

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 7th April, 2016

Present:

1. Sri M.K. Shankaralinge Gowda Chairman
2. Sri H.D. Arun Kumar Member

Suo Motu Case No.4 / 2015

First Party / Generator : Swasthik Construction Services,
D-1, Lotus Colony, Chamiers Road,
Nandanam,
CHENNAI -600 035
[Represented by Navayana Law Offices, Advocates]

Second Party /: Distribution Licensee Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
[Represented by Thiru & Thiru Chambers, Advocates]

Suo Motu Case No.5 / 2015

First Party / Generator : Swasthik Construction Services,
D-1, Lotus Colony, Chamiers Road,
Nandanam,
CHENNAI -600 035
[Represented by Navayana Law Offices, Advocates]

Second Party /: Distribution Licensee Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
[Represented by Thiru & Thiru Chambers, Advocates]

Suo Motu Case No.8 / 2015

First Party / Generator : Murugarajendra Oil Mills Pvt. Ltd.,
P.B.No.86, Davanagere Road,
CHITRADURGA – 577 502
[Represented by Nayak & Nayak, Advocates]

Second Party /: Distribution Licensee Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
[Represented by Thiru & Thiru Chambers, Advocates]

COMMON ORDERS

- 1) The above cases involve common issues of facts and law, for consideration. Therefore, these cases are clubbed together for passing final orders.

- 2) In these cases, this Commission has issued Notices dated 9.10.2015, directing the parties to appear before this Commission and to submit their written replies as to why the tariff for the Wind Power Projects of the Generators should not be reduced from Rs.4.20 (Rupees four and paise twenty only) per Unit as mentioned in the Power Purchase Agreements (PPAs) to Rs.3.70 (Rupees three and paise seventy only) per Unit, for the reasons stated in the said Notices.

- 3) The Commission noted that these Projects were commissioned on 27.9.2012, 2.4.2013 and 26.8.2011, respectively, and therefore they should be governed by the generic Tariff Order dated 11.12.2009 and not by the generic Tariff Order dated 10.10.2013, pertaining to the Wind Power Projects. Therefore, the Commission issued the said Notices to the parties in all the three cases. The main grounds stated in the Notices issued in the above three cases for reduction of the tariff, read thus :

“Section 62(6) of the Electricity Act, 2003 provides that a generating company is not entitled to recover a price exceeding the tariff determined by the Commission. Thus, the Commission is required to determine the proper tariff applicable for sale of energy by a generating company to the distribution licensee.

The Commission has passed generic Tariff Orders from time-to-time determining tariff for supply of energy by Renewable Energy Power Projects and has also specified the applicability of the tariff determined in such Tariff Orders to different types of Renewable Energy Projects. The tariff determined in such orders is applicable to the projects constructed and commissioned / established during the control period mentioned in the Orders. The fundamental principle involved in such generic tariff determination process is that, a generating company is entitled to a particular tariff, if it has incurred costs in constructing and establishing / commissioning of the plant during the Control Period mentioned in the relevant generic Tariff Order. The payment of tariff under the PPA is a continuing liability for distribution licensee and the Commission cannot allow a generating company to charge a higher tariff, for which it is not entitled to. The Commission is also duty bound to see that the consumers' interest is protected by regulating the payment of proper tariff.”

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- 4) The following are the relevant particulars of the above cases :

Sl.No.	Suo Motu Case No.	Capacity of Wind Power Generating Unit (in MW)	Date of Commissioning of the Project	Date of Execution of the PPA	Tariff per Unit, as per the PPA (Rs.Ps.)
1.	4 / 2015	0.80	27.9.2012	25.1.2014	4.20
2.	5 / 2015	0.80	2.4.2013	29.11.2013	4.20
3.	8 / 2015	0.85	26.8.2011	March, 2014	4.20

- 5) The Generators and the Distribution Licensee appeared through their counsel. The Distribution Licensee has filed its Statement in all the three cases. The Generators in Suo Motu Case Nos.4/2015 and 5/2015 have filed their Statements of Objections. However, the Generator in Suo Motu Case No.8/2015 has not filed any written Statement of Objections. It may be noted that the Generators have not disputed the dates of commissioning of the Projects, the dates of execution of the PPAs and the tariff of Rs.4.20 per Unit mentioned in the PPAs.

