IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 2 OF 2016

Dated : 19th December, 2023

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

In the matter of:

KISHANGARH HI-TECH TEXTILE PARK LTD (KHTPL)
(Through its Authorised Signatory)
Having its registered office at:
Agrawal Sadan, Bhat Mohalla,
Madanganj – Kishangarh,
District Ajmer, Rajasthan – 305801 … Appellant(s)

Versus

1. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION**
(*Through its Secretary*)
Vidyut Viniyamak Bhawan,
Sahakar Marg,
Near State Motor Garage
Jaipur - 302006

2. **RAJASTHAN RAJYA VIDYUT PRASARAN NIGAM LTD**
(*Through its Director*)
Vidyut Bhawan,
Janpath,
Jaipur - 302005

3. **AJMER VIDYUT VITARAN NIGAM LIMITED**
(Through its Director)
Old Power House,
Hathi Bhata Road
Jaipur Road

Ajmer - 305001

4. **RAJASTHAN DISCOMS POWER PROCUREMENT CENTRE**
(Through its authorized Signatory)
Shed No. 5/5, Vidyut Bhawan,
Jaipur, Rajasthan - 302001 … Respondent(s)

Counsel for the Appellant(s)	:	Anupam Chauhan Debolina Roy Vishal Gupta Kumar Mihir
Counsel for the Respondent(s)	:	Raj Kumar Mehta Himanshi Andley for Res 1 Pradeep Misra For Res 2 to 4 Ajatshatru S. Mina For R-3 & R-4

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant *Kishangarh Hi-tech Textile Park Ltd. (KHTPL)* has assailed the order dated 07.10.2015 passed by the respondent no.1 *Rajasthan Electricity Regulatory Commission (RERC)* whereby its petition has been dismissed. The appellant had sought directions against the respondents to levy the Open Access Charges (Transmission Tariff and Wheeling Charges) @ 50% of the tariff rates in line with the Regulation 90(3) of Tariff Regulation, 2009; to rewind the extra Open Access Charges (Rs.44,56,594/-) alongwith interest for the delayed payment @ 1.25% per month collected by the respondents towards excess claim of Open Access Charges; and to provide the six-monthly banking facilities as specified in Tariff Regulations, 2009.

2. The appellant is a company incorporated under the Companies Act, 1956, and besides having textile mills, is a leading investor in wind energy in the State of Rajasthan.

3. In the year 2009, the 1st respondent RERC notified tariff regulations known as RERC (Terms and Conditions of Determination of Tariff) Regulations, 2009, to be applicable for determination of tariff during the control period of 5 years i.e. from 01.04.2009 up to 31.03.2014. Regulation nos.90 and 92 relating to transmission and wheeling charges as well as banking of energy are material for the purposes of instant appeal and are reproduced herein below:

> *"90. Other Charges*
>
> *……..*
>
> *(3) Transmission & wheeling charges: In case of third party sale or for captive use both within the State, the transmission & the wheeling charges be recovered in cash and in kind as follows:*
> *(a) The transmission charges (in cash) applicable to RES power stations be half (i.e. 50%) of the transmission charges, specified by the Commission for open access consumer. However, where distribution licensee network below 132 kV level is utilized, the wheeling charges (in cash) applicable to RES power stations, be 50% of normal charges, as applicable & specified for 33 kV by the Commission, irrespective of the voltage at which electricity is supplied.*
> *(b) These charges (in kind) i.e. transmission & wheeling losses shall be as detailed at regulation 91.*

Provided, in case of Power Purchase Agreements executed and plants commissioned upto 31.03.2007, under the State Government policies specified in regulation 82, the wheeling charges as per policy shall be applicable as for transmission and wheeling charges (in cash and kind) as specified above unless RE power plant opts otherwise."

"92. Banking

(1) Energy shall be allowed to be banked at consumption end within the State only.

(2) Period of banking:

(a) In respect of third party sale and/or captive use of non firm energy, the banking and drawal shall be on six monthly basis i.e. April to September and October to March.

However, during the months of December, January & February utilization of the banked energy shall not be permitted.

(b) For firm energy from biomass power plants banking and drawal be accounted for in the same month.

(3) Energy accounting and treatment of banked energy at consumption end within the State in case of Non-Firm RE power Sources be as hereunder;

(a) Available energy at the beginning of any particular month shall be the sum of banked energy carried forward from the previous month including energy banked out of generation during previous month and the delivered energy from the generating

station during the previous month after accounting for sale to discom and wheeled energy to captive or open access consumer adjusted for applicable wheeling losses, as the case may be.

(b) Non-firm RE power station shall intimate to SLDC and to concerned distribution licensee on 1st of every month, out of available energy for that particular month, the quantum of energy;

(i) it wishes to bank,

(ii) it wishes to distribute amongst third party and

(iii) it wishes to captive use during that month out of available energy for that particular month. Where no such intimation is received on or before 1st of the month the intimation last received become appliable for the month.

Where no such intimation is received on or before 1st of the month the intimation last received become appliable for the month.

(c) The unutilized available energy and the banked energy shall be considered as banked energy as per sub regulation 3(a) above and shall be carried forwarded for the next month.

(4) in case, the energy drawal from the grid is more than the sum of energy banked wherever applicable and energy generated during any month, upon adjustment for applicable wheeling losses, the treatment of such excess energy drawal shall be in accordance with RERC (Terms and Conditions of Open Access) Regulations.

(5) Payment of unutilized banked energy adjusted for applicable wheeling losses shall be settled with RE power generation in the month of April and October of each financial year at the rate of

60% of energy charges including fuel surcharge (if any) applicable for Large Industrial Power tariff."

4. After the commencement of these 2009 Regulations, the appellant completed its 8.4MW wind power project at *Tejuva* site *Jaisalmer* in the State of *Rajasthan* and got it commissioned on 30.12.2010 after receiving the approval of the *Rajasthan Renewal Energy Corporation Limited*. Thereafter the appellant entered into an Energy Wheeling Agreement (EWA) dated 09.12.2010 with the respondent no.3 for a term of 20 years. Clause 5 of the said agreement is material and is reproduced hereunder: -

"5. (A) Transmission & Wheeling of Energy

Keeping in view the GOR Policy as amended from time to time, the Power Producer shall be free to use the power for their captive consumption at their unit viz. KISHANGARH HI-TECH TEXTILE PARK LTD., RICO Industrial Area, Silora, VIA – Kishangarh, District Ajmer 305802 after paying the transmission & wheeling charges and losses as per RERC order dated 23rd January 2009 & amended from time to time."

5. The Appellant executed a similar Energy Wheeling Agreement dated 20.12.2010 also with the respondent no.2 for a term of 20 years. Clause 3 of the said agreement is material and is reproduced hereunder: -

"3. Charges for Open Access

(i) The Power Producer shall pay transmission and wheeling charges and losses as per RERC notification dated 23rd January 2009 & amended from time to time."

6. Thus, upon execution of these two agreements, the appellant was granted concession on transmission and wheeling charges by 50% and the facility of six-monthly banking of energy in terms of the tariff regulations of 2009.

7. In the year 2014 the 1st respondent notified fresh tariff regulations known as RERC (Terms and Conditions for Determination of Tariff for Renewable Energy Sources – Wind and Solar Energy) Regulations, 2014, to be applicable for determination of tariff during the control period of 5 years commencing from 01.04.2014 upto 31.03.2019. Regulation nos.38(3) and 39 relating to transmission and wheeling charges as well as banking of energy respectively are pertinent with regards to the appeal at hand and are reproduced hereunder: -

"(3) Transmission & wheeling charges

In case of third party sale or for captive use both within the State or outside the State, the transmission charges and wheeling charges shall be recovered in cash and transmission losses and wheeling losses shall be recovered in kind as under:

(a) For use of transmission network, transmission charges and losses as determined by the Commission in respect of open access transactions would be applicable.

