

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

**Dated : 31<sup>st</sup> March, 2016**

**Present:**

- |                                 |          |
|---------------------------------|----------|
| 1. Sri M.K. Shankaralinge Gowda | Chairman |
| 2. Sri H.D. Arun Kumar          | Member   |
| 3. Sri D.B. Manival Raju        | Member   |

**Suo Motu Case No.1 / 2015**

**First Party / Generator :** Savita Oil Technologies Ltd.,  
66/67, Nariman Bhavan,  
Nariman Point,  
MUMBAI - 400021  
*[Represented by Navayana Law Offices, Advocates]*

**Second Party /: Distribution Licensee** Chamundershwari Electricity Supply Corporation Limited,  
No.29, Kaveri Grameena Bank Road,  
Vijayanagar, 2<sup>nd</sup> Stage,  
Mysuru – 570 019. ..  
*[Represented by Thiru & Thiru Chambers, Advocates]*

**Suo Motu Case No.2 / 2015**

**First Party Generator :** Savita Oil Technologies Ltd.,  
66/67, Nariman Bhavan,  
Nariman Point,  
MUMBAI - 400021  
*[Represented by Navayana Law Offices, Advocates]*

**Second Party: Distribution Licensee** Chamundershwari Electricity Supply Corporation Limited,  
No.29, Kaveri Grameena Bank Road,  
Vijayanagar, 2<sup>nd</sup> Stage,  
Mysuru – 570 019. ..  
*[Represented by Thiru & Thiru Chambers, Advocates]*

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**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 two 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 generating plant of the Generator should not be reduced from Rs.3.70 (Rupees three and paise seventy only) per Unit as mentioned in the Power Purchase Agreements (PPAs) to Rs.3.40 (Rupees three and paise forty only) per Unit, for the reasons stated in the said Notices.
- 3) The Commission noted that these two Projects were commissioned on 29.9.2009 and therefore they should be governed by the generic Tariff Order dated 18.1.2005 and not by the generic Tariff Order dated 11.12.2009, pertaining to the Renewable Sources of Energy. Therefore, the Commission issued the said Notices to both the parties. The relevant portion of the Notice issued in Suo Motu Case No.1/2015 reads thus :

*“Section 62(6) of the Electricity Act, 2003 provides that the 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 parameters for applicability of the tariff determined in such Tariff Orders to different types of Renewable Energy Projects. The tariff determined in such orders are made 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.*

*Whereas M/s Savitha Oil Technologies Limited, had achieved Commercial Operation of its plant of 1.5 MW capacity at Kopalahalli Village, on 29.09.2009 (CoD) and*

*entered into PPA dated 17.03.2010 with CESC, for sale of power at Rs. 3.70 per Unit. As the plant was established within the Control Period of 10.06.2004 to 31.12.2009 the tariff applicable would be Rs. 3.40 per Unit, as per the generic Tariff Order dated 18.01.2005.*

*Both parties submitted the PPA to the Commission for approval, giving an impression that the generating plant is yet to be commissioned, without specifically disclosing that the project was already commissioned at the time of execution of the PPA, thereby, the Commission was misled due to non-disclosure of relevant facts.*

*The Commission had informed, vide letter dated 27.4.2010, regarding approval of the PPA. A clarification was also issued in the letter that in cases where CoD of the Project had been achieved and energy was pumped into the grid prior to 1.1.2010 and PPAs were submitted to the Commission on or after 1.1.2010, in such cases the tariff applicability for projects shall be as follows:*

*(a) Old tariff as determined in Commission's order dated 18.1.2005 is applicable from the date of achieving CoD up to the date of submission of the PPA to the Commission.*

*(b) The new tariff as determined in the Commission's order dated 11.12.2009 is applicable only from the date of submission of the PPA to the Commission, provided the PPA is submitted to the Commission on or after 1.1.2010.*

*However, such clarification was issued without analysis of relevant facts to ascertain the applicability of the proper*

*generic tariff to a generating plant. The entitlement to a particular tariff is governed by the provisions of the Electricity Act, 2003 and the Regulations framed thereunder. The generating plant is not entitled to charge higher tariff than the tariff for which it is entitled to under the relevant Tariff Order.*

*From the above facts and circumstances, the Commission finds that the previous approval of the PPA with tariff of Rs.3.70 per Unit for the delivered energy was issued, without proper analysis of the facts and law. Therefore, the Commission deems it appropriate to modify the tariff approved under the PPA in accordance with law.*

*The Commission, has therefore, decided to initiate Suo motu proceedings in the matter.*

*Hence, the following*

*Notice :*

*Both parties are directed to appear before the Commission on 05.11.2015 in the Court Hall of the Commission at 3 p.m and submit their written replies as to why the tariff for the generating plant should not be fixed at Rs.3.40 per Unit from the date of commissioning of the project and further action should not be taken to recover the excess tariff paid.*

*Issued under my hand and seal of the Commission, this the 6<sup>th</sup> day of October, 2015."*

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The Notice issued in Suo Motu Case No.2/2015 also contains the same averments, except the location of the Project.

