

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

Dated : 10th October, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

RP No. 5/2016

BETWEEN:

Gulbarga Electricity Supply Company Limited,
Station Road,
Kalaburagi – 585 101.

.. **PETITIONER**

[Represented by Induslaw, Advocates]

AND:

Shah Distributors,
37, Shah Mansion, 1st Floor,
Opposite Clock Tower,
Station Road,
Davanagere – 577 001.

.. **RESPONDENT**

[Represented by Shri Deepak Sarangmath, Advocate]

RP No. 6/2016

BETWEEN:

Gulbarga Electricity Supply Company Limited,
Station Road,
Kalaburagi – 585 101.

.. **PETITIONER**

[Represented by Induslaw, Advocates]

AND:

RP Nos.5/2016, 6/2016 and 7/2016.

Shah Distributors,
37, Shah Mansion, 1st Floor,
Opposite Clock Tower,
Station Road,
Davanagere – 577 001.

.. **RESPONDENT**

[Represented by Navayana Law Offices, Advocates]

RP No. 7/2016

BETWEEN:

Gulbarga Electricity Supply Company Limited,
Station Road,
Kalaburagi – 585 101.

.. **PETITIONER**

[Represented by Induslaw, Advocates]

AND:

Shah Distributors,
37, Shah Mansion, 1st Floor,
Opposite Clock Tower,
Station Road,
Davanagere – 577 001.

.. **RESPONDENT**

[Represented by Navayana Law Offices, Advocates]

- - - - -

COMMON ORDER

- 1) This Common Order is being passed in the above-mentioned Review Petitions, as they involve common questions of law and facts. These Review Petitions have been filed against the Common Order dated 31.3.2016 passed by this Commission in OP Nos.2/2015, 3/2015 and 4/2015, filed by the Respondents herein, insofar as it relates to allowing the payment for the energy delivered by the Respondents, from the dates of commissioning of

RP Nos.5/2016, 6/2016 and 7/2016.

the Wind Power Projects to the dates of the execution of the Power Purchase Agreements (PPAs).

- 2) The Review Petitioner in all the above Review Petitions is Gulbarga Electricity Supply Company Limited (GESCOM) and the Respondents therein are the generators of wind energy. The relevant facts and dates that are necessary for understanding the controversy involved in the said Original Petitions, are given below :

Sl.No.	Case No.	Capacity of Wind Power Generating Unit (in MW)	Date of Commissioning of the Project	Date of Execution of PPA	Date of Submission of PPA to the Commission for Approval	Date of Approval of PPA by the Commission	Date of filing of Petition before the Commission
1.	OP 2/2015	0.25	31.3.2009	18.6.2010	15.7.2010	9.8.2010	14.1.2015
2.	OP 3/2015	2.00	31.3.2009	18.6.2010	15.7.2010	9.8.2010	19.1.2015
3.	OP 4/2015	1.00	30.3.2009	28.4.2011	16.6.2011	4.7.2011	19.1.2015

- 3) The disputes involved in OP Nos.2/2015, 3/2015 and 4/2015 relate to the claim made by the generators for payment for the energy supplied by them to the GESCOM from the dates of commissioning of the Projects to the dates

RP Nos.5/2016, 6/2016 and 7/2016.

of execution of the PPAs, on the ground that the terms contained in Article 5 of the PPAs were not properly worded and that the said terms should have been as per the Standard PPA, approved in this Commission's Order dated 18.8.2005 (hereinafter referred to as the 'Standard PPA') and also on the principles stated under Article 70 of the Contract Act. The GESCOM had contended that, the claim was barred by limitation and that the principles stated in Section 70 of the Contract Act were not applicable and that the modifications to the terms of the PPAs were effected as per the generic Tariff Order dated 11.12.2009 of this Commission. Therefore, the GESCOM had requested to dismiss the Original Petitions.

- 4) On consideration of the rival contentions in the Original Petitions, this Commission, by its Common Order dated 31.3.2016, has held that the claim of the generators is barred by time and that the claim could not be sustained as per the principles stated under Section 70 of the Contract Act,
- 5) During the course of hearing of the Original Petitions, considering the undisputed dates of commissioning of the Projects, this Commission had specifically directed the learned counsel for the parties to submit their views as to which of the generic Tariff Orders of this Commission, viz., the generic Tariff Order of 2005 or the generic Tariff Order of 2009, is applicable to the Projects of the generators. The Commission had framed Issue No.3 in this regard, in its Common Order. The PPAs in question were executed with a tariff of `3.70 per unit as per the generic Tariff Order dated 11.12.2009. This

RP Nos.5/2016, 6/2016 and 7/2016.

Commission has held that, as the tariff applicable for these Projects was as per the generic Tariff Order dated 18.1.2005, the tariff payable to the generators for the wind energy delivered should have been `3.40 per unit, but not `3.70 per unit. The generators had contended that, the generic Tariff Order of 2009 was applicable and the tariff of `3.70 per unit mentioned in the PPAs was in order. The GESCOM did not find any fault with the tariff of `3.70 per unit mentioned in the PPAs executed by the generators with it.

6) However, from a detailed analysis of the facts of the case, this Commission came to the conclusion that, the PPAs in question should have been governed by the tariff of `3.40 per unit determined in the generic Tariff Order dated 18.1.2005, but not the tariff of `3.70 per unit determined in the generic Tariff Order dated 11.12.2009. The Commission has also held that, the tariff period and the duration of the PPAs should be as mentioned in the Standard PPA, but not as could be modified as per the generic Tariff Order dated 11.12.2009.

7) In view of the above findings, this Commission stated its conclusions at paragraphs-11(c) and 11(d) of its Order dated 31.3.2016, thus:

“(c) In view of our findings on Issue No.(3), we are of the considered opinion that the terms of the PPAs should be rectified suitably, by inserting the tariff payable as

per the generic Tariff Order, 2005 and fixing the Tariff Period and the term of the PPAs as ten years and twenty years, respectively, from the date of commissioning of each of the Projects, and by reckoning the eleventh year tariff from the date of commissioning of the respective Project, as may be determined by the Commission. Therefore, we are of the considered opinion that the terms of the PPAs should be rectified, accordingly.

- (d) *When once the terms of the PPAs are rectified as stated above, the cause of action for adjustment of the rights and liabilities of the parties, as per those terms, would arise. In that event, though the Petitioners are not entitled to claim compensation for the energy injected into the State Grid, from the date of commissioning of the Projects to the date of execution of the PPAs, on the grounds stated by them in the Petitions, in view of the directions given below for rectification of the terms of the PPAs, the Petitioners are to be allowed to receive the tariff for the quantum of energy injected into the State Grid, from the dates of commissioning of the Projects to the dates of execution of the PPAs."*

- 8) From the above conclusions reached, this Commission felt it necessary to allow the claim of the generators (Respondents herein) for payment of the tariff for the quantum of wind energy injected into the State Grid, from the dates of commissioning of the Projects to the dates of execution of the PPAs. The reason is obvious, inasmuch as the tariff payable was reduced from `3.70 per unit to `3.40 per unit, though the reduction of tariff was opposed by the generators, while at the same time, the GESCOM had also not requested for reduction of the tariff under the PPAs. Therefore, the Commission, at its

discretion, allowed the claim of the generators for payment for the energy injected during the period mentioned above, in an equitable manner. The grant of the said equitable relief is independent of the provisions contained in the law of limitation or the provisions contained in a Contract or a Quasi-Contract.

- 9) In support of its contentions in these Review Petitions, the Review Petitioner (GESCOM) has contended that, as per the generic Tariff Order dated 18.1.2005 applicable to the Wind Power Projects, the tariff payable is `3.40 per unit, without any escalation, for the first 10-year period from the year of commercial operation of the Projects. Therefore, the Review Petitioner has contended that, allowing the tariff from the date of commissioning of the Projects till the date of execution of the PPAs is not proper. The Review Petitioner has further contended that, the commercial operation of the Projects could take place from the respective dates of execution of the PPAs, as concluded by this Commission in paragraphs-11(b) of its Order dated 31.3.2016, which reads thus:

“(b) The phrases, ‘Commissioning of the Project’ and ‘Commercial Operation of the Project’ are not synonymous or interchangeable. The ‘Commissioning of the Project’ means synchronization / interconnection of the Project with the State Grid, enabling the Project to inject the power into the State Grid. ‘Commercial Operation’ means injection of the energy into the State Grid in pursuance of some commercial transactions, like PPAs with the Distribution Licensees or sale of power to third parties, by availing open access, etc. The date

of Commercial Operation may coincide with the date of commissioning of a Project, where the PPA is executed with the Distribution Licensee in respect of a Project to be established or on the commissioning of the Project. However, in the case of the existing Project, which has already achieved the commissioning of the Project, if the PPA is executed at a later date, the date of commissioning of the Project would be different from the date of Commercial Operation of the Project."

Therefore, according to the Review Petitioner (GESCOM), granting of the relief for the energy injected, from the dates of Commissioning of the Projects to the dates of execution of the PPAs, could not have been allowed.

- 10) On the other hand, the generators in the above Review Petitions have contended that, the relief allowed is quite justified and there is no error under the circumstances of the case.
- 11) We have heard the learned counsel for the parties in the present Review Petitions.
- 12) As already noted above, the relief granted by this Commission for payment towards the energy injected, from the dates of commissioning of the Projects to the dates of execution of the PPAs, is exercised in an equitable manner, on the fundamental principles of equity, justice and good conscience, as the Commission has reduced the tariff of `3.70 per unit, agreed to in the PPAs, to `3.40 per unit, for the energy supplied, even without there being a

RP Nos.5/2016, 6/2016 and 7/2016.

plea to that effect by the Review Petitioner (GESCOM). Therefore, we are of the considered opinion that, the contention now raised by the Review Petitioner (GESCOM) in these Review Petitions, is not sustainable in law. It may also be noted that, on the doctrine of Election, the Review Petitioner cannot retain relief of the reduction of tariff, which is in its favour, and oppose the relief of payment for the energy supplied prior to the dates of execution of the PPAs, which is not in its favour. For the above reasons, we find that, the Review Petitioner (GESCOM) has not made any valid ground for review of this Commission's Order dated 31.3.2016 in OP Nos.2/2015, 3/2015 and 4/2015. It may be noted that, the reasoning given in this Commission's Order dated 31.3.2017, for grant of the relief, makes it amply clear that, it is based on the equitable principles.

- 13) For the foregoing reasons, we pass the following:

ORDER

- (a) The Review Petitions are dismissed.
- (b) Office is directed to keep the original Order in RP No.5/2016 and copies, thereof, in RP Nos.6/2016 and 7/2016.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER