

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 65 of 2006

Dated this the 1st day of September 2006

Present **:Hon'ble Mr. Justice E Padmanabhan, Judicial
Member**

Hon'ble Mr. H. L. Bajaj, Technical Member

In the matter of:

Kim Karanaj Pipodra Association of Persons
Comprising of:

- (a) Members of South Gujarat Texturizers
Welfare Association (SGTWA)
- (b) Members of Kim Pipodra Weavers
Associations (KPWA)
- (c) Gujarat Gas Company Limited,
2, Shanti Sadan Society,
Near Parimal Garden, Ellisbridge,
Ahmedabad, Gujrat

....Appellants

Versus

- 1. Gujrat Electricity Regulatory Commission,
1st Floor, Neptune Tower, Opp. Nehru Bridge,
Ashram Road, Ahmedabad.
- 2. Gujrat Urja Vikas Nigam Limited.
Vidyut Bhawan, Race Course Road,
Vadodra, Gujarat.
- 3. Gujarat Energy Transmission Corporation
Limited, Vidhut Bhawan, Race Course Road,
Vadodra, Gujrat

....Respondents

Counsel for the Appellants : Mr. Amit Kapoor with Mr. Mansoor Ali Shoket, Advocates,
Counsel for the respondents : Mr. M.G. Ramachandran with Ms. Taruna Singh Baghel and Ms. Hemantika Wahi, Advocates.

JUDGEMENT

1. In this appeal the appellants prayed for the following reliefs:
 - (a) Pass an order setting aside the impugned Order dated 21.11.2005, taking into account the facts and grounds set out herein in this Appeal.
 - (b) Adjudicate issues which the Commission has failed to adjudicate while hearing the petition;
2. The first Respondent Commission by impugned order and impugned judgment dated 21.11.2005 in petition No. 836/2004 while pointing out certain infirmities in the petition filed by the appellants held thus:

8.5 *“Rule 3(a) of the Electricity Rules 2005 (of the Ministry of Power) further clarifies that the condition regarding 51% captive use (within a variation not exceeding 10%) and consumption in proportion to their share has to be satisfied by the captive users in case of association of persons and only in case of power plant set up by registered co-operative society the above condition can be satisfied collectively by the members (of the cooperative society). In the instant case as the captive plant being set up by the Association of Persons, it is necessary that condition of consumption in proportion to their shares is satisfied individually by the members.*

8.6 As we saw, the project cost, particularly equity capital, is required to be contributed by the individual members (or alternatively they can also share ownership interest). Further, such individual members have to consume electricity generated from the captive plant in proportion to their share capital (or ownership interest). Petitioners have not given details of the share capital (for the project) to be contributed by each individual members and the share (of power) that will be allocated to the members i.e ultimate consumers (in terms of installed capacity and energy consumption). The petitioners will have to structure the project along the above lines to bring it in conformity with the provisions of the Electricity Act, 2003 read with the (relevant) Electricity Rules, 2005. Hence we dispose of the petition with the direction that the petitioners can (if they do desire) file a fresh petition in accordance with law.

8.7 Before leaving the matter, we would like to mention in passing some of the issues which were urged during the course of the proceedings. The question of Parallel Operating Charges raised in this petition is not relevant. It may be clarified that no such charges are being currently levied. If any petition in this regard is received from the successor entities of GEB, the matter will be disposed of in accordance with law. As regards open access for transmission of power generated from CGPs, such transmission can be either through dedicated transmission lines or through the network of GETCO. With regard to the former, approval from the State Government under Section 68 will be necessary. The use of GETCO network will be governed by the relevant provisions of the law. These matters will have to be addressed, (on a case to case basis), as and when they arise. The Commission would not like to examine at this stage, the question whether dedicated transmission lines, if entrusted to a separate O&M Operator, would require a license. As regards sale of surplus power from captive power plants to licensee or to open access consumers, the provisions of law are clear. Hence no specific comments at this stage are warranted.

8.8 During the course of the hearing, a mention was also made of the decision of the MERC in relation to dedicated transmission line case of M/s. Bhushan Steel and Strip Limited and also about the sale of surplus energy by a captive power plant to a third party. As brought out during the hearing, this decision of MERC has

been set aside by the Hon'ble Mumbai High Court. Hon'ble Supreme Court declined to entertain an appeal against the Hon'ble Mumbai High Court order.

