

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

APPEAL NO. 69 OF 2009

Dated: 10th November, 2009

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. BAJAJ, Technical Member**

In the matter of:

**Bangalore Electricity Supply Company Ltd.,
Corporate Office,
K.R. Circle,
Bangalore-560009.**

...Appellant

Versus

- 1. M/s Enercon Wind Farms (Karnataka) Ltd.,
Shah Industrial Estate, Veera Desai Road,
Andheri (West),
Mumbai-400 053.**
- 2. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2. M.G. Road,
Bangalore-560 091.**

... Respondents

**Counsel for the Appellant(s) : Mr. Raghavendra S. Srivatsa,
Mr. Venkat Subramanian T.R.,**

**Counsel for the Respondent (s): Mr. Sanjay Sen,
Ms. Sikha Ohi,
Ms. Mandakini Ghosh**

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

JUDGMENT

The short question which arises for consideration in this case is as to the reckoning of the **“date of commercial operation of a power plant”** for the purpose of computing escalation charges under the Power Purchase Agreement (PPA).

2. Bangalore Electricity Supply Company Limited is the Appellant herein. M/s Enercon Wind Farm (Karnataka) Limited is the Respondent No. 1.

3. There was a dispute between the Appellant being the distribution company and the Respondent No.1 being the generating company over the fixing of the date of commercial operation. Unable to settle the issue among themselves, Enercon Wind Farm (Karnataka) Limited, the Respondent

No. 1 filed a petition before the State Commission to settle the said dispute.

4. After enquiry, the State Commission passed the final order dated 10.7.08 allowing the petition filed by the Respondent thereby fixing the date of commercial operation as 14.5.2003 after rejecting the claim of the Appellant that the actual date of commercial operation was 26.8.2003. Challenging this impugned order dated 10.7.08 the Bangalore Electricity Supply Company Limited has filed this appeal.

5. The short facts that are required for disposal of this Appeal are as follows:-

- i) The Appellant is engaged in the business of distribution and supply of electricity in the designated area and is fully owned by the Government of Karnataka.

- ii) M/s Enercon Wind Farm (Karnataka) Limited, the Respondent No. 1 is a generating company engaged in the business of power generation.
- iii) On 24.9.2002 M/s Enercon Wind Farm (Karnataka) Limited, the Respondent No. 1 executed a PPA with the Appellant's predecessor viz. Karnataka Power Transmission Company Limited (KPTCL) in respect of its 21 MW wind power based project in Chitradurga District of Karnataka. The said PPA was approved by the State Commission.
- iv) The Appellant's predecessor, KPTCL had been procuring the energy from the power project of the Respondent from 14.5.2003 on which date the project of the petitioner was commissioned.
- v) On 24.6.2003 a commissioning certificate was issued by the KPTCL certifying that 12 wind energy mills of 7.2 MW out of 21 MW had been commissioned by M/s Enercon Wind Farm (Karnataka) Limited on 14.5.2003. From that date onwards, the supply was

started and the bills were paid regularly by the Appellant's predecessor to the Respondent.

- vi) Up to 9.6.2005 the KPTCL was the contracting party and on 10.6.05 the Bangalore Electricity Supply Company Limited, the present Appellant was assigned with the managing of the company and as such the Appellant became the contracting party with the Respondent from that date onwards. Even, thereafter, the bills were regularly paid by the Appellant. When things stood thus, all of a sudden, the Appellant felt and concluded that there was an excess payment in the earlier escalation which was made on the basis of the wrong fixation of commercial operation date as 14.5.2003 instead of 26.8.2003. In view of this peculiar situation, meetings were held to decide about the date of commissioning of the project. After deliberations in State Power Procurement Coordination Centre (SPPCC) meeting, it was decided to adopt the weighted average method after fixing the date of commissioning as 21.7.2003.

- vii) On the strength of the said conclusion the Appellant deducted a sum of Rs. 20,29,268/- by fixing the date of commercial operation as 21.7.2003 as decided in the SPPCC meeting.
- viii) The Respondent, questioning the wrong deduction of the Appellant, approached the Appellant to reconsider the issue. There were a number of meetings held between the Appellant and the Respondent starting from 20.10.2006 till 14.11.06. Even during the month of December 2006 and January 2007 the Respondent No. 1 held a series of meetings with the Appellant for fixing an equitable date of commercial operation but there was no proper response.
- ix) Being aggrieved over the inaction of the Appellant, the Respondent No. 1 approached the State Commission and filed a Petition challenging the illegal deduction effected by the Appellant seeking for the direction for the refund of the amount unauthorisedly deducted.
- x) The State Commission on entertaining the said petition filed by the Respondent No. 1, issued notice to

the Appellant, which in turn appeared before the Commission and repudiated the claim of the Respondent contending that the deductions were legal and justified as all the generating units of the project were commissioned only on 26.8.2003 and in the subsequent meeting, both the parties agreed to fix 21.7.2003 as the date of commissioning and as such the claim made by the Respondent that date of commercial operation to be 14.5.2003 was wrong. The State Commission after considering the materials placed on record and hearing both the parties passed the final order dated 10.7.08 holding that the date of commercial operation was 14.5.2003 only and as such the Respondent No. 1 M/s Enercon Wind Farm (Karnataka) Limited would be entitled for the refund of the unauthorizedly collected amount from the Appellant. Hence this Appeal.

6. The learned counsel appearing for the Appellant has assailed the order impugned by urging the following contentions:-

- a) The finding recorded by the State Commission fixing 14.5.03 as the commercial operation date and holding that the year of escalation to be the fiscal year is wrong. This finding is not in accordance with the Article 4.1 of the PPA. It is also wrong on the part of the State Commission to conclude that the escalation every year should tally with the fiscal year.
- b) The actual date of commissioning of operation under the PPA for the purpose of reckoning of the annual escalation prescribed by the PPA is the date of the commercial operation of the entire project. Only one part of the project was commissioned on 14.5.03 and the entire project became functional only on 26.8.03. Therefore, 14.5.2003 date could not be construed to be the date of commercial operation as per the definition contained in the PPA.

- c) The commissioning certificate was issued by KPTCL on 24.6.03 only with regard to the 12 units of 7.5 MW out of 21 MW that were commissioned on 14.5.03 and not with regard to the entire project.
- d) The entire project became operational on 26.8.03. In view of this peculiar situation meetings were held to decide as to what should be the date of commissioning of the project. After detailed discussions and deliberations, it was agreed by both parties to adopt the weighted average method and by such process the date of commercial operation was fixed as 21.7.2003. Only in pursuance of the same, the escalation was calculated as per the commercial operation date which was fixed as 21/7/03 and consequently it was decided to deduct a sum of Rs.20,29,268/-, the excess amount in view of the earlier escalation date.
- e) The Appellant as a Respondent on receipt of notice from State Commission appeared and filed its statement of objections substantiating the deduction on calculation on the basis of the weighted average of

the date of commercial operation of the project decided in SPPCC meeting. The State Commission without giving opportunity for final hearing, and without considering the objections simply accepted the claim of the Respondent No. 1 and passed the impugned order.

7. On the above grounds the learned counsel for the Appellant argued at length contending that the impugned order is wrong and liable to be set aside.

8. The learned counsel appearing for the Respondent, M/s Enercon Wind Farm (Karnataka) Limited replied in justification of the impugned order passed by the State Commission. The gist of his reply is as follows:-

(a) The Power Purchase Agreement (PPA) was entered into between the Appellant's predecessor and the Respondent No. 1 and the same had been duly approved by the State Commission by the order dated 17.9.2003. The State Commission having approved the PPA retained control

over the same particularly in relation to interpretation of the terms and definitions contained in the said Agreement. For the purpose of tariff, the parties agreed that the Commercial Operation Date will be taken from the date from which energy will be delivered from the project. Although the project was not entirely operational, the Appellant's predecessor had been paying tariff @ Rs. 3.25 per kwh from 14.5.2003 which was taken as a commercial operation date.

- (b) Admittedly, the Appellant and his predecessor have been procuring power from the project of the Respondent No. 1 from 14.5.2003 on which date the project of the Respondent No. 1 was certified to be commissioned by the Corporation. The Respondent has been supplying power to the Appellant at a rate agreed in Clause 4.2 of the PPA. The Appellant had not only issued commissioning certificate but also admitted invoices and made payments in the effected escalation for more than three years from the commercial operation date.

- (c) The Appellant in order to avoid natural and practical meaning of the various definitions and terms of the PPA had sought the involvement of the State Power Procurement Coordination Centre (SPPCC), a third party to define the commercial operation date. The SPPCC has no power to revise the date of commissioning by applying the weighted average method. The date of commercial operation has to be arrived at according to the terms and conditions of the PPA.
- (d) The findings of the State Commission on the issue of commercial operation date and the year of escalation to be the fiscal year as per the definition of the contract year under PPA is perfectly justified.

9. We have heard the learned counsel for the parties and perused the Appeal, reply, rejoinders and other records. We have given our thoughtful consideration to the rival contentions urged by the learned counsel for both the sides.

10. As indicated above, the main dispute between the parties over the question is as to the reckoning of the actual date of commercial operation for the purpose of computing the annual escalation charges prescribed under the Power Purchase Agreement.

11. According to the learned counsel for the Appellant, 14.5.03 can not be the date of commercial operation since out of 21 MW of wind power, only 7.2 MW was commissioned on 14.5.03 and the entire project became operational only on 26.8.03, and in view of the said peculiar situation both the parties attended the SPPCC meeting and agreed that the commercial operation date (COD) could be fixed as 21.7.2003 and on that basis the deductions were made. On the other hand, the learned counsel for the Respondent submits that the COD has been, defined, in the PPA and as per the definition, the date of commissioning of the project shall be the date which is certified by the competent authority of the Corporation; the Corporation through the certificate dated 24.6.2003 has certified that 14.5.03 was the commercial date of operation and that therefore, the COD has to be reckoned

from 14.5.03 only and not from 26.8.2003 and at any rate, the COD can not be fixed as 21.7.2003 as decided in the SPPCC meeting, as the same is contrary to the PPA.

12. It is not disputed that after signing of this PPA, both KPTCL, the predecessor of the Appellant as well as the Respondent No.1, allowed the escalation from May of each year starting from 2004 onwards, after accepting the actual commercial operation date as 14.5.2003 on which 7.2 MW was commissioned. The PPA was entered into between them on 24.9.2003 and the same was approved by the State Commission. It is also not disputed that the PPA which was entered on 24.9.03 between KPTCL, the predecessor of the Appellant of the and the Respondent No. 1 was assigned to the Appellant only on 10.6.05 as KPTCL was prohibited from trading electricity under the provisions of the Electricity Act 2003. Even thereafter, the bills were paid regularly by the Appellant accepting that 14.5.2003 was the date of commercial operation.

13. Only on 30.9.06 on the strength of a letter from the Director, State Power Procurement Coordination Centre (SPPCC), for the first time, the Appellant disputed the correctness of the date of the commercial operation and introduced a new concept of weighted average basis on different date of Commercial Operation Date (COD) for computing the escalation charges. This change of stand was purely on the basis of the decision taken in the SPPCC meeting.

14. At the outset, it shall be stated that the decision taken by SPPCC in the meeting fixing the different date of COD for computing the escalation on the basis of weighted average method is not binding on the parties. It is also to be pointed out that the decision on COD can be taken by the State Commission only on the basis of the PPA and not on the basis of the decision taken in the SPPCC meeting. Hence we are not inclined to give any importance to the SPPCC meeting decision as we are concerned in this Appeal only in regard to the

question as to what was the actual date of commercial operation for computing the escalation charges under the terms and definition contained in the PPA.

15. In the light of the above, let us now go into the various definitions and terms contained in the PPA for the purpose of deciding the core issue which arises in this matter. The definitions of various terms in the Article (1) of the PPA are as follows:

The definition of Commercial Operation Date (COD).

“Commercial Operation Date will be the date of commissioning of the project as certified by the competent authority of the Corporation”

16. The above definition would clearly show that the date which is certified through the certificate issued by the competent authority of the Corporation fixing the date of commissioning of the project is to be taken as a Commercial

Operation Date. In this case KPTCL being the Corporation had issued the certificate on 24.6.2003 certifying that 12 Nos. of 600 KW Wind Energy Generators have been commissioned on 14.5.2003.

17. Let us now see the contents of the said certificate. The same is as follows:-

“This is to certify that 12 Nos. of 600 KW (7.2 MW, out of 21 MW, wind energy converters with associated electrical equipments interconnecting the wind farm with KPTCL grid at Pandarahally MUSS by 66 KV overhead lines of M/s Enercon Wind farms (Karnataka)Ltd. New Doddapura Village Jogimatti wind zone Chitradurga District, through M/s Enercon’s 66 KV/33KV Sub-station at Kakkerharu Village Chitradurga District Karnataka has been commissioned on 14.5.2003. As per the interconnecting approval accorded by The General Manager Technical KPTCL, Bangalore vide letter No.

