost Norm for Solar PV power projects and Solar Thermal power projects applicable during FY 2015-16 dated 31.03.2015 for determination of final tariff for the reasons that the Commission has so far not issued any generic tariff order for RE projects and secondly the AERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources), 2012, is in line with CERC (Renewable Energy) Regulation, 2012 based on which the above CERC generic tariff order is notified.

7. As per Regulation 9 of the AERC (Terms and Conditions for Tariff Determination from Renewable Energy Source) Regulations, 2012 “Petition and proceedings for the determination of tariff”:

- a) *The Commission shall determine the generic tariff on the basis of suo motu petition at least six months in advance at the beginning of each year of the Control period for renewable energy technologies for which norms have been specified under the Regulations.*
- b) *Notwithstanding anything contained in these regulations,*
 - i. *The generic tariff determined for **Solar PV projects** based on the capital cost and other norms applicable for any year of the control period shall also apply for such projects **during the next year**; and*
 - ii. *The generic tariff determined for **Solar thermal projects** based on the capital cost and other norms for any year of the control period shall also apply for such projects during the next two years, provided that*
 - a) *The Power Purchase Agreements in respect of the Solar PV projects and Solar thermal projects as mentioned in this clause are signed on or before last day of the year for which generic tariff is determined and*
 - b) *The entire capacity covered by the Power Purchase Agreements is commissioned on or before 31st March of the next year in respect of Solar PV projects and on or before 31st March of subsequent two years in respect of solar thermal projects.*

CERC Regulations also have the same provisions.

- 8. *SEIPL and APDCL signed the PPA on 10.11.2014 (before the period of FY 2015-16). As per the regulations 9.2(a) ad 9.2(b), the entire capacity covered by the PPA is commissioned to be on or before 31st March of the next year in respect of Solar PV project. The plant gets commissioned on Aug 2016 (FY 2016-17). The benchmark capital cost norms for 2015-16 will remain valid for next year (i.e. 2016-17) for Solar PV project. Therefore, both the criteria were fulfilled. So there is no error in consideration of CERC Benchmark capital cost norm for 2015-16 for determination of tariff. So, this issue does not attract any review.*

(Emphasis supplied)

9. Perusal of the above referred order of the Commission passed in the Review Petition of the Appellant makes it manifest that the Commission has taken aid of Regulations 9.2 (a), 9.2 (b) of AERC, Regulations, 2012 in applying CERC benchmark capital cost norm for 2015-16 in determination

of final levelized tariff for the project of the 2nd Respondent even though it was commissioned in the financial year 2016-17.

10. The Counsel for the Appellant vehemently argued that if the Commission was dis-satisfied by the information furnished by the 2nd Respondent for determination of project specific tariff, the Commission should have determined the capital cost on the basis of benchmark norms specified by the Central Commission for the relevant financial year i.e. 2016-17 in which the project achieved commercial operation. The Learned Counsel pointed out that in the impugned order, the Commission has stated that the tariff determination exercise has been undertaken under Regulations 7.8 & 9.3 read with Regulation 11 of AERC Regulations 2012 whereas in the order dated 2nd May, 2018 passed in the Review Petition, the Commission states that the tariff determination has been made in Regulation 9.2(a) & 9.2(b) of AERC Regulation, 2012, which indicates that the observations in the review order are in total contradiction to the observations made by it in the impugned order. According to the Learned Counsel, it is a trite law that the tariff applicable in respect to a generating station is based on the date of commissioning of the project and not on the date of signing of PPA on any other date. It is argued that the determination of tariff is solely depending on the commissioning of the project and the

prior events or subsequent developments cannot be taken into consideration during such exercise. The Learned Counsel also argued that even for the aspects where the CERC benchmark has been followed, the Commission has allowed an unjustified mark up over the benchmark which is totally unacceptable as there was actually no evidence to substantiate any of these parameters. To buttress his submissions, the Learned Counsel has relied upon the judgements of this Tribunal dated 3rd January, 2014 passed in Appeal No. 206 of 2013 titled Viyyat Power Pvt. Ltd. vs. KSERC and Ors. and judgement dated 30th November, 2014 passed in Appeal No. 318 of 2013 in Batot Hydro Power Limited vs. HPERC & Ors.

11. The submissions of the Appellant's counsel were very strongly refuted by the Learned Counsel for the 2nd Respondent. He argued that the commission, while determining project specific tariff has not applied the CERC benchmark norms for 2015-16 in entirety but has taken into consideration the geographical conditions of Assam and accordingly modified the norms to suit the circumstances applicable for the project of the 2nd Respondent. He referred to Regulation 58 of AERC Regulations, 2012 to canvass that the Commission is empowered to deviate from the capital cost benchmark norms during the exercise for determination of project specific tariff and accordingly the Commission has exercised its

discretion in the instant case by suitably modifying the CERC benchmark norms which cannot be interfered by this Tribunal in this appeal. It is the submission of the Learned Counsel that the Commission has rightly followed for the mandate of Section 67 of the Act in promulgating tariff Regulations, 2012 which are in parametria with CERC Tariff Regulations the financial year 2015-16. He argued that the rationale behind the adoption of CERC benchmark norms for financial year 2015-16 in the instant case by the Commission can be traced to Regulation 58 of AERC Tariff Regulations, 2012 which nowhere specified any restrictions/bar on the applicability of capital cost benchmark norms for generic tariff, for determination of project specific tariff.

