

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APL NO 180 OF 2018, APL NO 181 OF 2018
APL NO 182 OF 2018, APL NO 183 OF 2018
&
APL NO 184 OF 2018

Dated: 13th November, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

APL NO 180 OF 2018

In the matter of:

Eswari Green Energy LLP

Door No. 815, Raja Nagar, P.N. Road,
Pitchampalayam Puddur (Post)
Tirupur 641 603
Tamil Nadu

.... Appellant

Versus

1. **Karnataka Electricity Regulatory Commission**
No. 9/2, 6th & 7th Floor,
Mahalakshmi Chambers, M.G. Road,
Bengaluru,
Karnataka 560 001
Through its Secretary
2. **Hubli Electricity Supply Company Limited**
(HESCOM)
Corporate Office, Navanagar, P.B. Road,
Hubballi 580 025
Through its Chairman
3. **Karnataka Power Transmission Corporation Limited**
2nd Floor, KPTCL,

Kaveri Bhavan
Bengaluru 560 009
Through its Chairman

... Respondents

APL NO 181 OF 2018

In the matter of:

The Impetus Associates LLP

5/3, MS Puram,
BS Sundaram Road,
Tirupur 641 601
Tamil Nadu

.... Appellant

Versus

1. Karnataka Electricity Regulatory Commission

No. 9/2, 6th & 7th Floor,
Mahalakshmi Chambers, M.G. Road,
Bengaluru,
Karnataka 560 001
Through its Secretary

**2. Hubli Electricity Supply Company Limited
(HESCOM)**

Corporate Office, Navanagar, P.B. Road,
Hubballi 580 025
Through its Chairman

3. Karnataka Power Transmission Corporation Limited

2nd Floor, KPTCL,
Kaveri Bhavan
Bengaluru 560 009
Through its Chairman

... Respondents

APL NO 182 OF 2018

In the matter of:

Ahill Apparel Exports (P) Limited

24, Anna Nagar,
K.P.N. Colony,
Tirupur 641 601
Tamil Nadu

.... Appellant

Versus

- 1 Karnataka Electricity Regulatory Commission**
No. 9/2, 6th & 7th Floor,
Mahalakshmi Chambers, M.G. Road,
Bengaluru,
Karnataka 560 001
Through its Secretary

- 2 Hubli Electricity Supply Company Limited (HESCOM)**
Corporate Office, Navanagar, P.B. Road,
Hubballi 580 025
Through its Chairman

- 3 Karnataka Power Transmission Corporation Limited**
2nd Floor, KPTCL,
Kaveri Bhavan
Bengaluru 560 009
Through its Chairman ... Respondents

APL NO 183 OF 2018

In the matter of:

Laurel Apparels

24, Anna Nagar,
K.P.N. Colony,
Tirupur 641 601
Tamil Nadu

.... Appellant

Versus

- 1 Karnataka Electricity Regulatory Commission**
No. 9/2, 6th & 7th Floor,
Mahalakshmi Chambers, M.G. Road,
Bengaluru,
Karnataka 560 001
Through its Secretary

- 2 Hubli Electricity Supply Company Limited (HESCOM)**
Corporate Office, Navanagar, P.B. Road,
Hubballi 580 025
Through its Chairman

3 Karnataka Power Transmission Corporation Limited
2nd Floor, KPTCL,
Kaveri Bhavan
Bengaluru 560 009
Through its Chairman ... Respondents

APL NO 184 OF 2018

In the matter of:

Sakthi Masala Private Limited
No. 6, Mamarathupalayam
Erode 638 004
Tamil Nadu Appellant

Versus

1 Karnataka Electricity Regulatory Commission
No. 9/2, 6th & 7th Floor,
Mahalakshmi Chambers, M.G. Road,
Bengaluru,
Karnataka 560 001
Through its Secretary

2 Hubli Electricity Supply Company Limited (HESCOM)
Corporate Office, Navanagar, P.B. Road,
Hubballi 580 025
Through its Chairman

3 Karnataka Power Transmission Corporation Limited
2nd Floor, KPTCL,
Kaveri Bhavan
Bengaluru 560 009
Through its Chairman ... Respondents

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Ms. Mrinal Kanwar

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Mr. Utkarsh Singh For R-1

Mr. Sriranga Subbanna
Ms. Sumana Nagananda
Ms. Medha M Puranik
Ms. Deepthi C R For R-2
(HESCOM)

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. These matters were taken up for final hearing by video conference, physical presence being not possible due to National Lockdown imposed for containing spread of corona virus (Covid-19).

PREFACE

2. This batch of appeals assail Order dated 04.09.2017 (the impugned order) passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as “the KERC” or “the State Commission” or “the Commission”) determining the generic tariff of Rs 3.74 per kWh for Generation and sale of electricity by the wind power projects in the State of Karnataka to the Electricity Distribution Licensees (hereinafter ESCOMs) including the second respondent Hubli Electricity Supply Company Limited (hereinafter referred to as “the HESCOM” or “the Discom”). The generic tariff determined under the said order dated

04.09,2017 has been applied not only prospectively for the wind projects which are commissioned after 04.09.2017 but also to the wind power projects of the appellants whose projects were commissioned prior to 04.09.2017 and in respect of which the ESCOMs had approached the State Commission for approval of final Power Purchase Agreement (hereinafter referred to as “the PPA”) and the same was pending with the State Commission as on 04.09.2017. It is the contention of the appellants that the view taken by the impugned order is unfair and unjust because their wind power projects had been certified by the third respondent Karnataka Power Transmission Corporation Limited (hereinafter referred to as “KPTCL”), Chief Electrical Inspector (CEI) and also HESCOM to have been duly commissioned on 31.03.2017, the PPAs with HESCOM for sale of electricity also executed on 24.03.2017 (submitted by HESCOM on 31.03.2017 before the Commission for its approval, it statedly being pending ever since), the tariff stipulated in the PPA at Rs 4.50 per kWh being applicable since such tariff had been determined by the State Commission by its earlier order dated 24.02.2015, which was prescribed as applicable for projects that may be commissioned during the period of 5 years.

3. Simply put, the grievance of the appellants is that the impugned order denies to them the admissible tariff of Rs 4.50 per kWh and instead reduces it unjustly to Rs 3.74 per kWh.

FACTS

4. The appellants are Limited Liability Partnership/ Companies which own and operate wind power projects of capacities from 2 MW to 10 MW at Basavana Bagewadi Village of Basavana Basewadi Taluk, Vijayapura District (hereinafter referred to as “the appellants” or “the generators”). The second respondent, Hubli Electricity Supply Company Limited is the Distribution Licensee in the State of Karnataka and is responsible for power distribution in Dharwad, Gadag, Vijayapura, Bagalkot, Uttar Kannada, Haveri and Belgaum districts of Karnataka (hereinafter referred to as “the HESCOM” or “the Discom”). The appellants’ projects fall within the licensed area of HESCOM. The Wind Power Projects of the appellants are inter-connected to the KPTCL’s sub-station at Bagewadi. It is undisputed that M/s. RBRK Investment Limited (hereinafter referred to as “the developer”) has been the developer of the wind power projects of the appellants and certain others with capacities aggregating to 88 MW under the approval given by the State Government.

5. On 08.11.2011, the Government of Karnataka (“the State Government” or “GoK”), by its Order No. EN 493 NCE 2011, accorded permission to the developer for installation of 33 MW capacity Wind

Power Project at Basavana Bagewadi, Jainapur and Takkalaki Villages, Basavana Bagewadi Taluk, Vijayapur District.

6. On 10.10.2013, the State Commission passed a generic tariff order in regard to procurement of power from wind projects in the State of Karnataka, *inter alia*, providing as under:

“In view of the above, the Commission determines the tariff for wind projects at Rs.4.20/unit without any escalation for the period of PPA and the same shall be applicable to all the power purchase agreements signed during the period of five years from the date of this order. The order of this Commission dated 11.12.2009 in so far as it relates to tariff for wind energy stands superseded with immediate effect.”

7. The abovesaid order dated 10.10.2013 of the State Commission was subject matter of challenge before this tribunal in Appeal (no. 82 of 2014 and batch) of *Guttaseema Wind Energy Company Private Limited v. Karnataka Electricity Regulatory Commission*. The matter was remanded by order dated 25.11.2014 to the State Commission for re-determination of tariff.

8. In pursuance of the above, the State Commission passed a fresh order on 24.02.2015, modifying its earlier order dated 10.10.2013, redetermining the tariff for Wind Power Projects at Rs. 4.50 per kWh for projects for sale of electricity to the Electricity Supply ESCOMS in the State including HESCOM. The control Period for the application of the said tariff of Rs 4.50 per kWh was specified as five years commencing

from 10.10.2013 namely till 09.10.2018. The order, *inter alia*, reads as under:

“46. Using the above parameters, the levellised tariff for wind energy projects works out to Rs.4.49 per kWh rounded off to Rs.4.50 per kWh, taking into account the life of the project at 25 years. The Commission therefore determines the tariff for wind energy projects, as follows:

O R D E R

47. (i) In modification of the earlier order dated 10th October, 2013, the Commission hereby redetermines the tariff for wind power projects at Rs.4.50 per kWh for projects established during the control period of five years commencing from 10th October, 2013.

(ii) This tariff shall be applicable to all the new wind power projects entering into power purchase agreements (PPA) on or after 10.10.2013 for the control period of five years from that date.

(iii) In respect of the projects which have already entered into PPAs with ESCOMs from 10th October, 2013 and up to the date of this Order, the tariff as determined in this Order shall be applicable.

(emphasis supplied)

9. On 22.07.2015, the State Commission passed an order approving the amendments to the existing standard formats of Power Purchase Agreements in respect of Renewable Energy Projects, except Solar Power Projects and thus applicable to Wind Mill Power Projects.

10. On 16.11.2016, the State Government, by its Order (no. EN 249 NCE 2016), accorded permission to the developer for enhancement of Wind Power Project capacity from 33 MW to 84 MW at Basavana Bagewadi, Jainapur and Takkalaki Villages, Basavana Bagewadi Taluk,

Vijayapur District. Subsequently, on 18.03.2017, the State Government, by its Order (no. EN 126 NCE 2017), accorded permission to the developer to transfer aggregate capacity of 20 MW out of 84 MW Wind Power Project capacity it was developing, to the appellants.