(b) For use of distribution licensee's network, the wheeling charges and losses as determined by the Commission in respect of open access transactions at respective voltage levels at which electricity is supplied, would be applicable.

(c) For use of both EHV and distribution network, both transmission and wheeling charges as well as losses, as applicable, shall be payable:

Provided that in case of Power Purchase Agreements executed and plants commissioned upto 31.03.2007 under the State Government Policies specified in regulation 33, the charges as per Policy shall be applicable unless RE power plant opts otherwise."

"39. Banking

(1) Energy shall be allowed to be banked at consumption end for only captive consumption within the State.

(2) Period of banking:

The banking shall be on monthly basis.

(3) Energy Accounting:

(a) RE Power Generator/Developer shall intimate to SLDC and to the concerned Distribution Licensee on first day of every month, out of available energy for that particular month, the

quantum of energy it wishes to bank for captive consumption within the State:

Provided that where no such intimation is received on or before first day of the month, the intimation last received would become applicable for the month.

(b) The banked energy in a month shall not exceed the quantum of energy injected in the grid in the month. In case the energy injected in the month is lower than indicated banked energy, the banked energy would be deemed to get restricted upto the energy injected.

(c) The RE Power Generator/Developer would be entitled to get payment @60% of energy charges applicable for large industrial power tariff, excluding fuel surcharge, if any, in respect of 10% of unutilized banked energy after the end of month of banking. Unutilized banked energy, in excess of 10% shall lapse.

(4) The Distribution Licensee shall make the payment, if any, on or before the last working day of the month, next to the relevant month of banking, beyond which, the Late Payment Surcharge (LPS) at the rate, as specified in these Regulations, would become applicable.

(5) Banking charges at the rate of 2% of banked energy in each month would be payable in kind."

8. Thus, these regulations of the year 2014 provided for recovery of 100% transmission and wheeling charges and reduced the banking of energy period to one month.

9. Subsequently, the respondents applied these regulations of the year 2014 to the appellant's wind power project also and accordingly revised the credit reports thereby levying 100% of transmission and wheeling charges and reducing the period of banking facility from six months to one month.

10. In these circumstances, being aggrieved by such act of the respondent nos.2&3, the appellant approached the 1st respondent RERC by way of petition no.497 of 2014 which came to be dismissed vide impugned order dated 07.10.2015.

11. The contentions of the appellant before the 1st respondent RERC were that its wind power project was governed by the tariff regulations of 2009 during the control period of which it was commissioned and in the absence of any express provision in the regulations of 2014 to the effect of repeal, amend or overriding the Regulations of 2009, these could not have been applied. It was contented that the Regulations of 2014 cannot be applied retrospectively to the power projects which were set up and commissioned much prior to the year 2014. It was further stated that these 2014 Regulations cannot be applied to the Energy Wheeling Agreements dated 09.12.2010 and 20.12.2010 executed between the appellant and respondent nos.2&3 which came into existence much before the date when these regulations were notified.

12. The contentions of the appellant did not find favour with the Commission and accordingly the Commission dismissed the petition while holding as under: -

> *"The applicability of the terms and conditions of transmission charges and wheeling charges have been separately specified under Regulations 90(other charges) and for banking facilities under Regulation 92 (Banking) of the Tariff Regulations, 2009. These are independent from the calculations for tariff determination.*
>
> *The contention of the Petitioner that the provision of Regulation 1 (2) of the RE Tariff Regulations, 2014 also governs the applicability of transmission and wheeling charges and banking facility cannot be accepted since the proviso under this Sub-Regulation clearly indicates that only the issues related to determination of Tariff shall be governed by the Tariff Regulations, 2009.*
>
> *The Commission under Tariff Regulation, 2009 has determined the transmission and wheeling charges and banking facility for the control period of 01.04.2009 to 31.03.2014. Similarly, Commission has determined the above charges for the control period 01.04.2014 to 31.03.2019 under the RE Tariff Regulations, 2014. Therefore the contention advanced by the Petitioner that charges determined under 2009 Regulation shall continue to supply throughout the agreement period does not hold water. The above charges determined under 2009 Regulation cannot apply beyond the control period of the said Regulation, and charges determined under 2014 Regulation shall apply thereafter.*

No tariff charge or billing charge can remain static. They have to be determined from time to time depending on the cost incurred by the Licensees. No. Licensee can be made to give the service dehors its actual cost. The tariff shall always reflect the actual cost & other factors of the relevant period.