- 4) The Generator and the Distribution License appeared through their counsel and filed their statements.
- 5) The contention raised by the Generator 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 the 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.
  - (c) There was delay on the part of the Distribution Licensee in finalizing and executing the PPAs in question, though the Projects were commissioned on 29.9.2008 and started injecting the power into the State Grid from that date. (But, according to the Distribution Licensee, the date of commissioning of the two Projects is on 29.9.2009.)

- (d) The Distribution Licensee, by its letter dated 13.1.2010 (ANNEXURE – R4), communicated to the Generator, that the PPAs have been prepared and requested to verify the terms of the draft PPAs, for finalization.
- (e) Immediately thereafter, the Generator noticed that the draft PPA contained term that the tariff would be paid from the date of the PPA, for which the Generator objected, as it had injected the energy into the State Grid from the date of commissioning of the Projects.
- (f) The Distribution Licensee informed that this Commission had issued the generic Tariff Order dated 11.12.2009 and as per that Order, the term regarding 'Monthly Energy Charges Payable' had been drafted in the PPAs and that it would obtain clarification from the Commission regarding payment for the energy injected into the State Grid from the date of commissioning to the date of the PPA.
- (g) That this Commission, by its letter dated 29.4.2010, clarified that, in cases where the Commissioning of the Project had been achieved and energy was being pumped into the Grid prior to 1.1.2010 and the PPAs were submitted to the Commission on or after 1.1.2010, the applicability of the tariff was as follows :

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*“(a) Old tariff as determined in Commission's order dated 18.1.2005 is applicable from the date of achieving CoD up to the date of submission of the PPA to the Commission.*

*(b) The new tariff as determined in the Commission's order dated 11.12.2009 is applicable only from the date of submission of the PPA to the Commission, provided the PPA is submitted to the Commission on or after 1.1.2010.”*

- (h) The said clarification has been merged with the subsequent Tariff Orders, which have become final, and any change in the tariff structure of the PPAs from a retrospective date would mean, re-visiting and reviewing of the Tariff Orders of the Commission from the year 2010 till date.
- (j) The clarifications issued by the Commission has become final and it cannot be re-opened.
- (k) The Commission may regulate the component of tariff that is to be allowed as 'pass through' to the consumers, but the Commission cannot regulate the price at which the Generator sells the energy to the licensee.
- 6) The contentions of the Distribution Licensee may be stated as follows:
  - (a) Being a Government Company, it is obliged to follow the procedure laid down for finalizing the terms of the PPA, and it has to pass through



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bureaucratic procedures and therefore there was an inevitable delay in finalizing the PPAs.

(b) The generic Tariff Order dated 11.12.2009 stated as follows :

*“The tariff as determined by the Commission in the present order shall be applicable to all the Power Purchase Agreements submitted to the Commission for approval on or after 01.0.12010, for a period of 10 years from the date of signing of PPA.”*

Therefore, the Distribution Licensee entered into the PPAs in question with the tariff of Rs.3.70 per Unit, being under the impression that the tariff determined under the Commission's generic Tariff Order dated 11.12.2009 would apply.

(c) It is further submitted that, as pointed out by the Commission, the Generator was not entitled to Rs.3.70 per Unit, but was entitled to only Rs.3.40 per Unit, in view of the date of commissioning of the Projects. Therefore, it is submitted that the Tariff may be reduced as proposed by the Commission.

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

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- (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 18.1.2005?
  - (2) Whether the Commission can reduce the tariff already agreed in the PPAs and approved by the Commission?
  - (3) What Order?
- 8) After considering the submissions of the parties and their respective pleadings, our findings on the above issues are as follows :
- 9) **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 18.1.2005?*
- (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.

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- (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 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. In the present cases, in respect of all the PPAs entered into by the Generator with the Distribution Licensee, the tariff agreed is Rs.3.70 (Rupees three and paise seventy only) per Unit, without any escalation, for the Delivered Energy for a period of ten years from the date of the PPA.

(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) In the generic Tariff Order dated 18.1.2005, at paragraph-8(vii), it is specifically stated that, the Commission is limiting the determination of tariff to new Projects only. The various Articles of the approved Standard PPA would show that the said terms of the Standard PPA would be applicable to the Projects proposed to be established, but not to the

Projects already existing and commissioned. At Paragraph-12 of the generic Tariff Order, 2009, while dealing with the scope of the said Order, it is held that, "*The tariff determined in this Order is applicable to all the new Renewable Energy Projects which are entering into Power Purchase Agreements on or after 1.1.2010.*" Therefore, it could be said that the tariff determined in the generic Tariff Order, 2005 would be applicable to all the PPAs entered into in respect of new Projects to be established on or after 10.6.2004 till 31.12.2009, and the tariff determined in the generic Tariff Order, 2009 would be applicable to all the PPAs entered into in respect of new Projects to be established on or after 1.1.2010 till 31.12.2014. However, by its subsequent generic Tariff Order dated 10.10.2013 relating to only Wind Power Projects, the Commission has curtailed the Control Period (1.10.2010 to 31.12.2014) and determined new tariff, applicable to the PPAs entered into on or after 10.10.2013 till 31.3.2018.

