

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 245 of 2023

Dated : 7th February, 2025

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

In the matter of:

Hubli Electricity Supply Company Limited

Corporate Office, Navanagar,

PB Road, Huballi

Karnataka – 580025

Advocate for the Petitioner: Shahbaaz Hussain

shahbaaz@precinctlegal.com

... Appellant

Versus

1. Adyah Solar Energy Private Limited

138, Ansal Chambers-II, Bhikaji Cama Place,

New Delhi – 110066

Presented by its Director

sarin@ayanapower.com

2. Karnataka Electricity Regulatory Commission

No. 16, C-1, Millers Tank Bed Area,

Vasanth Nagar,

Bengaluru – 560052, Karnataka

Represented by its Secretary

asst.secykerc@gmail.com

... Respondent (s)

Counsel on record for the Appellant(s) : Shahbaaz Husain
Stephania Pinto
Fahad Khan
V.M. Kannan
K Sumanth Gowda
Dalima Gupta for App. 1

Counsel on record for the Respondent(s) : Sujit Ghosh Ld. Sr. Adv.
Mannat Waraich
Mridul Gupta
Ananya Goswami for Res. 1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Order dated 15th June, 2021 passed by Karnataka Electricity Regulatory Commission (“hereinafter referred to as “the Commission”) has been assailed in this appeal by the Appellant.
2. The Appellant, Hubli Electricity Supply Company Limited (in short “HESCOM”) is a Distribution Licensee in the State of Karnataka and is a Govt. of Karnataka Undertaking.
3. The 1st Respondent Adyah Solar Energy Pvt. Ltd. is a generating company and has set up 50 MW capacity solar power plant in Block B-13 of the Pavagada Solar Park located in the State of Karnataka. The power generated by the power plant is procured

by the Appellant in accordance with terms of the Power Purchase Agreement (in short “PPA”) dated 28th April, 2018 executed between the parties.

4. The Karnataka Renewable Energy Department (in short “KREDL”) has issued a request for proposal (RFP) inviting bids for development of grid connected ground mounted solar photovoltaic project of 1200 MW capacity within 2000 MW (AC) Pavagada Solar Park. A competitive bidding process was conducted by KREDL and, thereafter, letter of Award (LOA) was issued in favour of 1st Respondent. A PPA dated 20th April, 2018 was also executed between the Appellant and the 1st Respondent for procurement of power generated by the Solar power plant of 1st Respondent.

5. It appears on 30th July, 2018, the Department of Revenue, Ministry of Finance introduced Safeguard Duty (in short “SGD”) and Integrated Goods and Services Tax (in short “IGST”) on the import of solar modules. Accordingly, the 1st Respondent filed Petition No. 08 of 2019 before the 2nd Respondent – Commission with the prayer to declare the imposition of SGD and IGST as Change in Law event and for determination of increase in tariff due to

imposition of SGD. The 1st Respondent claimed Rs.31,75,76,295/- as SGD towards import of solar modules.

6. On the basis of pleadings of the parties as well as the rival contentions raised on their behalf, the Commission framed following six issues for its consideration:-

Issue No.1: Whether it would be necessary for this Commission not to proceed with the present petition till the disposal of the SLP No.24009-24010/2018 pending before the Hon'ble Supreme Court of India?

Issue No.2: Whether the petitioner prove that the imposition of Safeguard Duty vide Notification No.01/2018-(Custom-(SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of Solar Modules amounts to 'Change in Law' as per Article 15 of the PPA?

Issue No.3: Whether the petitioner is entitled to interest/carrying cost from the date of incurring expenses to the date of actual payment on additional expenditure incurred by it as claimed in the petition?

Issue No.4: Whether the respondent prove that the petitioner has imported excess Solar Modules and SGD claim is excessive?

Issue No.5: Whether the petitioner is entitled for appropriate and proportionate increase in tariff due to imposition of Safeguard Duty and consequently amend tariff specified in the PPA dated 20.04.2018?

Issue No.6: What Order?"