- 6) The contentions raised by the Generators in Suo Motu Case Nos.4/2015 and 5/2015, opposing the reduction of tariff, may be stated as follows :

- (a) The PPAs were submitted for approval by the Distribution Licensee and therefore, there was no question of the Generator withholding any material information at the time of getting the approval by the Commission to the PPAs.

- (b) The Generating Company is not subject to any regulatory process by the Commission and the tariff cannot be reduced, adversely affecting the Generator after execution of the PPAs. The approval of the PPA and the tariff thereof, is a matter strictly confined to a Regulator and its Licensee. A Generator is not a licensed or regulated entity and hence it cannot be regulated by the Commission.
- (c) The jurisdiction of this Commission is limited solely to the regulation of its Licensee and does not stretch beyond that. Therefore, this Commission may, at best, decide on allowance or disallowance of the so-called tariff to the Generator by the Distribution Licensee, but cannot alter the rates firmed up in the PPA signed between the Generator and the Distribution Licensee. This Commission cannot regulate the price at which the Generator sells the energy to the Licensee, but can regulate the component of tariff that would be allowed to pass through to the consumers.
- (d) Subsequent to the approval of the PPAs, this Commission has passed some Tariff Orders and has taken up truing up exercises for the respective years and for Control Periods. Several Tariff Orders passed by this Commission have got merged in the Hon'ble Appellate Tribunal for Electricity (ATE) / Hon'ble Supreme Court Judgments. Any change in the tariff structure of the PPA from a retrospective date would mean

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- re-visiting and reviewing of the Tariff Orders of this Commission passed from time-to-time.
- (e) The relevant generic Tariff Order dated 10.10.2013 states that, *"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 insofar as it relates to tariff for Wind energy stands superseded with immediate effect."* Therefore, for the PPAs signed on or after 10.10.2013 in respect of Wind Power Projects, the tariff applicable should be Rs.4.20 / unit, as stated in the said Order dated 10.10.2013.
- (f) In view of the generic Tariff Order dated 24.2.2015, the Wind Power Projects entering into PPAs with Electricity Supply Companies (ESCOMs) from 10.10.2013 upto the date of the said Order are entitled to the tariff of Rs.4.50 per Unit. Therefore, the Generators are entitled to the tariff of Rs.4.50 per Unit, instead of Rs.4.20 per Unit stated in the PPAs.
- (g) In Suo Motu Case No.4/2015, the Generator had opted to sell the power under Average Pooled Power Cost (APPC) under REC route, as allowed by this Commission and in this regard, it had entered into a Memorandum of Agreement (MoA) dated 13.7.2012 with the Distribution

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- Licensee (HESCOM) . Thereafter, this Generator changed its decision and opted for signing of a PPA with HESCOM at regular tariff, for which this Commission had given its approval, and also later approved the PPA dated 25.1.2014, with a tariff of Rs.4.20 per Unit. Therefore, this Generator had not withheld the information pertaining to the date of commissioning of the Project from the Commission.
- (h) In Suo Motu Case No.8/2015, the learned counsel for the Generator pointed out that, after commissioning of the Project on 26.8.2011, the Generator opted for captive use of the energy generated and had entered into a Wheeling & Banking Agreement (W&BA) dated 29.9.2011, and subsequently made up its mind to sell power to HESCOM and executed the PPA in March, 2014, with a tariff of Rs.4.20 per Unit, as per the generic Tariff Order dated 10.10.2013.
- (j) For the above reasons, the Generators have requested to drop the Notices issued to them.
- 7) The contentions of the Distribution Licensee may be stated as follows:
- (a) In the generic Tariff Order dated 10.10.2013, the Commission has held that, *"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 insofar as it relates to tariff for Wind energy stands superseded with immediate effect." Therefore, the Distribution Licensee (HESCOM) deemed it safe to literally interpret the applicability of the Order and hence came to the conclusion that the tariff of Rs.4.20 per Unit should be applicable to all the PPAs entered into on or after 10.10.2013.

(b) The Distribution Licensee (HESCOM) had no intention to mislead this Commission at the time of getting approval of the PPAs.

8) We have heard the learned counsel for the parties. The following issues would arise for our consideration :

(1) Whether the Generators are entitled to the tariff determined by this Commission in the generic Tariff Order dated 11.12.2009 or the generic Tariff Order dated 10.10.2013?

(2) Whether the Commission can reduce the tariff already agreed in the PPAs and approved by the Commission?

(3) What Order?

