

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

Appeal No. 52 of 2010

Dated : 8th March, 2011

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

In the matter of:

Oil and Natural Gas Corporation Ltd., (ONGC),
Head Engineering Services, 3rd Floor, Avani Bhawan,
Chandkheda, Ahmedabad-5.Appellant

Versus

1. Gujrat Electricity Regulatory Commission.
1st Floor, Neptune Tower, Opp. Nehru Bridge,
4 Ashram Road, Ahmedabad- 380 009
2. Gujrat Energy Transmission Co. Ltd. (GETCO)
Race Course, Vidyut Bhawan, Vadodara 390 007.
3. Uttar Gujrat Vij Company Limited (UGVCL),
Visnagar, Mehsana 384 001.
4. Dakshin Gujrat Vij Company Ltd., (DGVCL),
Nana Varachha Road, Surat 390 007.
5. Madhya Gujrat Vij Company Ltd., (MGVCL),
Race Course, Vidyut Bhawan, Vadodara 395006.

.....Respondents

Counsel for Appellant:

Mr.P.B. Suresh

Mr. Vipin Nair.

Counsel for Respondents:

Mr. M.G. Ramachandran for R-2

Ms. Sneha Venkatramni for R-2

J u d g m e n t

Per Hon'ble Shri V.J. Talwar, Technical Member:

Oil and Natural Gas Corporation (ONGC) is the Appellant.

1. Gujarat Electricity Regulatory Commission (State Commission) is the first Respondent. Gujarat Electricity Transmission Corporation (GECTO) is the second Respondent. 3rd, 4th & 5th Respondents are distribution licensees in the State of Gujarat.
3. Aggrieved by the impugned Order of State Commission dated 23.9.2009 in respect of wheeling charges for wheeling power from Captive Wind Energy Generators setup by the Appellant in the State of Gujarat through Transmission system of GECTO (R-2) to various locations for its own use, ONGC, the Appellant has filed this Appeal.
4. Material facts of this case are given below.
5. State Commission (R-1) notified Regulations for Procurement of Power from Renewable Sources on 29.9.2005. Government of Gujarat (State Government) issued Wind Power Policy 2007 on 13.6.2007 to encourage generation of electricity from Renewable Sources of Energy in the State. State Commission issued Tariff Order for wind energy on 11.8.2006.
6. Appellant (ONGC) decided to setup 34 Wind Energy Generators each of 1500 kW in Kutch district of Gujarat for captive use at various locations in Gujarat in terms of State Commission's Regulations and State Government's Policy 2007. Three Wind Energy Generators were commissioned on 31.3.2008. The

wheeling agreement was signed between ONGC (Appellant) and GECTO (R-2) on 27.5.2008. Another set of seven Wind Energy Generators were commissioned on 31.5.2008. However, GECTO (R-2) did not allow wheeling of energy to Appellant's various facilities (at more than two captive locations).

7. Hence, the Appellant approached State Commission (R-1) vide petition No. 954 of 2008 filed on 10.9.2008 with the following prayers:
 - i. Seeking permission for wheeling of energy provided by 31 nos. of Wind Energy Generators installed in Kutch District.
 - ii. Seeking permission to sign wheeling agreements with GECTO (R-2)/Discoms concerned for wheeling of power from these Wind Energy Generators to the places of consumption
 - iii. For payment of surplus energy at the rate of Rs 3.37 per unit determined in the tariff Order dated 11.8.2006.
8. While the said petition was pending, remaining 24 Wind Energy Generators were also commissioned on 29.9.2008. On 20.12.2008 GECTO (R-2) entered in to wheeling agreement for wheeling of power from 7 Wind Energy Generators commissioned earlier on 31.5.2008. GECTO (R-2), however, refused to enter in to wheeling agreement for balance 24 Wind Energy Generators commissioned on 29.9.2008 on the ground that as per State Government Wind Power Policy 2007, wheeling of power is restricted to two captive locations per Wind Energy Generator and that ONGC would wheel

power from these 24 Wind Energy Generators to more than two locations, which is not permitted under State Government Policy 2007.

9. The State Government amended its 2007 Policy which provided for Wheeling of power from a Wind Energy Generator to more than two locations of consumption subject to certain conditions. This amendment to 2007 Policy came in to effect from date of notification i.e. 7.1.2009.
10. GECTO (R-2) informed ONGC, the Appellant on 5.3.2009 that wheeling agreement between GECTO (R-2) and ONGC could be signed in accordance with the amendment to State Government policy 2007 vide notification dated 7.1.2009. ONGC replied to the above letter on 12.3.2009 stating that since State Government issued an amendment in the wind power policy 2007 on 7th January 2009, they had no objection in revising the agreement as advised by the GECTO (R-2) vide its letter dated 5.3.2009. ONGC, the Appellant, however, added in their letter that it might be ensured that this comes in to effect from the date of notification i.e. 07.01.2009. The date of commissioning of their Wind Energy Generators being much earlier, ONGC requested that applicability of the wheeling charges & levy of 5 paise per unit may be incorporated in the agreements from the date of notification of Amendment to 2007 policy. ONGC further added that matter was already pending before State Commission and its decision shall be final.
11. State Commission issued Tariff Order on 17.1.2009 on GECTO's (R-2) ARR petition for FY 2009-10 fixing transmission charges at Rs 2410/MW/day. Accordingly, GECTO (R-2) started recovery of transmission charges from all Wind Energy Generators wheeling power through GECTO (R-2) network.

12. Thereupon State Commission passed Order in ONGC's petition No. 954 of 2008 on 6.5.2009. In the said Order, State Commission observed that it is in the process of reviewing its existing regulations and Order on renewable energy and as a part of this process, the State Commission would take a view separately, on the amendments to the wind power policy announced by State Government in January 2009. The State Commission in this Order, directed GECTO (R-2) to immediately allow ONGC, the Appellant to wheel power to all the locations as proposed by ONGC with a condition that ONGC will pay transmission and wheeling charges and excess power purchase as per amendment to Wind Power Policy 2007 dated 7th January 2009.
13. The said Order also directed both parties (ONGC and GECTO) to enter into a wheeling agreement with a provision that the Transmission charges for wheeling of power and payment for surplus energy in respect of Wind Energy Generators connected to grid prior to 7th January 2009 should be in accordance with the prevailing regulations/Orders of the Commission and for others, the transmission charges for wheeling power and payment of surplus energy will be as per the arrangement agreed to by both parties i.e. GECTO (R-2) and ONGC, the Appellant.
14. GECTO (R-2) raised the bill for transmission charges for all the 34 Wind Energy Generators in accordance with amendment to State Government Wind Power Policy dated 7.1.2009. ONGC, the Appellant was of the view that since all his Wind Energy Generators have been commissioned and connected to grid prior to 7.1.2009, it should have been charged in

accordance with the then prevailing regulations/Orders i.e. as per State Government Policy 2007 and State Commission's wind energy tariff Order dated 11.8.2006 and not under the amendment to State Government Wind Power Policy 2007 notified on 7.1.2009. .

15. Having aggrieved over GECTO's (R-2) action of raising the bill under the amended policy, , ONGC filed a petition No 971 of 2009 before State Commission, praying for the compliance of State Commission's Order dated 6.5.2009 to the effect that amendment to State Government Wind Power Policy notified on 7.1.2009 should not be made applicable to 24 no. of Wind Energy Generators commissioned earlier.
16. After hearing the parties, State Commission passed impugned Order dated 23.9.2009 in the petition No. 971/2009. The State Commission in para [5] of impugned Order has observed that:

“The petitioner has in para 3 of the earlier petition no. 954/2008 Stated that 3 No. Wind Energy Generators out of 34 nos. were commissioned on 31.3.2008 and wheeling agreement had been signed. Seven more no. of Wind Energy Generators were commissioned in May 2008 and wheeling agreement was under execution. Remaining 24 no. of Wind Energy Generators were ready for commissioning in June 2008 had not been connected to the grid in spite of petitioner's requests. Thus, the petitioner has accepted that on 9.9.2008 when petition was filed, only 10 nos. of the WEGs were commissioned and remaining 24 nos. of WEGs were not

connected with the grid. The aforesaid matter was disposed off by the Commission on 6.5.2008. Till that day, no other fact contrary to the above was brought to the notice of the Commission by the petitioner. Even during the proceedings of Petition no. 954/2008 the petitioner did not submit that 24 nos. of WEGs were commissioned and connected with the grid.”

17. State Commission in para 5.4 of the impugned Order dated 23.9.2009 has recorded that:

“5.4 Hence, GECTO (R-2) ought to have sent invoice /bill for transmission charges as per Wind Power Policy, 2007 and Order No.2 of 2006 dt.11.8.2006 for 10 Nos of Wind Energy Generators and not as per Policy dated 7.1.2009. In case of remaining 24 nos. of Wind Energy Generators, GECTO (R-2) is entitled to raise invoice/ bills as per amendment made in the Wind Power Policy,2007, which was agreed to by the petitioner during the proceedings in Petition No.954/2008. Both ONGC and GECTO (R-2) are directed to implement the Commission’s Order dt.6.5.2009 in Petition No.954/2008 accordingly. GECTO (R-2) is directed to withdraw invoices/ bills issued on 25.5.2009 and 18.6.2009 and revise the same as per the direction given in earlier para of this Order. It is clarified that amendments to State Government Policy, 2007 notified on 7.1.2009 will not be applicable to the 10 nos. of Wind Energy Generators which were commissioned and connected to the grid prior to 6.5.2009. Through the Amendment to State Government Policy,2007 notified on 7.1.2009 is to be applied by GECTO (R-2) to the remaining 24 nos. of Wind Energy

Generators as a special case. Both petitioner and respondents are directed to implement this Order immediately.”

18. Aggrieved by this Order dated 23.9.2009, the Appellant, ONGC has filed this present appeal.
19. Learned Counsel for the Appellant would raise the contentions as follows:
 - i. There was no restriction on number of locations for Wind Energy Generator as per the State Government Wind Power Policy 2007. GECTO (R-2) had delayed wheeling agreement without any reason.
 - ii. Appellant's Wind Energy Generators were commissioned and connected to grid much before amendment to State Government Wind Power Policy 2007, which came in to force on 7.1.2009
 - iii. State Commission in its Order dated 6.5.2009 had observed that it was in the process of reviewing its existing regulations and Order on renewable energy and as a part of this process, the State Commission would separately take a view on the amendments to the wind power policy announced by State Government in January 2009. Thus the earlier Order dated 6.5.2009 was a protem Order until the State Commission finalized consideration of State Government's amendment dated 7.1.2009. Since then, State Commission has come out with a number of Orders by which it is made clear that for Wind Energy Generators commissioned prior to 11.8.2009, the unamended policy would alone apply and as such there is no basis for increased tariff under the amended policy.

