Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 02nd Dec, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member,

In The Matter Of

APPEAL NO.194 of 2010

Paschim Gujarat Vij Company Ltd.,
Laxminagar, Nana Mava Main Road,
Rajkot-360 004 … Appellant

Versus

1. **Gujarat Electricity Regulatory Commission,**
   1st Floor, Neptune Tower, Ashram Road,
   Ahmedabad-380 009
2. **The Kutch Salt & Allied Industries Ltd**
   Maitri Bhavan, Plot No.18, Sector-8,
   Gandhidham, Kutch-370 201
3. **Gujarat Energy Transmission Corporation Ltd**
   Sardar Patel Vidyut Bhavan,
   Race Course, Vadodara-390 007
4. **Gujarat Urja Vikas Nigam Ltd.,**
   Sardar Patel Vidyut Bhavan,
   Race Course, Vadodara-390 007 ….Respondent(s)

Counsel for Appellant(s): Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Sneha Venkataramani
Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran

Counsel for Respondent(s): Mr. C K Rai for R-2
Mr. Wajesh Shafiq
Mr. Mukesh Tripathi
Mr. Sudhansu Palo

APPEAL NO.2 of 2011

Paschim Gujarat Vij Company Ltd.,
Laxminagar, Nana Mava Main Road,
Rajkot-360 004

… Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission,**
   1st Floor, Neptune Tower, Ashram Road,
   Ahmedabad-380 009
2. **Ruchi Soya Industries Ltd.,**
   301, Mahakosh House,
   5/7, South Tukoganj,
   Indore, Madhya Pradesh-451 001
3. **Gujarat Energy Transmission Corporation Ltd**
   Sardar Patel Vidyut Bhavan,
   Race Course, Vadodara-390 007

….Respondent(s)

Counsel for Appellant(s): Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Sneha Venkataramani
Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran

Counsel for Respondent(s): Mr. Sanjay Sen (R-2)
Ms. Surabhi Sharma
Ms. Shikha Ohri

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Appeal No.194 of 2010 and 2 of 2011 are being disposed of through this common judgement since the issues raised in both the Appeals are the same.

2. Let us now see the facts of these Appeals one by one.

3. In Appeal No.194 of 2010, Paschim Gujarat Vij Company Ltd., Rajkot is the Appellant. This Appeal has been filed as against the impugned order of Gujarat Electricity Regulatory Commission (State Commission) dated 23.8.2010. In this order, the State Commission directed the Appellant to allow set off for the captive generation by the 2nd Respondent Kutch Salt & Allied Industries Limited against the energy supplied effective from the date of the commissioning of the Wind Turbine Generator instead of the date of the signing of the wheeling agreement with the Appellant by Kutch Salt & Allied Industries Limited (R-2). The relevant facts in this case are as follows:

(a) The Appellant is the distribution licensee in the area of West Gujarat. Gujarat Electricity Regulatory Commission is the 1st respondent. The Kutch Salt & Allied Industries Limited the 2nd Respondent, is a manufacturer and exporter of industrial grade salt and marine gypsum. It was permitted to set up three Wind Turbine Generators of 1.5 MW each. Gujarat Energy Transmission Corporation Ltd (GETCO) the 3rd Respondent is a transmission licensee. The 4th Respondent is the Gujarat Urja Vikas Nigam Ltd (GUVNL) is the Trading Licensee. It purchases electricity in bulk from the generating company and supplies to the distribution companies including the Appellant.

(b) The Kutch Salt & Allied Industries Ltd (R-2) had installed three Wind Turbine Generators of 1.5 MW each for its own use. These Wind Turbine Generators were commissioned on 1.10.2009. For the purpose of wheeling of power generated from these Wind Turbine Generators to its industrial units, the Kutch Salt & Allied Industries Ltd (R-2) executed a Wheeling Agreement with the Appellant on 24.12.2009. As per Clause 6 of this agreement the set off of wind energy would be given from the date of commissioning

of the Wind Turbine Generators or the date of signing of Wheeling Agreement whichever is later.

(c) In this case though the Wind Turbine Generators was commissioned on 1.10.2009, the Wheeling Agreement was entered into and signed only on 24.12.2009. The Kutch Salt & Allied Industries Ltd (R-2) submitted invoices along with a forwarding letter dated 13.2.2010 for the energy injected in to the Appellant's grid from 1.10.2009 i.e. from the date of commissioning of the plant. The Appellant, through its reply dated 15.3.2010 rejected the request of set off of units generated from the date of commissioning to the period prior to execution of Agreement on the strength of the clause 6 of the Agreement which provides that the R-2 is entitled for set off only from the date of execution of the agreement which is a later date i.e. from 24.12.2009.

(d) Aggrieved by this rejection, Kutch Salt & Allied Industries Ltd (R-2) filed a petition before the State Commission claiming set off against the energy injected in to the grid from the date of commissioning of the Wind Turbine Generators i.e. from 01.10.2009.

(e) The State Commission, after hearing both the parties passed the impugned order dated 23.8.2010 holding

that clause 6 of the agreement dated 24.12.2009 providing for the set off of the energy from commissioning of the plant or from the date of the agreement whichever is later, is in violation of the tariff order of the State Commission dated 30.1.2010. Consequently, the State Commission directed the Appellant to give set off to Kutch Salt & Allied Industries Ltd (R-2) from the date of the commissioning of the Wind Turbine Generators i.e. from 1.10.2009.

(f) Aggrieved by this impugned order, dated 23.8.2010, the Appellant has filed this Appeal in Appeal No.194/2010.

4. Let us now see the facts in Appeal No.2 of 2011. In this Appeal, Paschim Gujarat Vij Company Ltd is the Appellant. This Appeal has been filed by the Appellant as against the order dated 8.11.2010 passed by the State Commission directing the Appellant to allow set off of for the captive generation by Ruchi Soya Industries Limited (R-2) from the date of the commissioning of the plant.

(a) The Gujarat Electricity Regulatory Commission is the 1st Respondent. The 2nd Respondent Ruchi Soya Industries is a manufacturer of edible oil and soya foods. It was permitted to set up one Wind Turbine

Generator of 1.5 MW in Rajkot. The Gujarat Energy Transmission Corporation Ltd (Transmission Company) is the 3rd Respondent.

(b) Ruchi Soya Industries Ltd (R-2) commissioned 1.5 MW Wind Turbine Generator in Rajkot on 1.10.2009 for the purpose of wheeling of power to its manufacturing units in Gujarat.

(c) The Ruchi Soya Industries Ltd (R-2) executed a Wheeling Agreement with the Appellant on 13.1.2010. As per the agreement, the set off of wind energy would be given either from the date of commissioning or from the date of signing of the Agreement whichever is later. In this case, 13.1.2010 is the date of Agreement. 1.10.2009 is the date of commissioning of the Wind Turbine Generators. Accordingly the Appellant allowed setoff from 13.1.2010 being the later date.

(d) The State Commission earlier by the order dated 30.1.2010 determined the tariff for procurement of power by the distribution licensees from Wind Turbine Generators. It provided that the Wind Energy Generators shall be eligible to get set off against energy generated by their Wind Turbine Generators. Ruchi Soya Industries Limited (R-2) raised invoices

from the period of commissioning of the plant but the Appellant sent reply to Ruchi Soya Industries Limited (R-2) indicating the clause 6 of the agreement and informing that the Appellant would be liable to pay for the electricity supplied only from the date of the Agreement.

(e) Aggrieved over this, the Ruchi Soya Industries Limted (R-2) filed a petition before the State Commission on 11.5.2010 claiming for the set-off of the wheeled energy from the date of commissioning of the plant.

(f) The State Commission, after hearing both the parties by the impugned order dated 8.11.2010 decided that since clause 6 of the agreement dated 13.1.2010, is in violation of the earlier tariff order passed by the Commission dated 30.1.2010, the said clause is invalid and consequently, it directed the Appellant to give set off to Ruchi Soya Industries Limited (R-2) from the date of the commissioning of the Wind Turbine Generators i.e. from 01.10.2009 and directed both the parties to amend the Agreement.

(g) Aggrieved over this order dated 8.11.2010, the Appellant has filed the present appeal in Appeal No.2 of 2011.

5. The Learned Counsel for the Appellant in both the Appeals would make the following submissions for assailing the impugned orders dated 23.8.2010 and 8.11.2010:

(a) The Wheeling Agreements between the Appellant and the Kutch Salt and Ruchi Soya (R-2) in these Appeals specifically provided for set off of energy injected into the grid from the date of commissioning of the plant or the date of execution of the agreement whichever is later. In fact, both the Respondents had approached the Appellant for the execution of the Wheeling Agreement only after the commissioning of the Wind Turbine Generators. In both these cases Wind Turbine Generators were commissioned on 1.10.2009 itself. Since the Wheeling Agreements were executed on a later date which is different from the date of commissioning of the plant, the Respondents Kutch Salt and Ruchi Soya (R-2) agreed to the term that they are entitled to set off for electricity generated only from the date of agreement namely 24.12.2009 and 13.1.2010 respectively as per clause 6 of the agreement. The Appellant did not take any undue advantage of its position and the wheeling agreements were executed by the Respondents not under the coercion or duress.

(b) Once an Agreement has been executed, the same should be given effect to. The parties should not be allowed to go back from the solemn Agreement entered into between the parties. The Kutch Salt and Ruchi Soya (R-2) had commissioned the plant and injected the electricity into the Grid without any intimation to the Appellant. They did not approach the Appellant till nearly three months after commissioning of their plants. The Appellant had no knowledge over the injection of electricity during the intervening period. Therefore, the State Commission cannot grant set off or payment for such electricity generated for the earlier period ignoring the relevant clause of the agreement.

(c) Clauses 2 and 3.3 of the agreements do not entitle the granting of set off electricity from the date of commissioning. Clause 2 refers to the duration of the agreement and not to the period of wheeling of energy or otherwise. Similarly, clause 3.3 provides for wheeling of energy for respective months as per the wheeling and transmission agreements. Clause 6 clearly provides for set off either from the date of commissioning or date of execution of the agreement whichever is later. Therefore, clause 2 and 3.3 cannot

be interpreted in a manner which completely contradicts the clear wordings of clause 6.

(d) The basic principle of law is that substantive rights need to be applied prospectively and not retrospectively. In other words, substantive rights can be vested only with prospective effect especially when there is a clear provision for the same.

(e) The reliance on the tariff order dated 30.1.2010 passed by the State Commission is erroneous. In that order, the State Commission only determined the tariff terms and conditions for banking and wheeling of energy. This order did not deal with the date on which the agreements were entered into. Therefore, such order cannot give retrospective effect to the agreement.

(f) The State Commission in the impugned orders has merely stated that the agreement is contrary to the provisions contained in the Act and that therefore, it needs to be given retrospective effect. The State Commission has not specified as to which provision of the Act has been violated by the Agreement. As a matter of fact, there is no provision in the Act dealing with the date of applicability or wheeling of banking provision. Hence, the impugned orders are liable to be set aside.

6. In reply to the above grounds urged by the Appellant, Learned Counsel for the Respondents Kutch Salt & Allied Industries Ltd and Ruchi Soya Industries in both the Appeals, would make the following submissions:

(a) The State Commission by the order dated 30.1.2010, determined the tariff for procurement of wind power by distribution licensees from wind energy generators. This order was the culmination of an elaborate consultation process after considering the suggestions received from various stake holders. Thus the State Commission adopted a single part generic tariff arrived on cost plus basis. If the clause 6 of the wheeling agreements in question is given effect to, it will restrict the rights of R-2 conferred by the tariff order to recover the tariff/expense and cost. This tariff order dated 30.1.2010 was made effective from 1.8.2009. The Wind Turbine Generators of the Respondents were commissioned on 1.10.2009. Therefore, they are covered by the provision of the tariff order dated 30.1.2010.

(b) Clause 6 of the wheeling agreements has been added by the Appellant without prior approval of the State Commission, which had passed the statutory order dated 30.1.2010 allowing banking and setoff of energy

generated by Wind Turbine Generators. Appellant has illegally added this clause without obtaining the consent of the Respondent (2). In fact, the Appellant abused its dominant position and compelled the Respondent-2 to sign the unfair and unjust agreement.

(c) The delay in execution of wheeling agreement was occurred because of various procedures involved. Such delay could not be attributed to the Respondent-2 .

(d) From Clause 2 and 3.3 of the agreement, it is quite clear that the parties expressly agreed to give set off from the date of the commencement of the operation of Wind Turbine Generators. The energy wheeled will be set off against the monthly consumption of its recipients units.

(e) No wheeling agreement could be executed before obtaining the Commissioning certificate from the GDA. Hence the impugned orders are perfectly valid.

7. In the light of the above submissions, the following questions may arise for consideration:

(a) Whether the Wheeling Agreements entered into between the Appellant and Respondent-2 can be

given effect to retrospectively for the period prior to the date of Agreements?

(b) Whether the clause 6 of the Wheeling Agreements entered into between the parties providing for the set off energy either from the date of the commissioning of the plant or from the date of execution of the Agreement whichever was later is valid or not?

8. On these two questions, the Learned Counsel for the Appellant in both the Appeals would summarise his submissions projecting the grounds assailing the impugned order. The gist of the grounds are as follows:

(a) The Wheeling Agreements dated 24.12.2009 and 13.1.2010 respectively explicitly provided that the set off of the wind energy would be given from the date of commissioning or from the date of signing of the agreement whichever is later. Therefore, since the Agreement was signed on 24.12.2009 and on 13.1.2010 respectively, the 2nd Respondents in both the Appeals are not entitled to claim set-off from the date of commissioning namely 1.10.2009 but they are entitled only from the dates of Wheeling Agreements i.e. 24.12.2009 and 13.1.2010.

(b) Clause 6 of these Agreements does not violate the Tariff order No.1 dated 30.1.2010 passed by the State Commission. Therefore, the non allowance of the set-off of wind energy for the period i.e. date from the commissioning of Wind Turbine Generators till the date of signing of the Agreements is not illegal, unfair and against the objective of the Electricity Act, 2003. Therefore, the impugned orders are liable to be set-aside.

9. To substantiate the plea of the Appellant, the following judgements have been cited by the Learned Counsel for the Appellant:

(a) AIR 1951 SC 280 Bishundeo Narain & Anr V Seogeni Rai & Jagernath;

(b) Appeal No. 123 and 124 of 2007 dated 8.5.2008 judgment rendered by this Tribunal in Hyderabad Chemical Limited V Andhra Pradesh Electricity Regulatory Commission and Anr;

(c) AIR 2010 4 SCC 733 in Karam Kapadhi V Lal Chand Public Charitable Trust

(d) 2010 ELR (SC)697 Transmission Corporation of Andhra Pradesh V Sai Renewable Power Private Limited and Ors;

10. On the other hand, the Learned Counsel for the Respondent-2 in both the Appeals would cite the following authorities:

(a) 2010 ELR (APTEL)1059 Himachal Pradesh State Electricity Board V Uttarakhand Electricity Commission;

(b) 1995 5 SCC 482 LIC of India and Anr V Consumer Education and Research Centre and Ors;

(c) 1986 3 SCC 156 Central Inland Water Transport Corporation Ltd & Anr Vs Brojo Nath Ganguly and another;

(d) 2010 4 SCC 603 PTC India Limited Vs Central Electricity Commission;

(e) 2006 2 SCC 628 Shin Satellite Public Company Limited Vs Jain Studios Limited;

(f) Appeal No.90 etc of 2006 batch Ritwik Energy System Limited case;

11. We have heard the Learned Counsel for both the parties on these issues and given our thoughtful consideration to their submissions.

12. The main argument advanced by the Learned Counsel for the Appellant that the R-2 is not entitled to claim set off from the date of the commissioning of the plant is mainly on the strength of clause 6 of the Wheeling Agreements dated 24.12.2009 and 13.1.2010 in question, which provides for the set off from the date of Agreements.

13. The reply by the R-2 is that the clause 6 of the wheeling Agreement violates the provisions of wind tariff order in

order No.1 of 2010 passed on 30.1.2010 and so it cannot be acted upon.

14. Thus, the main concept would revolve over the impact of the clause 6 of the Wheeling Agreement. It cannot be debated that the Tariff order No.1 of 2010 dated 30.1.2010 was passed by the State Commission in accordance with the provisions of Section 61(h), 62 (1)(a) and 86 (1)(e) of the Electricity Act, 2003 and that in the said order, the State Commission determined the prices for procurement of wind power by distribution licensees and others in Gujarat from Wind Energy Generators.

15. Let us now quote the opening part of the said order dated 30.1.2010 which is as under:

"In the matter of: determination of the tariff <u>for procurement of power</u> by distribution licensees from wind energy generators and other commercial issues…."

In exercise of the powers conferred under section 61 (h), 62 (1) (a) and 86 (1) (e) of the Electricity Act, 2003 (36 of 2003) and all other powers enabling it in this behalf, the Gujarat Electricity Regulatory Commission (hereinafter referred to as "the commission") determines the price for procurement of power by distribution licensees and others in Gujarat from winder energy projects".

16. This order dated 30.1.2010 was the culmination of an elaborate consultative process by the State Commission

after considering the suggestions received from various stake holders. As provided under section 86 (1) (e) of the Act, the State Commission had adopted an approach of providing a preferential tariff to the renewable energy sources.

17. Let us now refer to the relevant observations made by the State Commission in the order dated 30.1.2010 relating to the preferential tariff. This is as follows:

"the Commission has examined various options and come to conclusion that in the context of wind energy generators, a single part, generic levelised tariff arrived on cost plus basis is the best option. Accordingly, the Commission decides to proceed with determination of tariff for procurement of power by distribution licensees from wind energy generators on the above principle".

18. Thus, the State Commission in the above order has adopted a single part, generic levelised tariff arrived on cost plus basis. This tariff determined by the State Commission through the order dated 30.1.2010, was based on normative parameters. These parameters were determined after considering various objections and suggestions made by the stake holders.

19. Now let us see clause 6 of the two Wheeling Agreements referred to in these two Appeals. Clause No.6 of the Wheeling Agreements dated 24.12.2009 reads as under:

"This Agreement is effective from the date of signing of the Agreement i.e. Date of Agreement 24th December, 2009. Set-off of wheeled energy generation from Wind Farm to Company will be given from the date of commissioning of Wind Farm Or date of signing of this Agreement whichever is later. Similarly, purchase of surplus energy by PGVCL after giving Set-Off will be considered from the date of commissioning of Wind Farm OR date of signing of this Agreement whichever is later".

20. Clause 6 of the Agreement dated 13.1.2010 is as follows:

"This Agreement is effective from the date of signing of the Agreement i.e. Date of Agreement 13th January, 2010. Set-off of wheeled energy generation from Wind Farm to Company will be given from the date of commissioning of Wind Farm Or date of signing of this Agreement whichever is later. Similarly, purchase of surplus energy by UGVCL after giving Set-Off will be considered from the date of commissioning of Wind Farm OR date of signing of this Agreement whichever is later".

21. The wordings in clause 6 of the both the Agreements are the same except the date of Agreement. There is no dispute in the fact that Gujarat Urja Vikas Nigam Limited (GUVNL) had issued a circular dated 23.9.2009 directing all the distribution companies to get the wheeling agreement executed before commissioning of the Wind Turbine Generators to avoid any grievance by the wind turbine generating owners and to give set off from the date of the commissioning. However, on the advise of the GUVNL through their letter dated 9.12.2009, the clause 6 of the

Agreement was added. It is not disputed that the Wind Turbine Generators plants were commissioned on 1.10.2000 itself, i.e. much earlier to the letter of the GUVNL dated 9.12.2009.

22. In the light of the above facts, we have to analyze whether clause 6 of the wheeling agreement would restrict the rights of the Respondent-2 to recover expenses incurred by them during the specified period as claimed by the Respondent-2. The State Commission, in itss order dated 30.1.2010 has determined the tariff for generation of electricity from wind energy projects at Rs.3.56 for its entire project life of 25 years. The State Commission has further clarified in this order that this tariff shall be applicable to wind energy projects which has been commissioned on and from 11.8.2009. Admittedly, as mentioned above, the plants of the Respondents in these cases have been commissioned on 1.10.2009. Therefore, R-2 is covered by the provisions of the tariff order dated 30.1.2010. In the same order, the State Commission held that banking is allowed to captive users due to infirm nature of the wind energy. It further provides flexibility to project developers to utilize the banked units within one month's time which should be sufficient.

23. Let us now quote the relevant observations made by the State Commission in the order dated 30.1.2010 which would indicate about the applicability of the order in the present cases. The relevant observations are as follows:

"tariff fixed in the order shall be applicable to all the wind energy generators commissioned on or after 11th August, 2009. The existing contracts and agreements between the wind energy generators (WEG's) and Distribution Licensees signed upto 10th August, 2009 will continue to remain in force as per the PPA signed by the parties.

The GUVNL/Discom may revise the PPA if already signed with the WEG's who have commissioned machines on or after 11th August, 2009 in accordance with the provisions of this order….".

24. In the present case, the wheeling agreements admittedly, were signed on 24.12.2009 and 13.1.2010 and the Wind Turbine Generators were commissioned on 1.10.2009 i.e. after 11th August, 2009. Therefore, as per the tariff order dated 30.1.2010, the Wind Turbine Generators of R-2 are covered. This aspect has been referred to in the impugned order dated 23.8.2010 in Appeal No.194 of 2010. The relevant portion of the impugned order in Appeal No.194 of 2010 is as follows:

"9.4……The Electricity Act, 2003 mandates promotion of renewable energy source. Hence, while promoting such generation the SERC's are mandated to decide the tariff for such generation and commercial mechanism for the same.

In the para 6.2 of the aforesaid order, the commission has decided that the Wind Turbine Generators set up and opting for captive use of energy generated by it, shall be eligible to get set up against the energy generated subject to certain conditions. In para 6.3 of the said order the commission decided that surplus energy available after set off of wheeled energy shall be deemed as the sale to the distribution licensee at 85% of the Applicable tariff. The aforesaid order came in to force from 11.8.2009. A cogent reading of the above provisions of the order reveals that the Commission has decided that Wind Turbine Generators's are eligible to get set off against the wheeled units and also eligible for receiving the rates decided by the Commission for the surplus energy, if any, available after the set off. The first para of clause No.6 of the Wheeling agreement restricts the petitioner from availing their rights during the period under dispute. The petitioner has challenged the above clause without the approval of the Commission under duress and unequal bargaining. It is an admitted fact that the petitioner has executed an agreement and objected the incorporation of clause No.6 on 23.12.2009 i.e. one day prior to date of signing of wheeling agreement.