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- 9) After considering the submissions of the parties and their respective pleadings, our findings on the above issues are as follows :
- 10) **ISSUE No.(1)** : *Whether the Generators are entitled to the tariff determined by this Commission in the generic Tariff Order dated 11.12.2009 or the generic Tariff order dated 10.10.2013?*
- (a) The tariff for supply of electricity by a Generating Company to a Distribution Licensee is regulated under the provisions of the Act and the relevant Regulations framed thereunder. The State Commission has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which electricity shall be procured from Generating Companies, through agreements, for distribution and supply within the State.
- (b) This Commission has issued the Karnataka Regulatory Commission (Power Procurement from Renewable Sources of Energy by Distribution Licensees) Regulations, 2004 (hereinafter referred to as the 'KERC Regulations, 2004'), and pursuant to these Regulations, this Commission has determined the generic tariff in respect of Renewable Sources of Energy, by Order dated 18.1.2005. Under this Order, for the Wind Power Projects, the tariff determined is Rs.3.40 (Rupees three and paise forty only) per Unit, without any escalation, for the first 10-year period from the year of the Commercial Operation of the Plant. The tariff determined

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- under this Order has been made applicable to all the PPAs, filed before this Commission for approval, on or after 10.6.2004. It is also stated in the said Order that the tariff determined under this Order would be further reviewed after five years, which shall be applicable to all the Power Purchase Agreements to be entered into after that date.
- (c) This Commission subsequently, by Order dated 11.12.2009, determined the generic tariff in respect of Renewal Sources of Energy. Under this Order, for the Wind Power Projects, the tariff determined is Rs.3.70 (Rupees three and paise seventy only) per Unit, without any escalation, for the first 10-year period from the date of signing of the PPA. The tariff determined under this Order has been made applicable to all the new Renewable Energy Projects, the PPAs in respect of which are filed before this Commission for approval, on or after 1.1.2010, for a period of ten years from the date of signing of the PPA. It is also stated in the said Order that the tariff determined under this Order would be further reviewed after five years, which shall be applicable to all the Power Purchase Agreements to be entered into after that date. In the said Order, it is also stated that, in respect of the PPAs already approved by this Commission and in respect of the PPAs received by the Commission before 1.1.2010, the tariff and all the terms and conditions as per those PPAs should hold good for the period specified in the PPAs.

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(d) Regulations 5.7 and 5.8 of the KERC Regulations, 2004 read thus :

“5.7 *The tariff so determined by the Commission shall be applicable for a period of 10 years from the date as notified by the Commission.”*

“5.8 *The tariff so determined by the Commission is subject to review after 5 years and such revised tariff shall be applicable to agreements entered into after that date.”*

(e) With effect from 31.3.2011, this Commission has issued the Karnataka Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2011 (hereinafter referred to as the 'KERC Regulations, 2011') repealing the earlier KERC Regulations, 2004. Regulation 9 of the KERC Regulations, 2011 specifies the norms for determination of tariff for Renewable Sources of Energy.

(f) Pursuant to the KERC Regulations, 2011, this Commission, by Order dated 10.10.2013, determined the generic tariff for Wind Power Projects at Rs.4.20 per Unit without any escalation for the period of PPA, applicable to all the PPAs signed during the period of five years from the date of said Order, superseding the tariff determined under the generic Tariff Order dated 11.12.2009, insofar as it relates to tariff for Wind Energy.

(g) As per the directions of the Hon'ble ATE in Appeal Nos.82/2014, 11/2014 and 49/2014, the generic Tariff Order dated 10.10.2013 has been revised

by this Commission, by its Order dated 24.2.2015, re-determining the tariff for Wind Power Projects at Rs.4.50 per Unit for the Projects established during the Control Period of five years commencing from 10.10.2013. The said Order dated 24.2.2015 further states that:

“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.”

“In respect of the Projects which have already entered into PPAs with ESCOM from 10th October, 2013 and up to the date of this Order, the tariff as determined in this Order shall be applicable.”