- iv. It is not open to State Commission to materially amend its earlier Order dated 6.5.2009. In case, the State Commission is of the view that they had been misled, they should have examined the matter dispassionately on the merits after recalling the earlier Order as being based on a misrepresentation.
 - v. The categorical assertion in the operative part of the earlier Order is that in respect of Wind Energy Generators connected to the Grid prior to January, 2009, the unamended policy would prevail. Admittedly, in this case, 34 Wind Energy Generators were connected to the Grid prior to 7.1.2009
 - vi. The impugned Order itself recognizes that for 10 WTGs connected prior to 7.1.2009, the earlier policy is applicable. Therefore, on a parity of reasoning, the balance 24 WTGs also should be governed by the earlier policy only.
20. The learned counsel for respondent submitted in reply as follows:
- i. Appellant had been misinterpreting the Order dated 6.5.2009, which refers to Wind Turbine Generators connected to the Grid prior to 7.1.2009 in the sense of supply of the electricity to the Grid. The Appellant is confusing it with the testing of the units and making it ready for commercial operation.
 - ii. The correct factual position is that unlike the first 10 wind turbine units, the 24 wind turbine units were connected to the grid after 7.1.2009 for wheeling and therefore would be governed by the Wheeling charges as specified in the Amended Policy effective from 7.1.2009.

- iii. The reading of the Order dated 6.5.2009 clearly establishes that the Appellant claimed commissioning of 24 units was prior to 7.1.2009 and the Respondent No. 2 objecting to the claim for wheeling of electricity to more than two locations. The differing stand taken by both parties had invited the decision of the State Commission (by settling the matter) that the connection to the grid for wheeling be considered with effect from 4.3.2009 and that the Appellant would pay wheeling charges for the 24 Wind Turbine units as per Amended Policy dated 7.1.2009.
 - iv. Appellant had settled the matter with the Respondent No. 2 vide his the letter dated 12.3.2009, wherein the Appellant dealing specifically with the 24 Wind Turbine units in issue Stated clearly that the Appellant agrees to the payment of wheeling charges as per Amendment dated 7.1.2009. The same was reiterated in the Rejoinder filed before the State Commission on 25.3.2009. The Order dated 6.5.2009 was made pursuant thereto. It is not open to the Appellant to take a contrary stand subsequently and claim that the wheeling from 24 units shall be governed by the un-amended 2007 policy.
 - v. The Appellant signed wheeling agreements with the Respondent No. 2 for wheeling of electricity from the 24 units set up after the Amended Policy of the Government of Gujarat dated 7.1.2009. Pursuant to and in terms of the wheeling Agreements executed, the Appellant was permitted to wheel electricity from the place of generation to its different locations.
21. In view of rival contentions referred to above urged by the learned counsel for parties, following questions would arise for consideration:

- i. Whether there was any provision for restriction up to two locations per Wind Energy Generator in State Government Wind Policy 2007 and on this ground GECTO (R-2) delayed entering into wheeling agreement with ONGC?
- ii. Whether all 34 Wind Energy Generators of ONGC were commissioned and connected to grid prior to 7.1.2009?
- iii. Whether ONGC can raise the issue of wheeling charges when it has agreed to pay the same as per provisions of amended policy?
- iv. Whether State Commission was right in holding that issue cannot be raised on the ground that commissioning of 24 Wind Energy Generators were not brought to its notice during proceedings and appellant had agreed to be covered by amended policy?
- v. Whether Government of Gujarat's amendment to 2007 Policy date 7.1.2009 fixing wheeling charges for captive Wind Energy Generators is legally tenable in terms of Electricity Act 2003.

22. We shall now deal with each question one by one.

23. First question to be decided as to whether there was any restriction in regard to number of locations per Wind Energy Generator in State Government Wind Power Policy 2007. For the purpose of finding out the answer for this, we will have to examine the contents of State Government's Wind Power Policy 2002 and Wind Power Policy 2007.

24. The Wind Power Policy of the Government of Gujarat, notified in 2002. inter

alia, provided for wheeling of electricity by Industrial Undertakings for their use as under :

"3. Eligibility:

..... such industrial units may be allowed to wheel power to their own manufacturing units (maximum up to two units) within the State at wheeling price to be paid by them" (emphasis supplied)

.....

"8. Wheeling of Electricity

The industrial undertakings setting up wind energy generators while opting for wheeling the electricity to their manufacturing units may be allowed to do so at a wheeling charge of 4%."

The Wind Power Policy of 2002 was superseded by notification of the Wind Power Policy, 2007 providing for various terms and conditions applicable to the generators setting up wind energy projects in the State of Gujarat.

The Policy of 2007, inter-alia, provided as under :

"2. Operative period:

This policy will come into force with effect from 20th June, 2007 and shall remain in operation upto 30th June, 2012, which will be the operative period of the scheme. Wind Turbine Generators (WTGs) installed and commissioned during the operative period shall become eligible for the

incentives declared under this policy, for a period of twenty years from the date of commissioning or for the life span of the WTGs, whichever is earlier.

3. Eligible Unit

Any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person, will be eligible for setting up of WTGs, either for captive use and/or selling the energy, in accordance with the Electricity Act 2003, as amended from time to time.

Explanation :- The use of electricity for own consumption at his end use location/s by the owner of WTGs shall be considered as captive use.

5. Wheeling of Electricity:

The wheeling of electricity generated from the WTGs, to the desired location/s within the State, shall be allowed at a wheeling charge of 4% of the energy fed to the grid, as per Gujarat Electricity Regulatory Commission (State Commission) Order, as amended from time to time."