9.5. *We also observe that first paragraph of clause No.6 of the wheeling agreement is restricting the rights of Wind Turbine Generators's against he assured benefits provided under Order No.1 of 2010 dated 30.1.2010 of the Commission which is in violation of the Order and spirit of the Act".*

25. As referred to in the impugned order, the right to recover tariff is a statutory right of the generating Company arising out of the statute i.e. Electricity Act, 2003 and Statutory Regulations framed there under. The term 'preferential

tariff' has been defined in Gujarat Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations 2010. The definition is as follows:

"The tariff fixed by the Commission for sale of energy from a generating station based on renewable energy sources to a distribution licensee".

26. The Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh V. Sai Renewable Power Private Limited & Ors 2010 ELR (SC) 697 while dealing with the powers of the Regulatory Commission held as under:

"*30. The Regulatory Commission is vested with very vast powers and functions. Section 11 of the Reform Act, 1998 declares fixation of Tariff as one of the Primary Functions of the Regulatory Commission in general more particularly, to the specified consumers under Section 26 of the Reform Act, 1998. While under the Electricity Act, 2003, Sections 61 and 62 read with Section 86 (1) (b) deals with fixation of tariffs in relation to production, distribution and sale of generated power to the end consumer. <u>These provisions clearly demonstrate that the Regulatory Commission is vested with the function for determining the Tariff for generation, supply, transmission and billing of electricity etc as well as regulation of electricity purchase and procurement process of distribution licensees, including price at which electricity shall be procured from the generating companies…."</u>*

27. In the light of the above ruling, we will now consider the relevant observation in the tariff order passed by the State Commission 30.1.2010. The following is the observation:

"4. Tariff Determination

……The Commission, therefore, determines the tariff for generation of electricity from wind energy projects at Rs.3.56 (constant) for its entire project life of 25 years i.e. from the first year to the twenty fifth year. *This tariff shall be applicable for purchase of wind energy by Distribution Licensees/other entities for complying with the renewable power purchase obligations specified in the regulate on by Commission from time to time. This tariff is applicable to wind energy projects which commission brand new wind energy plants and equipments from 11th August, 2009 onwards".*

28. At para 6.3 of the Order No.1 of 2010 dated 30.01.2010 the State Commission held as under:

"6.3 Purchase of Surplus Power from WEGs Wheeling Power for their captive use after adjustment of energy against consumption at the recipient unit(s)

Wind energy Generation is an infirm power and is not predictable, creating uncertainty for the distribution licensees regarding availability. ***It is also a fact that wind energy generation is available both during peak and off-peak hours. One month banking is allowed during which WEGs would be able to utilize the surplus power generated by them. At times, when they are unable to utilize the same within a month, it needs to be***

considered as sale to the Distribution licensee concerned.

……..

In view of the above facts, the Commission had proposed that any excess generation (over and above that set off against monthly consumption) would be treated as sale to the distribution licensee concerned at a rate of 85% of the tariff applicable to WEGs".

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29. Para 9 of the order No.1 states as under:

"9. Applicability of the Order

As already clarified in para 2.2 above, this order shall come into force from 11th August, 2009…."

30. As held by the State Commission in the tariff order, the right which has been given to R-2 to wheel power generated by its Wind Turbine Generators for its own use can not be taken away by way of clause 6 of the agreement which was incorporated by the Appellant in pursuance of the Circular issued by the GUVNL, which is merely a trading licensee of the State Commission created under 5th provisio to section 14 of the Electricity Act 2003.

31. All licensees are to be governed by the conditions laid down by the State Commission under Section 16 of the Act.

Under the Act, only the State Commission has power to direct the licensee in accordance with the Regulations framed by the State Commission. No licensee has got the power, what so ever, to direct another licensee. In other words, insertion of Clause 6 in the wheeling agreements as per direction issued by the GUVNL (R-4) through its circular dated 9.12.2009 can not be said to be in accordance with law. When such a right has been conferred by the State Commission by the tariff order dated 30.1.2010 to the Respondent-2, the said right cannot be restricted by introducing clause -6 in the agreement.

32. According to the prevailing practice, the Transmission agreement with the Transmission Company could only be executed after the receipt of the Commissioning certificate from the GEDA. Only then, the Wheeling Agreement with the Appellant could be executed. Thus, it is clear that the clause 6 of the agreement has been inserted to give effect to set off only from the date of signing of the agreement even though the Appellant knew well that there is no other system in existence through which the Wheeling Agreements could have been signed earlier i.e. before the date of the commissioning of the wind farm. So, the object of insertion of clause 6 in the Wheeling Agreements is with a view to restrict the statutory rights of R-2 to recover the

generation tariff conferred through the tariff order dated 30.1.2010 passed by the State Commission, which is not permissible under law.

33. As held by the State Commission in the impugned orders, from the perusal of the clause 2 and 3.3 of the Agreements, it is quite evident that the parties expressly agreed that from the date of commencement of the operation of the wind farm and from the date of injection to transmission company grid system, the energy wheeled will be set off against the monthly consumption recipient units of the R-2 located in the licensed area of distribution company. Therefore it is not now open for the Appellant to challenge the grant of set off from the date of the commissioning of the wind farm as ordered by the State Commission in the Tariff Order.

34. Under sub-sections (b)(c)(e) of Section 86 (1), of the Electricity Act, 2003, the State Commission has got the following obligations:

(a) Regulate electricity procurement process of distribution licensees;

(b) Facilitate intra-state transmission and wheeling of electricity and;

(c) Promote generation of electricity from renewable sources of energy by providing suitable measures for

connectivity with the grid and sale of electricity to any person;

35. In view of the above, no clause could be inserted in the agreements without the express approval of the State Commission. It can not be disputed that the Tariff order dated 30.1.2010 which was passed by the State Commission in compliance with the directives contained in Section 68 (h) and Section 86 (1) (e) of the Act, 2003 had not been challenged. It has attained finality. Therefore, the Appellant cannot under the pretext of insertion of clause 6 of the agreement, violate or vitiate the order dated 30.1.2010 as well as the Section 86 (1) (e) of the Electricity Act, 2003.

