

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

APPEAL NOS. 22 & 24 OF 2014

Dated : 22nd April, 2015

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal No. 22 of 2014

In the matter of :

**Madhya Gujarat Vij Company Limited
Sardar Patel Vidhyut Bhavan,
Race Course Circle,
Vadodara-390007.**

....Appellant

Versus

- 1. Ankur Scientific Energy Technologies Pvt. Ltd.
Ankur, Near Navarachana School,
Sama Road, Vadodara-390008.**
- 2. Gujarat Energy Development Agency,
4th Floor, Block No.11 & 12,
Udyog Bhavan,
Sector-11, Gandhinagar,
Gujarat-382017.**
- 3. National Load Despatch Centre,
Power System Operation Corporation Limited,
8/A, Qutub Institutional Area,
Katwaria Saria, New Delhi-110016**
- 4. Gujarat Electricity Regulatory Commission,
6th Floor, GIFT ONE,
Road 5 C, Zone 5,
GIFT City,
Gandhinagar-382355.**

....Respondent(s)

**Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal**

Counsel for the Respondent(s) : Mr. C.K. Rai and
Mr. Ravin Dubey for R-1

Ms. Suparna Srivastava,
Ms. Nishta Sikrora,
Mr. Kumar Harsh and
Mr. S.R. Pandey for R-4

Mr. Ashok Rajan and
Mr. Arjun Krishnan for R-3

Appeal No. 24 of 2014

1. **Paschim Gujarat Vij Company Limited
Nana Maya Main Road,
Laxminagar, Rajkot-360004.**
2. **Dakshin Gujarat Vij Company Limited,
Nana Varachha Road,
Kapodara, Surat-395006.**
3. **Uttar Gujarat Vij Company Limited
UGVCL Regd. & Corporate Office
Visnagar Road, Mehsana-384001.**
4. **Gujarat Urja Vikas Nigam Limited,
Sardar Patel, Vidyut Bhavan Race Course,
Vadodara-390007.**
5. **Gujarat Energy Transmission Corporation Limited
Sardar Patel, Vidyut Bhavan Race Course,
Vadodara-390007
Gujarat**

.....Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission
6th Floor, GIFT ONE, Road 5C, Zone 5,
GIFT City, Gandhinagar-382355.**
2. **Surajbari Windfarm Development Pvt. Ltd.
102, "EL Tara Building" Orchard Avenue,
Hiranandani Park, Powai, Mumbai-400076.**
3. **Hi-Bond Cement (India) Pvt. Ltd.
Gautam Chambers, Gondal Road,
Rajkot-360002.**

....Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal

Counsel for the Respondent(s) : Ms. Suparna Srivastava,
Ms. Nishta Sikroria,
Mr. Kumar Harsh and
Mr. S.R. Pandey for R-1

Mr. Sanjay Sen, Sr. Adv.,
Mr. Rajiv Yadav,
Mr. C.K. Rai,
Mr. Ravin Dubey,
Mr. A. Zaidi and
Mr. Rakesh Rathore for R-2

Mr. Rajesh B. Dave for R-3

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal Nos. 22 of 2014 and 24 of 2014 have been filed by the distribution licensees in which they have raised the issue whether the renewable energy generators which are supplying energy to 3rd parties through open access are entitled to avail promotional benefits provided by the State Commission under Section 61 (h) and 86 (1) (e) of the Electricity Act as well as claim the benefit of Renewable Energy Certificate under the provisions of the Central Commission's Regulations?

2. Appeal No. 22 of 2014 has been filed by Madhya Gujarat Vij Company Limited, a distribution licensee, against the impugned order dated 25.06.2013 allowing the Petition of Respondent No.1, the renewable energy generator and holding that the Respondent No.1 is entitled to promotional measures applicable to renewable energy generators under the applicable regulations and orders of the

State Commission while simultaneously taking the benefit of Renewal Energy Certificate ('REC') under the Central Commission's Regulations.

3. Appeal No.24 of 2014 has been filed by Paschim Gujarat Vij Company Limited, and other two distribution companies, GUVNL and Gujarat Energy Transmission Company, the Transmission Licensee , challenging the Order dated 07.11.2013 passed by the State Commission whereby the State Commission has adjudicated the dispute in regard to entitlement of promotional measures under Section 61 (h) and 86 (1) (e) of the Electricity Act, 2003 and directing the Appellants to refund the amount of cross subsidy surcharge and wheeling charges/losses recovered from the Respondents and pay the tariff to the Respondent No.2 at the rate of 85% of the Average Power Purchase Cost ("APPC") for the surplus energy generated by the Respondent No.2 and not utilized by the consumer of the Respondent No.2. By virtue of this order, Respondent No.2 will avail the benefit of concessional and promotional benefits provided by the State Commission under Section 61 (h) and 86 (1) (e) of the Electricity Act, 2003 as well as take the benefit of REC under the provision of the Central Commission's Regulations.
4. The brief facts of the Appeal No. 22 of 2014 are as under:-
 - (a) On 14.01.2010 Central Commission notified Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, hereinafter referred as "REC Regulations, 2010".

- (b) The State Commission by Order No. 5 of 2010 dated 17.05.2010 determined the tariff for procurement of power by the distribution licensees from biomass based power generator and other commercial issues. The said order provided concessional and promotional measures to biomass generators, being renewable energy generators.
- (c) On 08.04.2011, the Respondent No.1 registered its biomass project with central agency as per Central Commission's REC Regulations, 2010
- (d) On 28.07.2011, a tripartite wheeling agreement was entered into between Appellant, Respondent No.1 and the consumer for wheeling of electricity from the generating station to the place of use using the distribution system of the Appellant. Wheeling agreement provided for applicability of Order No. 5 of 2010 of the State Commission providing the promotional measures to the renewable energy generators.
- (e) On 18.12.2010, Central Commission in an alternate Petition held that the cogeneration based renewable generators which is not a captive generating plant will also have to forgo all concessional benefits or banking facility or waiver of electricity duty, etc., before availing the RECs for the entire generation from the generating plant including self-consumption.
- (f) Subsequently in July, 2012 when the Appellant came to know that the Respondent No.1 had registered itself under the REC Regulations of the Central Commission to be entitled to RECs for the electricity generated by it, the Appellant raised demand on the Respondent for the period August,

2011 to April, 2012 for electricity duty, wheeling charges/losses and cross subsidy surcharge as applicable to other/normal open access customers.

- (g) On 21.02.2012, the Respondent No.1 filed a petition before the State Commission challenging action of the Appellant stating that the Respondent No.1 is entitled to promotional and concessional measures as applicable to renewable generators and at the same time is entitled to RECs under REC Regulations of the Central Commission.
 - (h) By the impugned order dated 26.06.2013, the State Commission allowed the Petition filed by the Respondent No.1. Aggrieved by the impugned order of the State Commission, the Appellant has filed this Appeal.
5. The brief facts specific to Appeal No.24 of 2013 are as under:-
- (a) In the year 2013, a petition was filed by the Respondent Nos.2 and 3, the wind energy generators, before the State Commission claiming promotional and concessional measures apart from being entitled to RECs under the REC mechanism.
 - (b) The State Commission passed impugned order allowing the Petition by the Respondent Nos.2 and 3. Aggrieved by impugned order dated 07.11.2013, the Appellants have preferred the present Appeal.
6. The Appellants have submitted as under:-
- (a) The claim of the Respondents that being non-captive generators selling power to 3rd parties, they are entitled to claim the concessional benefit as well as the REC and restriction on non-availment of concessional benefits for being entitled to REC is only applicable to captive generators has been

incorrectly accepted by the State Commission by interpreting the provision of REC Regulations , 2010 of the Central Commission.

- (b) The Respondents are only seeking to avail double benefit namely concessional and promotional measures provided under Section 61 (h) and 86 (1) (e) of the Electricity Act, 2003 as well as RECs, which is impermissible. The entire object and purpose of the REC mechanism is to provide an alternative mechanism for promotion of renewable energy generation wherein the renewable energy generators are treated akin to conventional generators for the physical components of electricity whereas the promotional benefit in the form of renewable/green attributes is provided in the form of sale of RECs.
- (c) The underlying principle behind REC framework as also emphasized in the Statement of Objects and Reasons is that a renewable generator set up under REC mechanism does not in any case take any of the preferential measures otherwise available to the renewable generators and undertakes the activity of generation and supply of electricity like a conventional energy generator for being entitled to RECs.
- (d) Both by reading the regulations and also considering the basic intent and purpose, the renewable energy generators can not be entitled to avail double benefit of preferential wheeling charges etc. as also RECs.
- (e) The claim that the condition for non-availing promotional/concessional measure apply only to a Captive Power Plant and not to an Independent Power Plant (“IPP”) are based on a pedantic and restricted interpretation

of the applicable Regulations and contrary to very intent and object of the REC mechanism.

- (f) The Central Commission which is the author of the REC regulation has interpreted and clarified the provisions of the REC regulation to hold that a renewable generator which is not a captive generator is required to give up all promotional and concessional measures while availing REC by its order dated 18.10.2012.
- (g) The Review Petition against this order dated 18.10.2012 was rejected by Central Commission by Order dated 08.01.2013.
- (h) The Central Commission again by order dated 13.03.2013 has reiterated its decision in earlier orders dated 18.10.2012 and 08.01.2013.
- (i) The intent of REC regulation is also manifested by registration process for REC in which it is to be specifically declared by generator that no concessional measures have been taken. The application form notified by Central Commission for registration of REC specifically required declaration by the renewable generator with regard to non-availing any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty. The declaration is a statutory document which has been prescribed under the Central Commission's Regulations. The Respondent renewable generating companies actually gave the above declaration while registering for REC mechanism.

- (j) The State Commission has wrongly proceeded on the basis that since the Respondents after dispute arose gave a physical affidavit contrary to the earlier declaration given, the earlier given declaration is of no effect. This is misconceived.
 - (k) The State Commission has wrongly held that the wind energy generator is entitled to 85% of the APPC for the surplus electricity injected into the grid which is not consumed by the consumer of the generator. There was no such provision for payment of consideration for inadvertent excess injection of electricity by wind energy generator supplying electricity to 3rd party and taking the benefit of RECs.
 - (l) The position of law is settled that the State Commission can not make inroad to a contract by an order passed. Only a regulation having status of delegated legislation can make inroad into contracts.
 - (m) In the present case, Order dated 31.02.2010 does not provide for payment of 85% APPC for any excess injection and there is no regulation providing for any basis for excess injection for renewable energy generators set up under REC mechanism.
7. On the above issue, we have heard Mr. M.G. Ramachandran, Mr. Anand K. Ganesan, Learned Counsel for the Appellants, Ms. Suparna Srivastava, Learned Counsel for the State Commission and Mr. Sanjay Sen, Sr. Advocate and Mr. C.K. Rai, Learned Counsel on behalf of the Respondent Generating Companies. They also filed comprehensive written submissions.

8. The following question would arise for our consideration on the basis of the submissions made by the parties:-
- i) Whether a renewal energy generator supplying electricity to 3rd party through open access is entitled to promotional/concessional benefits like wheeling, banking, etc. under Section 61 (h) and 86 (1) (e) of the Electricity Act and simultaneously avail the benefit of Renewable Energy Certificate?**
 - (ii) Whether the State Commission was correct to interpret the Central Commission Regulations that the condition for non-availing concessional/promotional benefits for being entitled to REC was applicable only to Captive Generating Plants and not to Independent Power Producers?**
 - (iii) Whether the Central Commission's REC Regulations do not allow a renewable energy IPP registering for REC to not to avail any benefit/concessions provided by the State Commission for wheeling, banking, etc.?**
 - (iv) Whether the State Commission was correct in holding that for the surplus energy injected into the grid by the wind energy IPP, registered under REC scheme, after setting off the energy consumption of consumer is eligible for payment by the distribution licensee at the rate of 85% of Average Power Procurement cost?**
9. The first three issues common to both the Appeals are interconnected and are being dealt with together.

10. The main contentions of the Appellants for disallowance of benefits for wheeling charges/ losses, etc., to the renewable energy generators availing the benefit of REC are:
- (a) The basic objectives behind the REC mechanism is to provide an alternative avenue to a renewable energy generator for the green component of electricity generated in the form of REC while the physical electricity sale and consumption of renewable energy is treated at par with a conventional energy generator. In such circumstances renewable energy generators availing REC benefit are not entitled to take any benefits that is otherwise available to a renewable energy generator in the form of preferential tariff, concessional wheeling charges/loss, waiver of cross subsidy charges, etc, as a compensatory element in the form of RECs is provided to the generator.
 - (b) Regulation 5(1)(b) of the REC Regulations, 2010 provides that there shall be no PPA at preferential tariff determined by the Appropriate Commission for registering under REC mechanism. Preferential tariff when sale of power is to a distribution licensee is the power purchase tariff. However, in case of sale by a renewable energy based IPP to third parties preferential tariff would include preferential wheeling tariff, losses, cross subsidy surcharges, etc. The term tariff includes a cartel of charges payable and includes all

charges that are payable. Reliance is placed on BSES Ltd. V. Tata Power, (2004) 1 SSC 195 to press this point.

- (c) Clause 5(1)(c) of the REC Regulations, 2010 provides that sale to distribution licensee shall be at a price not exceeding APPC. If clause 5(1)(b) was to be interpreted as only preferential power purchase cost, it would become otiose and a surplusage. When the sale is at a price not exceeding APPC cost, it obviously cannot be at preferential tariff. Application of clause 5(1)(c) would automatically render clause 5(1) (b) redundant. It is a well settled principle of interpretation that each provision needs to be given effect and cannot be interpreted in a manner to render them as surplusage. When clause 5(1)(b) does not specify sale to distribution licensee, it cannot be interpreted to restrict its application to sale to distribution licensee.
- (d) The condition for non-availing the promotional/concessional measures apply only to a Captive Generating Plant (“CGP”) and not to an IPP is based on pedantic and restrictive interpretation of the applicable Regulations and contrary to the very intent and object of the REC mechanism. If a CGP does not utilize minimum 51% of annual generation then it will become eligible for both namely REC as well as concessional wheeling charges/losses, etc. This cannot be the intention of the Regulation.

- (e) Findings in Central Commission's order dated 18.10.2012 and review order dated 8.1.2013 in a separate petition relating to co-generation plant would establish their case.
- (f) While registering for REC mechanism the generators had specifically declared that no concessional benefits have been taken by them. The declaration form is statutory in nature.

11. The Respondents renewable energy generators have submitted as under:

- (a) The conjoint reading of the REC Regulations, 2010 contemplates that RE generator which is a CGP and registered under REC shall not be entitled to concessional transmission/wheeling charges/wheeling losses, electricity duty and banking facility. The said Regulation does not restrict such benefits if allowed by the State Commission to IPP.
- (b) Contention of the Appellant that benefit of concessional/promotional transmission/wheeling charges, banking facility benefit and waiver of electricity duty also includes the cross subsidy surcharge is also not tenable and liable to be rejected in the absence of the word 'etc' in the said proviso.
- (c) The Appellants have misconstrued the order dated 18.10.2012 passed by the Central Commission on the issue of whether co-generation plants are eligible for the benefits of REC on self consumption in accordance with the REC Regulations or not.
- (d) The RE Generators had initially applied for registration under REC scheme in the proforma prescribed by the Central Commission. The

declaration regarding availing of concessional benefits of wheeling, etc., was a standard clause in the said proforma and online registration did not allow any change in the said clause. However, RE Generators subsequently furnished revised declaration to the nodal agency requesting to forward a copy to the National Load Despatch Centre.

12. National Load Despatch Centre ('NLDC') which registers the RE projects under REC mechanism has submitted in the written submissions that REC Regulations, 2010 does not contemplate that RE generators requested under REC scheme would not be entitled to the concessional transmission or wheeling charges granted by the State Commission. Further it does not provide that the consumers who procure the physical component of electricity generated by the RE generators registered under REC scheme shall be required to pay cross subsidy surcharge. The amendment to the Regulations provides that RE generator which is a CGP registered under REC scheme shall not be entitled to the concessional transmission/wheeling charges/ wheeling losses and electricity duty and banking facility. The Regulation does not restrict such benefits of the concessional wheeling/ transmission charges and losses and electricity duty, if allowed by the State Commission to an IPP which is registered under REC scheme. Proviso introduced by the amendment to the REC Regulations, 2010 applies to CGPs and not to IPPs. The dispute before the Central Commission in the Petition which resulted in order dated 18.10.2012 and 8.1.2013 was pertaining to whether persons who were captive generators/captively consuming power but less than 51% i.e. not falling within the definition of 'Captive

Generating Plant' under the Electricity Rules, 2005 were entitled to the benefit of REC even though were taking certain benefits in view of captive generation.

13. Ms. Suparna Srivastava made submissions in support of the impugned order.

14. Let us examine the Central Commission's REC Regulations, 2010.

(a) "Preferential Tariff" has been defined as the tariff fixed by the Appropriate Commission for sale of energy from a generating station using renewable energy sources, to a distribution licensee.

(b) Eligibility and Registration of Certificate under Regulation 5 has been described as under:

"5. Eligibility and Registration for Certificates:

(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills the following conditions:

a. it has obtained accreditation from the State Agency;

b. it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission ; and

c. it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an

open access consumer at a mutually agreed priced, or through power exchange at market determined price.

Explanation:- for the purpose of these regulations 'Pooled Cost of Purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.

(2) The generating company after fulfilling the eligibility criteria as provided in clause (1) of this regulation may apply for registration with the Central Agency in such manner as may be provided in the detailed procedure.”

(c) Regulation 7(2) provides as under:-

“the Certificates shall be issued to the eligible entity after the Central Agency duly satisfies itself that all the conditions for issuance of Certificate, as may be stipulated in the detailed procedure, are complied with by the eligible entity.”

(d) An amendment was made in Regulation 5(1)(c) of the Principal regulations through an amendment dated 29.9.2010. The amendment reads as under:-

“Amendment of Regulation 5 of principal regulations:

The following provisos shall be added at the end of the Sub-clause (c) of Clause (1) of Regulation 5 of the principal regulations, namely;

Provided that such a generating company having entered into a power purchase agreement for sale of electricity at a preferential tariff shall not, in case of pre-mature termination of the agreement, be eligible for participating in the Renewable Energy Certificate (REC) scheme for a period of three years from the date of termination of such agreement or till the scheduled date of expiry of power purchase agreement whichever is earlier, if any order or ruling is found to have been passed by an Appropriate Commission or a competent court against the generating company for material breach of the terms and conditions of the said power purchase agreement.

Provided further that a Captive Power Producer (CPP) based on renewable energy sources shall be eligible for the entire generated from such plant including self consumption for participating in the REC scheme subject to the condition that such CPP has not availed or does not propose to avail any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty.

Provided also that if such a CPP forgoes on its own, the benefits of concessional transmission or wheeling charges, banking facility benefit and waiver of electricity duty, it shall become eligible for

participating in the REC scheme only after a period of three years has elapsed from the date of forgoing such benefits.

Provided also that the abovementioned conditions for CPPs for participating in the REC scheme shall not apply if the benefits given to such CPPs in the form of concessional transmission or wheeling charges, banking facility benefit and waiver of electricity duty are withdrawn by the State Electricity Regulatory Commission and/or the State Government.