The contention of the Petitioner that the agreement specifying the charges payable by it shall be governed by Regulation, 2009 ignores the words used in the EWA and WBA ' as amended from time to time'. The interpretation of the Petitioner that 2009 Regulations have not been amended is also not correct. 2014 Regulations are nothing but amendment of 2009 Regulations. The Hon'ble Supreme Court in the case of I.C. Golaknath V/s State of Punjab AIR 1967 SC 1643 has interpreted the word 'amend' to mean "change". In the instant case the word used from time to time and context in which it is used mean changed ones. Therefore, we are of the view that Petitioner is liable to be charged from 01.04.2014 as per the changed charges determined under 2014 Regulations and not as per 2009 Regulations.

The Petitioner has referred to the judgement of Hon'ble Supreme Court in Civil appeal No. 5612 of 2012 Bangalore Electricity Supply Co. Ltd. V/s Konark Power in support of its case. We are of the view that this judgement has no application to the present case.

In the Petitioner's case, the WBA specifically states that the Regulation as amended shall apply whereas PPA referred to in the judgment did not have a similar provision.

Viewed from any angle we are of the considered opinion that there is no merit in the contention of the Petitioner. We hold

that Petitioner shall be charged according to the charges determined under 2014 Regulation from the control period covered by it. Accordingly, Petition stands dismissed."

13. We have heard the Learned Counsels for the parties extensively and have gone through the impugned order as well as records of the case. We have also perused the written submissions filed by the Learned Counsels.

14. It was vehemently argued by the Learned Counsel for the Appellant that the Tariff Regulations of 2014 do not have retrospective application and therefore, cannot be applied to wind power project of the appellant set up in the year 2010 and regarding which wheeling of energy agreements were also executed in the year 2010. He submitted that the respondents have sought to arbitrarily and illegally apply the Regulations of 2014 which has adversely affected the financial viability of the appellant's project in as much as it has been charged for transmission and wheeling of electricity as per the new rates thereby withdrawing the concession of 50% made available under 2009 Regulations. It is Also argued by him that even otherwise also the Regulations of 2014 cannot be applied to previously concluded contracts between the parties as these nowhere specify that these repeal, amend or override the earlier regulations of the year 2009. According to the Learned Counsel, it is fallacious to hold that every time when fresh tariff regulations are notified, all the previously executed Energy Wheeling Agreements would be affected and would get to be reopened. He also argued that since these Tariff Regulations of 2014 are meant for cases requiring tariff determination during the control period of 5 years between 01.04.2014 up to 31.03.2019, these cannot be applied to the power projects which have been setup and commissioned much prior to the commencement of this control period.

15. Per contra, the Learned Counsels appearing for the respondents entirely supported the impugned order stating that no error or infirmity can be found in the same. It was pointed out that the clause 5A of the Energy Wheeling Agreement dated 09.12.2010 as well as clause 3 of the Energy Wheeling Agreement dated 20.12.2010 executed between the appellant and the respondent nos.2&3 unambiguously provide that the transmission and wheeling charges shall be as per the RERC order dated 23.01.2009 and as amended from time to time.

16. The issue which arises for consideration in the present appeal is whether the Tariff Regulations of the year 2014 are applicable to the Energy Wheeling Agreements executed between the appellant and respondent nos.2&3 in the year 2010 i.e. much prior to the date when these regulations were notified or are these agreements immune from the impact of these regulations.