11. Karnataka Renewable Energy Development Limited (“KREDL”), an organization under the control of Energy Department, GoK, works with the objectives of promoting renewable energy and for initiating necessary actions for Energy Conservation in the State. In the wake of the above-mentioned events, the appellants entered into an agreement with KREDL on 22.03.2017. Thereafter, on 24.03.2017, each appellant entered into a Power Purchase Agreement (“PPA”) with respondent HESCOM for sale and supply of Wind power (4 MW, 2 MW, 2 MW, 2 MW and 10 MW respectively) generated by each of them to HESCOM for a period of 25 years from the Commercial Operation Date (“COD”) at a tariff of Rs 4.50 per unit as per the then prevailing Generic Tariff Order dated 24.02.2015. Pertinent to note here that the PPA carried the following clause on the subject of COD:

“VII. “Commercial Operation Date” with respect to the Project shall mean the date on which the Project is available for commercial operation as certified by Corporation/HESCOM and in any case, shall not be beyond the scheduled date of completion.”

(emphasis supplied)

12. On 28.03.2017, the Chief Electrical Inspector to the Government (“CEIG”) wrote to the appellants approving the installation drawings. On 30.03.2017, the CEIG wrote another letter submitting the work completion report. On same date (30.03.2017), the Deputy Chief Electrical Inspector submitted its report of initial inspection and recommendation. On 31.03.2017, letters were issued by the Chief Electrical Inspector, GoK to the developer granting safety approval for the Wind Power Projects, the communication, *inter alia*, stating thus:

“Electrical Safety approval as required under regulation 32 and 43 if the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations 2010 is hereby accorded for electrical installation pertaining to 2 MW WPP at location no.BBV36 comprising of 1 x 2 MW 690V Wind Turbine Generator, 1x 2.3 MVA, 690V/33KV Transformer along with DP yard and 33KV intrafarm SC OH internal line for a length of 0.75 Km along with 33 KV metering yard at Basavanabagewadi Village, Basavanabagewadi Tq, Vijayapura District in favour of M/s.The Impetus Associates LLP.

This approval is strictly subject to your full compliance with the relevant provision of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations 2010 (as amended to date) in every respect.

This approval is subject to conditions mentioned below and overleaf.”

(emphasis supplied)

13. On 31.03.2017, letter was issued by third respondent (KPTCL) to the developer regarding the provisional interconnection approval for 20 MW WTGs out of 24 MW temporarily availed evacuation scheme out of

(19.5 + 33) MW = 52.5 MW Wind Power Project at Jainapur, Takkalaki, Mannur, Uppinadinne Village, B. Bagewadi Taluk, Vijayapura District.

This letter, *inter alia*, stated as under:

“Adverting to the above letter cited under references, permission for synchronization approval with the KPTCL grid for proposed 20 MW out of 24MW temporarily availed evacuation scheme out of (19.5 + 33) MW = 52.5MW Wind Power Project at Jainapur, Takkalaki, Mannur, Uppinadinne village, B. Bagewadi taluk, Vijayapura District based in above documents was requested.

Considering the above request, I am directed to communicate Provisisonal interconnection approval for your 20MW out of 24MW temporarily availed comprehensive evacuation scheme out of (19.5 + 33)MW = 52.5MW Wind Power Project at Jainapur, Takkalaki, Mannur, Uppinadinne village, B. Bagewadi taluk, Vijayapura District with KPTCL grid at 33kV voltage calss to 220/110/33kV Basavana s/s for a period of there moths from the date of this intimation in accordance with the approved evacuation scheme along with terms & conditions, drawings and technical specification. The list if the interconnecting WTGs is appended below:

SI NO	Name of the firm	Transferred capacity in MW out of 24 MW	Proposed capacity in MW	Balance capacity in MW
1	M/s Laurel Apparels	2	2 WTG loc no: BBV35	Nil
2	M/s The Impetus Associates LLP	2	2 WTG loc no: BBV36	Nil
3	M/s Eswari Green Energy LLP	4	4 WTG loc no: BBV37 & BBV38	Nil
4	M/s Ahill Apparell	2	2	Nil

	<i>Exports Pvt Ltd</i>		<i>WTG loc no: BBV34</i>	
5	<i>M/s Sakthi Masala Pvt Ltd</i>	10	10 <i>WTG loc no: BBV22, BBV23, BBV41, BBV48 & BBV49</i>	<i>Nil</i>
	<i>Total</i>	20	20	00

“It may please be noted that since you have requested for interconnection approval without furnishing the statutory documents such as PTCC energization approval, Route approval, Railway NOC, Forest NOC etc. thus you alone will be held responsible towards any undue consequences that may arise by commissioning of this project in the absence of statutory documents/approvals. it is your bound responsibility to observe all the electrical safety rules /regulations / guidelines for the 33kV evacuation lines.”

The Chief Engineer (Ele), Transmission zone, KPTCL, Bagalkote shall ensure that the form has fulfilled all the formalities before commissioning the said project. PC test shall be conducted before interconnecting the plant with the KPTCL grid & to ensure the temporary evacuation scheme works are completed in all respect.

5. The concerned Executive Engineer El., TL&SS, KPTCL of the area along with Executive Engineer El., O&M Division, of concerned ESCOM has to take joint meter reading of the tariff meter initially before commissioning and every month as per the standard procedure in such cases.”

(emphasis supplied)

14. On 31.03.2017, a Meeting was held between KPTCL, HESCOM and the Developer- M/s. RBRK Investments Limited for commissioning of 20 MW Wind Turbine Generators and Electrical Equipments and in the Minutes of the said Meeting it was, *inter alia*, recorded as under:

“As per the approval of CEIG, Bangalore vide letter Nos. 1) CEIG/ACEI/EI-1/AEI-3/5 1900-06/16-17 Dt. 31.03.2017-For 33 KV Metering Bay and Transmission Line, 2) CEIG/ACEI/EI-1/EI-3/5 1907-13/16-18 Dt. 31.03.2017- For 2 MW WPP of The Impetus LLP, 3) CEIG/ACEI/EI-1/AEI-3/5 1914-20/16-17 Dt. 31.03.2017-For 2 MW WPP of M/s. Ahill Apparels, 4) CEIG/ACEI/EI-1/AE-3/5 1921-27/16-17 Dt. 31.03.2017-For 2 MW WPP of M/s/. The Laurel Apparels, 5) CEIG/ACEI/EI-1/AEI-3/5 1928-34/16-17 Dt. 31.03.2017-For 10 MW WPP of M/s. Shakthi Masala Pvt Ltd., 6) CEIG/ACEI/EI-1/AEI-3/5 1935-41/16-17 Dt. 31.03.2017- For 4 MW WPP of M/s. Eswari Green Energy LLP and Chief Engineer (Ele.), P&C, KPTCL Bangalore vide letter No. CEE(P&C)/SEE(Plg)/EE(PSS)/KCO-96/64271/F-622/21572-88 Dt. 31/03/2017 in favor of RBRK Investments Ltd has commissioned the 1 No. of 33 KV Metering bay and associated electrical equipments for 20 MW (10x2000KW) capacity of wind power project at Bhasavanabagewadi, Takkalaki & Muttagi Villages, Basavanabagewadi Tq., Vijayapura Dt., Karnataka as per following details:

Sl No	Name of Customers	Capacity	Location Nos	Sub Meeting at WPP	Main Metering Unit RR.No. at 220/110/33KV Basavanabagewadi Substation
1	M/s.RBRK Investments Ltd.	20MW			BBGD-IPP-16
2	M/s.The Impetus Associates LLP	2MW	BBV-36	SUB-BBGD-IPP-16A	
3	M/s.Ahill Apparel Exports Pvt Ltd	2MW	BBV-34	SUB-BBGD-IPP-16B	

4	M/s Laurel Apparels	2MW	BBV-35	SUB-BBGD-IPP-16C
5	M/s Sakthi Masala Pvt Ltd	4MW	BBV-22 & 23	SUB-BBGD-IPP-16D
		6MW	BBV-41, 48 & 49	SUB-BBGD-IPP-16E
6	M/s.Eswari Green Energy LLP	4MW	BBV-37 &38	SUB-BBGD-IPP-16F

The sub-metering unit arrangement are interconnected to KPTCL grid having bulk tariff metering unit RR No. BBGD-IPP-16 AT 220/110/33 KV KPTCL Basavanabagewadi sub-station for 20 MW Wind Power Generators are commissioned the following KPTCL, HESCOM officials on 31.03.2017.”

(emphasis supplied)

15. The Minutes of Meeting quoted above were signed by four Officials of HESCOM, three Officials of KPTCL and three officials of the developer in terms of what was envisaged under the KPTCL’s Letter dated 31.03.2017 referred to earlier.

16. On 03.04.2017, the Commissioning Certificates were issued by HESCOM certifying that the 2 MW capacity of wind power projects of the appellants at Basavanabagewadi Taluk, Vijayapura District were commissioned on 31.03.2017 and interconnected to the grid. The said Commissioning Certificates, *inter alia*, read as under (quoting from one as illustration):

“This is to certify that 2MW (1x2000KW) capacity of wind power project of M/s. Impetus Associates LLP at

Basavanabagewadi Village, Basavanabagewadi Tq. Vijayapura Dt., Karnataka has been commissioned on 31.03.2017 and is interconnected to KPTCL grid having bulk tariff metering unit bearing RR No. BBGD-IPP-16 at 220/110/33kV KTPCL Basavanabagewadi Sub-station and sub metering arrangement at Proposed 2MW Wind Power Project bearing RR No. SUB-BBGD-IPP-16A. This certificate is issued as per the Interconnection approval accorded by Chief Engineer (Ele.), P&C, KPTCL Bangalore vide letter No. CEE (P&C)/SEE(Plg)/EE(PSS)/KCO-96/64271/F-622/21572-88 Dt. 31/03/2017 and commissioning approvals accorded by Chief Electrical Inspectorate to Govt. of Karnataka, Bangalore vide letter Nos. 1) CEIG/ACEI/EI-1/AEI-3/51900-06/16-17 Dt. 31.03.2017-For 33KV Metering Bay and Transmission Line, 2) CEIG/ACEI-1/AEI-3/51907-13/16-17 Dt. 31.03.2017- For 2MW WPP and associated electrical equipment's of The Impetus Associates LLP."

(emphasis supplied)

17. Noticeably, the above certificate was issued on 03.04.2017 but confirmed the fact of commissioning on 31.03.2017. It is pertinent to add here that on same date, i.e. 31.03.2017, HESCOM submitted before the State Commission for according its approval to the PPAs entered upon by it with each appellant. As is sought to be highlighted by the appellants, it is noted that there was no qualification or reservation in the above letter sent by HESCOM for approval of PPA. It was also not a petition filed under Section 86(1)(b) of the Electricity Act, 2003, impleading the Appellants as parties and seeking the initiation of any regular proceedings to consider the matter and grant approval. What was sought was that approval be communicated administratively.

18. On 12.04.2017, the State Commission passed an order revising the tariff for Grid Interactive Megawatt Scale Solar Power Plants for Financial Year 2018. This order modified the earlier order dated 30.07.2015 determining tariff at Rs. 4.36 per unit for all new grid connected MW scale solar PV Plants entering into PPAs on or after 01.04.2017 but before 01.04.2018. Furthermore, this tariff was also made applicable to such grid connected megawatt scale Solar PV Plants as for which PPAs were entered into before the 01.04.2017 but the Power Projects had not been commissioned within the specified COD during the period from 01.04.2017 to 31.03.2018.

19. On 25.04.2017, the State Commission issued an advisory to the State Government under section 86 (2) of the Electricity Act, 2003 as under:

“Hence, the Commission vide its letter dated 25.04.2017, issued an advisory to the Government of Karnataka under Section 86(2) of the Electricity Act, to direct the ESCOMs not to enter into any fresh PPAs with Wind Power Projects until further review by the Commission. The Commission requested the State Government to frame a policy for procurement of Wind Power to meet any future requirement only through competitive bidding with reverse auction as per the bidding guidelines proposed to be issued by the Government of India, duly obtaining prior approved from the Commission.”

(emphasis supplied)

20. It is not disputed that the above was the first time the State Commission had stated anything about no further signing of the PPAs

with Wind Power Developers. There was no decision taken at that stage by the State Commission against approval of the power purchase agreements sent to it by 31.03.2017.

21. Though the appellants plead ignorance in such regard, it appears that on 02.05.2017 the State Commission returned the PPAs stating thus:

“The Commission has observed that, the ESCOMs are continuing to enter into PPAs and forwarding the same to the Commission for approval, despite fulfilling the RPO targets. Considering the anticipated energy requirement in the State, the increased drawal of RE power would result in backing down of the new Thermal Power Stations (TPS) which have been commissioned in the State. This would result in payment of fixed cost without drawing the energy from such TPS. Thus, the drawal of further RE energy beyond the RPO requirement, would result in additional tariff burden to the consumers.

The Commission has also observed that, the tariff of the wind projects across the country has come down significantly. The ESCOMs having over achieved the non-solar RPO, further capacity addition through signing of wind project-PPAs at the existing generic tariff, is not sustainable. Further, some of the ESCOMs have not been paying their current power purchase dues to the generators promptly. Hence, in the interest of consumers and financial health of the ESCOMs, all future procurements should be made only through competitive bidding, to the meet the RPO.

Under the above circumstances, the Commission is unable to approve the PPAs in respect of Wind Power Projects, submitted by the HESCOM. The wind generators are at a liberty to sell the power in the market. In case, there is a shortfall in RPO compliance, in future, the HESCOM may procure the power through competitive reverse bidding,

through the KREDL, keeping the tariff determined by the Commission, as the ceiling price.

I am directed to return the following thirteen number of Wind Power Projects for total capacity of 252 MW, which were submitted for the approval of Commission.”

(emphasis supplied)

22. It is not disputed by the respondents that the above letter/communication was never forwarded either by HESCOM or by the State Commission to the appellants and further that there was no follow up by the State Commission on the issue of abandonment of the PPAs as stated in the letter dated 02.05.2017.

23. On 19.05.2017, the State Commission issued a discussion paper titled “*Revision of Generic Tariff for Wind Power Projects and mandatory procurement of wind Power through Bidding*” inviting comments/suggestions/views from interested persons. The Discussion Paper, *inter alia*, read as under:

“Discussion Paper on “Revision of Generic Tariff for Wind Power Projects and mandatory procurement of wind Power through Bidding”

1. The Commission mandated under the Electricity Act, 2003 to promote generation of electricity from renewable sources of energy has been determining periodically their generic tariff based on normative financial and operational parameters. To create a stable environment for investment in such projects, the generic tariff is fixed for all projects commissioned during a control period. Accordingly, the Commission, vide its Order dated 24th February, 2015 has determined the generic tariff for wind power projects, wherein a levelized tariff of Rs.4.50/unit has been determined for the life of the projects, namely 25-years. The said Order was made applicable to all new wind power projects which are entering or have entered into power

purchase agreements during the fiveyear control period commencing from 10.10.2013. i.e. upto 09.10.2018.

2. Meanwhile, the new Tariff Policy dated 28.01.2016, envisages future procurement of renewable energy (except from waste to energy plants) only through competitive bidding, as per its notified bidding framework. Pursuant to the same, the Central Government, has issued the Draft Bidding Guidelines.

3.

6. The above facts and developments indicate that in the recent years the wind tariffs have come down significantly due to increased plant efficiency by adoption of technically improved and higher hub-height Wind Turbine Generators (WTG) and also due to reduction in the capital costs of the wind projects resulting from economies of scale. Thus, the current tariff determined by this Commission at Rs.4.50/unit is considerably higher and therefore, there is a need for mid-term tariff revision to ensure that, the consumers get the benefit of lower cost of wind power generation and there is an incentive to adopt efficient and improved technology in wind power projects.

7. The midterm revision of term is also necessitated by other factors. The Commission in order to promote generation of electricity from renewable sources, has also been mandated to impose renewable purchase obligation (RPO). While fixing such RPO, the Commission needs to consider apart from the guidelines of the MNRE, Government of India, the generation capacity created in the State, the grid stability, the financial health of the distribution licensees and the interest of consumers who cannot be asked to bear beyond a reasonable amount, the additional tariff on account of renewable sources, which are generally higher than conventional sources. The Wind power generation potential in the State is estimated to be 15783.22 MW and the cumulative capacity created as on 31.03.2017 is 3798.66 MW. Out of this, the State's distribution licensees have contracted to procure 2787.10 MW. The nonsolar RPO fixed is mostly met through procurement from wind power. The available capacity indicates that the distribution licensees in the State as a whole would be able to comfortably meet their RPO for the FY18 and the FY19, which are 10.48 % and 11.54% respectively.

8. Therefore, keeping in view the new Tariff Policy,2016, the wind power generation capacity created in the State so far and the contracted procurement of wind power by the distribution licensees to meet their RPOs and general demand, the

Commission proposes that all future wind power purchase by the distribution licensees should be only through competitive bidding and the licensees should follow the bidding guidelines as may be finally notified by the Central Government. Further, 4 the Commission proposes that the ESCOMs should seek its approval, before adopting the tariff as discovered under bid. However, to have a benchmark tariff for calling such bids, the Commission proposes to determine the tariff afresh for wind power projects based on the following parameters: a) Capital cost including evacuation system cost. b) CUF, Capacity Utilization Factor, c) Debt Equity Ratio, d) Interest on term loan, e) Depreciation, f) Return on equity, g) Operation and maintenance charges, h) Interest on working capital, i) Auxiliary consumption. 9. The Commission proposes to deal with each of the above parameters as follows:

9

10. Applicability of revised tariff: It is proposed to make the above revised tariff applicable to all wind projects, commissioned after 01.09.2017, for which PPAs are entered into after the date issue of this order. For projects which have entered into PPA prior to the date of issue of this Order, the tariff as per the 12 Commission's Order dated 24.02.2015 would be applicable, provided the projects are commissioned within the time stipulated in those PPAs, failing which the revised tariff would be applicable"

(emphasis supplied)

24. On 04.09.2017, the State Commission passed the impugned order revising the generic tariff for Wind Power Projects and the mandatory procurement of wind power through Competitive Bidding. By this order, it modified its earlier order dated 24.02.2015 and determined the lower tariff for wind power projects at Rs. 3.74/- per kWh instead of Rs.4.50/- per kWh and reduced the period to twenty years for the new wind projects, PPAs for which are entered into and approved by the State

Commission after the date of the said order. Further, the reduced tariff determined by this order i.e. Rs.3.74 for 20 years has also been made applicable for such projects as had been entered into PPAs prior to the date of this order and that were not yet approved by the Commission.

25. On 27.10.2017, the State Government issued an order (no. EN 93 VSC 2017) under Section 108 of the Electricity Act, 2003 directing the 270.5 MW Wind Power Projects, a list of which was attached as Annexure 1, and which included the projects of the appellants, should be approved at the old rate of Rs 4.50 per unit. The wind power developers of 270.5MW capacity were those which were commissioned by 31.03.2017 and with whom the PPAs were signed by the ESCOMs by the said date i.e. 31.03.2017. The Government Order, *inter alia*, read as under:

“1. To approve Electricity purchase Agreements @ Rs. 4.50 / per each unit – for the projects implemented before 31-03-2017, mentioned in Appendix-1 for 270.5 MW (BESCOM -100.5 M.W., and HESCOM -170 M.W.) Capacity projects.

2. To approve - as per the K.E.R.C Revised Tariff Order dated 04-09-2017 for projects has got implemented within the period from 04.09.2017 to 31-03-2018, subject to the condition of giving bank guarantee of Rs. 20/Lakh for each M.W. by the Developers to CREDEL, to approve @ 3.74 per Unit as per K.E.R.C revised Tariff, for entering into purchase agreements for the purchase of Electricity under Wind Power Projects.”

(emphasis supplied)

26. The Energy Department, GoK by letter dated 15.11.2017 directed all the ESCOMs to resubmit the PPAs of Wind Power Generators to the State Commission. On 13.12.2017, the State Commission passed an order in the subject matter- *“Proceedings of the Commission in the matter of PPAs of Wind Power Projects which have been commissioned on or before 31.03.2017 without the approval of the PPAs by the Commission”, inter alia*, holding as under:

“The generic tariff for the Renewable Energy sources determined by the Commission is in the nature of a standing offer to a Project Developer, intending to supply, electricity generated to any ESCOM in the State. In case of need for purchase or Renewable Energy for complying RPO, an ESCOM can enter into a PPA with the developer of such rate and the approval for such PPA is normally granted by the Commission. Approval of the Commission for a ESCOM for other than complying RPO would be granted after consideration of the relevant facts.

.....

“The Commission now notes that, even after the re-allocation of Re-power among the ESCOMs as per the Government Order dated 26.09.2017, there is shortfall in compliance to the Non-Solar RPO targets (about 141.23 MU) for the FY17 by the ESCOMs. Hence, under the changed circumstances, the Commission decides to approve the PPAs already executed by the ESCOMs in respect of new Wind Power Projects, which have been commissioned on or before 31.03.2017, at the tariff determined as per the Commission’s order dated 24th February 2015, as the same may be required for fully achieving the non-Solar RPO targets for future years. Hence, the following Order.

ORDER

For the foregoing reasons the Commission decides that notwithstanding anything contained in the Commission’s

Order dated 04.09.2017, the tariff determined in the Commission's Order dated 24.02.2015 shall be applicable for the Wind Power projects, which have entered into PPAs with the ESCOMs prior to the date of the Commission's Order dated 04.09.2017 and have been commissioned on or before 31.03.2017, subject to approval of the Commission.

(emphasis supplied)

27. It may be noted here itself that in the abovementioned order, there was no stipulation regarding injection of power by the Wind Power Projects or such injection being recorded in the log book of KPTCL sub-station. The order only provides for the two conditions viz. (i) of PPAs entered into before 04.09.2017 or (ii) the Commissioning of the power project by 31.03.2017. Thus, the Commission was providing for even PPAs that may be signed say on 03.09.2017 much after the Commissioning of the project on 31.03.2017. This was consistent with the discussion paper dated 19.05.2017 that had provided the cut-off date as 01.09.2017 and the Commissioning date of 31.03.2017 as taken from the State Government's order dated 27.10.2017 particularly Annexure 1.

28. On 19.12.2017, the State Commission issued a communication to HESCOM, *inter alia*, stating:

"Please refer to your letter dated 28.11.2017 cited under reference wherein you have sought approval of the Commission for the subject PPA.

The Commission has observed that, though the said Wind Power Project is stated to have been commissioned on 31.03.2017, the Commercial availability of the plant and

actual injection of energy has not started on 31.03.2017, as per B-Form and Log Extract of KPTCL Sub station.

Under the above circumstances, the Commission is unable to identify the commissioning date as 31.03.2017 and to approve the PPA as proposed. I am therefore directed to return the PPA along with relevant documents, which were submitted for approval of the Commission.”

(emphasis supplied)

29. On 11.01.2018, the respondent HESCOM re-submitted the PPAs entered into by it, *inter alia*, with the appellants for approval. Noticeably, as is pointed out by the appellants, there was no qualification or reservation in the above letter sent by HESCOM for approval of PPAs, much less any issue being raised as to injection of power even after the State Commission had decided on the aspect by order dated 19.12.2017.

30. On 18.01.2018, the Secretary of the State Commission proceeded to communicate the approval of some of the PPAs where projects were Commissioned prior to 31.03.2017 aggregating to 242.5 MW as being entitled to Tariff of Rs. 4.50 per unit, there being no decision communicated about certain others including those of the appellants. The letter of the Commission, *inter alia*, read as under:

“The Commission had observed that, though the above Wind Power Projects are stated to have been commissioned on or before 31.03.2017, the Commercial generation and actual injection of energy has not started on 31.03.2017, as per the B-Form and Log extract of KPTCL Sub Station. Hence, the Commission as unable to approve the said PPAs and had returned the PPAs along with

relevant documents, which are submitted for approval of the Commission.

I am directed to inform you that, if the developer of the said Wind Power Project opts for the tariff of Rs 3.74/Unit, as per the Commission's Generic Tariff Order for Wind Power Projects dated 04.09.2017, you are directed to re-submit the PPAs along with compliance of the following observations:

i) Necessary undertaking from the developer of the Wind Power Project to accept the tariff of Rs 3.74/Unit, as per the Commission's Generic Tariff Order for Wind Power Projects dated 04.09.2017.

ii) Suitable SPPA by modifying Article 5 of the PPA, regarding tariff.

(emphasis supplied)

31. The five appeals at hand were filed On 31.01.2018 challenging the denial of approval. The appeals came up for hearing before this tribunal on 04.05.2018 and it was observed that there must be a reasoned order passed, the communication dated 18.01.2018 being only a letter intimating such order, the appellants having been directed accordingly to produce the reasoned order.

32. On 04.05.2018, the appellants addressed request to the State Commission informing it about the proceedings pending before this tribunal requesting for copy of the reasoned order on the basis of which the above referred letter had been issued to be made available. In response, on 24.05.2018, the State Commission, while clarifying the contents of the letter dated 18.01.2018, *inter alia*, stated as under:

"The PPAs pertaining to the above mentioned addressees, had been resubmitted to this Commission by the

HESCOM, under its letter dated 28.11.2017 for approval, indicating the tariff payable at Rs.4.50 per unit and asserting that these projects had been commissioned on or before 31.03.2017. These PPAs have been scrutinized and the Commission found that there was no actual injection of energy in to the Grid on or before 31.03.2017, as per 'B' Form (meter reading sheet) and the KPTCL Sub-station log extracts relating to these projects. The Commission was of the opinion that only the PPAs of those projects said to have been commissioned on or before 31.03.2017 would be entitled to tariff of Rs. 4.50 per unit, provided such projects had actually injected energy in to the Grid on or before 31.03.2017. Otherwise, such projects would be entitled to tariff of Rs. 3.74 per unit only, if the developers of the projects so opt. This was an administrative decision taken by the Commission considering the relevant prevailing orders and the material obtained and the same was communicated to the parties in the Commission's letter dated 18.01.2018.

The Commission also notes that if any of the parties is aggrieved by such a decision, it could have approached the Commission, with relevant documentary proof refuting such observations.”

(emphasis supplied)

33. In the wake of above-mentioned communication from the Commission, the Appellants amended the appeals with approval granted by this tribunal by order dated 11.07.2018. The primary challenge in the amended appeals is in regard to the stipulation contained in the Impugned order dated 04.09.2017 of restricting the tariff of Rs 4.50 per kWh for projects for which PPAs have been executed and which have been commissioned before 03.09.2017 on the ground that the State Commission had not approved the PPA till the passing of the Impugned order.

34. It may be noted here that the impugned order dated 04.09.2017 was earlier challenged in another appeal (no. 384 of 2017) filed by Indian Wind Power Association (IWPA) before this tribunal. However, it was allowed to be withdrawn in view of Government Order dated 27.10.2017, with liberty to IWPA to seek redressal of their grievances before appropriate legal forum.

35. The respondents question the maintainability of these appeals. As noted earlier, the State Commission has termed its communication dated 18.01.2018 as one conveying an 'administrative decision', implying thereby that it is not a judicial order or decision of the Commission. In view of such position taken by the Commission by letter dated 24.05.2018, the appellants amended the appeals and challenged the order dated 04.09.2017, the prayer in which respect was allowed by Order dated 11.07.2018.

36. In above view, the respondents can no longer question the maintainability of the appeals. Thus, we proceed to examine the legality, validity and propriety of the impugned order dated 04.09.2017 on merits of grounds urged in such regard.

GROUND OF CHALLENGE

37. The appellants have raised several grounds of challenge which may be now considered.

PPA on Standard Format –Approval by Commission not required?

38. It is pointed out by the appellants that the State Commission had passed the generic tariff order with the conditions of its applicability and also approved the model format of the PPA to be entered into with the developers. It is submitted that it was inherent in such arrangement that the PPAs executed on such basis were only required to be taken on record without the need for granting approval by the Commission for the PPA to come into effect. The appellants question the move by respondent HESCOM by submitting the individual PPAs “for approval”. It is pointed out that the Central Electricity Regulatory Commission (CERC), Gujarat Electricity Regulatory Commission (GERC), Maharashtra Electricity Regulatory Commission (MERC) and Tamil Nadu Electricity Regulatory Commission (TNERC) do not approve individual PPAs for renewable energy projects. It is argued that the very purpose of fixing a generic tariff and approving a standard format for PPAs is to ensure that individual PPAs need not be approved separately by the Regulatory Commissions. It is also pointed out that in other cases, the State Commission has specifically held that once the power procurement quantum has been approved in the Annual Revenue Requirements (ARR) culminating in the tariff orders for the respective

years, the PPAs are deemed to have been approved. Even in cases of large Thermal Power Plants such as JSW, UPCL etc, ESCOMs are purchasing power without any approval of the PPA's from the State Commission.

39. It is the contention of the appellants that the Commission, by its order dated 24.02.2015, had not contemplated approval of individual PPAs, which were entered into, the subsequent order dated 22.07.2015 having approved the standard format of PPAs in respect of Renewable Energy Projects, except Solar Projects to be the basis. It is submitted that the suggestion of respondent HESCOM insisting on approval of individual PPAs was rejected.

40. Thus, the appellants contend that the tariff as prescribed under the order dated 24.02.2015 was available for Wind Energy Generator (WEG) on the basis of entering into a PPA there being no need for separate approval from the State Commission, the order relied upon by the respondents to the effect of rejection being *non est*.

41. The State Commission, in the impugned order dated 04.09.2017, has observed, *inter alia*, that the tariff determined by said order shall also be applicable for the projects which had entered into PPAs with any ESCOM prior to the date of the order but where the same are not approved by the State Commission, if they so opt. It is submitted that there is a fundamental error in the order to above effect because the

Commission has not permitted such generators as had already entered into PPAs before the promulgation of the said order (04.09.2017) in the format approved by the Commission to get the tariff specified by the order dated 24.02.2015, viz. Rs 4.50 per kWh.

42. We do not agree with the broad argument of the appellants that there is no need for separate approval of the State Commission in respect of initialed PPAs simply because the general format of the PPA had been approved by the Commission on 22.07.2015. It cannot be overlooked that the Commission regulates the purchase and procurement process of each distribution licensee by virtue of the power conferred on it under Section 86(1)(b) of the Electricity Act, 2003. The statute saves the operation of the Karnataka Electricity Reforms Act, 1999 by virtue of Section 185(3). The provision contained in Section 17(1) of the Karnataka Electricity Reforms Act, 1999 reads as under:

*“17. Regulation of generating companies and stations.- (1) A licensee or a bulk purchaser or any other person may enter into a contract with a generating company for purchase of electricity in the manner approved by the Commission and such approval granted by the Commission shall have the effect of the consent given by the State Government in terms of section 43A of the Electricity (Supply) Act, 1948 :
Provided that, the approval granted by the Commission under this sub-section shall not in any manner affect the requirements to obtain approvals and sanctions of the State Government or any other authority under any other law, rule or regulations.”*

(emphasis supplied)

43. Further, the KERC (Conditions of Licence for ESCOMs) Regulation 2004 dealing with power procurement procedure provides thus:

“21. Power Procurement Procedure

21.1 The Licensee shall in all circumstances purchase electrical capacity and/or energy in an efficient and economical manner under a transparent procurement process as approved by the Commission and following the guidelines issued by the Commission from time to time relating to preparation of load forecasts, power procurement plan and power procurement procedure.

21.2 The Licensee shall not purchase electrical capacity and/or energy without an authorization granted by the Commission under the terms of condition 21.1 except in the case of short duration purchases for less than 6 months.

21.3 An authorization required under condition 21.2 shall be granted when the Licensee has demonstrated to the Commission's satisfaction that:

(a) electrical capacity and/or energy is necessary to meet the Licensee's service obligation in accordance with condition 2.1(a); and is consistent with the approved load forecast and power purchase plan

(b) the Licensee has examined the economic, technical, system and environmental aspects of commercially viable alternatives to the proposals for purchasing electrical capacity and/or energy (including arrangements for reducing the level of demand) and such examination has been carried out- in a manner approved by the Commission.

The Commission shall dispose of the application within 120 days from the date of receipt of such application.

21.4 In all circumstances the Licensee shall purchase electrical capacity and/or energy in a manner

(a) which is in compliance with the State Grid Code

(b) the details of contracts entered into for capacity/energy purchases are furnished to the Commission within one month from the conclusion of such contracts.

(emphasis supplied)

44. A perusal of the statutory provisions and Rules formulated thereunder shows that the distribution licensee can procure power only in the manner approved and it is required to place a proposed Power Purchase Agreement for approval of the State Commission. The Regulation also prescribes a timeframe for approval of the PPA. It also requires final version of the PPA to be provided to the State Commission.

45. We agree with the respondents that reference made to the process followed by other regulators (CERC, GERC, MERC and TNERC) is of no consequence in view of the framework of law in force for the State of Karnataka.

46. *De hors* the above, the respondents are also right in pointing out that the express provisions contained in the initialed PPA which has been placed for consideration makes (by Article 2.1) its effect conditional upon grant of all “approvals” including statutory, the approval by the Commission being specifically included in fourth schedule.

47. In above context, reference may be made to following observations of the Supreme Court in *Tata Power Company Limited vs Reliance Energy* reported in (2009) 16 SCC 659, while construing the functions of the Regulatory Commission under Electricity Act, 2003:

“108. A generating company, if the liberalisation and privatisation policy is to be given effect to, must be held to

be free to enter into an agreement and in particular long-term agreement with the distribution agency; terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted.”

48. The documents produced show that all concerned have throughout been of unanimous view that the power purchase agreements which had been initialed required the approval of the State Commission. Having sought such approval through HESCOM, it is not permissible for the appellants to now contend that no approval was required. There is no doubt that approval of the State Commission in respect of individual PPA is a condition precedent without which the PPA cannot come into existence though, the respondent HESCOM concedes, with post-facto approval the PPA becomes operational retrospectively from the date of the PPA.

49. The respondents are also right in submission that there is no vested right to get approval of the PPA from the Commission which is duty-bound to consider it in light of statutory provisions and within regulatory framework.

50. But then, more than the above, the core issue raised in these appeals concerns fairness and propriety of the approach of KERC to the

request for approval of the PPAs entered into by HESCOM with the appellants.

Doubts raised about commissioning?

51. As noticed earlier, the Commissioning Certificate issued by HESCOM clearly records that the plants of the appellants were commissioned on 31.03.2017, the same having been granted on the basis of the inter-connection approval from the Chief Engineer. This implies that the plants were fully ready and commissioned before the cut-off date.

52. The reason stated by the Commission for not approving the PPAs is that the Commercial availability of the Wind Power Projects and actual injection of energy had not started on 31.03.2017, as per the B-Form and Log Extract of KPTCL sub-station. It has been argued that in terms of the PPA, the commissioning can only be achieved once there is injection of power into the grid. Though there is nothing in the dispensation by the Commission or in the averments or submissions of HESCOM before the Commission to indicate that the correctness of the Commissioning Certificates was to be questioned on the ground of absence of data of injection of electricity on or before 31.03.2017, such is the line adopted by both of them at the hearing on these appeals. When questioned about the basis of such stand, HESCOM sought to substantiate the plea by affidavits dated 08.10.2020 and 12.10.2020 of Mr. M. Muniraju, Managing Director (MD), while the appellants countered by submitting affidavit sworn on 08.10.2020 by Mr. P. Ganesh Kumar, Authorised Representative of the developer.

53. In addition to the definition of “Commercial Operation Date” already noted earlier, the respondent HESCOM refers to the following provisions of the PPA:

“(xli) ‘Scheduled Date of Completion’ shall mean the date on which the Project is scheduled to deliver electricity to HESCOM at the Delivery Point after completion of all the required tests, and shall be within eighteen months from the date of achievement of Financial Closure or Twenty Four months from the date of execution of agreement whichever is later.

(xii) ‘Delivered Energy’ means the kilowatt hours of Electricity actually fed and measured by the energy meters at the Delivery Point in a Billing Period

(xi) ‘Delivery Point’ or ‘Interconnection/Evacuation Point’ shall be the point at which the power is injected into the substation bus of the HESCOM/Corporation.”

(xxvi) ‘Interconnection / Evacuation Facilities’ in respect of the Company shall mean all the facilities installed by the Company or by any other person acting on its behalf to enable HESCOM to receive the Delivered Energy from the Project at the Delivery Point, including transformers and associated equipment, relay and switching equipment, protective devices and safety equipment and transmission lines from the Project to Corporation’s/HESCOM nearest sub-station.”

“5.1 Monthly Energy Charges: Subject to clause 5.4, HESCOM shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.4.50 (Rupees Four and Fifty Paise only) per Kilowatt hour without any escalation.”

54. It is argued by HESCOM that the plant is said to be commissioned only when it commences the actual injection of energy into the grid. It is submitted that a conjoint reading of the definitions of Commercial Operation Date, Scheduled Date of Completion, Delivery Point,

interconnection/ evacuation facility, monthly charge leaves no doubt that injection of energy at the delivery point is essential for achieving commercial operation. Reliance is placed on the following observations of Supreme Court in *MP Power Management Company v. M/s Dhar Wind Power Projects* (C.A.No.9218/2018 decided on 25.7.2019):

“26. In line with the above provisions, the guidelines that were issued by the first appellant on 18 March 2016 provided a format for the issuance of commissioning certificates. The format required readings of: (i) WTG meters; (ii) main billing meters; and (iii) check billing meters. The format required the submission of this data in order to establish the date on which a particular project had been commissioned. The actual date of commissioning would determine the applicable tariff; the tariff of Rs. 5.92 per unit would apply to projects which were commissioned on or before 31 March 2016, while the new rate of Rs. 4.78 per unit would apply to projects which were commissioned on or after 1 April 2016. Requiring the SLDC to submit data of the actual injection of power into the grid was with the objective of establishing the actual commissioning of the project.

27. In the present case, the principal submission of the appellants is that the data which was furnished by the SLDC indicates that the actual injection of power into the grid by the first respondent took place on 1 April 2016. It is on that basis that the first appellant has submitted that the commissioning certificate was not in accordance with the prescribed format and had to be revoked. Before this Court, the data which has been furnished by the SLDC is not in dispute. Indeed, that is the basis on which Mr. Vivek K Tankha, learned senior counsel urged his alternative submission that in any event, even going by the SLDC data, it is evident that the power was injected into the grid on and from 1 April 2016.

28. On reviewing the documentary material on the record, we are not prepared to accept the view which has weighed with the High Court, namely, that the commissioning of the project was completed by 31 March 2016. The certificate of

commissioning which has been issued by the Superintending Engineer is belied by the objective factual data available from the SLDC which is a statutory body constituted under Section 31 of the Act. The objective data on the record indicates that the injection of power into the grid took place on 1 April 2016. Hence, we are of the view that this should be the basis on which the claim for the entering into a PPA should be founded.

29. Since the factual data has been placed before this Court, we are of the view that the project of the first respondent was commissioned on 1 April 2016 since the SLDC data indicates the injection of power into the grid with effect from that date. On the basis of the commissioning of the project on 1 April 2016, we find merit in the alternative submission which has been urged on behalf of the first respondent in the appeals that the Tariff Order that must apply is the Tariff Order dated 17 March 2016. The first respondent was before the Madhya Pradesh High Court in writ proceedings espousing its claim to the benefit of a higher rate of Rs. 5.92 per unit on the basis of the earlier Tariff Order and on the basis that the commissioning of its project had taken place on 31 March 2016. The first respondent was bona fide pursuing its claim in that regard which found acceptance in the impugned judgment and order of the High Court. Though we have differed with the view which has been taken by the High Court, we are of the view that it would be unfair to deny to the first respondent the benefit of the rate which came to be prescribed by the Tariff Order of 17 March 2016. The rate which was prescribed by that Tariff Order of Rs. 4.78 per unit was to apply during the control period beginning from 1 April 2016 and ending on 31 March 2019 and that rate would continue to govern the life cycle of 25 years, as prescribed by Para 5 of the Tariff Order. The first respondent cannot be denied a parity of treatment, as has been allowed to other projects of a similar nature which would be governed by the control period stipulated in Para 5 of the Tariff Order dated 17 March 2016.”

(emphasis supplied)

55. We note that the Supreme Court did not lay down in the case cited above an unexceptional rule that in order to be treated as duly

commissioned it must be invariably demonstrated that the project had not only started generating electricity but also that such electricity had started being injected into the grid. We also note a distinguishing feature. Unlike the factual matrix of the cases at hand, the procurer had issued guidelines prescribing format requiring data about injection of power to be furnished. The decision in *MP Power Management Company vs M/s Dhar Wind Power Projects* (supra) turned on the guidelines prescribing the format of requisite data. Here, in the cases at hand, the stipulation for COD required only confirmation as to availability. As would be noticed at length hereinafter, there was proper synchronization meeting with the requirements of above-noted aspects.

