

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 309 OF 2013

Dated: 27th March, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF

1. Hubli Electricity Supply Company Limited,

A company incorporated under the
Companies Act, 1956.

Having its registered office at P. B. Road,
Navanagar, Hubli -580029

Represented by its General Manager

..... **Appellant**

V E R S U S

1. M/s Parrys Sugar Industries Ltd.,

Having its registered office at Venus Buildings,
1/2, Kalyanamantapa Road,
Jakkasandra, Koramangale,
Bangalore-560034

..... **Respondent/
Petitioner**

2. Karnataka Electricity Regulatory Commission,

6th& 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore 560 091

..... **Respondent**

Counsel for the Appellant ... Ms. S. Sriranga
Mr. Mayank Kshirsagar
Mr. A.M. Shodhan Babu
Ms. Sumana Naganand

Counsel for the Respondent(s)... Mr. Prabhuling K. Navadgi
Mr. Shubhranshu Padhi
Mr. Vedanayaki Kiran D.
Ms. Bhabna Das for R-1

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by Hubli Electricity Supply Company Limited (HESCOM) (in short, the '**Appellant**') feeling aggrieved by order, dated 7.2.2013, in O.P. No. 46 of 2012, passed by the learned Karnataka Electricity Regulatory Commission (in short, "**State Commission**") whereby the learned State Commission has directed the parties therein to amend Article 5.1 of the PPA, dated 8.10.2010, by signing a Supplemental Agreement and to incorporate a tariff of Rs. 3.90 in place of Rs. 3.59 to bring it in conformity with the generic tariff order, dated 29.3.2012, and to submit the same for approval by the State Commission.

2. The Appellant herein is a Distribution Licensee and Respondent/petitioner is a Generating Company having a bagasse based power plant with an exportable capacity of 7.5 MW.

3. The generic tariff order, dated 11.12.2009, was passed by the learned State Commission fixing the tariff at Rs.3.59/unit for renewable energy. The PPA, dated 8.10.2010, entered into between the Appellant and the Respondent/Petitioner (Generating Company) and the tariff was fixed at Rs.3.59/unit therein pursuant to the generic tariff order, dated 11.12.2009. The said PPA was approved by the State Commission on 1.12.2010.

4. This Appellate Tribunal, in Appeal No. 148 of 2010, filed by the South India Sugar Mills Association (Karnataka) (SISMA) against the aforesaid tariff order, dated 11.12.2009, vide judgment, dated 5.4.2011, while partly allowing the appeal, remanded back the matter to the State Commission for re-examination of the 'project cost' factor alone. Thereafter, the State Commission, after rehearing, vide its generic tariff order, dated 29.3.2012, re-fixed the generic tariff at Rs.3.90/unit for all renewable energy sources.

The Respondent/Petitioner filed O.P. No. 46/2012, before the State Commission seeking redetermination of tariff in PPA, dated 8.10.2010, as per the subsequent generic tariff order, dated 29.3.2012, which was allowed by the State Commission, vide impugned order, dated 7.2.2013, and directed the parties to enter into a supplemental agreement with the revised tariff of Rs.3.90 / unit. The Appellant challenged the impugned order in R.P. No. 02 of 2013 before the State Commission, which was rejected by the State Commission vide order, dated 13.6.2013. In these circumstances, the main grievance of the Appellant is that the State Commission has, by the impugned order, erroneously modified its earlier generic tariff order, dated 29.3.2012, passed in the proceedings on remand, by giving the contesting Respondent petitioner/generating company, the benefit of revised tariff retrospectively as the Electricity Act, 2003 does not empower the State Commission to fix the tariff retrospectively and tariff fixation made by the State Commission, being delegated legislation, cannot be retrospective in its operation. Since, the price fixation is legislative in nature, and hence, operates prospectively only. The exercise of tariff fixation by the State Commission under the Electricity Act, 2003, can have no retrospective operation. Further, grievance of the Appellant in the instant appeal is that the State Commission could not have been modified its earlier tariff order, dated 29.3.2012, in remand proceedings. The tariff order, dated 29.3.2012, being an order passed on remand as ordered by this Appellate Tribunal, could not have been modified by the State Commission as the said order is deemed to have merged with the order of this Appellate Tribunal. The generic tariff order, dated 29.3.2012, passed by the State Commission, in effect, supersedes the earlier generic tariff order, dated 11.12.2009, passed by the State Commission and, hence, operates only with effect from the date on which it was passed. Hence, any benefit or liability accrued during the time when the order, dated 11.12.2009, was operative will continue till the subsequent order, dated 29.3.2012, became operational. According to the Appellant, in these circumstances, the benefit of subsequent tariff order, dated 29.3.2012, allowing increase tariff for renewable energy

sources/projects, in pursuance of the judgment, dated 5.4.2011, of this Appellate Tribunal, ordering remand of the matter is not available to the Respondent petitioner.

5. Further grievance of the Appellant in the instant appeal is that the basis upon which the Respondent petitioner before the State Commission by filing O.P. No. 46 of 2012, on 15.9.2012, seeking the benefit of the subsequent generic tariff order, dated 29.3.2012, was that by virtue of being member of the South India Sugar Mills Association (Karnataka) (SISMA), which approached this Appellate Tribunal challenging the previous generic tariff order, dated 11.12.2009, the benefit of the subsequent generic tariff order, dated 29.3.2012, passed remand by the State Commission ought to have automatically enured to the benefit of the Respondent/petitioner. This contention of the Respondent/petitioner was wholly untenable in the light of the specific direction in the order, dated 29.3.2012, by the State Commission. If the Respondent/petitioner was aggrieved by the fact that revised tariff order, dated 29.3.2012, would be applicable to the PPAs signed after 29.3.2012 only, it was open to the Respondent/petitioner and others to challenge the said order, which the Respondent/petitioner did not. Therefore, having accepted the order, dated 29.3.2012, does not open to the Respondent/petitioner to now claim the benefit of the revised tariff order, dated 29.3.2012.

6. Since, the Respondent/petitioner did not make available its project details to indicate actual capital cost as the Respondent/petitioner's plant and one other plant were cases of up-gradation to cogeneration only and not new plants. When Respondent/petitioner, on being given an option to furnish material justifying higher capital cost, the Respondent/petitioner was unable to produce the adequate material, the Respondent/petitioner ought not to have been given the benefit of the increased tariff, merely on account of it being a member of SISMA.

7. One more grievance of the Appellant is that the impugned order, dated 7.2.2013, passed by the State Commission cannot cause the order, dated 29.3.2012, to be modified. In the review proceedings initiated on the basis of review petition of the Respondent/petitioner under Section 94 of the Electricity Act, 2003 read with Article 8 of the KERC (G&C of Proceedings) Regulations, 2000. The impugned order could not be passed by the State Commission because the revised tariff order, dated 29.3.2012, had already attained finality, and it was not open to the State Commission to modify the same in the scheme of the Act. The directions given in the impugned order by the State Commission wherein the parties have been directed to amend Article 5.1 of the PPA, dated 8.10.2010, the said direction is opposed to law and liable to be set aside.

8. The learned State Commission, on 1.12.2012, accorded its approval to PPA, dated 8.10.2010. In the interregnum, the name of the Respondent/petitioner came to be changed from M/s GMR Industries Limited to M/s Parry's Sugar Industries Limited due to change in the management of the generating company.

9. The relevant facts giving rise to the instant Appeal are as under:

- (a) that on 13.1.2000, the Government of Karnataka, accorded the 'in principle clearance' for setting up of bagasse based co-generation power plant to Shri Dhanlakshmi Sahakari Sakkare Kharkane Niyamit, Khanpet Village [subsequently leased to the Respondent/petitioner for 11 MW (gross) and 7.5 MW (exportable)]
- (b) that on 25.10.2002, the Government of Karnataka accorded its sanction to the power enhancement proposal of the Company for installation of a bagasse based co-generation Electric Power Generating Station of 12 MW (gross) from 11 MW and 7.5 MW (exportable) capacity to Shri Dhanlakshmi Sahakari Sakkare Kharkane Niyamit, Khanpet Village (lease to the Appellant

company) and permitted the Appellant to entered into an agreement with the Respondent/petitioner for purchase of electricity.

- (c) that on 24.10.2007, a lease agreement was entered into between Shri Dhanlakshmi Sahakari Sakkare Kharkane Niyamit and the Respondent/petitioner agreeing to take the sugar factory on Build Operate Own Transfer (BOOT) basis for lease for a period of 25 years commencing from the crushing season 2007-08 to 2031-32.
- (d) that on 11.12.2009, a generic tariff order was passed by the State Commission fixing the tariff at Rs.3.59/unit for renewable energy sources.
- (e) that on 30.9.2010, the Government of Karnataka, vide its order, dated 30.9.2010, assigned the Respondent/petitioner project to the Appellant.
- (f) that on 8.10.2010, a Power Purchase Agreement (PPA) was entered into between the Appellant and the Respondent/petitioner (generating company). The tariff was fixed at Rs.3.59/unit under clause 5.1 of the PPA, dated 8.10.2010. The said tariff of Rs.3.59 was fixed pursuant to the determination made by the State Commission vide its earlier generic tariff order, dated 11.12.2009. The PPA, dated, 8.10.2010, was approved by the State Commission on 1.12.2010.
- (g) that the South India Sugar Mills Association (Karnataka) (SISMA), being aggrieved by the generic tariff order, dated 11.12.2009, filed an Appeal before this Appellate Tribunal being Appeal No. 148 of 2010 and this Appellate Tribunal, vide its judgment, dated 5.4.2011, allowed the Appeal in part and remanded back the matter to the State Commission for re-examination on the issue relating to capital cost of the project.