9. *We find that GEB sought certain information from the Petitioners about the proposed captive power plant (paragraph 4.11 of this order). We would like to observe in general that some of the information sought by GEB from the petitioners (such as existing revenue earned by GEB and financial implications, if any), will not be relevant. However the technical aspects involved in dedicated transmission lines and interconnection to the grid sought by GEB from petitioners will be required since it has a bearing for system operations. GETCO or other concerned licensee should only seek such information as is relevant to the provisions of the law or the technical requirement of the system operations. As the petition in its present form cannot be entertained, we do not consider it necessary to go into the above (and such related) matters in depth. However if any further application in this regard is received from the petitioners, it will be dealt with in accordance with the provisions of the law.”*

3. Mr. Amit Kapoor learned counsel appearing for the appellants reiterated the contentions advanced by the appellant. Per contra Mr. M.G. Ramachandaran and Mrs. Hamantika Wahi learned counsels appearing for other respondents pointed out that it is well open to the appellants to go before the Regulatory Commission as the State Commission has neither passed final order nor finally negated the appellant's petition. It is also pointed out by Mr. M.G. Ramachandaran that certain infirmities were pointed out by the Commission and in fact opportunities were afforded to the appellants to attend to the infirmities found in the petition and come back with proper petition satisfying the requirements of The Electricity Act, 2003. Though Mr. Amit Kapoor learned counsel appearing for the appellants was forceful in his arguments, ultimately he has to admit that it is in the interest of the appellants, they have to go before the Commission and work out remedies, while adding that a direction may be issued by this

Appellate Authority to the Regulatory Commission to consider the petition in the proper perspective.

4. The appellants sought to set up captive generating plant for consumers, who are the members and who contribute for the setting up of the captive generating plant.
5. At the time of the hearing the learned counsel for the appellant submitted written memorandum of issues for consideration of this Appellate Tribunal. Since we do not propose to consider the issues on merits, it would be just sufficient to extract the material part of memorandum in our order as the same in our view has to be considered on merits by the Commission.
6. Material portion of the memorandum reads thus:

“(a) Feasibility of the Appellants to construct, operate, maintain or operate a dedicated transmission line (“DTL”) and to carry power generated at the proposed Captive Generating Plant (“CGP”) via the DTL to the captive users in the areas, i.e., Kim, Karanj and Pipodara adopting either of the following options:-

- (i) From a single CGP upto the premises of the Captive Users via a DTL;*
- (ii) From separate CGP’s to captive consumers in each of the areas i.e. Kim Karanj and Pipodara via DTLs in each of the said areas*

(b) Legal interpretation of the term “load center”

(c) Feasibility of the following options for creation of Special Purpose Vehicle to own the CGP:-

- (i) Co-operative Society*
- (ii) Company / AOP*

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3. *The Appellant submits that one of the key issues which requires adjudication by the Commission was the ability and feasibility of the Appellants to construct, operate, maintain or operate a dedicated transmission line (“DTL”) and to draw power generated at the proposed Captive Generating Plant (“CGP”) via the DTL to the captive users in the areas, i.e., Kim, Karanj and Pipodara without the intervention of the distribution licensee supplying in the area. The Hon’ble Commission had however failed to address the issue and the same needs to be addressed by this Hon’ble Tribunal in this Appeal.*

4. *In this regard, the Appellant submits that the power generated at the CGP can be transferred to Captive Users, by recourse to either the existing “transmission lines”, “distribution system” or a “dedicated transmission line”, subject to compliance with the Act. Further in terms of Section 9(2) of the Act, a person setting up a CGP has a right to “open access” for carrying electricity from CGP to destination of his use, subject to availability of adequate transmission facility (as determined by the STU). In this context, it is pertinent to note that:*
 - (a) *Definition of “open access” under Section 2(47) of the Act refers to use of transmission line as well as distribution system.*
 - (b) *In terms of Section 9(2) of the Act, any person who has set up a CGP has a right to open access subject to availability of transmission facility. It is pertinent to note that this provision does not make the right to open access, subject to Section 42(2) of the Act.*
 - (c) *The Appellants submit that in terms of the provisions of the Electricity [Removal of Difficulty] (fifth) Order, 2005 dated 8th June 2005 (“Order”) a person setting up a CGP is not required to obtain a license under the Electricity Act, 2003 (“Act”) for establishing, operating or maintaining a DTL if such company or person complies with the conditions set out in the Order. Thus till the time the person does not take recourse to “supply” i.e. sale of electricity to a licensee or consumer through the DTL, it does*

not need a license and nor does it need to take recourse to distribution licensee in the said area to take recourse.

- (d) *The Appellant submits that right to open access of “Captive Users” is much wider and the Respondents cannot defeat the same and objectives of Act read with the National Electricity Policy dated 12th February 2005 and the Electricity [Removal of Difficulty] (fifth) Order, 2005 dated 8th June 2005 (“Order”) by giving narrower interpretations to the provisions of the Act. The Appellant submits that the definition of “distribution system” (under Section 2(19) of the Act) does not include “load centers” and means the system of wires and associated facilities between delivery points on transmission line or generating stations and point of connection to the installation of the consumers and does not make any reference to a “load centers”.*
- (e) *The Appellant submits that the proposed Captive users are empowered in law to construct, operate, maintain or operate a DTL (“DTL”) and to carry power generated at the proposed CGP via the DTL to the point of use. The Appellant submits that it would in the process of carrying power from the CGP to the point of use of captive users not access the distribution system of any distribution licensee and it would only take recourse to a DTL for carrying power from the CGP to the point of use of its members in the areas, i.e. Kim, Karanj and Pipodara. Further in case it is not feasible to carry the power to captive users via a single DTL, recourse to separate CGP’s would be taken in each of the areas i.e. Kim Karanj and Pipodara and consumers in each of the areas would be provided power through DTLs.”*

7. We also direct that the entire memorandum of issues filed on behalf of the appellants before us be placed by the appellant before the commission for its consideration in addition to any other representation that may be made.

8. We are also to point out that it is not the scope of proceedings either before the commission or before this Appellate Tribunal to give advice or consultancy. It is needless to point out that appellants have to appoint a suitable consultant to advise them appropriately so that the appellants satisfy the requirement of the statutory provisions of The Electricity Act 2003 as well as the regulations framed by the Gujarat Electricity Regulatory Commission.

9. We do not propose to express ourselves on the merits of the various contentions and claims advanced by the counsel for the appellant as the commission has not decided the same, much less finally on the petition submitted by the applicant. As rightly pointed out by Mr. M.G. Ramachandaran the appellants have to go before the commission, comply with the requirements stipulated and expected of them. In fact the commission has not passed final order and it had only required the appellant to come back after attending to the deficiencies or defects pointed out by it with requisite materials, documents, suitable re-organizations so that the petition can be considered and orders be passed on merits. We do find that the Commission was placed in such a predicament by the glaring defects and therefore it has just passed the impugned order and it is not with a view to curtail or prohibit the appellants from resubmitting their petition.

10. Under the circumstances, we remand the matter and direct the appellant to go before the Respondent Regulatory Commission to resubmit the application with necessary modifications or alterations besides submitting additional materials so that the

appellants satisfy the requirements of The Electricity Act 2003 and the regulations framed by the Regulatory Commission.

11. It is needless to add that the Commission may also consider request of the appellant in the proper perspective with a view to encourage Small Scale Entrepreneurs who have come forward to set up a captive generating plant in terms of The Electricity Act 2003 to serve their power requirements. We are confident that commission will also render all the required assistance to enable the appellants to secure necessary permissions and at the same time see that the appellants satisfy the requirements of the statutory provisions.
12. There are no findings in the impugned order against the appellant which require to be set-aside and it is sufficient if the matter is remanded back to the commission without expressing ourselves on merits of the appellant's claim.
13. We also add that the commission may give priority and consider the appellants request without delay and such a course alone will encourage the Small Scale Entrepreneurs,
14. The appeal is ordered accordingly in the above terms.

Pronounced in the open court on this 1st day of September, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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