(emphasis supplied)

25. From perusal of the two policies i.e. 2002 Policy and 2007 Policy, it can be noticed that the 2002 policy explicitly provided restriction of two location per Wind Energy Generator, where as the 2007 policy did not specifically provide for the number of locations to which wheeling shall be allowed. In fact the use of word location/s in explanation to clause 3 and clause 5 of

the Wind Power Policy 2007 clearly indicate that end use could be at more than one location. GETCO (R-2) assumed that in the absence of specific provision, earlier provision would continue and thus did not allow ONGC to wheel power to more than two locations per Wind Energy Generator.

26. It is well established principle of law that, when an alteration is made to existing provision, the alteration must be considered to have been made deliberately. Hon'ble Supreme Court in K C Deo Bhanj v Raghunath Misra (AIR 1959 SC 586) observed that

“In the marginal note, however, the word “reduce” was not substituted by the word “modify”, apparently through inadvertence. If the word “modify” is to be read as “reduce”, then there could be no point in provincial legislature substituting the word “reduce” by the word “modify”. This change must have been made with some purpose and the purpose could only have been to use the expression of wider connotation so to include not only reduction but also other kinds of alteration... In our opinion the dropping of the word “reduce” and introduction of the word “modify” in the body of section 60 of the Act under consideration clearly indicate an intention on part of legislature to widen the scope of this section...”

27. In the present case, specific restriction of up to two captive locations per Wind Energy Generator as provided in 2002 Policy was dropped in 2007 Policy of State Government. In fact the words “up to two locations” in 2002 Policy were replaced by word “location/s” in 2007 Policy. The change

cannot be assumed to have occurred inadvertently.

28. Further, through its letter dated 6th November 2008 from Deputy Secretary, Energy and Petrochemical Department; State Government addressed to Managing Director, GECTO (R-2) clarified the issue beyond doubt. The relevant portion of said letter is reproduced below:

“With reference to the letter dated 21st May 2008 from the Vice Chairman, M/S India Wind Energy Association, Ahmadabad regarding interpretation of certain provisions of Wind Power Policy along with earlier Wind Power Policy -2002 for wheeling of wind power to more than two Captive locations.

In this regard, I am directed to clarify that the wheeling of Wind Power to more than two captive locations is allowed under existing Wind Power Policy 2007, I am therefore, to request you to kindly take note of this for favour of further necessary action at your end accordingly.” (emphasis added)

29. The above letter dated 6th November 2008 from Deputy Secretary, State Government had cleared any doubt in respect of number of captive locations and GECTO (R-2) should have entered into wheeling agreement with ONGC without further delay. However, GECTO (R-2) further waited till the State Government amended its Wind Power Policy 2007 on 7th January 2009 wherein wheeling charges had increased substantially. Only then GETCO (R-2) invited Appellant ONGC to enter in to wheeling agreement on

revised terms and conditions as per amended policy.

30. From the above discussions, it is to be concluded that there was no restriction on number of captive locations in Wind Power Policy 2007 and GECTO (R-2) had, therefore, delayed the wheeling agreement to the disadvantage of the Appellant.
31. Next question for consideration is as to whether Wind Energy Generators of ONGC were commissioned and connected to grid prior to 7.1.2009?
32. ONGC, the Appellant in its petition number 954 of 2008 dated 10.9.2008 filed before the State Commission, had Stated that 3 number Wind Energy Generators had already been commissioned and connected to grid for wheeling of power and Wheeling agreement had been entered into by GETCO (R-2). Seven number Wind Energy Generators were also commissioned and connected to grid but GETCO (R-2) was not entering in to wheeling agreement with Appellant.
33. Another set of 24 numbers of Wind Energy Generators were ready for commissioning. Hence Appellant requested State Commission to direct GECTO (R-2) to enter into wheeling agreement. ONGC has claimed that 24 Wind Energy Generators were also commissioned on 29.9.2008 and has put on record a certificate from Gujarat Energy Development Agency (GEDA) in support of this claim. Certificate from GEDA dated 23.10.2008 clearly shows that 24 Wind Energy Generators were commissioned on 29.9.2008. These Wind Energy Generators had produced power and injected it into GETCO

(R-2) grid. The certificate mentions that:

“This wind farm is connected by 33 kV grid line to 33/220 kV, 300 MVA capacity Moti Sindhohli site substation at Moti Sindhohli. The Moti Sindhohli site substation is connected to GECTO (R-2) Nani Khakhar Substation.”

34. GECTO (R-2) on the other hand contested the above and submitted that the certificate by GEDA was only for testing purposes and making them ready for commercial operation. We have closely examined the copy of certificate issued by GEDA. Relevant portion of certificate issued by GEDA dated 23/10/2008 is reproduced below:

“CERTIFICATE OF COMMISSIONING

This is to certify that M/S Oil and Natural Gas Corporation Ltd ... have commissioned 36 MW capacity wind farm consisting of 24 (twenty four) numbers of new wind turbine generators as per the WTG ID no. and date of Commissioning given below....

This wind farm is connected by 33 kV grid line to 33/220 kV, 300 MVA capacity Moti Sindhohli site substation at Moti Sindhohli. The Moti Sindhohli site substation is connected to GETCO Nani Khakher Substation...”

35. The above certificate issued by GEDA cannot be taken as a mere certificate for testing and making them ready for commercial operation. In fact the title of certificate itself is "Certificate of Commissioning". This certificate has also given details of generation report for the purpose of commissioning of wind farm showing some amount of generation by wind farm and fed into the grid.
36. GETCO (R-2) has in its written submission in para 8 also accepted that Wind Energy Generators were commissioned and connected to grid as indicated below:

"Thus, the wheeling of electricity from the 24 units of the Appellant was only commenced after the date of coming into force of the Amended Policy of the Government of Gujarat dated 7.1.2009. Prior to the Agreement, there was no wheeling and the Appellant did not get any adjustment for the Energy Units, if any, injected into the grid by the Appellant by reason of connectivity to the system. All such units were taken as unscheduled injection of Energy into the Grid. Thus, notwithstanding any connectivity to the Grid, there was no wheeling and there was no agreement or arrangement where under the Appellant could be said to have commenced wheeling of electricity."

37. Respondent (2) has, thus by admitting that prior to the agreement, there was no wheeling and Appellant did not get any adjustment for the Energy units, if any, injected into the grid by Appellant by reason of connectivity to the system, has virtually accepted that the Wind Energy Generators were commissioned and connected to grid before signing of wheeling agreement. There is no denial of the fact that wheeling would commence only from the

date of the wheeling agreement. The real Question is as to whether Wind Energy Generators of ONGC were commissioned and connected to grid prior to 7.1.2009 i.e. the date from which Amendment to Government of Gujarat's Wind Power Policy 2007 came in to effect.

38. From commissioning certificates issued by GEDA and assertion of GETCO (R-2), it is clear that the Wind Energy Generators were in fact commissioned and connected to grid prior to 7.1.2009. The State Commission ought to have ascertained these facts regarding commissioning and grid connectivity from full dump of memory contents of energy meters installed at Wind Energy Generator site. However this was admittedly not done.
39. Under these circumstances, we are of the opinion that all Wind Energy Generators were commissioned and connected to grid prior to 7.1.2009 and then same should have been dealt with accordingly.
40. Next question under consideration is as to whether ONGC, the Appellant can be permitted to withdraw from a stand taken vide its letter dated 12.3.2009 that there was no objection in revising the agreement in terms of amendment to 2007 Policy and now claim that his Wind Energy Generators were commissioned and connected to grid prior to 7.1.2009 and therefore it is not liable to be subjected to provisions of amendment to Wind Power Policy 2007?
41. For getting answer to this question it would be proper to refer to the contents of ONGC's letter dated 12.3.2009. Letter is reproduced below:

“Please refer your letter no. GETCO/EE-C/2108 dated 05.03.2009 regarding subject cited above, since Government of Gujarat has issued an amendment in the wind Power Policy 2007 on 7th January 2009 we have no objection to revise the agreement clause no. 3.2 & 3.6 as advised vide your above referred letter.

*However this may please be ensured that this comes into effect from the date of G.R. (this is w.e.f 07.01.09). **The date of commissioning of our WTGs being much earlier, it is requested that applicability of the wheeling charges & levy of 5 paise per unit under clause 3.2 & 3.6 respectively may be incorporated in the agreements from the date of notification of amendment to policy.***

It is not out of Order to mention that the hearing of our petition before Hon’ble GERC is scheduled to be held on 17.03.09 & the decision of Hon’ble commission shall be final” (emphasis added)

42. In the first paragraph of the said letter, the Appellant has Stated that since the Policy of 2007 had been amended by Government of Gujarat on 7th January 2009, they have no objection in revising the relevant agreement clauses accordingly. In second paragraph, the Appellant has clearly mentioned that date of commissioning of their Wind Energy Generators being much earlier to 7.1.2009, applicability of amended wheeling charges and other conditions to be incorporated in the agreement would be from the date of notification of amendment to the policy.

43. The relevant portion of Government of Gujarat Government Resolution dated 7th January 2009 amending Government of Gujarat's Wind Power Policy 2007 is reproduced below:

"1. Title

This Policy Shall be known as "Wind Power Policy (First Amendment) 2007

"2. Amendment of Clause No. 5 – Wheeling of Electricity

The clause shall be substituted by the following:-

(a) Wheeling of power to consumption site at 66 kV voltage level and above:-

The wheeling of electricity generated from the Wind Turbine Generators (WTGs) to the desired location(s) within the State, shall be allowed on the payment of transmission charges and transmission losses otherwise applicable to normal Open Access Customers.

.....

Wind farm owner desiring to wheel electricity to more than two locations shall pay 5 paise per unit on energy fed in the grid to concerned Distribution Company in whose area, power is consumed in addition to above mentioned transmission charges and losses, as applicable.

...

This will come in to effect from the date of Government Resolution”
(emphasis supplied)

44. According to the Appellant, the date of above mentioned Government Resolution was 7.1.2009 and therefore all Wind Energy Generators commissioned prior to that date would be covered under earlier 2007 policy and Wind Energy Generators commissioned on or after 7.1.2009 would be covered under amendment to 2007 Policy.
45. Let us now examine the chronological events in this context. First set of 3 Wind Energy Generators were commissioned and connected to grid on 31.3.2008 and Wheeling agreement was signed on 27.05.2008. Another set of 7 Wind Energy Generators were commissioned and connected to grid 31.05.2008 and wheeling agreement was signed on 21.12.2008. Balance 24 Wind Energy Generators were ready for commissioning during June 2008 but wheeling agreement could not be signed due to GETCO's (R-2) refusal to allow wheeling to more than two captive locations.
46. On 10.09.2008 ONGC, the Appellant filed petition before State Commission, seeking for the direction to GETCO (R-2) to enter in to wheeling agreement. The matter was pending before State Commission for long. In the meantime all the 24 Wind Energy Generators were commissioned and connected to grid on 29.9.2008. State Government also issued clarification on 6.11.2008 that there was no restriction on number of locations to wheel wind power. On 7.1.2009 the State Government issued amendment to Wind Power Policy 2007 enhancing wheeling charges substantially. GETCO (R-2) informed ONGC about change in 2007 Policy on 5.3.2009.