12. We have considered the rival submissions made by the Learned Counsels and have also gone through the written submissions filed by them. We have also gone through the judgements cited at par by the Learned Counsels.

13. Regulations 6, 7, 8 & 9 of AERC Tariff Regulations, 2012 are material for the adjudication of the issue involved in this appeal and are accordingly quoted hereinbelow :-

“6. Control Period or Review Period

The Control Period or Review Period under these Regulations shall be of five years of which the first year shall be the period from the date of notification of these regulations to 31.3.2013.

Provided that the benchmark capital cost for Solar PV and Solar thermal projects may be reviewed annually by the Commission.

Provided further that the biomass price may be reviewed at the end of the third year of the control period.

Provided further that the tariff determined as per these Regulations for the RE projects commissioned during the Control Period, shall continue to be applicable for the entire duration of the Tariff Period as specified in Regulation 7 below.

Provided also that the revision in Regulations for next Control Period shall be undertaken at least six months prior to the end of the first Control Period and in case Regulations for the next Control Period are not notified until commencement of next Control Period, the tariff norms as per these Regulations shall continue to remain applicable until notification of the revised Regulations subject to adjustments as per revised Regulations.

7. Tariff Period

- 7.1 *The Tariff Period for Renewable Energy power projects except in case of Small hydro projects below 5 MW, Solar PV, Solar thermal, Biomass gasifier and Biogas based power projects shall be thirteen (13) years.*
- 7.2 *In case of Small hydro projects below 5 MW, the tariff period shall be thirty five (35) years.*
- 7.3 *In case of Solar PV and Solar thermal power projects the Tariff Period shall be twenty five (25) years.*
- 7.4 *In case of biomass gasifier and biogas power projects the tariff period shall be twenty (20) years.*
- 7.5 *Tariff period under these Regulations shall be considered from the date of commercial operation of the renewable energy generating stations.*
- 7.6 *Tariff determined as per these Regulations shall be applicable for Renewable Energy power projects, only for the duration of the Tariff Period as stipulated under Regulation 7.1, 7.2, 7.3, 7.4 and 7.5 above.*

8. Project Specific tariff

- a) *Project specific tariff, on case to case basis, shall be determined by the Commission for the following types of projects:*
 - (i) *Municipal Solid Waste Projects*
 - (ii) *Solar PV and Solar Thermal Power projects, if a project developer opts for project specific tariff:*

Provided that the Commission while determining the project specific tariff for Solar PV and Solar Thermal shall be guided by the provisions of Chapters VII & VII of these Regulations.

- (iii) Hybrid Solar Thermal Power plants*
- (iv) Other hybrid projects include renewable-renewable or renewable-conventional sources, for which renewable technology is approved by MNRE;*
- (v) Biomass project other than that based on Rankine Cycle technology application with water cooled condenser.*
- (vi) Any other new renewable energy technologies approved by MNRE. However, the Commission may consider any Renewable Energy projects for determination of project specific tariff as it may deem it appropriate.*
- b) Determination of Project specific Tariff for generation of electricity from such renewable energy sources shall be in accordance with such terms and conditions as stipulated under relevant Orders of the Commission.*

Provided that the financial norms as specified under Chapter-II of these Regulations, except for capital cost, shall be ceiling norms while determining the project specific tariff.

9. Petition and proceedings for determination of tariff

- 9.1 The Commission shall determine the generic tariff on the basis of suo-motu petition at least six months in advance at the beginning of each year of the Control period for renewable energy technologies for which norms have been specified under the Regulations.*
- 9.2 Notwithstanding anything contained in these regulations,*
 - a) the generic tariff determined for Solar PV projects based on the capital cost and other norms applicable for any year of the control period shall also apply for such projects during the next year; and*
 - b) the generic tariff determined for Solar thermal projects based on the capital cost and other norms for the any year of the control period shall also apply for such projects during the next two years, provided that*
 - (i) the Power Purchase Agreements in respect of the Solar PV projects and Solar thermal projects as mentioned in this clause are signed on or before last day of the year for which generic tariff is determined and*
 - (ii) the entire capacity covered by the Power Purchase Agreements is commissioned on or before 31st March of the next year in respect of Solar PV projects and on or before 31st March of subsequent two years in respect of Solar thermal projects.*

- 9.3 *A petition for determination of project specific tariff shall be accompanied by such fee as may be determined by regulations and shall be accompanied by*
- a) *information in forms 1.1, 1.2, 2.1 and 2.2 as the case may be, and as appended in these regulations;*
 - b) *Detailed project report outlining technical and operational details, site specific aspects, premise for capital cost and financing plan etc.*
 - c) *A Statement of all applicable terms and conditions and expected expenditure for the period for which tariff is to be determined.*
 - d) *A statement containing full details of calculation of any subsidy and incentive received, due or assumed to be due from the Central Government and/or State Government. This statement shall also include the proposed tariff calculated without consideration of the subsidy and incentive.*
 - e) *Any other information that the Commission requires the petitioner to submit. The proceedings for determination of tariff shall be in accordance with the AERC (Conduct of Business) Regulations, 2004.”*

14. Regulation 8 mandates the Commission to determine project specific tariff for various types of projects including Solar PV and Solar Thermal Power Projects (as that of 2nd Respondent) on case to case basis. Proviso attached to Regulation 8(b) states that financial norms as specified in chapter II of these regulations, except for Capital Cost, shall be ceiling norms while determining the project specific tariff.

15. Chapter II of these Regulations begins with Regulation 13 which extracted herein below:

“13. Capital cost

The norms for the Capital cost as specified in the subsequent technology specific chapters shall be inclusive of all capital work including plant and machinery, initial spares, civil work, erection and commissioning, financing and interest during construction, and evacuation infrastructure up to inter-connection point.

Provided that for project specific tariff determination, the generating company shall submit the break-up of capital cost items along with its petition in the manner specified under Regulation 9.”

16. Capital cost incurred by a generating company in the Power Project is one of the essential parameters to be taken into consideration while determining project specific tariff. Proviso to Regulation 13 makes it obligatory upon a generating company to submit break up of capital cost items alongwith its petition in the manner an specified under Regulation 9.

17. Regulation 9.3 specifies the manner in which petition for determination of project specific tariff has to be filed by a generating company. Among other things, it shall be accompanied by “premise for Capital cost” as envisage under Regulation 9.3(b). The generating company is also bound under Regulation 9.3(e) to submit any other information which the Commission requires.

18. Undisputedly, the 2nd Respondent had approached the Commission by way of petition no. 03/2017 for determination of project specific tariff for its solar PV Power plant. Therefore, the Commission has rightly noted in paragraph 5.2 of the impugned order as :-

“5.2 Tariff design:

As per Regulations 7, 8 and 9.3 of the AERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources), 2012 read with Regulation 11 of the same Regulation, a levelized discounted tariff shall be determined for a tariff period of 25 years from the date of Commissioning of the project.”

19. It is manifest from the perusal of the impugned order that the 2nd Respondent has, despite the directions of the Commission, failed to furnish original documents/invoices in support of the figures submitted alongwith the petition. It is in this situation that the Commission notes in third sub para of paragraph no. 5 of the impugned order as :-

“In absence of the original documents/invoices submitted by the Petitioner, the Commission deems it appropriate to adopt relevant operating and financial norms of CERC regulations for FY 2015-16 for determination of tariff for the reasons that the Commission has so far not issued any generic tariff order for RE projects and secondly the AERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources), 2012, is in line with CERC (Renewable Energy) Regulations, 2012 based on which the above CERC generic tariff order is notified.”

20. No fault can be found in the commission adopting operating and financial norms of CERC Regulations, in the absence of original documents/invoices but what is questionable is what lead the commission to adopt norms of CERC Regulations for Financial year 2015-16, when the power project of the 2nd Respondent was commissioned on 20/08/2016 i.e. during the financial year 2016-17.

21. The impugned order is silent on this aspect but the Commission has given clarification in this regard in the order dt. 02/05/2018 passed on the Review Petition of the Appellant by stating that bench mark capital cost

norms for 2015-16 shall be valid for next year i.e. 2016-17 also for Solar PV projects in view of Regulations 9.2(a) and 9.2(b) of AERC Regulations 2012. Here the Commission has fallen into a grave error. Regulations 9.2(a) and 9.2(b) of these regulations are applicable only while determination of generic tariff for solar PV projects whereas the commission was dealing with a petition for determination of project specific tariff. On one hand, the commission has proceeded with the petition as per Regulations 7, 8 and 9.3 but at the same time it has applied Regulations 9.2(a) and 9.2(b) which relate to determination of generic tariff. Thus, the commission has patently misdirected itself which has resulted in an erroneous and unsustainable tariff determination.

22. It is a settled principle of law that date of commission of a power project is material for determination of tariff particularly in case of solar power plants where there is no variable cost associated with the generation of power and the fixed cost incurred depends on the date & year of commissioning. Therefore, if the Commission was not satisfied with the data/information/documents furnished by the 2nd Respondent, it ought to have determined the capital cost on the basis of market benchmark norms prevailing during the relevant period in which the power project of the 2nd Respondent was commissioned.

23. In view of the above discussion, we are unable to sustain the impugned order of the commission. The same being erroneous is hereby set aside. Accordingly, the appeal stands allowed. The case is remanded back to the commission for fresh tariff determination for the solar PV power project of 2nd Respondent on the basis of market Benchmark norms prevailing during the relevant period in which the power project of 2nd respondent was commissioned. The Commission shall conclude the fresh exercise in this regard within two months from the date of this order positively.

Pronounced in the open court on this 19th day of December, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

✓
~~REPORTABLE / NON-REPORTABLE~~

js