7. Vide the impugned order dated 15th June, 2021, the Commission declared the imposition of SGD and IGST as a Change in Law event and accordingly held the 1st Respondent entitled to Rs.21,75,18,010/- as the amount towards reimbursement on this count. The Commission further awarded an incremental tariff of Rs.0.39 to the 2nd Respondent for the entire period of 25 years of the PPA in addition to the tariff of Rs.2.91 per unit as provided under Article 12.1 of the PPA towards reimbursement of the additional capital cost of Rs.21,75,18,010/-. In doing so, the Commission considered the additional expenditure incurred by 1st Respondent towards SGD and IGST as additional capital expenditure for being part of the project and hence adopted the parameters as per the generating tariff order dated 18th May, 2018 issued in respect of new solar power projects viz;

(i) Debt: Equity Ratio;

ii) Interest on capital loan;

iii) Tenure for repayment of loan;

iv) Return on Equity;

v) Depreciation;

vi) Interest on working capital;

vii) Discount Rate etc. for determining such incremental tariff.”

8. The Appellant is aggrieved only by the mechanism adopted by the Commission for determining incremental tariff to off-set the adverse financial impact suffered by the 1st Respondent on account of Change in Law event.

9. Therefore, the issue which arises for re-determination in this appeal is:

“whether the Commission was justified in adopting the parameters and principles specified in the Generic Tariff order dt. 18/05/2018 for determination of incremental tariff to set off the adverse financial impacts suffered by a power generator due to a change in Law event where the tariff had been discovered by way of competitive tariff bidding under Section 63 of the Act.”

10. We have heard Learned Counsel for the Appellant as well as Learned Senior Counsel for the 1st Respondent. We have also

gone through the impugned order as well as the written submissions submitted by the Learned Counsels.

11. Learned Counsel for the Appellant vehemently argued that by adopting the parameters specified in the Generic Tariff order dated 18/05/2018, the commission has taken aid of Section 62 of the Indian Electricity Act, 2003 for determination of incremental tariff for the project for which tariff had been initially determined through competitive bidding process under Section 63 of the Act, the Commission has blurred the distinction between the two legal provisions and thus has committed a grave error. He submitted that in a number of judgements, this Tribunal has clarified that tariff determination process under Section 62 read with Sections 61 & 64 of the Act, is totally distinct and independent from the tariff determined under Section 63 and the parameters under Section 62 cannot be applied or relied upon in determination of tariff (whether incremental or otherwise) under Section 63 of the Act. On this aspect, the Learned Counsel cited the judgement of this Tribunal dated 2nd May, 2022 in Cogeneration Association of India Vs. Maharashtra Electricity Regulatory Commission & Ors. in Appeal No. 381 of 2019.

12. Learned Counsel referred to Article 15 of the PPA which permits determination of incremental tariff proportionate to any cess or Safeguard duty imposed by the Government and argued that the impugned order compensates the 1st Respondent disproportionately by creating the additional expenditure incurred SGD and IGST as capital investment and then applying various parameters like return of equity etc. on the same. He would argue that while the Appellant is responsible for reimbursement to the 1st Respondent towards additional cost incurred on account of Change In Law events as per Article 15 read with Article 15.1.1(e) of the PPA, it does not imply that such additional cost can be considered as capital investment of the generator.

13. Learned Counsel was very fair in pointing out that if the compensation for SGD and IGST is spread over 20 or more years, there will be an associated cost due to the time value of money. He further submitted that to balance the interest of both the generators as well as the consumers, it may be reasonable to apply discounting factor while determining the incremental tariff to compensate the generator for the expenditure incurred towards SGD and IGST but such discounting factor should not be combined

with any other tariff parameters specified under Section 62 of the Act.

14. *Per Contra*, it is argued on behalf of the 1st Respondent that the Commission, in its judicial wisdom, has proceeded to formulate a mechanism which is uniform and within four corners of the law and thus cannot be faulted with. Learned Senior Counsel appearing on behalf of the 1st Respondent argued that while indeed Section 63 of the Act indicates that the same is “notwithstanding” Section 62, this does not in itself mean that once tariff has been adopted under Section 63, the Commission can not determine tariff under Section 62 on account of situations like Change in Law events envisaged in the PPA. He submitted that Section 63 is squarely limited to the adoption of tariff by the Commission that has been determined through transparent process of competitive bidding and consequent to such adoption, Section 63 cannot be again applied for the determination of tariff pursuant to Change in Law event envisaged under PPA.