56. In his affidavit dated 08.10.2020, the MD of HESCOM sought to explain thus:

“3. ... the commissioning of plants is the physical interconnection of the power plant with KPTCL grid for bi-directional flow of energy i.e., either to export power from generating plant or to import power form the grid. Per contra, the term Commercial Operation Date denotes the day on which the energy is injected by the Wind Power plant to the KPTCL grid which may be on or after the date of commissioning for which HESCOM pays KERC determined tariff. Therefore, for commercial operation to have occurred, the energy being generated has to be commercially available for consumption by the distribution utility. Therefore, I state that without generation of energy and running of blades it is possible to commission a generating plant and issue commissioning certificate as the wind power plant is commissioned for bi-directional flow of energy i.e. either to export power from generating plants or to import power from the grid.

4. *In the case on hand, the Commissioning certificate issued on 3.4.2017 indicating that the plant has been commissioned has not been issued after the energy has started flowing from the generating unit. Therefore, the certificate of commissioning is not proof of generation of*

energy. It is submitted that the records indicate that the generation of energy has commenced only from 20.4.2017.”
(emphasis supplied)

57. On 08.10.2020, we questioned the MD, HESCOM to seek clarity on the declarations made in his affidavit and, in response, he disclosed that he has joined respondent HESCOM only in May, 2020 and that he never had any occasion to acquire personal knowledge of facts disclosed in the affidavit. On being asked, he stated that he has made the declaration on the basis of what was given to him to understand by the official assisting him particularly the authorized signatory Mr. J.L. Belagali, General Manager (Technical) and, further, that he has stated some of the facts on the basis of “*pre commissioning testing certificate dated 03.04.2017*”. There is no confirmatory affidavit or document authenticated by the authorized signatory Mr. J.L. Belagali, General Manager (Technical). When called upon to further clarify on the aspect of commissioning of the wind turbine generators, particularly the aspect of synchronization of the wind turbine generating system with the grid as mentioned in the commissioning certificate issued by the respondent Discom, the MD stated that while issuing the commissioning certificate the generators were synchronized with the grid by matching parameters i.e. frequency, voltage and phase sequence of the generator with the grid, conceding that for the purposes of synchronization the generator has to be necessarily switched on for the voltage, frequency and phase sequence to be matched.

58. The respondent HESCOM filed an additional affidavit of the MD on 12.10.2020 primarily to show that no injection of electricity generated by the WPPs of the appellants had been recorded by the metering systems prior to April 2017. *Per contra*, the appellants rely on the affidavit of Mr.

P. Ganesh Kumar, Authorised Representative of the developer and the explanation given at the hearing on 08.10.2020 by Mr. Sathisvaran, Dy. General Manager of M/s Inox which is the company looking after the operation of the wind turbine generators (appellant) with regard to the documents concerning synchronization of the generators. On basis of the said material, it was submitted that the generators were synchronized with the grid at 22:50:00 hrs. of 31.03.2017 and at the time of synchronization the generation was 9.635 KW and voltage was V1: 684V, V2: 679V and V3: 675V. He clarified that this information is based on documents submitted as Annexure-C to the affidavit of the authorized representative of the developer. He stated that this is the normal practice which is followed at the time of commissioning of the wind turbine generators wherein the wind turbine generators are made operational and synchronized with the grid by matching the parameters on either side in terms of the frequency, voltage and phase sequence. We note that there is no contest to the assertion in the affidavit filed by the appellants that *“if the number of units injected are less than (sic) 0.01% of the Multiplying Constant, the quantum will not get recorded in the Meter”*.

59. We are of the opinion that the position taken by HESCOM, post the impugned decision, is an unfair attempt to create doubts about the Commissioning Certificates respecting the WPPs of the appellants even though several of its own representatives were party to the exercise on 31.03.2017. As is clearly brought out from the above, for synchronization with the grid, generation of electricity was essential. It is inconceivable that such synchronization would have been certified by the representatives of all stake holders without confirming that the WPPs were available for generation and were actually generating electricity. As in the case of *Aikyam Holdings Private Limited* (which we shall notice at

length later), the volume of electricity generated at the time of Commissioning on 31.03.2017 was not such as could be logged by the meters. It is unjust to discredit (or rather backtrack from) the Commissioning Certificates at this late stage, particularly on the word of a person (MD/HESCOM) who was not even part of the organization at that point of time.

60. The definition of “*Commercial Operation Date*” as used in PPAs has been noted earlier. As per the said definition, the commercial operation date is not contingent on injection of electricity into the grid but it signifies the date on which availability of the plant for commercial operation is attained. In the case of WPPs of the appellants, the availability had been achieved on 31.03.2017, as affirmed by the Commissioning Certificate authenticated by the respondent HESCOM itself. The reference made by HESCOM and the State Commission to the actual energy injection and the log book data to argue that the appellants’ plants were not commissioned is contrary to the definition of Commercial Operation Date in the PPA.

61. We, thus, reject the theory as above propounded by the respondent HESCOM vis-à-vis the Commissioning Certificates while noting that injection of electricity into the grid from 31.03.2017 onwards was not even necessary for COD to be achieved since that depended on availability regarding which there is no doubt.

Reduction of Tariff - Arbitrary?

62. It is admitted case for all sides that, by order dated 24.02.2015, the State Commission had determined the tariff of Rs 4.50 per kWh making

it applicable for wind power projects (WPPs) for a period of five years from 10.10.2013 till 09.10.2018. It is also not disputed that in the wake of the said Tariff Order, the respondent had issued proceedings laying down instructions for processing applications for setting up of the 33MW - 84 MW WTGs. It is in response to the above that the appellants had made applications conveying expression of interest with HESCOM for commissioning the 2MW Wind Energy Projects. Keeping the chronology of events in mind, it is natural corollary that the appellants were persuaded to execute the PPAs with HESCOM primarily influenced by Order dated 24.02.2015 of State Commission determining the tariff at Rs. 4.50 per kWh for such WPPs as were established during the control period of five years commencing from 10.10.2013.

63. Subsequently, the appellants issued letters to the HESCOM for approving the installation drawings and, having established the WPPs through the developer, issued work completion reports as well. It is thereafter that HESCOM conducted an initial inspection and a report dated 30.03.2017 was issued by the DCEI, Belgavi of the initial inspection and recommendation.

64. The CEIG of GoK granted electrical safety approval as required under Regulation 32 and 43 of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 for electrical installation pertaining to 2MW WPP at BBV36 1x2 MW 690V

Wind Turbine Generator, 690V/33KV transformer along with DP yards and 33Kv intrafirm SC OH internal line for a length of 0.75 Kms along with 33KV metering yard at Basavanbagewadi Village, Vijay Pura District in favor of the appellants on 31.03.2017. Then followed a meeting between the HESCOM, KPTCL and the developer regarding commissioning of the Wind Turbine Generators (WTGs) and associated electrical equipment. It was confirmed by the Minutes of the Meeting held on 31.03.2017 that the sub-metering unit arrangements had been interconnected to the KPTCL's grid having bulk tariff metering unit at KPTCL Basavanabagewadi Sub-Station for the Wind Power Generators commissioned on 31.03.2017. It is on such basis that HESCOM issued the Commissioning Certificate on 03.04.2017, affirming that the 2MW capacity of each WPP set up by the appellants was commissioned on 31.03.2017 and interconnected to the third respondent's grid along with sub-metering arrangement.

65. It is the submission of the respondent HESCOM that the projects of the appellants were not put up based on the provisions of PPAs which were initialed on 24.3.2017. As per respondent, the order dated 04.09.2015 was an enabling order which permitted the signing of such PPAs at reduced tariff having regard to the fact that the tariff in renewable generation had come down drastically and also having regard to the fulfilment of Renewable Purchase Obligations. Thus, the ESCOMs

could renegotiate the PPA if any generators were desirous of the same. The respondent contends that the existing PPA can be changed during the subsistence of the PPA and in this context relies upon ruling of Supreme Court in the matter of *BESCOM v Konark Power Projects Ltd* 2016 13(SCC) 515 involving interpretation of KERC (Power Procurement from Renewable Source by Distribution Licensee) Regulation 2004 dated 27.09.2004 and KERC (Power Procurement from Renewable Source by Distribution Licensee and Renewable Energy certificate frame work) Regulation 2011. It was held that Regulation 9.1 empowers the State Commission to determine at any time tariff for purchase of electricity from renewable sources by distribution licensee and proviso to the said regulations saves PPAs approved under 2004 Regulation. This decision, it has been pointed out, was followed by this tribunal in *GESCOM v KERC in 2016 SCC Online APTEL 40* and *KPTCL v Soham Phalguni Renewable Energy, Appeal 271 of 2015 dated 20.11.2018*. The argument of the respondent HESCOM is that even if there was an approved and binding PPA, the Commission has the power to modify the same, reference being made to the power to modify the tariff order as envisaged in Section 62(4) of Electricity Act, 2003. There need not be a situation that power should always and only be exercised to enhance the tariff in favour of a generating company to the detriment of distribution licensee and the consumer.

66. We do not agree with the above arguments of the respondent. The order of 2015 was a generic order. It would have universal application. Of course, the Electricity Act empowers the Regulatory Commission to modify the tariff and the procurers definitely may renegotiate the terms of PPA. But the fact remains that the respondent did not engage the appellants in any such renegotiation. Instead, it had submitted the PPAs - rather resubmitted the PPAs - for approval of the same showing willingness to pay the tariff of 2015. The subsequent order of the Commission reducing the tariff cannot be treated as one modifying the existing PPA. It was intended to be enforced against later entrants. It was clear from its phraseology that the previous contracts covered by dispensation of 2015 were protected.

67. In view of the run up to the COD, we find merit in the submission that the appellants had altered their respective position by acting consistently with the assurances of tariff order then in vogue and the above noted developments. In such factual matrix, we agree with the plea that any change in the tariff order dated 24.02.2015 cannot affect them, subsequent modification in tariff regime possibly having only prospective effect but definitely not retrospective, particularly when developers such as the appellants had acted based on the said order and established the projects before the order changing the tariff i.e. 04.09.2017 had come to be passed.

Inconsistency in approach?