36. The State Commission in the impugned order held in favour of the R-2 with the intent to promote generation of electricity from renewable energy sources by permitting the wind energy generators to claim the set off. This order was passed in discharge of its functions under section 86 (1) (e) of the Act. This cannot be interpreted in a manner to obstruct or prevent the wind energy generators from claiming the set off. In other words, the Energy Wheeling Agreement has to be interpreted in accordance/conformity with the Electricity Act, 2003 and the tariff order passed by the State Commission.

37. Let us now go into the next question with reference to the validity of the clause 6 of the wheeling agreement.

38. According to the Appellant, clause-6 of the agreement does not violate the tariff order dated 30.1.2010 passed by the State Commission and as such it is valid in law. This submission in our view does not deserve acceptance.

39. Admittedly, the clause-6 of the wheeling agreement has been added by the Appellant without the prior consent of the State Commission. As indicated above, the above clause was added unilaterally by the Appellant on the basis of the circular issued by GUVNL a trading licensee who had no authority to dictate such terms in wheeling agreement. The statutory order had been passed on 30.1.2010. If any clause is added contrary to the said order, the Appellant must have approached the State Commission for the insertion of the said clause and obtained prior concurrence of the State Commission. Admittedly, this has not been done.

40. In the present case, the generating units were commissioned on 1.10.2009. The Commissioning certificate was obtained on 12.10.2009. Thereafter, the process for entering into a transmission agreement with GETCO (a transmission Company) started from 13.10.2009. The GETCO had taken its own time to make

certain changes at their own. After much deliberations, the GETCO called the R-2 to sign the agreement on 7.11.2009. Thereafter, the GETCO signed the transmission agreement on 5.12.2009. Only after execution of the said transmission agreement, the R-2 approached the Appellant for signing the wheeling agreement. Thereupon, the Appellant called upon the R-2 to sign the wheeling agreement. Accordingly, the wheeling agreements were signed on 23.12.2009 and 13.1.2010 respectively. Therefore the delay in execution of the wheeling agreements cannot be attributed to R-2 since the delay was due to the various procedures involved as mentioned above.

41. Admittedly, the Transmission Company after execution of the Transmission Agreements had recovered huge amounts from both the Respondents (R-2) in both the Appeals for the energy injected in the Grid from 1.10.2009 to 31.1.2010 even though the Transmission Agreement had been signed on 5.12.2009 and 15.12.2009 respectively. The injected energy by the R-2 in the Grid had been actually utilized by the Appellant by supplying to its consumers and recovering charges from such consumers at the Tariff rate determined by the State Commission.

42. Admittedly, the Appellant had neither allowed any set off against the wheeling energy nor paid any amount to R-2 for

the surplus energy available after the set off. Thus both the GETCO and the Appellant have been unduly enriched by denying the setoff to R-2 and at the same time claimed transmission charges and sold the energy generated by it to its own consumers. This action on the part of the Appellant is against the objective of the Act, 2003 which provides for promotion of renewable energy source and establishment of captive generating plants. Equally, this is against the statutory order passed on 30.1.2010.

43. According to the Appellant it was not aware of the intention of the R-2 to wheel the power or sell the power till the signing of the Agreements as this was not intimated to them. This contention cannot be countenanced since the R-2 had made its intention of wheeling energy clear, in its application for promotion to set up the wheeling farm to Gujarat Energy Development Agency (GEDA). That apart such intention of wheeling of R-2 also finds mention in permission letter of GEDA.

44. At this juncture, it would be appropriate to refer to clause 2 and 3.3 of the wheeling agreement. The same is as follows:

"2.0 Eligibility Period:

The Eligible Period of the Agreement will be 20 (twenty) years <u>from the date of commencement of operation by the Wind Farm or the life span thereof,</u> whichever is

earlier, for the purpose of availing the benefits on account of wheeling of power as more particularly described under this Agreement.

"3.3 Wheeling of Energy:

The company will be eligible to wheel the energy with DISCOM for the respective month ***from the date of its generation and injection into the GETCO Grid System*** *as per this Agreement and the Agreement with GETCO. GETCO shall transmit the energy to the boundary of DISCOM. The energy so wheeled (Net of Wheeling/Transmission loss/charge) shall be set off against monthly consumption of the company's recipient unit in DISCOM as per clause No.6 of this agreement".*

45. The reading of the above clauses would reveal that the clause-2 entitles R-2 to wheel the energy from the date of commencement of the Wind Turbine Generators. Similarly, clause 3.3 makes the R-2 eligible to wheel the energy generated and injected from the Wind Turbine Generators from the date of generation and to claim set off the wheeled units against the monthly consumption at its recipient units.

46. Thus, it is crystal clear that rights have been given to R-2 through their clauses to claim set off from the date of commencement of the Wind Turbine Generating plants. But on the basis of clause 6 of the Agreement, which was introduced without the approval of the State Commission and which restricts the right of R-2 to get set off, the Appellant has made a claim contrary to the provision of the Agreement as well as the Tariff Order. Therefore by

harmonious rule of interpretation, it becomes evident that the set off of the wheeled energy would be given from the date of the commissioning of the plants and not from the date of the Agreements as correctly held by the State Commission in the impugned orders.

47. We will now refer to the judgments cited by both the parties.

48. The Learned Counsel for the Appellant relied upon the following judgements:

(1) AIR 1951 SC 280 Bishundeo Narain & Anr V Seogeni Rai & Jagernath case

(2) 2010 ELR (SC)697 Transmission Corporation of Andhra Pradesh V Sai Renewable Power Private Limited and Ors case

(3) Appeal No.123, 124/2007 dated 8.5.2008 in Hyderabad Chemical Limited V Andhra Pradesh Elecricity Regulatory Commission and Anr case and

(4) the order passed by the State Commission in Petition No.1059 of 2010 dated 13.4.2011.

49. These decisions in our view are not applicable to the present case for the following reasons:

(a) AIR 1951 SC 280 Bishundeo Narain and Anr V Seogeni Rai Jagernath is a case wherein private dispute as to partition of a private property between

the family members was in question. Since a plea of undue influence was taken, the Hon'ble Supreme Court held that the parties must set forth particulars of undue influence in the pleadings and the case can be decided only on the basis of those particulars. Partition Agreement is not standard form of contract unlike the present case. In the present case, public element is involved and the issue of inequality of bargaining power is not raised. In short, the ratio of the said judgement would not apply to the present facts, as well as to the issues raised in the present case.

(b) The next case is the Transmission Corporation of Andhra Pradesh V Sai Renewable Power Private Lted & Ors 2010 ELR (sc) 697. In the above mentioned case, the agreement was not challenged. In fact, the parties accepted the terms of the agreement. In the present case, the agreement is challenged before the State Commission. That apart, in the above case, PPA was approved by the State Commission of Andhra Pradesh. In the present case, the approval of the State Commission with reference to the insertion of clause 6 which is contrary to the tariff order dated 30.1.2010 was not obtained. Therefore, this judgement would not apply to the present case.

(c) The next case is the judgement rendered in Appeal No.123 and 124 of 2007 dated 8.5.2008 in the case of Hyderabad Chemical Limited Vs APERC. In that case, the Tribunal held on facts that since there were no sale of energy and as such there cannot be purchase thereof. The State Commission considered two letters sent by the Appellant in that case in which it was mentioned that the energy that was pumped into the grid before execution of the agreement was not for sale but was to be supplied free of charge to the licensee as agreed by the parties. This will not apply to the present fact of the case since the State Commission in the order dated 30.1.2010, specifically referred to the element of deemed sale of excess generation. Therefore, this authority will not apply to the present case.

(d) The next decision is Hindustan Chemical Company case in petition No.1059 of 2010 dated 13.4.2011 passed by the State Commission. This was cited by the Appellant in order to show that the State Commission in a similar case refused to allow set off of the energy generated from the date of the commissioning by interpreting the same clause 6 of the wheeling agreement. We have gone through the said order passed by the State Commission. On going

through the said order, we find that this observation made by the State Commission is supporting the contention of the R-2. The relevant portion of the order is as follows:

> *"9.10 We also observe that 1st paragraph of clause No.6 of the wheeling agreement is restricting the right of Wind Turbine Generators from the assured benefits provided under order No.1 of 2010 dated 30.1.2010 of the Commission, which is in violation of the order and spirit of the Act. Hence, we decided that the 1st para of clause No.6 of the wheeling agreement is not inconsonance with the order No.1 of 2010. Hence actions taken based on clause No.6 needs to be set aside".*

The above observation would indicate that is a repetition of the findings of the State Commission in the impugned order dated 23.8.2010. Therefore, the contention of the Appellant that the State Commission has itself refused to allow set off of energy from the date of the commissioning in the order dated 13.4.2011 is not correct.

50. On the other hand, the authorities cited by the Learned Counsel for the R-2 would be relevant as they support the case of the R-2 and the findings rendered by the State Commission in both the impugned orders.

51. The first decision is 2010 ELR (APTEL) 1059 rendered by this Tribunal in Himachal Pradesh State Electricity Board Vs Uttarakhand Electricity Regulatory Commission. In this case, it has been held that the tariff order or regulations will prevail over any clause of agreement between the parties. The relevant portion of the findings is as follows:

> *"It is settled law that the method of determination of Tariff is provided under the Electricity Act, 2003 and Regulations will prevail over any Clause of agreement between the parties….."*

When clause 6 of the agreement restrict the statutory rights of the R-2 to recover the generation tariff as laid down in the tariff order dated 30.1.2010, then the tariff order will prevail over the clause 6 of the agreement. Therefore, the ratio laid down by this Tribunal with reference to the wind tariff would apply to the facts of the present case.

52. The next case is (1995) 5 SCC 482 LIC of India and Anr Vs Consumer Education & Research Centre and Others . In this case, it has been held by the Hon'ble Supreme Court that merely because the party who is weaker entered into a contract with unfair terms having no other option except to sign the contract, it cannot be said to be valid a contract or valid clause. The relevant portion of the observations made by the Hon'ble Supreme Court is as follows:

"47. It is, therefore, is settled law that if the contract or clause in the contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts, there would be no occasion for the weaker party to bargain or to assume to have equal bargaining power. He has either to accept only the services or goods in terms of the dotted line contracts. His option would be either to accept the unreasonable or unfair terms or forgo the service for ever. With a view to have the services of the goods, the parties entered into a contract with unreasonable or unfair terms contained herein and he would be left with no option to sign the contract".

53. On the similar line, one more judgement cited by the R-2 is 1986 (2) SCC 156 Central Inland Water Transport Corp Ltd & Anr Vs Brojo Nath Ganguly and Anr case. The relevant portion of the judgement is as under:

"91…….Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no code should encourage and would also not be in public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void……".

54. In the light of these ratio decided by the Hon'ble Supreme Court, if we look at clause 2 and 3.3 of the wheeling agreement, it is clear that the R-2 has to wheel the energy from the date of the commencement of the Wind Turbine Generating Plant and it is eligible to wheel the energy generated and injected into the Grid from the date of generation and to claim set off of the wheeled units against the monthly consumption at its recipient units. The aforesaid rights of the R-2 to claim set off cannot be restricted and denied by the Appellant on the basis of clause No.6 of the wheeling Agreement which was introduced unilaterally in to the Agreement on the basis of the circular issued by GUVNL, the incompetent authority without the approval of the State Commission particularly when this clause and circulars are against the spirit of the tariff order dated 30.1.2010.

55. On the issue of challenging only a part of the agreement while availing the benefits of the other clauses, the Learned Counsel for the Respondent have cited 2006 2 SCC 628 Shin Satellite Public Co Ltd Vs Jain Studios Ltd., case. In this case, it is held as follows:

"15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest

if otherwise it is not permissible. ***But it is well-settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.***

……..

17. In several cases, courts have held that partial invalidity in contract will not ispo facto make the whole contract void or unenforceable. ***Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts".***

56. So this decision would make it clear that whenever an agreement contains legal as well as illegal parts, the benefit should be given only to the legal part by striking out the other offending illegal part.

57. In the light of the above findings, we are of the opinion that the conclusion arrived at by the State Commission to the effect that the clause 6 of the agreement is not valid not only because it is violative of the tariff order but also against the objective of the Electricity act, 2003 and consequently, the same is liable to be set aside is perfectly justified.

58. Summary of Our Findings

a) As held by the State Commission in the tariff determination order dated 30.1.2010, the right which had been conferred to 2nd Respondents in

both the Appeals to wheel power generated by its Wind Turbine Generators for its own use can not be taken away by way of clause 6 of the agreement which was introduced by the Appellant at the instance of the GUVNL, which is merely a trading licensee of the State Commission. All licensees in the state are to be governed by the conditions laid down by the State Commission under Section 16 of the Act. Under the Act the State Commission alone has got the power to direct the licensee in accordance with the Regulations framed by the State Commission. No licensee has such power, what so ever, to direct another licensee. In other words, insertion of Clause 6 in the wheeling agreement the Circular issued by the GUVNL (R-4) dated 9.12.2009 is not in accordance with law. When such a right has been conferred by the State Commission through the tariff order dated 30.1.2010 to the Respondent-2, the said right cannot be taken away by introducing clause -6 in the agreement.

b) **According to the prevailing practice, the Transmission agreement with the Transmission Company could only be executed after the receipt of the Commissioning certificate from the GEDA.**

Only then, the Wheeling Agreement with the Appellant could be executed. Thus, it is clear that the clause 6 of the agreement has been inserted to give effect to set off only from the date of signing of the agreement even though the Appellant knew well that there is no other system in existence through which the wheeling agreement could have been signed earlier i.e. before the date of the commissioning of the wind farm. So, the object of insertion of clause 6 in the Wheeling Agreements is mainly to restrict the statutory rights of R-2 to recover the generation tariff conferred under the tariff order.

c) It can not be disputed that the tariff order dated 30.1.2010 was passed by the State Commission in compliance with the directives contained in Section 68 (h) and Section 86 (1) (e) of the Act, 2003. Therefore, the Appellant cannot under the pretext of insertion of clause 6 of the agreement, violate or vitiate the order dated 30.1.2010 as well as the Section 86 (1) (e) of the Electricity Act, 2003, that too without the approval of the State Commission.

d) According to the Appellant, clause-6 of the agreement does not violate the tariff order dated 30.1.2010 passed by the State Commission. This submission in our view does not deserve acceptance. Admittedly, the clause-6 of the wheeling agreement has been added by the Appellant without the prior consent of the State Commission. The above clause was added unilaterally by the Appellant on the basis of the circular issued by GUVNL a trading licensee who had no authority to dictate such terms in wheeling agreement. The statutory tariff order had been passed on 30.1.2010. If any clause is added contrary to the said order, the Appellant must have approached the Commission for the insertion of the said clause and obtained prior concurrence of the State Commission. Admittedly, this has not been done.

e) In the present case, the generating units were commissioned on 1.10.2009. The Commissioning certificate was obtained on 12.10.2009. Thereafter, the process for entering into a transmission agreement with GETCO a Transmission Company had started from 13.10.2009. The GETCO had taken its own time to make certain changes at

their own. After much deliberation, the GETCO called the R-2 to sign the agreement on 7.11.2009. Thereafter, the GETCO signed the transmission agreement on 5.12.2009. Only after execution of the said transmission agreement, the R-2 approached the Appellant for signing the wheeling agreement. Thereupon, the Appellant called upon the R-2 to sign the wheeling agreement. Accordingly, the wheeling agreements were signed on 23.12.2009 and 13.1.2010 respectively. Therefore the delay in execution of the wheeling agreement cannot be attributed to R-2 since the delay was due to the various procedures involved as mentioned above.

f) Admittedly, the Transmission Company after execution of the Transmission Agreements had recovered huge amounts from both the Respondents (R-2) in both the Appeals for the energy injected in the Grid from 1.10.2009 to 31.1.2010 even though the Transmission Agreement had been signed on 5.12.2009 and 15.12.2009 respectively. The injected energy by the R-2 in the Grid had been actually utilized by the Appellant by supplying to its consumers and recovering charges from such consumers at the

Tariff rate determined by the State Commission. Admittedly, the Appellant had neither allowed any set off against the wheeling energy nor paid any amount to R-2 for the surplus energy available after the set off. Thus both the GETCO and the Appellant have been unduly enriched by denying the setoff to R-2 and simultaneously claimed transmission charges after selling energy generated by it to its own consumers. This action on the part of the Appellant is against the objective of the Act, 2003 which provides for promotion of renewable energy source and establishment of captive generating plants. Equally, this is against the statutory order passed on 30.1.2010.

g) **According to the Appellant it was not aware of the intention of the R-2 to wheel the power or sell the power till the signing of the agreement as this was not intimated to them. This contention cannot be countenanced since the R-2 had made its intention very clear in its application for promotion to set up the wheeling farm to Gujarat Energy Development Agency (GEDA). That apart such intention of wheeling of R-2 also finds mention in permission letter of GEDA.**

59. In view of our findings referred to above, we find that there is no merit in this Appeal, especially when we do not find any infirmity in the conclusions arrived at by the State Commission.

60. Accordingly, the both the Appeals are dismissed. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 02nd Dec, 2011

REPORTABLE/NON-REPORTABALE