- (h) The principles for determination of tariff for electricity from Renewable Sources of Energy are stated in Clauses (3) and (4) of Regulation 9 of the KERC Regulations, 2011, which read thus :

“9. Determination of Tariff for Electricity from Renewable Sources of Energy :

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|-----|-----|-----|-----|
| (1) | XXX | XXX | XXX |
| (2) | XXX | XXX | XXX |

(3) *The Commission shall be guided by the principles and methodologies, if any, specified by the CERC, National Electricity Policy and Tariff Policy, while determining tariff for renewable sources of energy.*

(3) *While determining the tariff, the Commission may consider factors affecting the costs of generation including technology, fuel, market risk, environmental benefits and social contribution and other relevant factors relating to each type of renewable sources of energy.”*

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- (j) On the basis of the principles and methodologies applicable, this Commission has determined tariff for each category of Renewable Sources of Energy for different Control Periods. While determining the tariff for each category of the Renewable Sources of Energy, the Commission has taken into consideration the different financial and operational norms applicable to each of them. The tariff so determined is made applicable for a tariff period stated in the different generic Tariff Orders of the Commission. Such generic Tariff determined under the generic Tariff Order is in the nature of 'standing offers' made to the prospective Generators of Renewable Sources of Energy, who are establishing / commissioning of the Generating Plants during the relevant Control Period, for sale of electricity by them to the intending ESCOMs. The tariff for the different Control Periods for any Renewable Sources of Energy may vary according to the financial and operational norms prevailing in during the relevant Control Periods. Therefore, a Generating Plant, which is established / commissioned during a particular Control Period, cannot claim the tariff determined for a different Control Period.
- (k) In the present cases, the Wind Power Projects of the Generators have been commissioned on 27.9.2012, 2.4.2013 and 26.8.2011, respectively. Therefore, these Projects should be governed by the tariff of Rs.3.70 per Unit for Wind Power Projects as determined by this Commission in its generic Tariff Order dated 11.12.2009. Merely because the PPAs have been entered into on 25.1.2014, 29.11.2013 and March, 2014,

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- respectively, the Generators cannot claim the tariff determined by this Commission in its generic Tariff Order dated 10.10.2013, which is applicable for the subsequent five-year Control Period from 10.10.2013.
- (l) The Generators have contended that, as per the generic Tariff Order dated 10.10.2013, the tariff for Wind Power Projects determined at Rs.4.20 per Unit without any escalation for the period of PPA shall be made applicable to all the Power Purchase Agreements signed during the period of five years from the date of the said Order and that the generic Tariff Order dated 11.12.2009, insofar as it relates to tariff for Wind energy, stood superseded with immediate effect. Therefore, the Generators have contended that, as they have executed the PPAs subsequent to 10.10.2013, they are entitled to the tariff of Rs.4.50 per Unit, as per the generic Tariff Order dated 24.2.2015 revising the tariff determined in the generic Tariff Order dated 10.10.2013.
- (m) Mere literal interpretation of the applicability of the tariff as stated in the Generic Tariff Order dated 10.10.2013 may lead to support the contention of the Generators. But, such literal interpretation would lead to anomalous results and contravene the principle on which the generic tariff is determined for a Control Period. Therefore, such literal interpretation cannot be adopted for determining the applicability of the generic Tariff Order dated 10.10.2013.

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(n) It may be noted that, this Commission has approved the Standard PPA formats for the Renewable Sources of Energy Projects, including the Wind Power Projects, by Order dated 18.8.2005, after hearing the stakeholders. These approved Standard PPA formats would show that these formats are applicable only to the Projects to be established and not to the existing Projects. The PPAs referred to in the generic Tariff Order dated 10.10.2013 should necessarily relate to the Standard PPA formats approved by this Commission. Therefore, it would show that the generic Tariff Order dated 10.10.2013 would apply only to the Projects to be commissioned, subsequently. In the case of the existing Projects, the provisions relating to the Financial Closure, the date of commencement of the Project, the date of completion of the Project and the consequences for the non-compliance of it, etc., as stated in the Standard PPA, would not be applicable.

(p) The generic Tariff Order dated 24.2.2015 is a continuation of the generic Tariff Order dated 10.10.2013. The said Order dated 24.2.2015 states thus:

“(i) In modification of the earlier Order dated 10.10.2013, the Commission hereby determines the tariff for Wind Power Projects at Rs.34.50 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

(PPAs) on or after 10.10.2013 for the Control Period of five years from that date.

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

Therefore, the reading of the two generic Tariff Orders dated 10.10.2013 and 24.2.2015 together would clearly show that, these Orders would apply only to the new Projects to be established on or after 10.10.2013. Therefore, there is no scope for accepting the contention of the Generators in this regard for the applicability of the tariff of Rs.4.20 per Unit or Rs.4.50 per Unit to their Projects, as per the generic Tariff Orders dated 10.10.2013 and 24.2.2015, but the Generators are governed by the tariff of Rs.3.70 per Unit as determined in the generic Tariff Order dated 11.12.2009. Therefore, we answer Issue No.(1) accordingly.