KPTCL/B-28/4/4152/2000-01 dated 13.05.2003.

And as per the approval for the commissioning of wind energy converters accorded by the Chief Electrical Inspector to the Government of Karnataka vide letter No. CEIG/DE13/AE13/1623-26 dated 09.05.2003”.

18. There is no dispute in the fact that this certificate had been issued by the competent authority of the Corporation fixing 14.5.2003 as the date of commercial operation for **part** of the project. It is also not disputed that this certificate had been acted upon by the KPTCL itself under which KPTCL began to procure the energy from 14.5.2003 onwards the Respondent No. 1 and clear the bills on the basis of the receipt of the supply of energy and on the strength of this certificate. Admittedly, there was no other certificate issued either by the Appellant's predecessor or by the Appellant later.

19. We shall now see the other relevant definitions to deal with the issue. Let us quote the definition of contract year which is follows:-

“Contract Year shall mean, with respect to the initial Contract Year, the period beginning on the Commercial Operation Date of the Unit and ending at 12.00 midnight on 31st March of that Fiscal Year. Each successive Contract Year shall coincide with the succeeding Fiscal Year, except that the final Contract Year shall end on the date of expiry of the Term or on Termination of this Agreement whichever is earlier”.

20. The definition of Fiscal Year is as follows:-

“Fiscal Year shall mean, with respect to the initial Fiscal Year, the period beginning on the Commercial Operation Date and ending at 12.00 midnight on the following March 31. Even successive Fiscal Year shall begin on April 1 and end on the following March 31, except that the final Fiscal Year shall end on the date

of expiry of the Term or on termination of this Agreement, whichever is earlier”.

21. Both these definitions would make it clear that the initial Contract Year means the period beginning on the Commercial Operation Date of the unit and end at the midnight of 31st March of the fiscal year. “Initial Fiscal Year” means the period beginning on the Commercial Operation Date and end at midnight of the 31st March of that year. This means that the succeeding Fiscal Year shall begin on 1st April and end on 31st March.

22. The dispute which is now being raised is limited to the issue of calculating the date from which escalation on base tariff has to be provided. In this context, it is relevant to refer to Clause 4.1 of the PPA which defines the base tariff as follows:-

“Monthly Energy Charges: if the project is commissioned beyond 31st August, 2003 the Corporation shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs. 3.10 (Rupees three and ten paise only) per kilowatt-hour (“the base tariff) for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 2% per annum over “the base tariff” every year. This shall mean that the annual escalation will be at the rate of Rs. 0.062 per kwh”.

23. From the above said definition, it is clear that the escalation @ 2% per annum over the base tariff is payable every year.

24. Let us now see the Article 4.2 of the PPA.

“Further, incase the Project is commissioned on or before 31st August 2003, the Corporation shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs. 3.25 (Rupees three and twenty five paise only) per Kilowatt-hour for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 2% per annum over “the base tariff” as herein indicated in Article 4.1”

25. These articles indicate the rates and charges to be paid. Under these Clauses, the annual escalation of every year is mentioned. Even if the project is commissioned in the middle of the year, the next year should start from the 1st April as defined in the Contract Year as well as the Fiscal Year. Therefore, while considering the escalation every year the Contract Year should tally with the Fiscal Year. In this case,

in the light of the above definitions of the PPA, each successive Contract Year shall coincide with each succeeding Fiscal Year.

26. The learned counsel for the Appellant points out the definition of the term "Project" to substantiate his plea. Let us see the definition of the project.

"Project means a windmill power station established by the Company at Doddapura (Sy. No. 10, extent of area 10.37 ha.), Yarehalli (Sy. No. 15, extent of area 15.97 ha.), Thekalavatti (Sy. No. 59, extent of area 35.42 ha., Sy. No. 60, extent of area 2.6 ha. And Sy. No. 80, extent of area 2.1 ha.) snf Kollalu (Sy. No. 112, extent of area 4 ha.), Jogimatti Wind Zone in Chitradurga District, in the State of Karnataka comprising of 35 (Thirty five) Units with an individual installed capacity of 600 Kilowatts and a total installed capacity of 21.0 MW and shall include land, buildings, plant, machinery, ancillary, equipment, material, switch-gear, transformers, protection

equipment and the like necessary to deliver the Electricity generated by the Project to the Corporation at the Delivery Point”.

27. On the strength of this definition, the learned counsel of the Appellant has contended that the entire project had been commissioned only on 26.8.03 and not on 14.5.03 and therefore, the 26.8.03 alone has to be construed to be the commercial date of operation.

28. We find some force in this contention. It is true that the Appellant's predecessor has been procuring power from the project from 14.5.03 onwards. As referred to above, the 14.5.03 is the date on which **part of the project** of the Respondent was certified to be commissioned by the competent authority of Corporation which satisfies the requirements of definition of Commercial Operation Date for that **part of the project**. It is also not in dispute that the energy has been supplied from that date to the Appellant at a rate agreed as per the Article 4.2 of the PPA and the bills also

have been paid as per the same by the Appellant's predecessor. Admittedly, no other certificate was issued by the Corporation with reference to the change of commercial operation date, on the stage of commissioning of entire project.

29. As pointed out earlier, as per this clause 4.2, Respondent has been regularly supplying power to the Appellant's predecessor as a contracted party to the PPA which in turn had been regularly paying for the delivered energy. It is also noticed from this clause that if the project is commissioned before 31.8.2003, the Corporation shall pay for the first 10 years @ Rs. 3.25 per KWh with an escalation at the rate of 2% per annum for the energy delivered to the Corporation. On the basis of this clause the Corporation has accepted that 14.5.03 was the commissioning date and accordingly they had been paying @ Rs. 3.25, the rate fixed in the formula. Appellant's predecessor issued commissioning certificate to the effect that 14.5.2003 was the commercial operation date for 7.2 MW. On the basis of the said certificate, it had admitted the invoices issued by the Respondent and made payments and effected

escalation for more than 3 years from the commercial operation date. Of course, by accepting the invoices and by making the payment to the Respondent for these years by the Corporation, on the basis of the certificate, the PPA was acted upon by both the parties endorsing that 14.5.2003 as the commercial operation date, but it can not change the ground reality that this certificate was only in respect of 7.2 MW and not 21 MW. Remaining 13.8 MW generators were commissioned on 26.8.2003 for which no certificate has been issued till date.

30. The project was not entirely operational on 14.5.03, The Respondent had been supplying energy and the Appellant has been paying tariff of Rs. 3.25 per kWh from 14.5.03 onwards from 7.2 MW generators and from 26.08.2003 from the entire project even though 14.5.03 was the commercial operation date for part of the project. As noted above, the Corporation issued certificate dated 24.6.03 accepting the commercial operation date was 14.5.03 but only for 7.2 MW and not for the entire project which is 21 MW project.

31. In view of the above, we hold that the certificate issued by the predecessor of the Appellant on 24.6.2003 is only for 7.2 MW generators being the 1st phase and not for the entire project. It cannot be the case of the first Respondent that the commercial operation date for 13.8 MW can be reckoned before the 2nd phase of project was commissioned. Accordingly, we conclude that the project has been commissioned in two phases with commercial operation date of 14.5.2003 for the first phase of 7.2 MW and second phase of 13.8 MW on 24.08.2003 when the generators started supplying power to the Appellant. We set aside the order of the Commission to this extent.

32. As we indicated above, at the risk of repetition, we are to state that we are not concerned with the decision taken in the SPPCC meeting as we are only concerned with the interpretation of the various definitions and relevant terms contained in the PPA.

33. The PPA is a regulated contract which has been approved by the Regulatory Commission through a regulatory process under Section 81 (i)(d) of the Electricity Act 2003. Hence, this can not be changed by a third party on the basis of the some meetings held between parties without approaching the State Commission. Therefore, the findings rendered by the State Commission with reference to the invalidity of the decision taken by the SPCC by fixing the commercial operation date by using weighted average method, in our view is perfectly justified. As correctly pointed out by the learned counsel for the Respondent, the commercial operation date has to be decided only as per the terms and conditions of the PPA and not on the basis of the decision taken in SPPCC meeting which is not a party to the PPA. Therefore, the contention urged by the learned counsel for Appellant on this aspect would fail.

34. In view of the discussions made above, we deem it appropriate to allow the Appeal in part and set aside the order of the State Commission to the extent indicated in para 31

above. Accordingly ordered and the State Commission is directed to recalculate the refund amount admissible to the 1st Respondent in the light of our decision regarding the date of commercial operation in two phases i.e. 7.2 MW on 14.5.2003 and 13.8 MW on 26.8.2003 and pass the appropriate order in accordance with law after hearing both the parties.

35. With these observations, the Appeal is disposed of.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 10th November, 2009

INDEX: Reportable.