

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal no. 189 of 2015

Dated: 4th December, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of

Chhattisgarh State Power Distribution Co. Ltd. ... Appellant(s)
Vidyut Seva Bhavan, Danganiya
Raipur – 492 013

Versus

Chhattisgarh State Electricity Regulatory
Commission
Irrigation Colony, Shanti Nagar
Raipur – 492 001, Chhattisgarh ...Respondent no. 1

Chhattisgarh Biomass Energy Developers Association
C-33, 3rd Floor, Ashoka Millennium Ring Road No.1
Rajendranagar Chowk
Raipur – 492 001, Chhattisgarh ...Respondent no. 2

Counsel for the Appellant(s) : Ms. Suparna Srivastava
Mr. Rahul Srivastava
Ms. Neelmani
Mr. Arvind Banerjee
Ms. Anushka Arora

Counsel for the Respondent(s) : Mr. Ravi Sharma for R-1
Mr. Buddy A. Ranganadhan and
Mr. Raunak Jain for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

This Appeal has been filed by the Chhattisgarh State Power Distribution Company Ltd (**hereinafter referred to as “Appellant”**) under Section 111 of the Electricity Act, 2003 against Impugned Order dated 31.10.2014 passed by the Chhattisgarh State Electricity Regulatory Commission (**hereinafter referred to as “State Commission”/Respondent no.1**). Subsequent to the filing of the Appeal, Chhattisgarh Biomass Energy Developers Association (**hereinafter referred to as “Respondent No.2”**) filed Application for Intervention through I.A. No. 143 of 2015 which was allowed. Chhattisgarh State Power Distribution Co. Ltd., the Appellant is one of the successor companies of the undivided Chhattisgarh State Electricity Board which has been unbundled in terms of the Chhattisgarh State Electricity Board Transfer Scheme Rules, 2010 notified by the Government of Chhattisgarh under Section 131 of the Electricity Act, 2003 and performing functions and duties pertaining to the distribution of power in the State of Chhattisgarh. The Respondent no.1 is Chhattisgarh

State Electricity Regulatory Commission and is performing the functions under Section 86 of the Electricity Act, 2003 including regulation of power procurement process for purchase of power by the Distribution Licensees from various Renewable Energy (RE) sources operating in the State of Chhattisgarh.

2. The State Commission passed the Impugned Order dated 31.10.2014 whereby the State Commission has determined the tariff for power purchase for the FY 2014-15 by the Appellant from various RE generators operating in the State of Chhattisgarh including from biomass based power producers in *suo motu* Petition No. 34/2014 (M). The Appellant is aggrieved by the Impugned Order dated 31.10.2014 and has filed the present Appeal.

3. Facts of the Appeal.

a) The State Commission notified on 27.07.2012 the CERC (Terms and Conditions for determination of generation tariff and related matters for electricity generated by plants based on renewable energy sources) Regulations, 2012 (**hereinafter referred as “CERC RE Regulations”**) for control period of five years with effect from 01.04.2012. The said Regulations specified the terms

and conditions of tariff for wind, hydro, biomass and solar based electricity generating stations for the purpose of sale of power to Distribution Licensees. The State Commission while notifying the CSERC RE Regulations for Biomass plants indicated the following operating parameters as well as the fuel price;

- i. Station Heat Rate (SHR) 4000 Kcal/KWH.
 - ii. Calorific value at 3300 Kcal/kg.
 - iii. Fuel price for the first year of control period is Rs.2476/MT.
- b) In terms of Regulation 8 of CSERC RE Regulations, the State Commission is required to determine the generic tariff for renewable plants and accordingly the State Commission issued Draft Order dated 29.12.2012 inviting comments from various stakeholders for purchase of power from RE generators which are achieving Commercial Operation Date during the first year of control period i.e. FY 2012-13. In response to the same, the Appellant submitted its comments/objections on the above draft order and opposed the fuel cost and the operating parameters and sought the State Commission's intervention for fixing operating parameters such are SHR & calorific value at reasonable levels and the fuel price to be determined at reasonable rate keeping in

view the existing rice husk price in the State which is much lower than as compared to the proposed one. However, as alleged by the Appellant, the State Commission did not consider the above objections of the Appellant and decided the tariff for the first year of control period by taking the operating parameters and the fuel cost as proposed in the draft order.

- c) For the following Financial Year i.e. FY 2013-14, the State Commission issued draft order dated 01.04.2013 for determination of generic tariff for purchase of power from RE generators which are achieving Commercial Operation Date during the second year of the control period i.e. FY 2013-14.
- d) In response to the same, the Appellant submitted its comments/objections on 25.04.2013. The State Commission again did not consider the same and determined the tariff for the second year of the control period based on the State Heat Rate ("**SHR**"), Calorific Value ("**CV**") and the fuel cost as proposed in the draft order which in the opinion of the Appellant are much higher than the reasonable levels.
- e) The Central Commission amended CERC RE Regulations on 18.03.2014 by making available an option to the State Commission

for determination of biomass fuel price annually based on the biomass fuel prices as per an independent survey to be conducted in this regard.

- f) The State Commission issued draft order on 18.07.2014 for determination of generic tariff for purchase of electricity generated from various RE sources in the State of Chhattisgarh that are achieving Commercial Operation Date during the third year of control period i.e. FY 2014-15.
- g) The Appellant vide letter dated 12.08.2014 submitted its comments/objections on the above draft order to the State Commission and sought their indulgence in specifying the reasonable operating parameters as well as the fuel cost.
- h) The Appellant vide the above mentioned letter brought to the notice of the State Commission that biomass tariff in the State for Chhattisgarh had been witnessing unabated increase and is defeating the purpose as laid down in the Electricity Act, 2003 and the Tariff Policy. The Appellant requested the State Commission to urgently review the CSERC RE Regulations so as to rationalize and streamline biomass tariff being determined in the State of Chhattisgarh.

- i) The Appellant submitted that the operational norms need to be reviewed by the State Commission for the efficient operation of the plants and to avoid unnecessary financial burden on the consumers of the State of Chhattisgarh. The Appellant reiterated that the prevailing market rates for the biomass fuel in the State of Chhattisgarh are much lower than the normative price prescribed and submitted that the same should also be determined in accordance with the Central Commission's first amendment to its Regulations issued in the year 2014 vide its Order dated 18.03.2014.
- j) The State Commission did not consider the repeated requests of the Appellant to review all the three norms and passed the Impugned Order dated 31.10.2014 determining therein the generic tariff for the purchase of electricity generated by RE power plants commissioned and achieved commercial operation in the FY 2014-15. As per that, the State Commission specified the following:
- i. SHR - 4000 Kcal/KWH
 - ii. Calorific value at 3300 Kcal/kg
 - iii. Fuel price for the control period FY 2014-15 is Rs2942.54/MT

- k) These norms as considered in the Impugned Order dated 31.10.2014 have not taken into consideration the amendment issued by the Central Commission on 18.03.2014. Thus, as per the Appellant the State Commission failed to take into account the option provided by the Central Commission for determining the state specific biomass fuel price and even also failed to consider the objections filed by the Appellant from time to time as regards to the determination of operating parameters such as SHR, calorific value etc.
- l) As per the Appellant, the Impugned Order dated 31.10.2014 issued by the State Commission has resulted in undue financial burden on the Appellant and its consumers due to the increased tariff as the Appellant is required to purchase power from biomass power producers in the State of Chhattisgarh at unrealistic and unreasonable tariffs.
4. We have heard at length learned Counsel for the Appellant and learned Counsel for Respondent no.1 and Respondent no.2 and considered their written submissions and the arguments put forth during the proceedings.

5. The main issues brought out for our consideration are:-
 - i) Whether the State Commission while specifying biomass fuel price for the year 2014-15 as Rs.2942.54/MT has erred by not adopting the provisions of Amended Regulations of the CERC (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations, 2012 issued vide its order dated 18.03.2014?**
 - ii) Whether the State Commission has erred while specifying therein the Station Heat Rate (“SHR”) for biomass based power plant as 4000 Kcal/KWH for FY 2014-15?**
 - iii) Whether the State Commission has erred while specifying the calorific value of biomass fuel as 3300 Kcal/kg for the FY 2014-15?**
6. Out of the three above issues, we shall first deal with the first issue i.e. Biomass Fuel price determination in the Impugned Order dated 31.10.2014.
7. The main grievance of the Appellant is with respect to the fuel price for the FY 2014-15 as fixed by the State Commission in the Impugned Order dated 31.10.2014 without taking into consideration

the alternate mechanism provided by the CERC Regulations vide its amendment dated 18.03.2014 wherein an option was available to the State Commission for fixing biomass price annually after undertaking independent survey by a State Level Committee.

- a) During the pleadings, the Appellant sought our attention to the provisions under Section 61 of the Electricity Act, 2003 wherein statutory mandate is given to the State Commission to specify, subject to the provisions of the Act, the terms and conditions for determination of tariff and in doing so the Appropriate Commission is to be guided by the following factors:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- (e) the principles rewarding efficiency in performance;*
- (f) multi year tariff principles;*

- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]*
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
- (i) the National Electricity Policy and tariff policy:*

The arguments put forth by the Learned Counsel for the Appellant that the State Commission is to be guided by the principles and methodology specified by the Central Commission for determination of tariff applicable to generating companies and while doing so, the State Commission is to ensure at all times that the consumers' interest is duly safeguarded. The Appellant stated that the statutory mandate of safeguarding the consumers' interest has not been followed by the State Commission while determining tariff for purchase of power from biomass based power project for the FY 2014-15 by not adopting option given by Central Commission issued vide its order dated 18.03.2014 for undertaking independent survey by a State Level Committee for fixing biomass price annually. The Appellant further quoted that even while fixing norms, the Central Commission have taken into consideration the following suggestions

given by the Chhattisgarh Biomass Energy Developers Association

(Respondent no.2):

“Chhattisgarh Biomass Energy Developers Association has suggested that Chhattisgarh being the largest producer of Biomass power and State has only rice husk as fuel for biomass based plants, there should be separate norms for determination of tariff.”

In response, CERC has stated as under:

“As regards request for separate norms for Chhattisgarh and Gujarat, in the absence of any authentic data, the Commission decided that till such time such States would be covered under the Other States category.”

- b) In the light of the above, the Appellant stated that no authentic data was available with Central Commission with respect to prevailing biomass fuel price in the State of Chhattisgarh while notifying the fuel price as such the Central Commission decided till the time the authentic data is made available, the State of Chhattisgarh would be covered under the other States category. It is clearly understood that once authentic data is available, the biomass fuel price for the State of Chhattisgarh would be determined separately and thereafter, the same would not be covered under the other States category. Central Commission vide its amendment dated 18.03.2014 specified option which reads as follows:-

“Alternatively, biomass fuel price shall be decided annually by the appropriate Regulatory Commission through an independent survey which could be carried out by constituting a State level committee consisting of representatives of State Nodal Agency, State Government, Distribution Licensees, biomass power producers association and any other organization.”

- c) The Appellant further submitted that there are not contesting earlier orders of the State Commission determining therein the biomass fuel price for the FY 2012-13 and 2013-14. However, they are aggrieved by fact that the State Commission while framing RE Regulations have taken into consideration the Central Commission RE Regulations but the Central Commission’s regulations were amended in 2014 and the State Commission should have adopted this amendment issued by the Central Commission and should have conducted an independent State level survey for determining the Biomass Fuel Price. Had it been done, in the opinion of the Appellant, much lower biomass fuel price would have emerged for FY 2014-15 thereby reducing the tariff for this FY which would have benefitted the consumers at large.
- d) The Learned Counsel for the State Commission submitted that Section 181(2)(zd) of the Electricity Act, 2003 gives powers to the State Commissions to frame regulations specifying terms and

conditions for determination of tariff under section 61 of the Electricity Act, 2003. Similarly, Section 178 (s) of the Electricity Act, 2003 gives powers to the Central Commission to frame regulations specifying terms and conditions for determination of tariff under section 61 of the Electricity Act, 2003. The powers of Central Commission under section 178 and powers of State Commissions under section 181 are independent of each other. Section 61 of the Electricity Act, 2003 requires of the appropriate Commission to specify terms and conditions for determination of tariff and while doing so it shall be, *interalia*, guided by the principles and methodologies specified by the Central Commission. If the intention of the legislature was that the State Commission would adopt the provisions of the regulations framed by the Central Commission, the legislature would have used the term 'shall follow' rather than the term 'shall be guided by' in section 61 of the Electricity Act, 2003.

Hence the prayer of the Appellant to amend the RE Tariff Regulation, 2012 and its tariff order dated 31.10.2014 at par with or as per the CERC (Terms and conditions for tariff determination

from Renewable Energy Sources) First Amendment) Regulations, 2014 is legally misconceived, against the law and not maintainable. It is further submitted by the Respondent no.1 that any regulations framed by the CERC cannot override the provisions of Indian Electricity Act 2003. Once State Electricity Regulatory Commissions have framed their own regulations, they have to follow their own regulations. The State Commission is also not mandated to follow any order of the Central Electricity Regulatory Commission which has recommended certain norms for biomass projects. Regulations of the CERC is only guiding factor till the time SERC have not made their own regulations and once SERCs have made their own regulation they are not bound by the norms and regulations of CERC.

- e) In support of their above arguments, the Respondent no.1 stated that the same principle has been laid down by this Tribunal in case of Haryana Vidyut Prasaran Nigam... vs Haryana Electricity Regulatory 18 April, 2012, Judgment in Appeal No. 102 of 2011 and the relevant extract is reproduced below;

“As pointed out earlier in Para 5 & 6 above, once the State Commission have notified its Regulations in accordance with the provisions of the Act, the Central Commission’s Regulations would have no relevance in the matter and the State Commission would

have to follow its own Tariff Regulations for determination of tariff for licensees and generating companies.....

.....

The crux of the above discussions is that the State Commissions are independent statutory bodies having full powers to frame its own Regulations specifying terms and conditions for determination of tariff and once such Regulations are notified, the State Commission is bound by these Regulations.”

- f) The significant development is brought to our notice by the Learned Counsel of the State Commission during the proceedings of the case that the State Commission has now initiated a process for market survey in the State of Chhattisgarh for determining the biomass fuel price.

- g) The Appellant further brought to our notice the following provisions contained in Chapter 9 of the CSERC RE Regulations 2012 issued by the State Commission which *interalia* include as under:-

“69. Deviation from norms

69.1 Tariff for sale of electricity by the generating company may also be determined in deviation from the norms specified in these Regulations subject to the conditions that the reasons for deviation from the norms specified under these Regulations shall be recorded in writing.

70. Power to Relax

70.1 The Commission may by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected may relax any of the

provisions of these Regulations on its own motion or on an application made before it by an interested person.

71. Power to remove difficulties

71.1 If any difficulty arises in giving effect to these Regulations, the Commission may, of its own motion and otherwise, by an order and after giving a reasonable opportunity to those who are likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.”

In our opinion it is upto the State Commission to decide whether they like to consider any relaxation if the circumstances so warrant and the Appellant if so desires could appropriately take up the same before the State Commission. We are not expressing any opinion on the same.

- h) The Appellant further brought to our notice the following orders of this Tribunal with respect to power to relax vested in the State Commission, which *interalia* states as under:-

- (i) NTPC Ltd. v Madhya Pradesh State Electricity Board, 2007 ELR APTEL 7 (Appeal No. 89/2006) decided on 22.1.2007:

“24.....In case any Regulation causes hardship to a party or works injustice to him or application thereof leads to unjust result, the Regulation can be relaxed.....”

- (ii) Ratnagiri Gas and Power Pvt. Ltd. v. CERC & Anr. (Appeal No. 130/2009) decided on 25.3.2011:

“18.1 The Regulations of the Central Commission and the decisions of the Tribunal and the Supreme Court confer the judicial discretion to the Central Commission to exercise power to relax in exceptional case. However, while exercising the power to relax there should be sufficient reason to justify the relaxation and non-exercise of discretion would cause hardship and injustice to a party or lead to unjust result. It has also to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming relaxation. Further, the reasons justifying relaxation have to be recorded in writing.”

In our opinion, the above decisions of the Tribunal are with respect to the specific circumstances necessitating the relaxations in the Regulation strictly on merits on a case to case basis. In our opinion, the State Commission has already initiated a process for conducting market survey in the State of Chattisgarh for determining the biomass fuel process and as such, the Appellant's main grievance is being addressed accordingly hence the applicability of the above orders of this Tribunal is not considered.

- i) The relevant operating portion of Impugned Order dated 31.10.2014 dealing with the determination of Biomass Fuel price is reproduced below:

“4.7.1. For determination of the energy charge for the existing biomass plants, relevant para of the RE Tariff Regulations 2012 is reproduced below (emphasis added);

“45. Fuel Cost

45.1 Biomass fuel price shall be 2476 Rs/MT during first year of the control period (i.e., FY 2012-13) and thereafter shall be linked to indexation mechanism as specified under Regulation 45.2 and 45.3.

45.2 In case of (existing and new) biomass power projects, the indexing mechanism specified in this Regulation for adjustment of fuel prices for each year of operation, will be applicable for determination of applicable variable charge component of tariff:

45.3 The indexed Biomass Fuel Price in case of Biomass Power projects for each year of the control period shall be considered pursuant to notification of such indexed Biomass Fuel Price norm as applicable for Biomass Power projects within the State by Central Electricity Regulatory Commission in accordance with indexation mechanism stipulated under CERC RE Tariff Regulations.