15. Learned Senior Counsel further argued that since neither the bidding guidelines nor the PPA prescribed any mechanism for determination of incremental tariff, to compensate the power

developer upon occurrence of Change in Law event, the Commission has the power to devise such mechanism on the basis of its judicial wisdom in exercise of wide powers under Section 86(1)(b) of the Act which the Commission has done in the instant case and, therefore, no legal infirmity can be found in the impugned order. To buttress his submission, Learned Counsel cited judgement of the Hon'ble Supreme Court in Energy Watch Dog vs. CERC, 2017, 14 SCC 80. He pointed out that though the Hon'ble Supreme Court was, in the said case, concerned with the powers of Central Commission under Section 79(1)(b) of the Act, the same is in parametria to Section 86(1)(b) of the Act which regulates the power of the State Commissions and, therefore, the findings of the Hon'ble Supreme Court in the said case are squarely applicable to the instant case also.

16. Relying upon the another judgement of the Hon'ble Supreme Court in JVVNL Vs. M.B. Power Limited and ors. 2024 8 SCC 513, the Learned Senior Counsel argued that for the purpose of determining incremental tariff for the 1st Respondent as a relief on account of Change in Law event, the Commission could not

have applied any other parameters apart the ones envisaged signed under Section 62 of the Act.

Our Analysis :-

17. Sections 62 and 63 of the Electricity Act, 2003 prescribe the modalities for determination of Tariff for a Power Project by the Appropriate Commission. We find it apposite to extract these two legal provisions hereunder :

“Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for

retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63. (Determination of tariff by bidding process):

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

18. Section 62 confers ample powers in general upon the Commission to determine Tariff and is doing so, it is obligated to keep in mind the guidelines specified in section 61 of the Act, the first and foremost being the principles & methodologies laid down by the Central Commission for determination of Tariff.

19. Section 63 is an exception to the general power bestowed upon the Commission under Section 62 to determine Tariff and seeks to curtail such powers of the Commission. It begins with a non obstante clause which overrides Section 62. Under Section 63, the tariff is discovered by way of bidding process which is then adopted by the Commission in case it is satisfied that the bidding process was transparent and in compliance with the guidelines issued by the Central Government.

20. In the instant case, undisputedly the tariff had been determined through bidding process which was later on adopted by the Commission under Section 63 of the Act. Then came the Change in Law event which Triggered enhancement of tariff in order to compensate the 1st Respondent (Power Generator) for the additional financial burden imposed upon it due to levy of SGD and

IGST by the Govt. on import of solar modules. In doing so, the Commission Considered the additional expenditure incurred by 1st respondent towards SGD and IGST as additional capital expenditure being part of the project and hence adopted the parameters as per Generic Tariff Order dated 18/05/2018 issued in respect of new Solar Power Projects viz: Debt-Equity ratio, interest on capital Loan, Tenure for repayment of loan, return on equity, depreciation, interest on working capital etc. for determination of incremental tariff for the power project of 1st respondent.

21. We are unable to find any fault in such approach adopted by the Commission.

22. We again note at the cost of repetition here that the tariff for the Power Project of 1st respondent had been determined under Section 63 of the Act through bidding process. We hasten to add that no such bidding process could have been conducted by the Commission to determine incremental tariff to offset the financial burden suffered by the 1st respondent due to the Change in Law event. So, it had to traverse outside Section 63 for determining the incremental tariff.

23. Concededly, neither the bidding guidelines nor the PPA prescribe any mechanism for determination of incremental Tariff to compensate the Power Generator upon occurrence of the Change in Law event.