- 11) **ISSUE No.(2)** : Whether the Commission can reduce the tariff already agreed in the PPAs and approved by the Commission?
- (a) The learned counsel for the Generators submitted that the agreed tariff cannot be reduced to the detriment of the Generator, and if at all any action is required, during the retail tariff exercise, a portion of the claim of the Distribution Licensee be disallowed as 'pass through' to the consumers. Further, he submitted that the Commission cannot revise its earlier approvals given to the PPAs. He further contended that the

Generators are not subject to any regulatory process by the Commission and the tariff cannot be reduced, adversely affecting the Generator after execution of the PPAs.

(b) After careful consideration of the contentions raised by the learned counsel for the Generators, the Commission is of the considered view that it has power to revise or review its earlier approvals given to the PPAs in question, for the following reasons :

- (i) The Commission has a duty to safeguard the interest of the consumers. The consumer would be the affected party, in case of a wrong application of tariff;
- (ii) The tariff for supply of electricity by generators is a matter of regulation by the Commission;
- (iii) The Generators as well as the Distribution Licensees have a duty to find out the appropriate tariff applicable to a particular Power Purchase transaction. Section 62(6) of the Act provides that a Generating Company cannot recover a price exceeding the tariff determined by the Commission;
- (iv) The Commission should also verify the validity of the claim for a particular tariff, before granting approval to the PPA;

- (v) In the present cases, it appears, before granting the approvals, the Commission had not analyzed the relevant principles and facts to ascertain the applicability of the correct generic tariff to be paid to the Generators. Hence, the Commission misdirected itself in assuming that the generic Tariff Order dated 10.10.2013 would apply to the PPAs submitted for approval on or after 10.10.2013, irrespective of the date of commissioning of the Projects;
- (vi) The approvals have been given in a routine manner. Therefore, the approvals given are in the nature of an *ex-parte* Order. Hence, such approvals can be reviewed at any time by the Commission, upon noticing the mistake committed in giving the approvals;
- (vii) The approvals granted earlier cannot be treated as, 'orders attaining finality in an adversarial judicial proceedings' and can be re-opened for valid reasons. The consumer would be the affected party, in case of allowing higher tariff than the legally permissible tariff;
- (viii) The term regarding tariff in a PPA is governed by the statute. Any higher claim for tariff is *void* and can be ignored by the party concerned in the PPA;

- (ix) The conditions regarding the applicability of the generic Tariff Orders in question are not reasonably subject to two different interpretations. The approvals regarding the PPAs would not have been communicated but for the erroneous assumption, which in fact, did not exist and its continuation would result in miscarriage of justice. In such circumstances, the Commission can rectify its own mistake. The payment of tariff under the PPAs is a continuing liability till the end of the term of the PPAs and the Commission cannot allow the mistake to be continued on technical grounds;
- (x) The contention of the Generators that the Commission cannot regulate the tariff for sale of electricity by the Generator to the Distribution Licensee for supply, is obviously not tenable, in view of Section 62(1)(a) of the Electricity Act, 2003. The other contention of the Generators that, if at all any action is required, during the retail tariff exercise, a portion of the claim of the Distribution Licensee be disallowed as 'pass through' to the consumers, is also not tenable.
- (c) For the above reasons, we hold that the generic Tariff Order dated 11.12.2009, issued by this Commission, is applicable to the PPAs in question and the Commission can issue directions to the parties concerned to rectify the mistake, even after communicating the

Commission's approval of the PPAs. Therefore, we answer Issue No.(2) in the affirmative.

12) **ISSUE No.(3)** : *What Order?*

For the foregoing reasons, we pass the following :

ORDER

- (1) The Power Purchase Agreements (PPAs) in question shall be governed by the tariff as determined in the generic Tariff Order dated 11.12.2009 of this Commission, from the respective dates of commissioning of the Projects, and appropriate modifications to the relevant Articles of the PPAs, in respect of the tariff payable, shall be carried out by the parties and they shall obtain approval of this Commission for the same;
- (2) The parties to the PPAs shall adjust their rights and liabilities, as per the terms of the modified PPAs, within 2 (two) months from the date of this Order, without any claim of interest on arrears, if any;
- (3) This Order shall be kept in Suo Motu Case No.4/2015 and a copies of it be placed in Suo Motu Case Nos.5/2015 and 8/2015,

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER