

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

Appeal No. 221 of 2016 & Appeal No. 222 of 2016,
Appeal No. 309 of 2016 & IA No. 638 of 2016,
Appeal No. 310 of 2016 & IA No. 639 of 2016,
AND
Appeal No. 317 of 2017 & IA No. 298 of 2017

Dated: 7th May, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N K Patil, Judicial Member

In the matter of :-

Appeal No. 221 of 2016 & Appeal No. 222 of 2016

Savita Oil Technologies Ltd.
66/67 Nariman Bhavan,
Nariman Point,
Mumbai 400 021

... Appellant

Versus

1. Karnataka Electricity Regulatory Commission
6th & 7th floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road
BANGALORE -560 001

...Respondent No.1

2. Chamundeswari Electricity Supply Corporation Ltd. (CESC)
L.J Avenue, New Kanthraj Urs Road,
Saraswathipuram
Mysuru- 575 201

...Respondent No.2

Counsel for the Appellant(s) : Mr. Sridhar Prabhu
Mr. Anantha Narayana M.G.

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri

**Ms. Neha Garg
Mr. Sandeep Rajpurohit
Mr. Dharpan** for R-1

**Mr. B.C. Thiruvengadam
Ms. Revathi T.
Mr. Ravi Agrawal** for R-2

**Appeal No. 309 of 2016 & IA No. 638 of 2016,
Appeal No. 310 of 2016 & IA No. 639 of 2016**

**Swastik Construction Services,
D-1, Lotus Colony,
Chamiers Road, Nandanam,
Chennai -600 035**

... Appellant

Versus

**1. Karnataka Electricity Regulatory Commission
6th & 7th floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road
Bangalore -560 001**

...Respondent No.1

**2. Hubli Electricity Supply Company Ltd. (HESCOM)
P.B.Road, Navnagar
Hubballi – 580 025**

...Respondent No.2

**Counsel for the Appellant(s) : Mr. Sridhar Prabhu
Mr. Anantha Narayana M.G.**

**Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg** for R-1

**Mr. B.C. Thiruvengadam
Ms. Revathi T.
Mr. Ravi Agrawal** for R-2

Appeal No. 317 of 2017 & IA No. 298 of 2017

**M/s. Avon Cycles Limited
G T Road
Ludhiana- 141 003**

... Appellant

Versus

**1. Karnataka Electricity Regulatory Commission
6th& 7th floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road
BANGALORE -560 001**

...Respondent No.1

**2. Chamundeswari Electricity Supply Corporation Ltd. (CESC)
L.J Avenue, New Kanthraj Urs Road,
Saraswathipuram
Mysuru- 575 201**

...Respondent No.2

**Counsel for the Appellant(s) : Mr. Sridhar Prabhu
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**Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg for R-1**

**Mr. B.C. Thiruvengadam
Ms. Revathi T.
Mr. Ravi Agrawal for R-2**

JUDGMENT

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

1. The present appeals are being filed by M/s Savita Oil Technologies Ltd., Swastik Construction Services and M/s. Avon Cycles Limited (hereinafter referred to as the “**Appellants**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the orders dated 31.3.2016 and 7.4.2016

(“**Impugned Orders**”) passed by Karnataka Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Suo-Motu Case Nos. 1/2015, 2/2015, 3/2015, 4/2015 and 5/2015 regarding allowing the lower tariff of the control period when the wind projects of the Appellants were commissioned in variance to the tariff earlier approved in the Power Purchase Agreements (PPAs) which was higher.

2. All the five Appeals are having same issue i.e. change in the applicable tariff by the State Commission in variance with earlier approved tariff by the State Commission in the PPAs. All the Appeals are being dealt by considering the Appeal No. 221 of 2016 as base case. The decision of this Tribunal based on the said Appeal will be equally applicable to all the instant Appeals.
3. The Appellants are renewable energy-based power generating companies operating wind power projects in the State of Karnataka.
4. The Respondent No. 1 i.e. KERC in all the Appeals is the Electricity Regulatory Commission in the State of Karnataka discharging functions under the provisions of the Act.
5. The Respondent No. 2 in the individual Appeals is the distribution licensee operating in their assigned areas in the State of Karnataka.

6. Facts of the present Appeal:

- a) The Appellants viz M/s. Savita Oil Technologies Ltd., Swastik Construction Services and M/s. Avon Cycles Limited have established Wind Power Projects (WPPs) of small capacity ranging from 0.8 MW to 1.5 MW in different parts of the State of Karnataka. The Appellants and the Respondent No. 2 in individual appeals have entered into PPAs for supply of power to the Respondent No. 2 from the WPPs.

- b) The State Commission issued the tariff order dated 18.1.2005 (2005 Order) applicable for the projects commissioned in the control period 10.6.2004 to 31.12.2009 wherein the generic tariff of Rs 3.40/kWh was determined for WPPs, tariff order dated 11.12.2009 (2009 Order) applicable for control period from 1.1.2010 to 31.12.2014 wherein the generic tariff of Rs 3.70/kWh was determined for WPPs and tariff order dated 10.10.2013 applicable for the control period from 1.10.2010 to 31.12.2014 wherein the generic tariff of Rs 4.20/kWh was determined for WPPs which was revised upwardly to Rs. 4.50/kWh on 24.2.2015.

- c) Commercial Operation Date (COD) of the Appellant's (as per M/s Savita Oil) WPP was achieved on 29.9.2008. There was delay in signing of the PPA for the said WPP which was signed on 17.3.2010 in the next control period whereas COD was achieved in the previous control period. The PPA was approved by the State Commission on 27.4.2010 with tariff of Rs. 3.70/kWh being

applicable for control period beginning from 1.1.2010 as per 2009 Order.

- d) Before signing of the PPA the State Commission on request of the Respondent No. 2 vide letter dated 22.3.2010 clarified the applicability of the tariff to the WPP. As per the clarification the tariff for the period from COD of the WPP till date of submission of the PPA (if it is on or after 1.1.2010) before the State Commission for approval the tariff shall be as per 2005 Order i.e. Rs. 3.40/kWh and for further period i.e. from the date of submission of PPAs for approval before the State Commission the tariffs shall be as per 2009 Order. Similar analogy was also applied by the State Commission to the other WPPs under the instant Appeals. Since the date of submission of the PPAs for approval before the State Commission was different for different WPPs of the Appellants the tariff applicable was also different.
- e) The PPAs of the Appellants for sale of power from the WPPs were duly approved by the State Commission.
- f) After passage of few years, on 9.10.2015, by a way of instituting suo-motu petitions, the State Commission issued notices to the Appellants to appear before it and submit the reason as to why the tariff for their WPPs should not be reduced.
- g) After hearing the parties, the State Commission decided the suo-motu petitions and clarified the applicability of the tariff (tariff of the control period when the COD of WPPs was achieved) of the WPPs owned and operated by the Appellants to their disadvantage. In

case of M/s Savita Oil the tariff was reduced from Rs. 3.70/kWh to Rs. 3.40/kWh.

- h) The State Commission issued Impugned Orders in March 2016 and April 2016. Aggrieved by the Impugned Orders the Appellants have preferred the present Appeals before this Tribunal.
- i) Appeal Nos. 221 and 222 of 2016 have been filed by M/s Savita Oil Technologies against the Impugned Order dated 31.3.2016 in suo-moto case nos. 1 & 2 of 2015.
- j) Appeal Nos. 309 and 310 of 2016 have been filed by M/s Swastik Construction Services Ltd. against the Impugned Order dated 7.4.2016 in suo-moto case nos. 4 & 5 of 2015.
- k) Appeal No. 317 of 2017 has been filed by M/s Avon Cycles Ltd. against the Impugned Order dated 31.3.2016 in suo-moto Case no. 3 of 2015.

7. Questions of Law:

The Appellants have raised the following questions of law in the present Appeals:

- a) Whether the judgment passed by the Hon'ble Supreme Court of India in the case of BESCO Limited V/s Konark Power Limited (Reported in 2015 (5) SCALE 711) is binding on the 1st Respondent in so far as it cannot re-open in a concluded and approved PPA between the parties ?

- b) Whether a Regulator can re-open a decided case after a lapse of several years without any justification?
 - c) Whether a Regulator can compel a Generator to alter its tariff after the PPA is concluded and approved?
 - d) Whether the lower Quasi-judicial authority can amend/review its orders once the same has been merged in the orders of higher judicial authority?
 - e) Whether the impugned order of the State Commission is not hit by the principles of promissory estoppel, legitimate expectation and regulatory uncertainty?
8. We have heard learned counsel for the Appellant and the Respondents at considerable length of time and we have carefully perused their respective written submissions, arguments put forth during the hearings. Gist of the same is discussed hereunder.
9. Submissions on issues raised for our consideration in the instant Appeal by Shri Shridhar Prabhu, learned counsel appearing for the Appellants are as follows:-
- a) The State Commission had registered a number of other suo-motu cases which involved the similar facts. In the case of Appellants the State Commission reduced the tariff and in few other cases like case No.6/2015 and case No.7/2015 the State Commission withdrew the suo-motu cases by allowing them to continue with the

same PPA. The State Commission has distinguished the cases by stating that certain facts stated in the replies were not before the Commission while issuing notice for reduction of tariff of those few cases. Before passing the Impugned Orders, the State Commission has not asked the Appellants to produce similar material which were submitted by other two power generators.

- b) The tariff determination is an inquisitorial exercise and this has been repeatedly held by the State Commission in its many orders. The State Commission failed to exercise its jurisdiction to verify whether any material is available to either justify the reduction of tariff or for continuation of the earlier tariff fixed, in view of the fact that the State Commission itself held that the inquisitorial procedure was to be adopted for the tariff fixation and not adversarial system in case of D Subrahmanya Bhat v. The Secretary, KERC.
- c) The State Commission has erred in revoking the statutory approval granted to PPAs as it is in violation to the Hon'ble Supreme Court's judgement in the case of BESCO Limited V/s Konark Power Limited (Reported in 2015 (5) SCALE 711) {Konark Case}
- d) The issues framed by the State Commission in the Impugned Order are at variance with the pleadings. The State Commission on request of the Respondent No. 2 issued an unambiguous clarification and direction stating as to what tariff is to be paid for the period prior to signing of the PPA and what tariff is to be paid subsequent to signing of the PPA. The State Commission

unwarrantedly registered suo-moto cases to the detriment of all parties and in violation of the process of law.

- e) The PPAs signed between the parties were approved by the State Commission as per law and the tariff so fixed was allowed to be pass through in the tariff orders passed by the State Commission from time to time to the consumers of the Respondent No. 2. The said tariff orders have been upheld/revised/pending before this Tribunal as well as before the Hon'ble Supreme Court. To this extent, the orders of the State Commission have been merged with the orders of this Tribunal and the Hon'ble Supreme Court. Accordingly, the State Commission has no authority in law to change its own order which has been merged with the judgments of the higher authorities.
- f) If it is now felt that the Respondent No. 2 have paid a higher tariff, the State Commission can at best disallow the higher expenditure incurred by the Respondent No. 2. The commercial interest of the Appellants should not be harmed in any case.
- g) The Appellants have not concealed any material information either at the time of submission of the PPAs for approval or at any subsequent stage. The PPA approval process is between the Respondent No. 2 and the State Commission and the Appellants have no role to play in it. The Appellants were unnecessarily dragged into the whole process to their disadvantage.
- h) The State Commission cannot reopen its own orders, judgments, decisions and approvals after several years. The higher tariff was

as per the tariff order passed by the State Commission and lower tariff was as per the previous tariff order of the State Commission. As per the tariff order in which higher tariff was determined was applicable to all PPAs submitted to the State Commission for approval. The lower tariff of the previous tariff order cannot be made applicable on the pretext that the COD of the WPPs was during the previous tariff order. The dates of submission of the PPAs by the Respondent No. 2 for the approval before the State Commission was the sole criteria for the applicability of the tariff.

- i) WPPs that signed the PPAs in 2010-2013 (control period of 2009 Order) were not the new projects in the sense that they were already conceived, financially closure done and constructed substantially prior to 2010. Gestation period of wind projects is about 2-3 years and hence, none of the WPPs commissioned during the control period of the 2009 Order will be new projects. 'New Projects' have not been defined in the 2005 Order or in 2009 Order. The only meaning that can be logically and legally assigned to it is the projects that sign the PPA during 2010-2013.
- j) Accordingly, the Impugned Orders passed by the State Commission are illegal, arbitrary, and perverse in law and hence are liable to be set aside.
- k) The Appellant has denied the contentions raised by the Respondent No. 2 in the reply filed by the Respondent No. 2.

10. Submissions made by Shri Anand K. Ganesan, learned counsel appearing for the State Commission on the issues raised for our consideration in the instant Appeal are as follows:-

a) The State Commission has initiated suo-motu proceedings in view of correct applicability of the tariff based on the COD of the WPPs pursuant to the judgement dated 15.4.2014 of this Tribunal in Appeal No. 218 & 219 of 2013 in case of Ramgad Minerals & Mining Ltd. v. KERC & Anr. In the said judgement the instance of M/s Savita Oil was referred by this Tribunal while rejecting the claim of Ramgad Minerals. The reference made was that M/s Savita Oil was given benefit of higher tariff despite its COD in the prior control period. The said judgement discussed the applicability of the generic tariff determined by the State Commission for different control periods. Accordingly, the State Commission has taken up to scrutinise the correctness of the tariff allowed in the PPAs of the Appellants. Delay in signing of the PPAs does not mean that the tariff is to be made applicable for the control period when PPAs were signed and harm the consumer interest. The same has been held in the said judgement.

b) The tariff order dated 18.1.2005 clearly states that the tariff of Rs. 3.40/kWh was applicable for a period of first 10 years from the year of COD of the WPP. The tariff order is a judicial order and is binding to all including the Appellants and the Licensees and it is not open to make any other tariff applicable. This is a settled position as per the judgement of Hon'ble Supreme Court in case of Shri Sidhali Steels Ltd. v. State of U.P. (2011) 3 SCC 193.

- c) When the State Commission became aware that some of the WPPs entered into the PPAs which were approved by the State Commission are being paid tariff (which was higher) according to the order of subsequent control period although they were commissioned in the earlier control period when the tariff was lower, the State Commission initiated suo-motu proceedings. Such PPAs approved by the State Commission can't be said to be judiciously approved as the State Commission lost sight of the COD of the WPPs while approving them. The suo-motu proceedings were initiated to correct the anomaly.
- d) The State Commission has inherent powers to correct mistakes in exercise of its jurisdiction at any stage. The State Commission has relied on certain judgements of the Hon'ble Supreme Court in this regard. They are Budhia Swain and Ors. v. Gopinath Deb and Ors. (1999) 4 SCC 396 and Tilak Raj v. Baikunthi Devi, AIR 2009 SC 2136. The State Commission is mandated to protect the interest of the consumers, which is one of the primary objectives of the Act. In this regard the State Commission has relied on the judgement dated 3.6.2010 of this Tribunal in case of NTPC Ltd. v. CERC & Ors. in Appeal No. 134 of 2008 and judgement of Hon'ble Supreme Court in case of All India Power Engineers Federation v. Sasan Power Ltd. (2017) 1 SCC 487. The State Commission as custodian of consumer interest initiated suo-motu proceedings as the PPAs are for 20 years and higher tariff to the generator would result in undue enrichment of it at the cost of consumers.

- e) The tariff is based on the commissioning when the costs get frozen. The State Commission had initiated the said proceedings based on the applicability of tariff to generating stations based on date of commissioning particularly wind and hydro where there is no variable component. This has been held by this Tribunal in Appeal No. 206 of 2013 in case of Viyyat Power Ltd. v. KSERC and Ors. Generators commissioned in a particular control period are entitled to the same tariff and cannot be discriminated. The Appellants have not questioned the tariff orders and they being judicial in nature are binding on all. The fundamental principle involved in generic tariff determination process is that a generating company is entitled to a particular tariff, if it has incurred costs in constructing and commissioning of plant during the control period mentioned in the relevant generic tariff order.
- f) There is no violation of process of law as the State Commission has corrected its mistake. The reliance of the Appellants on the judgement of the Hon'ble Supreme Court in Konark Case is misplaced. The said judgement deals with the alteration in tariff of a PPA with regard to increase in costs of the generator as per the provisions of relevant regulations. The Hon'ble Supreme Court has taken a slightly strict view regarding the powers of the State Commission only in the interest of the consumers at large so that subsequent higher tariff by way of supplementary PPA is not allowed to the generator.
- g) On the issue of communications and clarifications issued by the State Commission, the Learned Counsel for the State Commission stated that the said communications/ clarifications were

administrative in nature and cannot supersede the judicial proceedings and the view taken by the State Commission in the Impugned Orders which are judicial in nature.

- h) The State Commission in other suo-moto cases has taken different view as the facts in those cases were different. The plants in those cases entered into PPA at tariff (Rs. 3.42/kWh without escalation) lower than the applicable MNES tariff for the period from 2003 to 2013. Accordingly, those suo-motu petitions were dropped by the State Commission.
 - i) In case the present Appeals are allowed the generators will deliberately delay execution of the PPAs to seek the advantage of higher tariff by way of applicability of subsequent tariff order. This will hamper the interest of the consumers.
11. Submissions made by Shri B.C. Thiruvengadam, learned counsel appearing for the respondent No. 2 on the issues raised for our consideration in the instant Appeal are as follows:-
- a) PPAs are contracts which are governed by the provisions of the Indian Contracts Act, 1872 ("Contracts Act"). Void contracts are not enforceable. As per Section 24 of the Contracts Act, the contracts which are contrary to the law are void. As per Section 61 (d) of the Act, the State Commission is bound to safeguard the interest of the consumers at the same time reasonable recovery of the cost to the generator. As per Section 20 of the Contracts Act if there are bilateral mistakes in the contract, the contract is void. In this regard the judgement of Hon'ble Supreme Court in case of ITC Ltd. v.

George Joseph Fernandes and Anr. AIR 1989 SC 839 has been relied by the Respondent No. 2. There is no dispute regarding existence of mistake in the PPAs. The Respondent No. 2 has contended that the PPAs are void in terms of the above.

- b) The Appellants have established the WPPs after conducting feasibility studies and they could not have foreseen tariff of Rs. 3.70/kWh which was for the next control period. Instead the tariff applicable to that control period could have been considered in the feasibility studies. The Appellants have unjustly enriched themselves at the cost of consumers and the excess amount collected by them needs to be returned. The judgement of Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action v. Union of India & Ors. (2011) 8 SCC 161 has been relied upon by the Respondent No. 2 on this issue which deals with unjust enrichment and doctrine of restitution.
- c) The delay in executing the PPA was on technical ground as the Respondent No. 2 is required to follow the laid down procedures.
- d) The judgement of Hon'ble Supreme Court in Konark Case is not applicable in present case. In the said case it seems that the Section 10 of the Karnataka Electricity Reforms Act 1999 (KERA 1999) was not brought to the notice of the Hon'ble Supreme Court according to which the State Commission can review its decisions, directions and orders. The regulations cannot override the Statue and the State Commission is empowered to review its own orders, regulations which are creation of State Commission itself. In this regard the judgement of Hon'ble Supreme Court in case of

Bharathidasn University and Anr. V. All India Council for Technical Education and Ors. (2001) 8 SCC 676 has been relied where it has been held that even Hon'ble Supreme Court cannot override legislation and confer jurisdiction upon itself. Accordingly, Konark Case may not be considered as a binding precedent.

12. After careful consideration of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents and after perusal of the written submissions on various issues raised in the present Appeals, our considerations and conclusions are as follows:-
- a) In the present Appeals, the Appellants are mainly aggrieved by the reduction of tariff of their WPPs by the State Commission vide the Impugned Orders.
 - b) The Appellants have raised several questions of law which are reproduced at S. No. 7 above and are related to the main issue of reduction of tariff of their WPPs by the State Commission. Accordingly, we are analysing the main issue i.e. Whether the State Commission was right in reducing the tariff of the WPPs of the Appellants to their disadvantage when a higher tariff was already approved by the State Commission in their PPAs?
 - c) For answering the question we need to consider the findings of the State Commission as elaborated in the Impugned Order, 2005 Order, 2009 Order, PPAs, various judgements quoted by the parties, relevant regulations etc.

- i. Let us first analyse the finding of the State Commission in any one of the Impugned Order issued in suo-motu cases say the order dated 31.3.2016 in the Case No. 3 of 2015. The relevant extract of the same is reproduced below:

*“8) **ISSUE No.(1)** : Whether the Generator is entitled to the tariff determined by this Commission in the generic Tariff Order dated 11.12.2009 or the generic Tariff order dated 18.1.2005?*

.....