The dispute, if any, on the question as to whether such concessional/promotional benefits were availed by a CPP or not shall be referred to the Appropriate Commission.

Explanation: For the purpose of this Regulation, the expression 'banking facility benefit' shall mean only such banking facility whereby the CPP gets the benefit of utilizing the banked energy at any time (including peak hours) even when it has injected into grid during off peak hours.:

15. The principal regulation provides that a RE generator to be eligible for registration for REC has to fulfill the following conditions:
 - (a) It has obtained accreditation from the State Agency;
 - (b) it does not have any PPA for the capacity related to such generation to sell electricity at preferential tariff determined by the State Commission and

- (c) it sells electricity either to a distribution licensee of the area at pooled power purchase cost of the distribution licensee or to any other licensee or to an open access consumer at mutually agreed price or through power exchange.
16. The 'preferential tariff' is defined as tariff fixed by the Appropriate Commission for sale of energy from RE generator to a distribution licensee. Thus, clause 5(b) of the eligibility condition would relate to PPA by the RE generator with the distribution licensee at preferential tariff. Clause 5(1)(b) means to say that a RE generator having a PPA for sale of its energy to a distribution licensee at preferential tariff will not be eligible for registration under REC scheme. Clause 5(1)(c) first part states that a RE generator selling power to its area distribution licensee at pooled power purchase cost of the distribution licensee will be eligible for registration under REC scheme. Thus both the clauses 5(1)(b) and first part of 5(1)(c) are relating to sale to distribution licensee and clause 5(1)(b) conveys different meanings and clause 5(1)(c) first part would not make clause 5(1)(b) redundant.
17. The term 'preferential tariff' as used in clause 5(1)(b) would not include the preferential transmission/wheeling charges, cross subsidy surcharge, etc., determined by the State Commission for RE generators selling power to the third parties through open access in view of express definition of preferential tariff specified in the Regulations. This is also further clarified from the amendment to the REC Regulations wherein first proviso deals with pre-mature termination of PPA for sale of electricity at preferential tariff which is applicable in case of PPA

at preferential tariff with distribution licensee only. The State Commission is not empowered to determine the tariff at which the RE generator sells power to a consumer through open access, nor the PPA between the RE generator and open access consumer for supply of power is required to be approved by the State Commission. RE generators and the open access consumers have freedom to decide a consolidated tariff including all charges for supply of power. Therefore, the term 'preferential tariff' can not be construed to be used for transmission charges, wheeling charges/losses, cross-subsidy surcharges, etc. as contended by the Appellants. Therefore, we reject the submissions made by the Appellants in this regard. If concessional wheeling/transmission charges/losses, cross subsidy surcharge, etc., are considered as preferential tariff then clause 5(1)(b) would not make any sense. No Power Purchase Agreement is entered into with transmission/distribution company for wheeling / transmission and there is no sale involved in transmission/wheeling or recovery of cross subsidy surcharge. The ruling in BSES Ltd. V Tata Power cited by the Appellants would not be applicable to the present case in view of definition of preferential tariff specified in the Regulations.

18. The principal REC Regulations, 2010 does not provide that RE generators registered under the REC scheme are not entitled to concessional wheeling charges/losses, cross subsidy surcharge, etc., if the State Commission allows the same.
19. The amendment to principal Regulation 5 to the REC Regulation, 2010 on 29.9.2010 adds provisos at the end of the Regulation 5(1)(c). The first proviso

relate to pre-mature termination of PPA entered into at a preferential tariff. The second proviso provides that a Captive Power Producer based on RE source shall also be eligible for REC for the entire energy generated from such plant including self consumption subject to the condition that such CPP has not availed any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefits and waiver of electricity duty.

20. The above amendment is applicable specifically to Captive Generating Plants to restrict benefits of concessional transmission or wheeling charges, banking, electricity duty. There is no provision of withdrawal of benefit of cross subsidy surcharge. The above amendment is not applicable to renewable energy IPPs supplying power to third parties through open access availing REC and if benefits of concessional transmission/wheeling charges and losses, cross subsidy surcharge, etc., are allowed by the State Commission then such IPPs would be entitled to avail the same.
21. As rightly held by the State Commission, clause 5 of the principle regulations set the criteria regarding eligibility of renewable generators for registration under REC scheme in general. However, the Central Commission, vide subsequent amendment dated 29.09.2010, stipulated certain additional conditions for the Captive Renewable generators to become eligible for RECs. The second and third provisos of the aforesaid amendment carve out an exception for Captive Renewable generators from the general eligibility for RE generators for grant of RECs. The amendment made to the principal regulation puts some restrictions

on registration of CGPs for issuance of REC. The proviso introduced by the amendment of REC Regulations strictly applies to CGPs and not to IPPs.

22. It is a settled principle of law of interpretation of a proviso that the proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. A proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. A proviso qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment.
23. Regulation 5(1)(a) to (c) of REC Regulations deals with eligibility of all RE generators. The first proviso introduced by the amendment deals with eligibility of RE generators who terminate the PPA prematurely. The second and third provisos deal with the eligibility of CGPs based on renewable source of energy. There exceptions are in addition to general eligibility of RE generators for grant of REC. The second and third provisos carve out exception only in case of CGPs by providing additional condition which has to be fulfilled by CGPs alone.
24. **Let us now examine the Statement of Objects & Reasons of REC Regulations, 2010. The following would be relevant.**
- (a) The concept of REC seeks to address the mismatch between availability of RE sources and requirement of obligated entities to meet their RPO.

- (b) Regarding eligibility criteria for Captive Power Plants, the Commission clarified that if a captive RE project meets the eligibility criteria, sale of electricity for such project over and above the captive consumption will justify for RECs.
 - (c) On a suggestion by a stakeholder that in the event of sale of electricity component through open access etc. resulting in recovery of cost higher than the preferential tariff, such sale should not be eligible for REC, the Commission clarified that the price of electricity sold through traders, Power Exchange or open access is market determined and involves risks and returns of varying nature. As such, it would not be desirable to put restriction as suggested on such transactions.
25. The Statement of Objects and Reasons enclosed as Annexure-I, the salient features of REC framework as evolved by the Forum of Regulators. Learned Counsel for the Appellant has referred to a block diagram given in the salient features of REC framework which shows option for RE generators either to sell energy at preferential tariff or to sell electricity component to distribution company (at pooled power purchase cost)/ third party and sell REC to the obligated entities for fulfilling their RPO. Therefore, according to the Learned Counsel for the Appellants, the electricity component sold to the distribution license/ third party under REC scheme should be treated like conventional energy. We are not impressed by this argument. Firstly, there is no mention in the Statement of Objects & Reasons that RE generators supplying power to the distribution licensee at pooled power purchase cost or to third parties will not be entitled to

preferential transmission charges, wheeling charges/ loss, cross subsidy surcharges, etc. Secondly, Statement of Objects and Reasons can be referred to only if there is some ambiguity in the Regulations and reference to the Statement of Objects & Reasons would help in accepting one of the two interpretations possible from clauses of the Regulation. In this case there is no ambiguity in the Regulations. In *Babua Ram and others Vs. State of UP and Anr*, (1995) 2 SCC 689, on the question of applicability of objects and reasons in construing the statute it was held that Statement of Objects & Reasons would be looked into when there is ambiguity in the language used in the Statute.

26. We have also examined the Statement of Objects & Reasons for the first amendment to REC Regulations, 2010. The Statement of Objects and Reasons only answer the questions raised by the stakeholders regarding eligibility for REC in case of termination of PPA and for Captive Power Producers. There is no observation of the Central Commission regarding eligibility of IPP availing concessional transmission charges, wheeling charges/losses or cross subsidy surcharge for the open access, etc.
27. We have also examined the findings of the Central Commission in its order dated 18.10.2012 in a Petition filed by co-generation based renewable energy generators. The issue under consideration of the Central Commission was whether co-generation plants are eligible for the benefits of REC for self consumption under the REC Regulations, 2010. The findings of the Central Commission are confined to a co-generation plant which is to be treated as a CGP if it consumes 51% of the energy for self use. If it fails to maintain its status

as CGP due to failure to meet the condition laid in the electricity rules for maintaining CGP status then it will not be entitled to avail any benefits available to CGP. The order dated 8.1.2013 in the Review Petition is also reiterate its finding that co-generation plant not fulfilling the conditions of CGP, prescribed in the Electricity Rules, 2005 have to forego benefits available to CGPs for availing the benefits of REC.

28. One additional issue raised by the Appellant is that the RE generator in their application for registration an accreditation of the project under REC scheme have undertaken that they will not avail concessional/promotional benefits and hence they are not entitled to concessional/promotional benefits. The RE generators have submitted that they had initially applied for registration under the REC scheme in the proforma prescribed by the Central Commission which is common for CGP and IPPs. The clause in the proforma that the generator have not availed or do not propose to avail any benefit in the form of concessional/promotional wheeling charges, banking facility benefit and waiver of electricity duty is a standard clause in the said proforma and online registration does not allow any change in this clause. Therefore, the RE generator subsequently furnished the revised declaration to the accreditation agency through a separate letter with a request to forward the same to NLDC.
29. The State Commission in the impugned orders dealt with this issue and have held that it is not correct to deny the RE generator the facility of concessional, wheeling charges and losses and exemption of cross subsidy charges on the basis of undertaking given at the time of online application for registration under

the REC scheme. In the impugned order dated 7.11.2013, the State Commission has dealt with the declaration form, the same is reproduced below:-

“8.35. The various clause of the declaration form are as under;

I/We hereby also confirm that:

I. I/We have not entered in to any Power Purchase Agreement (PPA) and shall not enter into PPA to sell electricity generated from the proposed renewable energy generating station at the preferential tariff determined by the Appropriate Commission for 18 MW of the capacity for which participation in REC scheme is availed.

II. A period of three years/the period upto schedule date of expiry of Power Purchase Agreement (PPA) (in case of schedule date of expiry is earlier than three years, the hard copy of said PPA is also to be submitted to State Agency), has been elapsed from the date of premature termination of PPA i.e. due to material breach of terms and conditions of said PPA by me/us.

OR

III. I/We have prematurely terminated our PPA with obligated entity with mutual consent/due to material breach of terms and conditions of said PPA by the obligated entity for which necessary documentary evidence are also submitted be me/us in hard copy to the State Agency.

IV. I/We have not availed or do not proposed to avail any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty.

OR

V. A period of three years has elapsed for the date of forgoing the benefit of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty.

OR

VI. The benefits of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty has been withdrawn by the State Electricity Regulatory Commission and/or the State Government.

I/We hereby also confirm that the electricity generated from the proposes renewable energy generating station shall be sold either to the distribution licensee at price not exceeding the pooled cost of power purchase of such distribution licensee OR any other trading licensee OR to an open access consumer at mutually agreed price, or through power exchange.”

30. The State Commission has held as under:

“8.36 On verification of the above declaration form it transpires that clause II and III of the declaration form are alternative to each other and are with

reference to PPAs signed with the obligated entity at the preferential tariff. Similarly, clauses IV, V and VI are alternatives to each other and deal with benefits like concessional transmission and wheeling charges, banking facility or waiver of electricity duty not availed or proposed to be availed or if availed, to be foregone. The same clause read with the principle regulations on REC of CERC and its amendments, is applicable only to CGPs and not IPPs as held in earlier paras. Accordingly, the above clauses are not applicable to the petitioner who is an IPP, and therefore separate declarations with affidavit was submitted by the petitioner, to accreditation agency, GEDA on April 5, 2012 and April 11, 2012 to provide correct conditions applicable to the petitioner and status of it, and requested to GEDA to forward the same to NLDC.

8.37. It is observed from the revised declaration form submitted by the Petitioner that it had forwarded undertaking through GEDA to the NLDC, the nodal agency for registration of RE project under the REC scheme and affirm on affidavit that they do not propose to sell the electricity generated from WTG to the distribution licensee at preferential tariff. Further, the electricity generated from the proposed RE generator sale to the distribution licensee at price not exceeding pooled power purchase cost of Discom or trading licensee or open access customers at mutually agreed rate. The said declaration is silent about whether the applicant will avail the benefit of (i) concessional wheeling/ transmission charges and losses (ii) exemption of cross subsidy surcharge and (iii) eligible to receive the amount for payment of Amount receivable for the energy, if any, available after set-off. It was then, upto the NLDC to decide whether to cancel the registration of the Petitioner under REC scheme. However, no such action was taken by the NLDC. We, therefore, decide that it is not correct to deny the Petitioner the facility of concessional wheeling charge and losses and exemption from cross subsidy surcharge and amount receivable for surplus energy after set-off from the Discom on the basis of undertaking given at the time of online application for registration under the REC scheme.”

31. We are in agreement with the above findings of the State Commission. The declaration form has to be read with the principal Regulation and its amendments. All the declarations would not be applicable to IPPs, supplying power to third parties through open access. The declaration for concessional transmission, wheeling charges, banking facility and waiver of electricity duty would be applicable only for CGPs registered under REC who as per the

amendment to the principal Regulation are not entitled to avail these concessional benefits.

32. In view of above, we do not find any infirmity in the findings of the State Commission in the impugned order. Accordingly first three issues are held against the Appellants.
33. The fourth issue is regarding sale of surplus power of wind energy generators by IPPs registered under REC scheme, raised in Appeal No. 24 of 2014.
34. The main argument of the Appellants on the above issue are:
 - (a) The generators are governed by order dated 30.1.2010 passed by the State Commission wherein there is no provision whatsoever for payment of consideration for the inadvertent excess injection of electricity by wind energy generators (WEGs) supplying electricity to third parties and taking REC benefits.
 - (b) The agreement entered into between the Appellants and the WEG specifically provides that no payment shall be made for excess injection by the WEG.
 - (c) The position of law is settled that State Commission cannot make inroads into contracts by an order passed and only a Regulation having the status of a delegated legislation can make inroads into the contract. PTC India Ltd. Vs. CERC, (2010) 4 SCC 603 has been relied upon in this regard.
35. Learned Counsel for the Respondent Wind Energy Generators has submitted:
 - (a) In view of order no.1 of 2010, there was no justification for the Appellants to incorporate any contractual clause that was inconsistent with the

mechanism devised by the State Commission. Unilateral incorporation of the clauses that manifestly contrary to the terms of order no 1 of 2010 bears a testimony to the brazen abuse and their dominant position by the Appellants.

- (b) Settlement of surplus energy at the rate of 85% of tariff has been provided in the order no. 1 of 2012.

36. Let us examine the findings of the State Commission in this regard. The relevance paragraphs of the impugned order are reproduced below :

“(ii) Once a specific provision is made and decision taken by the Commission in its Order No. 1 of 2010 dated 30.01.2010 regarding payment of surplus energy available after set-off, in that case, the applicability of GERC (Open Access) Regulations, 2011 which provides any surplus energy in case of open access availed by the consumer does not restrict such right provided to the consumer. In such case, it is necessary to refer both provisions of the Order No.1 of 2010 dated 30.01.2010 and Open Access Regulations and required to give effect to the same. On cogent reading of the above provisions it is clear for that the surplus energy available after set-off the distribution licensee must pay the amount of 85% of the preferential tariff rate decide by the Commission. We have, in the previous para concluded that the appropriate tariff in the present case is the APPC. Thus by paying only 85% of APPC, the distribution licensee is not in any manner in loss and the same is not contrary to the decision of the Commission in its wind tariff order or provisions of Open Access Regulations. In fact non-payment of amount for the surplus energy available after set-off is against the decision of the commission, because in that case, the WTG owner is deprived for payment for surplus energy available after set-off which is specifically provided in case of third party sale by the Commission in its Order No.1 of 2010 dated 30.01.2010 and Order No.2 of 2012 dated 08.08.2012.

(iii) We also note that the surplus energy after set-off is sold by the distribution licensee to its consumer at the tariff rate decided by the Commission and earns revenue for such sale of electricity for which no payment is made by the Distribution Licensee. Hence, it is incorrect and invalid to deprive the wind energy generator, which is a renewable source of energy, from the payment of energy supplied by it as an advertent flow of energy to the distribution licensee.

(iv) Moreover, such action of Distribution Licensees who are the Respondents is against the provisions of the electricity Act, 2003, National Electricity Policy and Tariff Policy, which state for promotion of renewable energy source based generation.

(v) Non-payment of APPC price or 85% of it for surplus energy, if any, available after set-off will further distort the assured revenue returns to the RE projects registered under REC scheme. Hence, it is against the basic scheme of REC regulations.

From the above observations we decide that the WTGs which were commissioned by the petitioner within the control period of Order No.1 of 2010 dated 30.01.2010 are eligible to receive payment @ 85% of APPC rate of the relevant year for the surplus energy available after set-off is given at the consumer's end."

37. We are in agreement with the above findings of the State Commission. We find that there was a specific provision in the order no 1 of 2010 of the State Commission regarding sale of surplus power of wind energy generator supplying power to third parties through open access. According to this order only excess generation (over and above that set off against consumption in each time block) will be treated as sale to the distribution licensee concerned at 85% of the tariff rate determined by the Commission for such renewable sources. The Appellant was required to keep provisions in the wheeling agreement as per the applicable generic order of the State Commission for wind energy generators. Keeping conditions which are contrary to the generic order of the State Commission passed under Section 61(h) and 86(1)(e) of the Act by the distribution licensee was violation of the order of the State Commission. Ruling in the PTC case will not be applicable to the present case. In the present case the State Commission passed generic order under Section 61(h) and 86(1)(c) of the Electricity Act, 2003 deciding preferential tariff and other terms and conditions for wheeling etc. for RE generators. The Appellants were required to keep the same terms and

conditions in their wheeling agreements with RE generators. If the Appellants using their dominating position have kept different terms and conditions without the approval of the State Commission, the State Commission can strike down those conditions to align them with the generic order which governs the field for preferential tariff and other terms and conditions for RE generators decided under Section 61 (h) and 86 (1)(e) of the Electricity Act, 2003 for promotion of renewable sources of energy. There is no regulation governing the field for concessional benefits available to RE generators under Section 61(h) and 86(1)(e) of the Act. Therefore, the generic order will be applicable for such concessional benefits and is required to be followed by the distribution licensees.

38. Summary of our findings:

(i) According to REC Regulations, 2010 of the Central Commission, as amended, a renewable energy based IPP supplying power to third party through open access is entitled to concessional benefits such as transmission/wheeling charges, losses, cross subsidy surcharge etc. and simultaneously avail the benefit of REC if such concessions are permitted by the concerned State Commission. However, captive generating plant based on renewable energy sources shall be eligible for entire generated from such plant including self consumption for availing REC subject to the CGP not availing concessional/promotional benefit of transmission or wheeling charges, banking facility benefit and waiver of electricity duty.

- (ii) The State Commission has correctly held that for surplus energy injected by the wind energy IPP into the grid after setting off the energy consumption of consumer is eligible for payment by the distribution licensee at the rate of 85% average power purchase cost of the distribution licensee as per its order no. 1 of 2010 and Open Access Regulation 2011.

39. In view of above, the Appeals are dismissed. No order as to costs.

40. Pronounced in the open court on this 22nd day of April, 2015.

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓
~~REPORTABLE/NON-REPORTABLE~~
dk