68. In the tariff fixed for Solar Power Plants by order dated 12.04.2017, the State Commission has dealt with similar cases of solar projects commissioned prior to the date of the tariff order, which have entered into PPAs, but not received approval from the Commission. The following part of the said order is relevant for present discussion:

“1. Applicability of the Order:

“...In respect of the projects that are commissioned during the period from 1st April, 2017 to 31st March, 2018 for which PPAs have been entered into and submitted and received in the Commission’s office on or before 31st March, 2017 for approval, the tariff as per the said agreement shall be applicable....(i.e. Older rates)

4. Tariff for grid connected Solar PV for FY18:

i. On the basis of the approved parameters, in modification of its earlier Order dated 30th July, 2015, the Commission hereby determines the tariff of Rs. 4.36 per unit for all new grid connected MW scale solar PV Plants entering into Power Purchase Agreement (PPA) on or after 1st April, 2017 but before 1st April, 2018.

ii. This tariff determined shall also be applicable to those grid connected megawatt scale Solar PV Plants for which PPAs were entered into before 1st April, 2017 but are not commissioned within the specified commercial operation date (COD) and achieve COD during the period from 1st April, 2017 to 31st March, 2018.”

69. The Solar tariff order dated 12.04.2017 expressly states that the earlier tariff order would be approved with respect to projects for which PPA has been entered into and submitted and received in the office of the first respondent which clearly means that the revised tariff would be

made applicable prospectively, an approach contrary to the impugned order passed by the same Commission.

70. It has been brought to our notice that the impugned order is contrary also to the order dated 14.05.2018 passed by the State Commission in the matter of revision of wheeling and banking charges for renewable power projects. In the said order dated 14.05.2018, the State Commission has itself considered that the tariff of Rs. 4.50 per KWh is applicable for the wind generators which have commissioned their projects during the period between 10.10.2013 and 03.09.2017.

The order dated 14.05.2018, *inter alia*, reads as under:

“Taking into account the above analysis relating to the Wind and solar Power Projects and the Generic Tariff prevailing during different periods for the Solar, Wind and Mini Hydel Power Projects, we are of the considered view that:

(a) the Solar Power Projects commissioned earlier to 31.03.2017 may be continued with the existing concessional Wheeling Charges of 5% (five percent), in kind, out of the net injected energy;

(b) The Wind Power Projects commissioned during the period between 10.10.2013 and 03.09.2017, when the Wind Tariff was Rs.4.50 per unit, the proposed 25% (twenty five percent) of the normal Transmission Charges and/or Wheeling Charges, in cash, alone may be levied, exempting the proposed levy of the line loss, in kind;

(c) The Mini Hydel Power Projects commissioned during the period between 01.01.2015 and 31.03.2018, when the Mini Hydel Tariff was Rs.4.16 per unit, the proposed 25% (twenty five percent) of the normal Transmission Charges and/or Wheeling Charges, in cash and 50% (fifty percent)

of the proposed levy of the line loss, in kind, may be levied;
and,

(d) The Wind Power Projects commissioned upto 09.10.2013, which have not completed the 10-year period from 31.03.2018, and the Mini Hydel Projects commissioned upto 31.12.2014, which have not completed the 10-year period on 31.03.2018, are to be levied the proposed 25% (twenty five percent) of the Transmission Charges and/or Wheeling Charges, in cash and the proposed applicable line loss, in kind.

(emphasis supplied)

71. Since the State Commission, by the above-mentioned order dated 14.05.2018, had withdrawn benefits made available to the developers, it was assailed before High Court of Karnataka (by Writ Petition no. 23158 of 2018) in the matter of *Renew Power Limited v. Bangalore Electricity Supply Company Limited*. The High Court upheld the challenge and, *inter alia*, held as under:

“28. The orders dated 30.7.2015 and 12.4.2017 of the KERC confirms, reiterates the benefits of exemption allowed in wheeling, banking and cross subsidy surcharge and confirm the continuity of the same in terms of clause ‘d’ of the order dated 30.7.2015 and 12.4.2017 which reads thus:

.....

29. In such circumstances, the change of circumstances pleaded by the KERC to contend that the doctrine of promissory estoppel is not applicable to the petitioners inasmuch as the installation capacity of solar power which was 41 MW as on 18.8.2014 has increased to 1698 MW as on November 2017 and it is anticipated to touch 6000 MW by the end of financial year 2019 would not be countenanced as the increase in the capacity has happened with the consent of the Government of

Karnataka, KERC and ESCOMS and they having permitted such an increase in the capacity, having achieved their objective of increasing RE power, the benefits granted to the power projects cannot be withdrawn against the interest of the petitioners more particularly in view of the clarification issued by the orders dated 30.07.2015 and 12.04.2017. Such withdrawal of exemption would be against the public interest also, inasmuch as, if such exemptions are withdrawn, not only it would affect the financial viability of the petitioners but also would make the petitioners suffer monetary loss of huge amount thereby affecting the economy as such as the loans which could into thousands of crores of rupees given to the various power generators could not be recovered and the very financial equilibrium of economy would be in peril. The action of the banks refraining from altering the existing guidelines for commissioned projects pursuant to the impugned order if considered, indeed public interest would suffer owing to the incapacity of the power projects repaying the loans borrowed by the banks. These power plants have a long gestation period spanning across 25 years. The concessions are only for 10 years. A cooling period or tariff holiday cannot be withdrawn and trap the investors after securing the investments.

.....

32. It is thus clear that two factors have to be fulfilled to uphold the validity of sub-classification by reference to Article 14 of the Constitution viz., the subject matter classification should be founded on an intelligible differentia which distinguishes that subject matter from the others left out and secondly, such differential must have a rational nexus with the object sought to be achieved. That a RE power plant has a long gestation period about 25 years. Before concessional period, the proposal was in the order of 3 MW and after the withdrawal it is around 30 MW, but during the concessional period it attracted an investment of 2000 MW. It is thus self evident that the investments had come into the State only because of the exemption or tariff holiday. Inviting the investors with the incentive of exemption on wheeling and banking charges and then turning round making sub categorization between the projects commissioned between 1.4.2013 to 31.3.2017 and

the projects commissioned between 1.4.2017 to 31.3.2018 is not a reasonable classification. The same fails to withstand the test of intelligible differential. There is no rational nexus to the objective to be achieved in sub-classifying a homogenous class. As could be seen from the details furnished by the petitioners, to commission the project between 1.4.2017 to 31.3.2018, the process had begun during 2015-16 and finally the commissioning certificates were issued between 1.4.2017 and 31.3.2018. If a uniform scheme had been applied for all the projects commissioned between 1.4.2013 and 31.3.2018 that would have been different aspect but discriminating the RE plants commissioned between 1.4.2017 to 31.3.2018 would be discriminatory and cannot be approved.

33. Several judgments referred to, by the learned Senior counsel for the ESCOMS to contend that a cut off date prescribed by the Commission, will not invalidate the order impugned, would relate to service matters. Fixing a cut off date in the service matters stands on a different footing with respect to the investment made by the entrepreneurs based on the promise/assurance given by the State.

.....

37. It is the contention of the Commission and the State that the Commission has been conferred with the power to determine the tariff from time to time and it cannot be said that the Commission is functus officio once it has determined the price. The phrase 'time to time' emphasized would only mean that the KERC can determine wheeling and banking charges prospectively. Section 62 and 64 conferred the power on the Commission to determine the tariff and once settled contracts have been entered into, based on the tariff orders, sans any request by the either of the parties to the PPA, the KERC has not been conferred with the power to determine tariff from time to time."

(emphasis supplied)

72. The impugned order further runs contrary to the specific terms set out in the discussion paper titled "*Revision of Generic Tariff for Wind Power Projects and mandatory procurement of wind Power through*

Bidding” inviting comments/suggestions/views from interested persons, issued by the State Commission on 19.05.2017. As quoted earlier, the proposal (in para 10) thereof had made it absolutely clear that the “revised tariff” would apply to “wind projects, commissioned after 01.09.2017, for which PPAs are entered into after the date issue of this order” the only condition for projects which had entered PPAs earlier to avail of pre-revised tariff being that they should have been “commissioned within the time stipulated in those PPAs”.

73. A plain reading of the above discussion paper issued by the State Commission, leading to the passing of the impugned tariff order shows that it had classified projects in to two categories, viz. (i) the revised tariff would be applicable to the wind projects commissioned after 01.09.22017; and (ii) the projects which had entered into PPAs prior to the date of issue of the order, the tariff as per the State Commission’s order dated 24.02.2015 would be applicable. Clearly, the discussion paper was a step towards issuance of a tariff order that was intended to be prospective in nature, i.e., from 01.09.2017 and declared in advance to be made applicable only to such projects as had not entered into PPAs or had not been commissioned prior to such date of final orders. Concededly, even at the public hearing on the discussion paper, there was no request made by any party for the proposed order to be given retrospective effect.

74. Even otherwise, it is clear from the impugned order that the State Commission has determined the tariff taking into account the dynamic tariff parameters prevailing during the months of July - August 2017. This is an added reason as to why the tariff thereby determined can be

given only prospective effect. The parameters as approved in the impugned order with reference to FY 2017-18 and onwards cannot be applied to the projects commissioned by the year 2015-17 and, thus, their application to the appellants' projects wherein investments had been made by the year 2016 -17 and the power plants were duly commissioned on 31.03.2017 is erroneous.

75. We uphold the contention that the State Commission has acted contrary to its own consultation paper. The order challenged here is vitiated also because the State Commission has failed to afford an opportunity to the parties thereby affected before deciding the issue of retrospective effect. It is trite that State Regulatory Commissions are expected to determine such issues of import only after giving opportunity to the stakeholders to make their suggestions and comments. Since the impugned decision about retrospective effect went beyond what was set out in the proposal made public through the discussion paper, the stakeholders having not been put on notice, the impugned order to that extent is unjust and violative of principles of natural justice and consequently liable to be set aside [see Judgment dated 24.05.2013 passed by this tribunal in Appeal no. 197/2013 in the matter of *Beta Wind Farm & Ors. vs. TNERC & Ors.*].

76. We agree with the appellants that, on the foregoing facts, and in the circumstances, it is patently arbitrary and capricious that the Commission has proceeded to apply the tariff determined by the impugned order to such projects as had entered into PPAs with ESCOMs prior to the date of the order particularly if the projects had been commissioned within the time stipulated by previous dispensation, only the PPAs being pending before the Commission for approval.

Can 31.03.2017 be the cut-off date?

77. The order dated 24.02.2015 by which the tariff was fixed at Rs 4.50 per kWh was made applicable to the WPPs which were commissioned during five years from 10.10.2013. By such dispensation, the rate was to remain valid and effective till 09.10.2018. The tariff was amended by the subsequent order dated 04.09.2017. As observed earlier, the modification of tariff would have prospective effect. In such state of things, the date of 31.03.2017 cannot become the cut-off date. At best, the date of revision of tariff i.e. 04.09.2017 could be taken as the last date before which the benefit of earlier tariff regime (under order dated 24.02.2015) could be availed. Concededly, the injection of power from the appellants' projects was much before the said date.