- (h) that the learned State Commission, on the memo, dated 18.8.2011, filed by SISMA before the State Commission to hear them in the matter of capital cost as per the orders of this Appellate Tribunal and re-examine the project cost (capital cost). The learned State Commission, vide its order, dated 29.3.2012, re-fixed the generic tariff at Rs.3.90/unit in place of original determined tariff of Rs.3.59/unit. Thus, the tariff for the electricity generated by the co-generation plant was re-fixed and HESCOM was directed to adopt revised tariff while executing the PPA thereafter.
- (i) that Respondent/petitioner (generating company) on 15.9.2012, filed a petition being O.P. No. 46 of 2012, before the State Commission, placing reliance on the revised generic tariff order, dated 29.3.2012, seeking for direction to amend Article 5.1 of the PPA dated 8.10.2010, which provides for a tariff of Rs.3.59/unit and also for determination of the tariff. The O.P. No. 46 of 2012 was allowed by the State Commission vide its impugned order, dated 7.2.2013 and the State Commission directed the parties to amend Article 5.1 of the PPA, dated 8.10.2010, by signing a Supplemental Agreement to incorporate Rs.3.90/unit in place of Rs.3.59/unit to bring it in conformity with the tariff determined by the State Commission, vide its revised tariff order, dated 29.3.2012.
- (j) that the Appellant (HESCOM) aggrieved by the impugned order, dated 7.2.2013, filed a review petition being R.P. No. 2 of 2013, before the State Commission on 8.4.2013, seeking for review of the impugned order, which was dismissed vide its order, dated 13.6.2013.

10. We have heard the learned counsel for the Appellant as well as the learned counsel for the Respondents at length and deeply gone through the evidence/written submissions filed by the rival parties and other material

available on record including the impugned order passed by the State Commission.

11. The following issues arise for our consideration:

- (A) Whether the impugned order, dated 7.2.2013, is contrary to the revised generic tariff order, dated 29.3.2012, passed by the State Commission?**
- (B) Whether the State Commission has substituted its own mandate by the impugned order, dated 7.2.2013, over the contractual obligations of parties under the PPA, dated 8.10.2010, entered into between the Appellant and Respondent/petitioner?**
- (C) Whether the State Commission is justified in giving the benefit of the revised tariff order, dated 29.3.2012 to the Respondent/petitioner by reviewing its generic tariff order, dated 29.03.2012 by the impugned order, dated 7.2.2013, in collateral proceedings?**

12. Since, all the issues are interconnected and hence, being dealt with by us together.

13. The following contentions have been made by the Appellant on these issues:

- (a) that the impugned order, dated 7.2.2013, is illegal and arbitrary and is liable to be set-aside.
- (b) that the revised generic tariff order, dated 29.3.2012, by which the tariff has been enhanced from Rs 3.59/unit to Rs 3.90/unit is prospective and only applicable to the PPAs signed on or after the date of the order, i.e. 29.3.2012. The said order, dated 29.3.2012, has attained finality with the disposal of the Appeal No 148 of 2010 by this Appellate Tribunal on 5.4.2011.

- (c) that the effect of the impugned order is review of the revised tariff order, dated 29.3.2012, by the State Commission itself, in collateral proceedings which is impermissible.
- (d) that the State Commission had also no such powers as the order had merged with the judgment/order, dated 5.4.2011, of this Appellate Tribunal in Appeal No.148 of 2010.
- (e) that Article 5.1 of the PPA, dated 8.10.2010, sets out the year-wise tariff payable by the Appellant to the Respondent/petitioner for the first ten years from the date of signing of the PPA. The ten years contemplated under the PPA commenced on 8.10.2010 and ends on 7.10.2020. The Respondent/petitioner while signing the PPA had willfully acceded to the tariff set out in Article 5.1 of the PPA approved by the State Commission on 1.12.2011. The PPA having been signed by the parties voluntarily and approved by the State Commission is binding on the parties thereto.
- (f) that in the circumstances, the State Commission, by mandating that the tariff under the PPA be modified, is altering the terms of a concluded contract. This approach of the State Commission is against the settled principles of law.
- (g) that the tariff set out in the PPA, dated 8.10.2010, is based on the generic tariff determination in the order of the State Commission dated, 11.12.2009. The tariff set out in the PPA for the first ten years of the PPA is binding on the Respondent/petitioner and it is not open to the Respondent/petitioner to digress from the agreed terms of the PPA that too by placing reliance on the order, dated 29.3.2012, which has been given prospective effect. If such modification of terms of PPA is permitted, all PPA holders will attempt to seek for amendment of their respective PPAs based on such

amended generic tariff orders. The same would render the practice of entering into contracts futile.

- (h) that the State Commission in passing the impugned order has failed to consider the nature of the plant of the Respondent/petitioner and the fact that the same is an old plant which was leased to the Respondent/petitioner vide Lease Agreement, dated 24.10.2007. In the circumstances, the Capital Cost determined by the State Commission in its order, dated 29.3.2012, based on data with respect to the period 11.12.2009 to 21.3.2011, has no nexus with the Respondent/petitioner's plant. Moreover, the Respondent/petitioner has not placed any material on record to show that it is entitled to increased tariff due to increase in capital cost.
- (i) that the revised tariff order, dated 29.3.2012, of the State Commission expressly stated that the revised tariff for co-generation plants ought to be adopted in PPAs entered into after 29.3.2012. When PPAs executed prior to the passing of the said order, dated 29.3.2012, were specifically denied the benefit of the same, the State Commission in its majority impugned order has erred in allowing for revision of the tariff, whereby it has overlooked its own decision of approving the PPA and its decision of reviewing the tariff order, dated 29.3.2012, prospective in nature. Therefore, the impugned order is liable to be set aside.
- (j) that the State Commission while re-examining and re-fixing the Project Cost for the Co-generation Projects took into reckoning data in support of higher cost in DPRs of seven projects for the period 11.12.2009 to 21.3.2011, which were furnished by the Commissioner for Cane Development and Director of Sugar. The State Commission based on the said data arrived at the conclusion that Rs. 4.30 Crores/MW ought to be benchmark capital cost for the purpose of determining the tariff per unit. As

the data relating to cost was with respect to the period 11.12.2009 to 21.3.2011, it would not be appropriate to allow the Respondent/petitioner who signed a PPA as early as 8.10.2010 to reap the benefits of escalated prices which persisted during the period 11.12.2009 to 21.3.2011. Moreover, Respondent/petitioner's plant dates back to a period prior to 2007 when the same came to be leased on BOOT basis to the Respondent/petitioner. Though, the Respondent/petitioner was called upon to furnish the data pertaining to the alleged increase in cost at its plant, it failed to do so and as a result, the same was not even taken into consideration while passing the revised tariff order, dated 29.3.2012.

- (k) that the majority decision of the State Commission in the impugned order places reliance upon the tariff order, dated 29.3.2012, wherein Capital Cost of Rs. 4.30 Crores/MW was adopted and tariff for electricity generated by co-generation plants was re-fixed. The ESCOMs were also directed to adopt the same while executing PPAs after the date of the passing of the said order. In allowing retrospective operation of the revised tariff order, dated 29.3.2012, the State Commission has acted in contradiction with its own order, dated 29.3.2012. The impugned order is in fact a revision of the revised tariff order, dated 29.3.2012, after the expiry of over 10 months from the date of the order. The order, dated 29.3.2012, having attained finality, any modification of the said order is opposed to all tenets of law.
- (l) that the impugned order was passed in original proceedings being O.P. No. 46 of 2012, initiated at the instance of the Respondent/petitioner, the State Commission has, by way of the impugned order reviewed its earlier revised generic tariff order, dated 29.3.2012. The review of the revised generic tariff order, dated 29.3.2012, in such independent proceedings like

original proceedings, is opposed to the provisions of Section 94 of the Electricity Act, 2003 read with KERC (General and Conduct of Proceedings) Regulations, 2000 as Regulation 8 thereof mandates that a review petition ought to be filed within 90 days from the date of passing of the impugned order. The revised tariff order, dated 29.3.2012, having attained finality, could not have been modified by the State Commission through the impugned order.

14. Since, we are hearing the appeal against the aforesaid impugned order, dated 7.2.2013, we are restricting ourselves to the illegality of the impugned order. During arguments, a lot of submissions have been made on the review order, dated 13.6.2013, passed in O.P. No. 2 of 2013, which was filed by the Appellant before the State Commission. There is no appeal against the review order before us.

15. Before proceeding with our discussion and conclusion, we may mention here that majority of two members passed the impugned order, dated 7.2.2013, while third member gave a dissenting order, thus, we are supposed to go into the legality or correctness of the impugned order only passed by the majority of members.

16. The Respondent/petitioner, who was petitioner before the State Commission filed an original petition being OP No.46 of 2012 against the HESCOM (Appellant before us) praying for a direction to amend Article 5.1 of the PPA, dated 8.10.2010, which provides for a tariff of Rs.3.59/unit and also to determine the tariff to be incorporated in the Supplemental Agreement to be signed. The learned State Commission considered the respective submission of the parties, the terms of the PPA and also the judgment/order, dated 5.4.2011, passed by this Appellate Tribunal in Appeal no. 148 of 2010 and the State Commission's revised tariff order, dated 29.3.2012, in Case No. S/09/1.

17. The impugned order, in para 5 thereof, clearly mentioned that there is no dispute that the Respondent No.1/petitioner established a Bagasse-based Power Plant of 12 MW (gross) and 7.5 MW (exportable) capacity at Khanpet and had signed the PPA, dated 8.10.2010, with the Appellant with a tariff of Rs.3.59/unit for the first 10 years of PPA. At the time of signing the PPA, the State Commission's order, dated 11.12.2009, fixing a generic tariff for Bagasse-based co-generation plants at Rs.3.59/unit, was in operation. Further, it was also not in dispute before the State Commission that the South India Sugar Mills Association (SISMA) of Karnataka, being aggrieved by the State Commission's generic tariff order, dated 11.12.2009, filed Appeal No. 148 of 2010 before this Appellate Tribunal and this Appellate Tribunal, vide its order/judgment, dated 8.4.2011, allowed the appeal in part and directed the State Commission to re-examine the issue of capital cost, after re-hearing the Appellant and others and also upon consideration of the relevant materials that may be placed before the State Commission by the Appellant Association. After re-hearing, the State Commission passed the revised tariff order, dated 29.3.2012, and re-fixed the tariff at Rs.3.90/unit, as against Rs.3.59/unit fixed earlier adopting a capital cost of Rs.430 lakhs/MW as against Rs.365 lakhs/MW and the State Commission also directed the Electricity Supply Companies (ESCOMs) to adopt the new rate in the PPAs to be signed thereafter.

18. The main submission of the Respondent/petitioner before the State Commission was that the rate of Rs.3.59/unit incorporated by the Respondent/petitioner and the Appellant in the PPA, dated 8.10.2010, was based on the earlier generic tariff order of the State Commission, dated 11.12.2009 and once the said order undergoes a change pursuant to the Appellate Tribunal's orders, the tariff fixed in the PPA also needs to be modified in line with the revised generic tariff order, dated 29.3.2012. Against this contention of the Respondent/petitioner, there was a contention of the Appellant that once the PPA is signed by the parties and approved by the State Commission and in view of the specific order of the State Commission, making the order, dated 29.3.2012 prospective, the

Respondent/petitioner is not entitled to the prayers made in OP No. 46 of 2012.

19. We reproduce below the relevant part of the impugned order, dated 7.2.2013, for the purpose of testing the legality and correctness thereof, which is as under:

“10) We may observe that till this Commission’s Order dated 29.3.2012, the Petitioner and the Respondent had no option, except to incorporate the Tariff specified in the said Order, i.e., Rs.3.59 per Unit. Once this rate gets re-fixed to Rs.3.90 per Unit, it shall accrue to the benefit of the Petitioner and others, who had signed the PPAs as per the earlier Order dated 11.12.2009 of this Commission.

11) In our view, therefore, the prayer of the Petitioner deserves to be accepted and Article 5.1 of the PPA needs to be modified to incorporate the re-fixed Tariff of Rs.3.90 per Unit ordered by this Commission, since the very Order of the Commission fixing the Tariff at Rs.3.59 per Unit has been modified by this Commission pursuant to the remand Order dated 8.4.2011 of the Hon’ble ATE.