24. We concur with the submissions of Ld. Senior Counsel for 1st Respondent that the non-obstante clause “notwithstanding” occurring in the beginning of Section 63 cannot be taken to mean that once Tariff has been adopted under Section 63, the Commission cannot determine incremental Tariff in pursuance to the Change in Law event, under Section 62. Clearly, the embargo placed by the non obstante clause in Section 63 applies only at the time of initial adoption of tariff by the Commission which had been discovered through competitive bidding process. At that stage, the Commission is precluded from considering the parameters for tariff determination specified under Section 62 read with Section 61 and is required to satisfy itself about the fact that bidding process was transparent and in accordance to the guidelines framed by the Central Commission. The non-obstante clause in Section 63 has no relevance at a later stage where incremental tariff payable to power developer in the aftermath of a

Change in Law event, is to be determined as at that stage no bidding process is possible.

25. Even otherwise also, it is to be noted that the non-obstante clause contained in section 63 is with regards to section 62 only and does not refer to any other provision of the Electricity Act. Therefore, it does not curtail the powers of the state commission under section 86(1)(b) of the Act to regulate Electricity purchase and procurement process of distribution licensees as well as to regulate the price at which electricity shall be procured from the generating companies. In this regard, reliance can be profitably placed upon following observations of the Hon'ble Supreme Court in Jaipur Vidyut Vitaran Nigam Ltd. & ors Vs. MB Power (Madhya Pradesh) Ltd. & ors (2024) 4 SCC 513 dated 8th January, 2024 :-

"103. This Court in Energy Watchdog case, in para 20, further observed that the entire Act shall be read as a whole. It has been held that, all the discordant notes struck by the various sections must be harmonised. It has been held that, considering the fact that the non obstante clause advisedly restricts itself to Section 62, there is no reason to put Section 79 out of the way altogether. It has been held that, either under Section 62, or under Section 63. the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. It has been held that, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. It has further been held that, in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and

must exercise its regulatory functions, albeit under Section d 79(1)(b), only in accordance with those guidelines. It has further been held that, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can be used.

104. The aforesaid view of this Court in Energy Watchdog, which is a judgment delivered by a two-Judge Bench, has been approved by a three-Judge Bench of this Court in Tata Power Co. Ltd. (Transmission).

105. We have already referred to Section 86(1)(b) of the Electricity Act, which is analogous to Section 79 of the Electricity Act. Section 79 determines the functions of Central Commission, whereas Section 86 provides for the functions of the State Commission. Section 86 of the Electricity Act empowers the State Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.

106. It can thus be seen that Section 86(1)(b) of the Electricity Act gives ample power on the State Commission to regulate electricity purchase and procurement process of distribution licensees. It also empowers the State Commission to regulate the matters including the price at which electricity shall be procured from the generating companies, etc.”

26. Once, it is amply clear that even in a case covered under section 63, no embargo can be placed upon the general powers of the State Commission under section 86(1)(b) of the Act to regulate the price at which electricity shall be procured from the generating companies, it follows that there was no restriction upon the Commission to devise mechanism for determination of increment tariff in this case for the 1st respondent to offset the impact of

Change in Law event. In its wisdom, the Commission found parameters specified in the Generic Tariff Order dated 18/05/2018 relevant in this regard and adopted the same. We are unable to find any infirmity in such course adopted by the Commission.

27. It is nowhere the case of the Appellant that none of these parameters is relevant for tariff determination. No other mechanism can be conceived which could have been adopted by the Commission for determination of the incremental tariff. After all, it is these parameters only which would have been considered by the 1st respondent at the time of submitting its bid initially.

28. It was argued on behalf of the Appellant that the compensation sought by 1st respondent would stand at Rs. 31,75,76,295/- whereas tariff determined by the Commission would translate to Rs. 67,30,32,750/- which is highly excessive and can not be permitted. The argument has been noted only to be rejected. The reason is that the compensation is not being paid to the 1st respondent in one go. The 1st Respondent would receive the compensation by way of increment in Tariff by Rs. 0.39/- per kWh over a period of 22 years. Therefore, the Commission arrived at

this figure by taking into account the time overrun of money during these 22 years which makes the actual incremental tariff receivable by first respondent higher than the compensation sought by it.

29. Considering the above discussion, we do not find any error or infirmity in the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed.

Pronounced in the open court on this 7th day of February, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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