45.4 The biomass base price may be revised in line with the relevant orders of the CERC.”

4.7.2. The Commission, in terms of Regulation 45 of the RE Regulations 2012, has specified the biomass fuel price applicable during the period 2012~~13~~ as R s. 2476 per MT. Fuel cost indexation mechanism for biomass fuel price and bagasse price have been specified in regulations 45.3. As per these regulations, Central Commission’s indexation mechanism stipulated under CERC RE Tariff Regulations will be applicable. Central Commission has specified biomass fuel price for other States as Rs. 2942.54 per MT for the year 2014-15 and same will be applicable;

4.7.3. The Commission hereby approves and adopts the CERC approved biomass fuel price as Rs. 2942.54 per MT the year 2014-15.”

- j) In our opinion, the State Commission while determining the fuel cost for the FY 2014-15 in the Impugned Order dated 31.10.2014 has not erred as the same has been computed based on their RE Regulations notified by the State in the year 2012 for a control period of five years wherein they adopted the biomass fuel price as specified by the CERC Regulations for the year 2012-13 with the provisions of indexation for the following years and accordingly the State Commission in the Impugned Order dated 31.10.2014 notified the biomass fuel price at Rs.2942.54/MT. The only issue brought out by the Appellant was limited to the State Commission of having not adopted the amendment issued by CERC in 2014 for conducting a market survey for determining the biomass fuel price. This option was available to the State Commission while issuing the Impugned Tariff Order for the FY 2014-15 and it was for the State Commission to have considered whether to take into account the option made available vide the amendment of Central Commission issued in 2014 for determination of Biomass Fuel price for FY 2014-15. Though the State Commission had not adopted the amendment issued by Central Commission, but they have complied with the provisions of RE Tariff Regulations of the

State Commission which, *interalia*, specified the rate being approved by the Central Commission and accordingly, the State Commission approved and adopted the Central Commission's approved Biomass Fuel price as Rs. 2942.54/MT for FY 2014-15.

- k) In our considered opinion, the rate of biomass fuel as specified in the Impugned Tariff Order dated 31.10.2014 issued by the State Commission is in order. We have noted the fact that the State Commission has already undertaken a process for determining the biomass fuel cost based on the market survey in the State of Chhattisgarh and we feel the issue is being addressed appropriately.

8. Now we consider the other two issues brought out by the Appellant for our consideration with respect to the Station Heat Rate and the calorific value specified by the State Commission in the Impugned Order dated 31.10.2014.

- a) The State Commission vide its RE Regulations 2012 specified these parameters for the biomass generating stations and the State Commission in its Impugned Tariff Order dated 31.10.2014

have considered the same. This has been done even after the objections filed by the Appellant. As alleged by the Appellant, the State Commission did not consider the above objections of the Appellant and proceeded to decide tariff accordingly based on the specified norms.

- b) The submissions made by the Appellant with respect to these operating parameters is that in the adjoining States of Gujarat, Madhya Pradesh and Maharashtra, their respective State Commissions have specified lower value of SHR and calorific value. As submitted by the Appellant, the SHR and calorific value as notified by these adjoining States as under:-

“

<i>Name of the State</i>	<i>Heat Rate specified (kcal/kwh)</i>	<i>Calorific Value specified (kcal/kg)</i>
<i>Gujarat</i>	<i>3800</i>	<i>3300</i>
<i>Madhya Pradesh</i>	<i>3800</i>	<i>3612</i>
<i>Maharashtra</i>	<i>3800</i>	<i>3611</i>

“

- c) We have observed from this above table that the SHR as specified by the State Commission in its Impugned Order dated 31.10.2014 is 4000 Kcal/KWH whereas in the above states it 3800 Kcal/KWH.

The calorific value of biomass fuel as specified in these adjoining States is either same or higher with respect to that specified by the State Commission in its Impugned Order dated 31.10.2014 i.e. 3300 Kcal/kg.

- d) The operating parameters are determined based on the relevant data available with the State Commission. In the State of Chhattisgarh, there are many biomass generators and their operating parameters as well the local biomass fuel characteristics are available facilitating the State Commission to determine the same.
- e) It is our considered opinion that it is subject matter of the State Commission and they are in a better position to determine these parameters.
- f) The State Commission has computed the operating parameters such as Station Heat Rate and calorific value in its Impugned Order dated 31.10.2014 in accordance with the RE Regulations issued by the State Commission.

ORDER

We fully agree and approve the findings recorded by the State Commission in the Impugned Order dated 31.10.2014. The present Appeal is dismissed and the Impugned Order dated 31.10.2014 is confirmed.

No order as to costs.

Pronounced in the Open Court on this **4th day of December, 2015.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~

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