17. In order to decide the said issue, it is imperative to peruse the Energy Wheeling Agreements dated 09.12.2010 and 20.12.2010 executed between the appellant and respondent nos.2&3. At the cost of repetition, we find it apposite to reproduce the relevant clauses of these two agreements. Clause 5A of the Energy Wheeling Agreement dated 09.12.2010 provides as under: -

> *"5. (A) Transmission & Wheeling of Energy*
>
> *Keeping in view of GoR Policy and amended from time to time the Power Producer shall be free to use the power for their captive consumption at their unit viz. (Kishangarh Hi-Tech Textile Park Ltd., RIICO Industrial Area, Silora, VIA-Kishangarh,*

District Ajmer-305802) after paying the transmission & wheeling charges and losses as per RERC order dated 23rd January 2009 & amended from time to time."

18. Clause 3 of Energy Wheeling Agreement dated 20.12.2010 provides as under: -

"3. Charges for Open Access

The power Producer shall pay transmission and wheeling charges and losses as per RERC notification dated 23rd January 2009 & amended from time to time."

19. It is manifest from reading of the these clauses in the EWAs that the intention of the parties was not to keep payment of transmission charges and for unutilized banked energy unchanged for the entire period of 20 years. For this reason, it has been provided in the said clauses that payment of transmission and wheeling charges shall be governed by the orders to be passed by RERC and amended from time to time. Therefore, the provisions related to banking of energy and payment of transmission charges in the EWAs was/is amenable to any subsequent rules/regulations to be promulgated by the RERC and the amendments to be carried out in such rules/regulations. The contentions raised on behalf of the Appellant that the expression "as amended from time to time" used in the said clause in the EWA is only a written expression and not intended to be followed or applied cannot be accepted. There is nothing in the entire EWAs or in any other document on record to show that the said expression was never intended to be applied in case of these EWAs. It is a fundamental principle of interpretation of documents that the document must be read as a whole in its entire context and cannot be read in piecemeal and none of its terms can be said to be

superfluous unless it is found that any particular term/provisions of the agreement is out of context. The above referred term in the WBAs cannot be said to be out of context and therefore can't be ignored.

20. We also find ourselves in complete agreement with the observations of the Commission that the tariff charges or billing charges cannot remain static for all times to come and these have to be determined from time to time depending upon the cost incurred by the licensees and shall always reflect the actual cost as well as other factors prevailing at the relevant period of time.

21. It is true that the tariff regulations of the year 2014 are applicable for determination of tariff for the control period of five years from 1st April, 2014 till 31st March 2019 but it is equally true that it is specifically nowhere provided that these are not applicable to the previously executed EWAs for determination of tariff during the said control period. In this regard, we may also profitably refer to the judgment of the Hon'ble Supreme Court in PTC India Ltd. v. Central Electricity Regulatory Commission (2010) 4 SCC 603 which is a Constitution Bench Judgment and in which it has been specifically held that any regulations issued under Section 178 of the Indian Electricity Act, as a part of regulatory framework, intervenes and overrides the existing contracts between the regulated entities in as much as it casts statutory obligations on the regulated entities to align their existing and future contracts with the said regulations. It has been clarified that even the existing power purchase agreements have to be modified and aligned with the regulations made after the execution of those agreements and in fact the regulations make an inroad into the existing contracts also.

22. In view of the specific law laid down by the Apex Court in the above cited judgment, the case of the Appellant squarely falls to the ground. It is clear that the regulations of the year 2014 override the existing PPAs/EWAs executed between the Appellant and the respondent nos.2&3 and those PPAs/EWAs have to be modified/aligned with these regulations.

23. For the afore-stated reasons, we do not find any error or infirmity in the impugned order of the Commission i.e. the 1st respondent. No merit is found in the appeal and the same is hereby dismissed.

Pronounced in the open court on this 19th day of December, 2023.

(Virender Bhat) Judicial Member	(Sandesh Kumar Sharma) Technical Member (Electricity)

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