47. During this period, Appellant's Wind Energy Generators were commissioned injecting wind power in to the grid but could not get desired benefit. Under the said circumstances, Appellant had no option but to accept the offer made by GETCO (R-2) for wheeling. While accepting the offer, Appellant was careful enough to add that its Wind Energy Generators were commissioned much before the date of said Government Resolution and provisions of amendment to 2007 Policy would be applicable from date of Government Resolution. In other words, the Appellant had Stated that since its units were commissioned much before the date of Government Resolution and since the provisions of said Government Resolution are to be applied prospectively, it would not have any impact on it. The Appellant further added that the matter was pending before State Commission and its decision shall be final. Thus Appellant's acceptance vide said letter dated 12.3.2009 cannot be termed as absolute acceptance but at the best it can be considered a conditional acceptance.
48. In view of above, in our opinion Appellant is not estopped from raising the issue before the Commission and in this Tribunal.
49. Next issue for our consideration is as to Whether State Commission was right in holding that issue cannot be raised on the ground that commissioning of 24 Wind Energy Generators were not brought to its notice during proceedings and appellant had agreed to be covered by amended policy?
50. State Commission's findings in this regard in the impugned Order are as given below:

- (i) *During the proceedings, the petitioner did not submit that 24 number of Wind Energy Generators were commissioned and connected to the Grid. The petitioner has, for the first time, come with the evidence in the form of certificate issued by GEDA that 24 numbers of Wind Energy Generators were commissioned on 29.9.2008. This is a new evidence and plea which was never brought to the notice of the Commission. There was nothing on record that remaining 24 numbers of Wind Energy Generators had also been commissioned on 29.9.2008.*
- (ii) *The letter dated 6.11.2008 of Deputy Secretary, Energy & Petrochemical Department in which it is Stated that wheeling of wind power to more than two locations is allowed under the existing Wind Power Policy, 2007, is also new evidence and plea advanced by the petitioners.*
- (iii) *Moreover, petitioner had admitted before the Commission categorically and specifically that they are ready to pay transmission and wheeling charges as per Amendment made in Wind Power Policy, 2007.*

51. Before proceeding further, we would consider the merits of the observation made above.

51.1. As regards the observation made at (i) above, it is to be noted that Appellant had approached State Commission vide petition no. 954 of 2008 dated 10.9.2008 with a prayer to direct GETCO to enter into wheeling agreement

with the Appellant for wheeling power from its Wind Energy Generators and the State Commission in para 2.4 of its Order dated 6.5.2009, has Stated those facts as per petition filed by the appellant, which are given below:

“2.4 Three Wind Energy Generators out of the 34 Nos. installed were commissioned on 31.3.2008 and wheeling agreement has been signed. 7 more Wind Energy Generators were commissioned in May, 2008, wheeling agreement for which is under execution. The remaining 24 Nos. of Wind Energy Generators which were also commissioned but not connected to the grid inspite of petitioner’s requests.”

In para 7.7 of the said Order dated 10.9.2008 the State Commission took cognizance of Appellant’s letter to GETCO dated 12.03.2008 wherein Appellant had Stated that its Wind Energy Generators were commissioned much earlier than the date of Government Resolution i.e. 7.1.2009. In view of the above it cannot be held that Appellant had not informed the Commission about commissioning of 24 Wind Energy Generators during the proceedings in petition No. 954 of 2008 and the same had been informed only during proceedings related to the impugned Order.

51.2. As regards the second observation made by the State Commission, it is to be Stated that the letter dated 6.11.2008 from Deputy Secretary, Government of Gujarat was a new material and the said letter was also addressed to MD, GETCO (R-2). In this letter, Government of Gujarat had clarified that there was no restriction on number of captive locations per Wind Energy Generator in Wind Power Policy 2007. Immediately upon receipt of this letter, GETCO

(R-2) should have entered into Wheeling Agreement with Appellant and allowed him to wheel power to desired locations without any further delay. However, GETCO delayed the signing of wheeling agreement and waited for Amendment to 2007 policy enhancing wheeling charges substantially. State Commission should not have allowed GETCO to get benefit of higher wheeling charges for its intentional delay. It is well settled principle that no person can take advantage of its own wrong. The well known maxim is: ***“Nulls commode capere potest de injuria sua propria”*** (No one take advantage of his own wrong). Broom’s Legal Maxims, 10th Edition explains the maxim, inter alia as under:

“It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”

This maxim has been followed by the Hon’ble Supreme Court. In the decision of Union of India vs Major General Madan Lal Yadav reported in 1996(4) SCC 127.

In the present case before us, GETCO (R-2) had not allowed ONGC, the Appellant wrongly to wheel power from its Wind Energy generators to more than two captive location despite the clarification issued by Government of Gujarat in this regard. Hence, GETCO (R-2) cannot be allowed to take advantage of its own wrong.

52. In the light of above discussions, we are of the view that the State Commission should have decided the case on its own merits and not on the basis of observations made above. As indicated above, the State Commission ought to have ascertained the fact about commissioning of Wind Energy Generators from full dump of meters provided at Wind Energy Generators and passed the Order accordingly.
53. Now, next important question before us to consider is as to whether the amendment to 2007 Policy on 7.1.2009 enhancing wheeling charges as determined by the State Commission for captive Wind Energy Generators is legally tenable.
54. A new concept of Open Access has been introduced with enactment of Electricity Act 2003. Statutes in force prior to the enactment of 2003 Act did not have the provisions regarding wheeling of power and wheeling charges for third party use of distribution system of distribution licensee or SEB. Government of Gujarat with a view to harness vast potential of wind power in the State issued Wind power Generation Policy 2002. Relevant portion of this policy is given below:

“RESOLUTION

Gujarat has largest coast line in the country and the potential for wind energy in the State is around 5000 MW on the coast line of Saurashtra and Kutch. The Gujarat Energy Development Agency in collaboration with the Indian Institute of Meteorology, Bangalore has identified several excellent sites for wind power generation in the State. The Government of India has

also announced guild lines for Wind Energy. The formulation of a sustainable wind power generation policy was therefore under the active consideration of State Government. After due consideration, the State Government has decided to declare Wind Power Policy 2002...

3. Eligibility

Under this policy no cash incentives of Sales Tax incentives are available primarily due to constraints of resources. It is therefore, proposed to widen the eligibility criteria for setting up such wind energy generators. The beneficiaries are classed in two parts as under:

(i) Any registered industrial undertaking engaged in manufacture or production of goods within the State

Such Industrial units may be allowed to wheel power to their own manufacturing units (maximum upto two units) within the State at a wheeling pace to be paid by them. This would encourage the industrial undertakings to set up such wind generators since they would be availing the benefits of relatively cheaper electricity. Such wind energy generating units may also be allowed at their option to sell electricity to the Gujrat Electricity Board at a fixed price to be paid per unit. It should be made obligatory for them to give the option and the option once exercised should not be changed.

8. Wheeling of Electricity:

The industrial undertakings setting up wind energy generators while opting for wheeling the electricity to their manufacturing units may be allowed to do so at a wheeling charge of 4%.”

55. Since the statutes in force prior to year 2003 had no provision for determination of wheeling charges, provision contained in Government of Gujarat's 2002 Policy had force of law.
56. After enactment of Electricity Act 2003, power to determine tariff including wheeling charges did not remain with State governments. State Commissions had been entrusted with determination of tariff including wheeling charges under Electricity Act 2003. Section 86 of this Act providing the functions of State Commission is reproduced below:

86. Functions of State Commission (1) The State Commission shall discharge the following functions namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

57. In terms of Section 86 of 2003 Act, State Commission vide its Order no. 2 of 2006 dated 11th August 2006 determined Transmission and Wheeling Charges as under:

“ 20 Transmission and Wheeling Charges

The Commission clarifies that the procurement of power by distribution licensee/GUVNL from wind energy source shall be undertaken on ‘Ex-Bus’ basis...

However, in case the owner of a Wind Energy Generator opts for wheeling power for own use, the GETCO/ Distribution Licensee shall transmit the power to the point of use. The transmitting this power to the point of use, only GETCO will be entitled to charge 4% of energy injected (in kind) as all inclusive Transmission/ wheeling charges”

58. Thus State Commission adopted wheeling charges as specified under Wind Power Policy 2002. These charges specified under State Commission’s Order no. 2 of 2006 would remain unchanged until State Commission by another Order or Regulations modifies them. State Government has no power to disturb tariff or transmission charges or wheeling charges defined by State Commission.
59. Government of Gujarat replaced Wind Power Policy 2002 by Wind Power Policy 2007 on 13.6.2007. New Policy of 2007 also has provision of wheeling charges as under

5. Wheeling of Electricity:

The wheeling of electricity generated from the WTGs, to the desired location/s within the State, shall be allowed at a wheeling charge of 4% of the energy fed to the grid, as per Gujarat Electricity Regulatory Commission (GERC) Order, as amended from time to time."

60. Thus, Government of Gujarat, in its Policy of 2007, recognized the power of State Commission to specify the wheeling charges by stating "shall be allowed at a wheeling charge of 4% of the energy fed to the grid, as per Gujarat Electricity Regulatory Commission Order." Government of Gujarat, however, while amending the 2007 Policy in January 2009, made changes in wheeling charges enhancing them substantially. The modified clause of amendment to 2007 Policy read as under:

"2. Amendment of Clause No. 5 – Wheeling of Electricity

The clause shall be substituted by the following:-

(b) Wheeling of power to consumption site at 66 kV voltage level and above:-

The wheeling of electricity generated from the Wind Turbine Generators (WTGs) to the desired location(s) within the State, shall be allowed on the payment of transmission charges and transmission losses otherwise applicable to normal Open Access Customers.

.....

Wind farm owner desiring to wheel electricity to more than two locations shall pay 5 paise per unit on energy fed in the grid to concerned

Distribution Company in whose area, power is consumed in addition to above mentioned transmission charges and losses, as applicable."

61. Since the above modification in wheeling charges were made without the approval of the State Commission which is the sole authority to specify wheeling charges in terms of 2003 Act. The State Commission had taken up the issue with the Gujrat Urja Vikas Nigam through their letter No. GERC/SE/2009 dated 23rd January 2009, in which, the State Commission emphasized that as per Electricity Act 2003, only State Commission has got powers to determine tariff including Transmission and wheeling charges. Relevant portions of the said letter dated 23.1.2009 have been reproduced below:

"The Commission is considering / reviewing the policy declared by the Govt. on 7/1/2009. Under the Electricity Act 2003, determination of tariff including transmission tariff/charges and wheeling charges etc. are to be decided by the Commission. In the last para of your letter States that you are issuing instructions to GETCO and DISCOMs to start wheeling charges from wind turbine generators for wheeling of electricity (a) to consumption at 66 kV and above (b) to consumption site below 66 kV level according to the Government Policy. This is not in accordance with the Order of the Commission as of date.

All Orders and regulations issued by the Commission are required to be followed by the utilities/licensees till they are revised by the Commission"

62. Further, the State Commission in para 7.9 of its Order dated 6.5.2009 have observed that;

“...it may be noted that Commission is in the process of reviewing its existing regulations and Order on renewable energy. As part of this process, the Commission will take a view on the amendments to the Wind Power Policy announced by the Government in January 2009.”

63. From the above, it is clear that so far levy of wheeling charges are concerned, the amendment to Wind Power Policy 2007 issued by Government of Gujarat in January 2009 was without authority and were *ultra vires*. In fact Government of Gujarat had also recognized the powers of State Commission in Government Resolution dated 7.1.2009 as given below:

“Notwithstanding anything contained in this resolution, the provisions of the Electricity Act 2003 and the GERC regulations, as issued from time to time, shall prevail, for the purpose of the implementation of this policy.”

Thus the arrangement of wheeling power from Appellant's Wind Energy Generators as per amendment to 2007 Policy and Commission's Order dated 6.5.2009 were protem till Commission takes final decision in the Matter.

64. Thereupon, the State Commission had notified its new Regulation on Renewable Energy vide its Order no. 1 of 2010 dated 30.1.2010. In para 6.1 of this Order Commission has dealt with Transmission and Wheeling charges. Relevant portion of the Commission's Order dated 31.1.2010 is reproduced below:

“ 6.1 Transmission and Wheeling charges

...

Commission’s Ruling:

The Commission had, in the draft Order, proposed lower transmission/wheeling charges in case of the wind energy generators opting for wheeling of power for own use, considering the lower power plant load factor of the wind energy projects. But, as suggested by GETCO, cost of transmission/distribution assets created for such projects is required to be recovered through tariff. The proposed charges do not recover fully the cost of transmission and distribution assets. After considering the suggestions of the objectors and Govt. of Gujrat Amended Wind Power Policy dated 13th January, 2009, the Commission decides the transmission and wheeling charges applicable to the captive consumers as under:

(a) Wheeling of power to consumption site at 66 kV voltage level and above.

The wheeling of electricity generated from the Wind Power Generators, to the desired location(s) within the State, shall be allowed on payment of transmission charges and transmission losses applicable to normal Open Access Consumer.

(b) Wheeling of power to consumption site below 66 kV Voltage level.

- (i) *The wheeling of electricity generated from the Wind Power Generators, to the desired location(s) within the State, shall be allowed on payment of transmission charges, applicable to normal open Access Consumer and transmission and wheeling losses @ 10% of the energy fed to the grid. The above loss is to be shared between the transmission and distribution licensee in the ratio of 4:6. This provision shall be applicable to the Wind Energy Generators who are having more than one Wind Energy Generators.*
- (ii) *The wheeling of electricity generated by smaller investors, having one Wind Energy Generator in the State, to the desired location(s), shall be allowed on payment of transmission charges, applicable to normal open access consumer, and transmission and wheeling losses @ 7% of the energy fed to the grid. The above losses are to be shared between the transmission and distribution licensee in the ratio of 4:3.”*

65. From perusal of the above new Regulations, it becomes clear that State Commission had adopted the provisions of amendment to 2007 Policy with slight modification in relation to sharing of losses between transmission and distribution licensees. These Regulations came into force 11th August 2009. Para 9 of the Regulations dealing with applicability is reproduced below:

“9. **Applicability of the Order:**

As already clarified in para 2.2. above, this Order shall come into force from 11th August, 2009. The tariff fixed in the Order shall be applicable to all the wind energy generators commissioned on or after 11th August,

2009. The existing contracts and agreements between the wind energy generators (Wind Energy Generators) and distribution licensees signed upto 10th August will continue to remain in force as per the PPA signed by the parties.” (emphasis supplied)

66. As per above, only existing PPAs signed between energy generators and distribution licensees would continue to remain in force. Wheeling charges as determined in this Order would be applicable on Wind Energy Generators commissioned only after 11th August 2010. Wind Energy Generators commissioned and connected to grid prior to this date shall be governed by Government of Gujarat’s Wind Power Policy 2007 and State Commission’s existing Regulations on Renewable Sources, 2006. Undoubtedly Wind Energy Generators of Appellant were commissioned and connected to grid prior to 11th August 2009. These were to be covered under State Government’s Wind Policy 2007 and State Commission’s earlier regulations and accordingly Appellant is liable to pay wheeling charges at 4% of energy injected (in kind) as all inclusive Transmission and wheeling charges.
67. Summary of our findings
- I. **There was no restriction on number of captive locations per Wind Energy Generator in Government of Gujarat’s Wind Power Policy 2007. GETCO (R-2) had delayed the signing of wheeling agreement to wheel power from appellant’s Wind Energy Generators to desired locations.**
 - II. **Appellant’s Wind Energy Generator’s were commissioned and connected to grid prior to 7.1.2009.**

- III. **In view of intentional delay by GETCO to wheeling agreement, Appellant has right to raise the issue despite his conditional acceptance vide letter dated 12.3.2009.**
- IV. **State Commission ought to have taken into account the Government of Gujarat's letter dated 6.11.2008 clarifying the number of captive locations and decided the case accordingly.**
- V. **After enactment of Electricity Act 2003, State Commission is sole authority to specify wheeling charges. Government of Gujarat had no power to change the wheeling charges specified by State Commission vide its Order no 2 of 2006 dated 10.8.2006. Enhancement of wheeling charges in amendment to 2007 Policy vide Government Resolution dated 7.1.2009 is *void abnatio*.**
68. The matter is disposed off accordingly. Appeal is allowed with no Orders as to costs.
69. Pronounced in the open court today the 8th March, 2011

(V J Talwar)
Technical Member

(Justice M Karpaga Vinayagam)
Chairperson

INDEX : REPORTABLE/NON-REPORTABLE
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