- (f) The generic Tariff Orders relating to Renewable Sources of Energy Projects would show that the Commission has taken into consideration the cost of various components that are necessary while establishing a Renewable Power Project, during the Control Period of five years, for determination of tariff payable to a particular Project. Therefore, the Project Cost incurred will be the basis for the determination of tariff for the energy generated from a Project. Regulations are framed to assess the various

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- financial and operational parameters of a Project for enabling to determine the tariff applicable to that Project.
- (g) For various reasons, the Project Cost of a Project may vary during different Control Periods. From the above-noted provisions of law and the generic Tariff Orders issued by this Commission relating to Renewable Sources of Energy, the tariff as determined by this Commission for a particular Project is dependent on the Project Cost incurred during the relevant Control Period. Having regard to this principle, the generic Tariff Orders have laid down the criteria for the applicability of the tariff determined for the Projects to be established during the said Control Period. The generic Tariff Orders dated 18.1.2005 and 11.12.2009 specifically state that the tariff determined under these Orders are applicable for the new Projects to be established subsequent to the dates mentioned in the said Orders.
- (h) In the present cases, the Wind Power Projects have been commissioned either on 29.9.2008 or 29.9.2009, as per the respective versions of the parties. The generic Tariff Order dated 18.1.2005 was made applicable for the Projects, in respect of which the PPAs were submitted to the Commission for approval on after 10.6.2004, and the generic Tariff Order dated 11.12.2009 was made applicable for the Projects, in respect of which the PPAs were submitted to the Commission for approval on after 1.1.2010. A Project, which had been commissioned on or before

29.9.2009, cannot be treated as a 'new Project' for the purpose of applicability of the tariff determined in the generic Tariff Order dated 11.12.2009 of the Commission, which applies to the Projects to be established on or after 1.1.2010. For the applicability of the generic Tariff Order dated 11.12.2009, the PPAs should be in respect of a new Project and it should be submitted to the Commission for approval on or after 1.1.2010. As already noted, in the present cases, though the Projects were not new Projects, the tariff determined under the generic Tariff Order dated 11.12.2009 was made applicable, merely on the ground that the PPAs were submitted on or after 1.1.2010, for approval of the Commission. For the above reasons, the Commission is of the considered view that the Generator's Projects should have been governed by the tariff determined in the generic Tariff Order dated 18.1.2005. We, therefore, answer Issue No.(1) accordingly.

- 10) **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

clarification issued at the time of communicating the approval of the PPAs.

(b) After careful consideration of the contentions raised by the learned counsel for the Generator, 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 generic Tariff Orders of 2005 and 2009 and the criteria for their applicability to different Renewable Energy Projects have been laid down, after following the due procedure and hearing the stakeholders and consumers in the matter;
- (iv) 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;

- (v) The Commission should also verify the validity of the claim for a particular tariff, before granting approval to the PPA;
- (vi) In the present cases, it appears, before granting the approval, 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, 2009 would apply to the PPAs submitted for approval on or after 1.1.2010, irrespective of the date of commissioning of the Projects;
- (vii) 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;
- (viii) 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;

- (ix) 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;
- (x) The conditions regarding the applicability of the generic Tariff Order, 2009, stated therein, 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 term of the PPAs and the Commission cannot allow the mistake to be continued on technical grounds;
- (xi) The clarification previously issued by the Commission, as pointed out by the learned counsel for the Generators, is not on any better footing. Hence, that does not impede the Commission from correcting its earlier mistake. the PPA;
- (xii) The contention of the Generator 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 contentions of the Generator are also not maintainable.

- (l) For the above reasons, we hold that the generic Tariff Order dated 18.1.2005, 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 and issuing the clarification. Therefore, we answer Issue No.(2) in the affirmative.

- 11) **ISSUE No.(4)** : *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 18.1.2005 of this Commission, from the dates of commissioning of the Projects. The parties shall ascertain the correct date of commissioning of the Projects;

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- (2) The relevant terms and conditions of the PPAs in question shall be suitably modified, keeping in view the terms of the Standard PPA for Wind Power Projects approved by this Commission by the Order dated 18.8.2005;
- (3) The parties to the PPAs shall adjust their rights and liabilities, as per the terms of the modified PPAs to be entered into, within 2 (two) months from the date of this Order, without any claim of interest on arrears, if any;
- (4) This Order shall be kept in Suo Motu Case No.1/2015 and a copy of it be placed in Suo Motu Case No.2/2015.

Sd/-

(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER