

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeals Nos. 17 & 18 of 2008

Dated: 22nd January, 2009

Present: **Hon'ble Mr. Justice M.Karpaga Vinayagam, Chairperson**
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

M/s. Rajapalayam Mills Ltd., (Appeal No. 17/2008)
III Floor, Sabari Complex,
24, Residency Road,
Bangalore-560025

And

M/s. Madras Cements Ltd. (Appeal No. 18/2008)
Rama Mandiram,
Rajapalayam,
Tamil Nadu-626117

... Appellants

Vs.

1. Karnataka Power Transmission Corporation Ltd.,
Cauvery Bhavan,
Bangalore-560009.
2. The Bangalore Electricity Supply Co. Ltd.,
Corporate Office, K.R. Circle,
Bangalore-560001.
3. State Power Procurement Coordination Committee,
Cauvery Bhavan,
Bangalore-560009.
4. Karnataka Electricity Regulatory Commission,
6th & 7th Floor, Mahalaxmi Chambers,
9/2, M.G.Road, Bangalore-560001

... Respondents

Counsel for the Appellant (s) : Mr. K.Swami &
Mrs. Prabha Swami

Counsel for the Respondent(s): Mr. M.G.Ramachandran,
Mr. Anand K. Ganesan &
Ms. Swapna Seshadri
for Resps.1 & 2

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

Since common issue is raised in these two Appeals, it would be appropriate to render common Judgment.

2. M/s. Rajapalayam Mills Ltd. is the Appellant in Appeal No. 17/08 and M/s. Madras Cements is the Appellant in Appeal No. 18/08.

3. M/s. Rajapalayam Mills Ltd. is engaged in the area of research and development of bio-technology products. Their unit is situated in Bangalore Rural District. M/s. Madras Cements Ltd. is engaged in the manufacturing and selling of cement. Its factory is located in Chitradurga District, Karnataka.

4. Both the Appellants set up their plants in their respective areas for the purpose of captive generation of power. On the Applications filed by the Appellants, the open access to the grid was granted to both of them. Then the Appellants requested to execute a wheeling and banking agreement with them for the purpose of wheeling the electricity generated in their captive power plants.

5. Since the Respondents refused to execute the said wheeling and banking agreements, both the Appellants filed separate Applications in OP No. 41/06 and OP No. 42/06 respectively before the State Commission seeking for the appropriate directions to the Respondents. Though by the order dated 13/12/07, the State Commission directed the Respondents to provide the wheeling as well as the banking facilities to the Appellants by executing the agreements, it has held that the Appellants are liable to make the payment of unscheduled interchange charge (UI charges), despite the fact that the Appellants were not liable for payment of the said UI charges, as per Clause 11(9) of the KERC Regulations, 2004.

6. Being aggrieved by the same, the present Appeals have been filed.

7. Shri K.Swami, the Learned Counsel for both the Appellants, assailing the Orders impugned dated 13/12/07 has made the following submission:

“Admittedly, the Appellants have only wind energy plants. The provision providing for the levying of UI charges is Regulation No. 11(9) of the Regulatory Commission’s regulations. The payment of UI charges as per the provision arises only when there is a drawal of power at variance

with the agreed schedule for drawal. This pre-supposes the existence of an agreed schedule. The agreed schedule for drawal will come only as part of the Intra-State ABT. Only then, the respective companies are liable to pay the UI charges. In other words, UI charges would not be made applicable to wind energy generating plants and this is applicable only to Intra-State ABT power projects. Admittedly, wind energy generating plants are outside the purview of ABT metering. The very same Commission earlier passed an order on 20/6/06 holding that Intra-State ABT would not be applicable to wind energy generators as well as open access consumers drawing power from wind generators. Having held the same, the Commission by the impugned order dated 13/12/07 ought not to have held that the Appellants are liable to pay the UI charges.”

8. The Learned Counsel for the Appellant would further point out that when these Appeals were pending, the State Commission passed another Order on 11/7/08 in the matter of wheeling and banking agreements holding that renewable energy projects are not liable to pay UI charges and the liability to pay UI charges would arise only from the date the ABT is made applicable, and since the ABT has not been made applicable till date to the plants in question, the Order impugned is liable to be set aside in respect of the payment of UI charges.

9. Shri M.G.Ramachandran, the Learned Counsel for the Respondents, KERC and KPTC, while justifying the Order impugned dated 13/12/07, would make the following reply:

“The contentions urged by the Counsel for the Appellants is quite misconceived since the State Commission has never asked the Appellants to pay the UI charges. It is true that the Appellant is not required to pay the UI charges, since the UI charges are applicable only in the Intra-State ABT. It is not disputed that the Appellant’s plants are only wind energy generating plants and they are not coming under the purview of ABT metering. As a matter of fact, the State Commission has not held that the UI charges are payable by the Appellant.

On the other hand, it has merely held that when the Appellants wish to have the facility of wheeling and banking agreement, then the Appellants are required to pay certain charges and such charges shall be the difference between the UI charges prevalent at the time of injection of power into the grid, and the UI charges at the time of drawal of power from the grid. This difference is only the measure of determining the banking charges and it does not amount to subjecting the Appellants to pay the UI charges. The order passed on 13/12/07 is perfectly in consonance with the Order passed earlier on 20/8/06. The two Orders referred to by the Appellant, dated 9/6/07 and 20/6/06 do not relieve the Appellants from paying the difference of UI charges while availing the wheeling and banking facility. Further, the Appellants cannot take support from the Order dated 11/07/08, which was passed during the pendency of these Appeals as it does not deal with the issue but on the other hand it is merely an Order approving the model contract between the various parties. The Appellant cannot be permitted to indirectly challenge the said order dated 11/7/08 in this Appeal, which was not the subject matter before the Commission while the Impugned Order was passed on 13/12/07. Hence this Appeal is liable to be dismissed.”

10. We have heard the Counsel for the Appellants and the Respondents, and also gone through the Written Submissions filed by both the parties.

11. The matter in issue relates to the payment of UI charges by the Appellants in the facts and circumstances of this case. The Appellants avail the banking and wheeling facilities from the KPTCL. The main contention of the Appellants is that the Appellants are not liable to pay the said charges as these are all akin to UI charges which the Appellants have been exempted from paying the said charges by the earlier order dated 20/6/06 passed by the State Commission.

12. In the reply by the Counsel for the Respondent, it is stated that the State Commission has never asked the Appellants to pay the UI charges, but it has only held that the Appellants are required to pay certain charges and such charges shall be the difference between the UI charges prevalent at the time of injection to the grid and the UI charges prevalent at the time of drawal of power from the grid.

13. In the light of the rival contentions, it would be worthwhile to look into the relevant portion of the Order passed by the

Karnataka State Commission on 13/12/07. The following is the observation:

“On the issue of payment of UI charges, the Commission has held in its order dated 9/6/05 that banking facility is allowed in respect of wind and mini-hydel projects, subject to payment of difference between the UI charges at the time of injection and at the time of drawal of power from these sources. Regarding the Petitioners’ contention that as per clause 11(9) of the KERC (Terms and Conditions for Open Access) Regulations, 2004 payment of UI charges would arise only in respect of other users i.e. other than the consumer operating as a captive generating plant, it is hereby clarified that this condition does not apply to the Petitioner as the generation is not scheduled under the Intra-State ABT. Thus, as per the Commission’s order 9/6/05 referred to above, the Petitioner is liable for payment of UI charges which arise due to the difference in the time of injection and drawal of the banking of energy.”

14. A close reading of the observation referred to above would make it clear that the Commission did not mean that the Appellants are liable to pay the UI charges. In fact, the State Commission in clear terms has held that Clause 11(9) of the KERC Regulations would exempt the captive generating plant from payment of UI charges as the Petitioner’s/Appellant’s captive wind generating plants are not scheduled under the Intra-State ABT.

15. What the Commission meant was that if the Appellants wished to have the banking and wheeling facility, then they would be required to pay the difference between the UI charges prevalent

at the time of injection and UI charges prevalent at the time of drawal of power. It does not mean that the Appellants are liable to pay UI charges.

16. The wordings contained in the above paragraph of the order impugned would indicate that only for determining the difference in the compensatory charges, the Commission used the words “difference between the UI charges” to the relevant times becomes payable by the Appellant to the Respondent. This is made further clear by the Affidavit filed by the Respondent No.2 i.e. the Bangalore Electricity Supply Company Ltd., before this Tribunal. The relevant portions of the Affidavit are as follows:

(4) “I say that the Order dated 20/6/2006 is an Order passed by the State Commission dealing with the aspects of the implementation of intra-State ABT regime in the State of Karnataka. In the said Order, the State Commission held that intra-State ABT would not be applicable to wind energy generators and hence the same would not be applicable to open access consumers drawing power from wind generators. In view of the ABT regime not being made applicable to wind generators, the appellants are not liable to pay any UI charges.

(5) I say that if the appellants wish to have banking and wheeling facility, then they are only required to pay the difference between the UI charges prevalent at the time of injection and UI Charges prevalent at the time of drawal of power. The difference in the UI charges of two relevant times is only the measure of determining the compensatory charges that become payable to BESCO and it does not amount to subjecting the Appellants to pay UI Charges. For example, the appellants by availing banking facility can inject electricity at a non-peak hour i.e. when the pooled

cost of power purchase (including UI charges) for BESCO is Rs. 2.50 per unit and draw the same back during a peak hour i.e. when the pooled cost of power purchase (including UI charges) for BESCO is Rs. 5 per unit. In such a situation the appellants are not being subjected to pay Rs. 5 per unit as UI charges. The appellants only have to pay to the extent of the difference in the UI charges prevalent at the above two time, i.e. Rs. 5 – Rs. 2.50 = Rs. 2.50 per unit as a measure of compensating BESCO for the difference in the cost of power. This is because the cost of power at the peak hours is much higher to that of the cost of power at non-peak hours. The cost of power also varies from season to season.”

17. The conjoint reading of the Order passed by the Karnataka State Commission on 13/12/07 and also the statement of clarification made on behalf of the Respondent No.2 in para 4 and 5 of the Affidavit filed before this Tribunal would make it clear that the Commission has not directed the Appellants to pay the UI charges and that the said direction for payment of required charges was made only to measure the quantum of electricity injected by the Appellants into the Grid and also the quantum of electricity drawn by the Appellants from the grid. As correctly pointed out by the Counsel for the Respondents that the Counsel for the Appellants cannot make use of the Order passed by the State Commission dated 11/07/08 which was passed during the pendency of these Appeals as it deals with different situation which was not the subject mater of the Impugned Order.

18. With these observations, these two Appeals are dismissed as being devoid of merits. No costs.

(A.A. Khan)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 22nd January, 2009.

REPORTABLE / NON - REPORTABLE