12) As regards the contention of the learned Counsel for the Respondent that as the Order dated 29.3.2012 of this Commission was made applicable prospectively, it will not apply to the Petitioner’s case, we are of the view that when this Commission passed the general Order, the only issue before this Commission was re-fixation of the Capital Cost pursuant to the directions of the Hon’ble ATE. None of the parties appearing before this Commission had, at any time, brought out as to what would happen to the PPAs signed prior to the re-fixation of the generic Tariff. Therefore, this Commission had directed, in its Order dated 29.3.2012, to include the re-fixed rate in the PPAs to be executed thereafter. Further, in our view, the Order of this Commission dated 29.3.2012 does not bar any of the parties, who had signed PPAs pursuant to the earlier Order of this Commission, to get the Tariff re-fixed based on the modified Order of this Commission.

13) It was stated during the course of the hearing that the Petitioner is also a member of the South India Sugar Mills Association (SISMA) and the grievance made by the Association was also on its behalf that the Capital Cost adopted by the Commission in the impugned Order was not proper, considering the actual cost incurred by the Generating Companies. It is submitted that as a member of the Association, it is also entitled to get the modified Tariff based on the Capital Cost re-determined by the Commission. In view of this submission, we have looked into the two Orders of this Commission dated 11.12.2009 and 29.3.2012 – one which was

impugned before the Hon'ble ATE and the other passed after the remand of the Order by the Hon'ble ATE. While passing the impugned Order, SISMA had produced the cost of the generators including for one of the Plants taken over by the Petitioner. However, the same was not considered, as the Commission was in the process of determining the generic Tariff, and not specific Tariff to any particular generator. When the second Order came to be passed by this Commission on remand, SISMA again produced the data of cost incurred by several other generators, including that of the Petitioner. This Commission, not satisfied with the material produced by SISMA, called upon SISMA to produce Balance Sheets for a minimum of three Projects, which they relied upon – one of them was belonging to the Petitioner. SISMA, in response, had produced the Balance Sheets of three Generating Plants, including that of the Petitioner. Only after consideration of all the material data produced by SISMA and also the data produced by KERDL and the Commissioner Cane Development and Director (Sugar), the Commission decided to re-fix the Capital Cost adopted by it while fixing the generic Tariff in its earlier Order to Rs.430 Lakhs per MW, which translated into the revised Tariff of Rs.3.90 per Unit. When SISMA made a grievance on behalf of its members, including the Petitioner, and the Hon'ble ATE accepted the plea of SISMA and directed this Commission to re-determine the Capital Cost including that of the Petitioner, it is natural for the Petitioner to seek the benefit of the re-determined Tariff. Therefore, in our opinion, the Petitioner is also entitled to get its Tariff re-fixed in line with the Order of this Commission dated 29.3.2012, even though it had signed the PPA at the pre-revised Tariff of Rs.3.59 per Unit, from the date the revised rate is available for others, i.e., from 29.3.2012.

14) Therefore, considering the facts and circumstances of the case, we allow this Petition. We direct the parties to amend Article 5.1 of the PPA dated 8.10.2010 by signing a Supplemental Agreement and incorporate 'Rs.3.90' in place of 'Rs.3.59', to bring it in conformity with the Tariff determined by this Commission, vide Order dated 29.3.2012, and submit the same for approval of this Commission.

15) In all other respects, the PPA dated 8.10.2010 signed by the parties shall continue as it is.

16) Accordingly, the Petition is allowed in the above terms."

20. The Respondent No.1/petitioner filed an original petition being OP No.46 of 2012 against the Appellant (HESCOM) before the State Commission, praying for a direction to amend Article 5.1 of the PPA, dated

8.10.2010, providing for a tariff of Rs.3.59/unit and also to determine the tariff to be incorporated in the Supplemental Agreement to be signed. The learned State Commission considering the submissions of the parties, the terms of the PPA and the judgment/order, dated 5.4.2011, passed by this Appellate Tribunal in Appeal no. 148 of 2010 and the State Commission's revised tariff order, dated 29.3.2012, in Case No. S/09/1, which was passed in pursuance of the direction of this Appellate Tribunal in Appeal No. 148 of 2010, passed the impugned order, dated 7.2.2013, in OP No. 46 of 2012 whereby it has directed the parties namely, the Appellant and Respondent No.1/petitioner to amend Article 5.1 of the PPA, dated 8.10.2010, by signing a Supplemental Agreement and to incorporate a tariff of Rs. 3.90 in place of Rs. 3.59 to bring it in conformity with the generic tariff order, dated 29.3.2012, and to submit the same for approval before the State Commission. It is the impugned order, dated 7.2.2013, passed by the State Commission which has been challenged before us by the Appellant/distribution licensee.

21. The Respondent/petitioner filed the said O.P. No. 46 of 2012, before the State Commission seeking redetermination of tariff in PPA, dated 8.10.2010, in accordance with the subsequent/revised generic tariff order, dated 29.3.2012, passed by the State Commission. We may mention here that the learned State Commission passed the subsequent/revised generic tariff order, dated 29.3.2012 in compliance of the aforesaid judgment, dated 5.4.2011, of this Appellate Tribunal in Appeal No. 148 of 2010. The learned State Commission, in compliance of the judgment, dated 5.4.2011, of this Appellate Tribunal, passed the revised generic tariff order, dated 29.3.2012, by which the tariff of the power generators like that of the Respondent No.1, was increased to Rs.3.90/unit from Rs.3.59/unit. We further mention here that since at the time of the PPA, dated 8.10.2010, entered into between the Appellant and Respondent No.1/petitioner (generating company), the tariff order, dated 11.12.2009, which provided for a tariff of Rs.3.59/unit for renewable energy, was in operation and hence, the same tariff namely; Rs.3.59/unit was fixed in the said PPA,

dated 8.10.2010, as per the then existing generic tariff order, dated 11.12.2009. We further mention here that the South India Sugar Mills Association (Karnataka) (SISMA) feeling aggrieved against the tariff order, dated 11.12.2009, filed an appeal being Appeal No.148 of 2010 before this Appellate Tribunal and this Appellate Tribunal vide its judgment, dated 5.4.2011, while partly allowing the Appeal remanded the matter back to the State Commission for revising the 'project cost' factor alone. In the light of the judgment, dated 5.4.2011, of this Appellate Tribunal, the learned State Commission, after hearing the parties, passed the subsequent generic tariff order, dated 29.3.2012, whereby it re-fixed the generic tariff at the rate Rs.3.90/unit for all renewable energy power generating companies. On the same basis and grounds, the Respondent No.1/petitioner filed the aforesaid petition being OP No. 46 of 2012 before the State Commission which has been allowed by the State Commission by the impugned order, dated 8.10.2010, details of which we have mentioned above thereby extending the benefit of the revised generic tariff order, dated 29.3.2012, to the Respondent No.1/petitioner.

22. Thus, what the learned State Commission did in the impugned order, it simply gave the same relief to the Respondent No.1/petitioner as had earlier been given to the other renewable energy sources/projects in the circumstances mentioned above and this granting of the same relief to the renewable energy project of the Respondent No.1/petitioner has been challenged before us by the distribution licensee/Appellant contending that since the Respondent/petitioner did not challenge the first generic tariff order, dated 11.12.2009, before the Appellant Tribunal, now it is not open to him to claim the benefit of the revised generic tariff order, dated 29.3.2012. The Appellant also challenged the impugned order on the ground that although the Respondent No.1/ petitioner was a member of the South India Sugar Mills Association (Karnataka) (SISMA), he had not challenged the previous generic tariff order, dated 11.12.2009, before the Appellate Tribunal and now he cannot be entitled to the benefit of the subsequent generic tariff order, dated 29.3.2012 which had been passed

by the State Commission after remand of the matter by this Appellant Tribunal.

23. Contrary to the aforesaid contention of the Appellant, the main submission of the Respondent No.1/petitioner is that the rate of Rs.3.59/unit was incorporated in the PPA, dated 8.10.2010, which was executed between the Appellant and Respondent No.1/petitioner on the basis of the generic tariff order of the State Commission, dated 11.12.2009, which was in-force at the time of signing of the PPA and since the said order, dated 11.12.2009, had undergone a change in pursuant to this Appellate Tribunal's order, the tariff revised by the generic tariff order, dated 29.3.2012, passed by the State Commission in compliance of this Appellate Tribunal's judgment, the tariff has been revised to Rs.3.90/unit from Rs.3.59/unit, the same tariff should be allowed to the Respondent No.1./petitioner as he was a member of the said Association and is the renewable energy power generator.

24. On consideration of the contentions of the rival parties and examining the validity of the impugned order, we do not find force in any of the submissions/contentions of the Appellant. We find force in the submissions of the Respondent No.1/petitioner and the impugned order, dated 7.2.2013, passed by the State Commission is perfectly correct, legal, valid and just and need no interference at this stage by this Appellate Tribunal. Since, the benefit of revised generic tariff order, dated 29.3.2012, had earlier been given to the similarly placed renewable energy project, has only been granted to the Respondent No.1/petitioner. We agree to the view of the State Commission.

25. We observe that the impugned order, dated 7.2.2013, is not contrary to the revised generic tariff order, 29.3.2012, passed by the State Commission. We further observe that the learned State Commission has not substituted its own mandate by the impugned order, dated 7.2.2013, over the contractual obligations of parties under the PPA, dated 8.10.2010,

entered into between the Appellant and Respondent No.1/petitioner. We further note that the State Commission is legally justified in giving the benefit of the revised tariff order, dated 29.3.2012, to the Respondent No.1/petitioner by recording sufficient cogent reasons in the impugned order and **all these issues are decided against the Appellant.**

26. **SUMMARY OF OUR FINDINGS:**

26.1 The generic tariff order, dated 11.12.2009, was passed by the learned State Commission fixing the tariff at Rs.3.59/unit for renewable energy power projects. Since, the PPA, dated 8.10.2010, was executed/entered into between the Appellant/distribution licensee and the Respondent/Petitioner (Generating Company) at the time when the generic tariff order, dated 11.12.2009, passed by the State Commission, was in-force, tariff at Rs.3.59/unit was incorporated in the said PPA, dated 8.10.2010, and the said PPA was approved by the State Commission on 1.12.2010.

26.2 The generic tariff order, dated 11.12.2009, was challenged by the South India Sugar Mills Association (Karnataka) (SISMA) by way of filing an appeal being Appeal No. 148 of 2010, before this Appellate Tribunal and this Appellate Tribunal, vide judgment, dated 5.4.2011, while partly allowing the appeal, remanded back the matter to the State Commission for re-examination of the 'project cost' factor alone. After the remand of the said matter, the learned State Commission, after rehearing the parties, passed the revised generic tariff order, dated 29.3.2012, and re-fixed the generic tariff at Rs.3.90/unit for all renewable energy sources. Since, the generic tariff had been re-fixed at Rs.3.90/unit from Rs. 3.59/unit by the revised generic tariff order, dated 29.3.2012 for all renewable energy power generating companies, and the Respondent No.1/petitioner M/s Parrys Sugar Industries Ltd. was a member of the same association filed O.P. No. 46/2012 before the State Commission seeking redetermination of tariff in PPA, dated 8.10.2010, as per the subsequent/revised generic

tariff order, dated 29.3.2012. The said petition was allowed by the State Commission, vide impugned order, dated 7.2.2013, and directed the parties to enter into a supplemental agreement with the revised tariff of Rs.3.90 / unit. The learned State Commission by the impugned order, dated 7.2.2013, simply extended the benefit of the revised generic tariff order, dated 29.3.2012, to the Respondent No.1/petitioner (generating company), we do not find any illegality or perversity in the impugned order passed by the State Commission. The impugned order cannot be legally challenged by the Appellant/distribution licensee just on the ground that though the Respondent No.1/petitioner was a member of the South India Sugar Mills Association (Karnataka) (SISMA) but he did not challenge the generic tariff order, dated 11.12.2009 before this Appellate Tribunal, he could not be held entitled to the benefit of the revised generic tariff order, dated 29.3.2012 whereby, the learned State Commission re-fixed the generic tariff at Rs.3.90/unit for all the renewable energy power generating companies. This contention of the Appellant cannot be legally countenanced.

26.3 We further hold that since the generic tariff order, dated 11.12.2009, was challenged by the SISMA before this Appellate Tribunal in Appeal No. 148 of 2010, and this Appellate Tribunal partly allowed the Appeal quashing the generic tariff order, dated 11.12.2009, to that extent and remanded back the matter to the State Commission for re-examination of the 'project cost' factor alone, the generic tariff order, dated 11.12.2009, cannot be said to be a final order because the said order, dated 11.12.2009, was set-aside to that extent by this Appellate Tribunal and the matter was remanded back to the State Commission for re-examination of the 'project cost' factor alone and re-fixation of the tariff. The learned State Commission, after rehearing the parties, passed the revised generic tariff order, dated 29.3.2012, and re-fixed the generic tariff at Rs.3.90/unit for all the renewable energy sources, then the contention of the Appellant/distribution licensee that the revised generic tariff order,

dated 29.3.2012, could only be applied prospectively namely; from 29.3.2012 is meaningless.

27. In view of the above discussions, we dismiss this Appeal being Appeal No. 309 of 2013, and re-affirm the impugned order, dated 7.2.2013, passed by the State Commission in O.P. No. 46 of 2012 whereby the State Commission has directed the parties to amend Article 5.1 of the PPA, dated 8.10.2010, by signing a Supplemental Agreement and to incorporate a tariff of Rs. 3.90 in place of Rs. 3.59 to bring it in conformity with the generic tariff order, dated 29.3.2012. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 27TH DAY OF MARCH, 2015.

**(T. Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ **REPORTABLE/NON-REPORTABLE**

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