78. In this context, reference may be made to observations of the Supreme Court in *GUVNL vs. Solar Semi Conductor Power Company (India) Pvt. Ltd. & Ors.* 2017 SCC OnLine SC 1248, as under:

“64. As pointed out earlier, the State Commission has determined tariff for solar power producers vide Order dated 29-1-2010 and tariff for next control period vide Order dated 27-1-2012 [Hiroco Renewable Energy (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., Petition No. 1126 of 2011, order dated 27-1-2012 (Comm)]. The Order dated 29-1-2010 is applicable for projects commissioned from 29-1-2010 to 28-1-2012 and the Order dated 27-1-2012 [Hiroco Renewable Energy (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., Petition No. 1126 of 2011, order dated 27-1-2012 (Comm)] is applicable for projects commissioned from 29-1-2012 to 31-3-2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the power producer and the distribution licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably redetermine the tariff, it cannot force either the

generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.

Sanctity of power purchase agreement

65. *It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order, 2010 is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company, Respondent 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.”*

(emphasis supplied)

79. As pointed out by the appellants, in the discussion paper, there was no reference made to the return of the PPAs by the State Commission on 02.05.2017. On the other hand, the discussion paper provided for the specific cut-off date of 01.09.2017 for the application of new tariff to the PPAs entered thereafter and existing PPAs to be governed by the tariff as per order dated 24.02.2015. There was also no condition that the said cut-off date 01.09.2017 would be applicable only if the PPA is approved by the State Commission. The return of the PPAs for the reasons stated in the letter dated 02.05.2017 was therefore kept aside by the time the discussion paper was issued on 19.05.2017. This is clear from the totally contrary stipulation contained in the discussion paper.

80. The issue of injection of power prior to 31.03.2017 is frivolous and has been raised as an afterthought. It is clear that the Commission had no reasons to doubt that the commissioning had taken place prior to the passing of the tariff order dated 04.09.2017 and, therefore, the appellants could not be deprived of the vested rights arising under concluded contracts.

Aikyam case

81. In the case of one other wind power project namely *Aikyam Holdings Private Limited*, the State Commission, by its order dated 29.05.2018, had declined to accord approval on similar lines as in the cases of the appellants. The said other generator (*Aikyam*) had then filed Writ petition (nos. 28664-28665 of 2018) before the High Court of Karnataka against the said order of the State Commission. The High Court by order dated 28.02.2020 allowed the said Writ Petitions observing thus:

“3. Having heard the learned counsel for the parties and having perused the petition papers, this Court grants indulgence in the matter for the following reasons:

(a) petitioner-company and the respondent-BESCOM had concluded the Power Purchase Agreement on 01.03.2017 as per Annexure-C, is not in dispute; the said agreement having been submitted by the BESCOM for approval earlier, was returned by the KERC and that later it was re-submitted by the seeking approval, is also not in dispute;

(b) the respondent-KPTCL vide Commissioning Certificate dated 28.03.2017, ... specifically certified that the Project has been duly commissioned on 28.03.2017; this certificate is not in dispute; it refers to the Report dated 28.03.2017, of the Chief Engineer and the Report dated 25.03.2017, of the Chief Electrical Inspector; the Executive Engineer of respondent-BESCOM vide letter dated 19.01.2018, a copy

whereof is at Annexure-K also mentions about generation of 511 units of power by the petitioner-company on 28.03.2017;

(c) the version of the respondent-KERC that the actual injection of the power energy into the grid is an essential ingredient for claiming the commercial operation, is not much in dispute; however, no such generation of power took place during anytime between 29.03.2017 & 31.03.2017, is only a half truth, not fairly stated by the KERC; on 28.03.2017, petitioner-company had generated the energy that entered the grid stands prima facie established ...

(d) the only ground for the KERC to disbelieve the assertion of the petitioner as to generation of 511 units of energy on 28.03.2017 is that no evidentiary material was produced by him to vouch the same; petitioner has specifically stated and the same was not disputed by the BESCO that, the Meter at the Delivery Point having a high Multiplying Constant of 1,50,000 would not record the flow of paltry 11 units of power into the grid; nonproduction of extract of Log Book maintained by the BESCO/KPTCL for the period between 29.03.2017 & 31.03.2017 is mischievously irrelevant when there is an uncontroverted version as to the flow of 511 units of energy into the grid at 23:03:25 and 23:18:28 hours on 28.03.2017;

(e) twice, the Power Purchase Agreement was submitted for the approval of KERC, and both the times the file was returned on the inarticulate premise that the Electricity Supply Companies entering into PPA was detrimental to their interest inasmuch as the increased drawal of renewable energy would result in backing down of the new Thermal Power Stations commissioned in the State and that it would result in the payment of fixed costs without drawing energy from such plants; the other reason was that the tariff of the Wind Energy Projects across the Country had come down, significantly; this assumptive premise raises a presumptive bias, pecuniary or otherwise, with which the KERC treated the claim for approval of PPA of the petitioners unmindful of huge investments of money done in the subject project; thus the impugned order is vitiated especially when the exercise undertaken by the

KERC is required to be quasi judicial in nature vide PTC INDIA LTD –vs- CERC, (2010) 4 SCC 603 paragraph 50;

(f) there is also force in the alternate contention of the petitioners that neither commissioning nor commercial operation nor generation of power within 31.03.2017 was necessary to avail the tariff of Rs.4.50 going by the KERC Order dated 24.04.2015 which governed the transaction in question regardless of its modification by subsequent Order dated 04.09.2017; the KERC is not justified in adopting the varied standards and changing the goal posts pursuant to 2017 Order when the control period of 2015 Order ought to have factored for consideration; the stand of the respondent-BESCOM is not fair to the petitioner; having submitted the petitioners PPA for approval that too not disputing their assertion as to flow of energy into the power grid on 28.03.2017, it could not have contended to the contrary as an unscrupulous businessman would do, only for the purpose of earning profit; the business standards expected of the instrumentalities of 'State' as defined under Article 12 of the Constitution of India are not the punctus punctilio of the market places; they have to satisfy the requirement of yardsticks of fairness/reasonableness obtaining in the field;

(g) there is force in the contention of the petitioners that they have been singled out for a differential treatment; the KERC has granted approval to all the Power Purchase Agreements enlisted in the Government Order dated 27.10.2017 except that of the petitioners though the Government had recommended for the grant of approval; strangely the projects for which the PPAs got KERC approval were not even commissioned till March 2018, whereas petitioners PPA was commissioned on 28.03.2017 i.e., almost a year before; the allegation of the petitioners is prima facie substantiated by the PPA and connected papers of OSTRO DAKSHIN POWER PVT. LTD., copies whereof are at Annexure-M; thus, the impugned order militates against the Equality Clause enshrined in Article 14 of the Constitution of India; this apart, the KERC having granted approval to other similarly, if not, less favourably circumstanced PPAs, has professed a particular standard by which the case of the petitioners need to be adjudged; Justice Frankfurter of U.S. Supreme

Court in VITARELLI vs. SEATON (359 US 535) had observed that an Executive Authority must be rigorously held to the standards by which it professes its action to be judged and that such Authority must scrupulously observe the professed standards on pain of invalidation of an Act in violation thereof; this principle is accepted as a norm of our legal system by the Apex Court in RAMANA DAYARAM SHETTY vs INTERNATIONAL AIRPORT AUTHORITY OF INDIA, (1979) 3 SCR 1014 ...”

(emphasis supplied)

82. The above reasoning applies with equal force to the cases of the appellants. The appellants and respondent HESCOM had concluded the Power Purchase Agreements much before the stipulated date. The respondent HESCOM participated in the exercise leading to the issuance of certificates confirming commissioning on 31.03.2017, this being based, *inter alia*, on proof of synchronization and connectivity to the Grid. There is sufficient material available to show that there was actual generation of electricity on 31.03.2017 without which synchronization and connectivity were not possible to be achieved. Notwithstanding these facts, the premise that earlier tariff is not applicable because there was no proof of injection of power into the Grid is fallacious since, going by the KERC Order dated 24.04.2015 which governed the transaction in question, generation of power within 31.03.2017 was not necessary to avail the tariff of Rs.4.50. Borrowing the words from decision in *Aikyam*, the respondent Commission was not “*justified in adopting the varied standards and changing the goal posts pursuant to 2017 Order when the control period of 2015 Order ought to have factored for consideration*”.

83. It is not denied that the State Commission has, in fact, approved the PPA for number of wind power projects post 01.04.2017 with the tariff of Rs. 4.50 per unit. These wind projects are similarly placed

projects and the approval for such PPAs has been given to such projects after the impugned order dated 04.09.2017. As in the case of *Aikyam*, there has been violation of equality clause in Article 14 of the Constitution of India even against the appellants (whose WPPs achieved availability and consequently met the COD on 31.03.2017) in as much as certain other projects not commissioned till March 2018 have received approval of KERC with benefit of tariff determined by order dated 24.02.2015. The impugned order is, therefore, discriminatory.

CONCLUSION

84. For the foregoing reasons, the reliefs sought by the appellants deserve to be granted. We, thus, direct as under:

- (i.) The order dated 04.09.2017 of the respondent Karnataka Electricity Regulatory Commission in Case no. 5/01/17 in so far as it made the generic tariff of Rs. 3.74/kwh thereby determined applicable to the Wind Power Projects of the appellants commissioned prior to 04.09.2017 is set aside;
- (ii.) It is declared that the tariff of Rs. 4.50/kwh determined by the respondent Karnataka Electricity Regulatory Commission by its generic tariff order dated 24.02.2015 is applicable to the Wind Power Projects of the appellants for a period of twenty-five years with effect from the date of COD i.e. 31.03.2017 and that the State Commission is bound to approve the Power Purchase Agreements of the appellants with respondent HESCOM accordingly, the decision of rejection of the same on ground that there was no injection of power into the grid by 31.03.2017 being bad in law and consequently vacated; and

(iii.) The respondent Karnataka Electricity Regulatory Commission shall pass necessary/consequential orders in compliance with above directions within two weeks hereof.

85. The appeals are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 13th DAY OF NOVEMBER, 2020.**

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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