(e) In the generic Tariff Order dated 18.1.2005, at pagaraph-8(vii), it is specifically stated that, the Commission is limiting the determination of tariff to new Projects only. The various Articles of the approved Standard PPA would show that the said terms of the Standard PPA would be applicable to the Projects proposed to be established, but not to the Projects already existing and commissioned. At Paragraph-12 of the generic Tariff Order, 2009, while dealing with the scope of the said Order, it is held that, “The tariff determined in this Order is applicable to all the new Renewable Energy Projects which are entering into Power Purchase Agreements on or after 1.1.2010.” Therefore, it could be said that the tariff determined in the generic Tariff Order, 2005 would be applicable to all the PPAs entered into in respect of new Projects to be established on or after 10.6.2004 till 31.12.2009,

and the tariff determined in the generic Tariff Order, 2009 would be applicable to all the PPAs entered into in respect of new Projects to be established on or after 1.1.2010 till 31.12.2014. However, by its subsequent generic Tariff Order dated 10.10.2013 relating to only Wind Power Projects, the Commission has curtailed the Control Period (1.10.2010 to 31.12.2014) and determined new tariff, applicable to the PPAs entered into on or after 10.10.2013 till 31.3.2018.

(f) The generic Tariff Orders relating to Renewable Sources of Energy Projects would show that the Commission has taken into consideration the cost of various components that are necessary while establishing a Renewable Power Project, during the Control Period of five years, for determination of tariff payable to a particular Project.....
Therefore, the Project Cost incurred will be the basis for the determination of tariff for the energy generated from a Project.

(g)..... The generic Tariff Orders dated 18.1.2005 and 11.12.2009 specifically state that the tariff determined under these Orders are applicable for the new Projects to be established subsequent to the dates mentioned in the said Orders.

(h) In the present case, the Wind Power Project has been commissioned on 31.3.2009. The generic Tariff Order dated 18.1.2005 was made applicable for the

Projects, in respect of which the PPAs were submitted to the Commission for approval on after 10.6.2004, and the generic Tariff Order dated 11.12.2009 was made applicable for the Projects, in respect of which the PPAs were submitted to the Commission for approval on after 1.1.2010. A Project, which had been commissioned on or before 31.3.2009, cannot be treated as a 'new Project' for the purpose of applicability of the tariff determined in the generic Tariff Order dated 11.12.2009 of the Commission, which applies to the Projects to be established on or after 1.1.2010. For the applicability of the generic Tariff Order dated 11.12.2009, the PPAs should be in respect of a new Project and it should be submitted to the Commission for approval on or after 1.1.2010. As already noted, in the present case, though the Project was not a new Project, the tariff determined under the generic Tariff Order dated 11.12.2009 was made applicable, merely on the ground that the PPA was submitted on or after 1.1.2010, for approval of the Commission. For the above reasons, the Commission is of the considered view that the Generator's Project should have been governed by the tariff determined in the generic Tariff Order dated 18.1.2005. We, therefore, answer Issue No.(1) accordingly."

From the above it can be seen that the State Commission has held that the Appellant's WPP is eligible for the tariff as determined in the 2005 Order in view of the fact that as per

2009 Order the Appellant's WPP is not considered as new project as the said order was for the new projects who apply for the approval of the PPA in the control period 1.1.2010 to 31.12.2013.

- ii. Now let us analyse the provisions of the 2005 Order of the State Commission. The relevant extract from the same are reproduced below:

“8. Common Issues raised in the discussion paper on renewable energy projects:

.....

(vii) Tariff determination for old and new projects-

.....

Considering the debt repayment obligations, the Commission opines that differential tariff should be applicable for projects that have completed 10 years. However in the present case the Commission is limiting the determination of tariff to new projects only.

.....

10. B. Wind Projects:

.....

The Commission notes that the tariff that was proposed by the Government and adopted by the Commission prior to 10.06.2004 was Rs.3.10 per unit with an annual escalation of 2% (without compounding)

*which works out to an average tariff of Rs.3.38 per unit for the first 10 year period. The average tariff of Rs.3.40 per unit now worked out by the Commission for the first 10 year period is also in the same range. **Hence, the Commission determines the tariff for wind projects at Rs. 3.40 per unit without any escalation for the first 10 year period from the year of commercial operation of the plant.***

The State Commission based on powers conferred to it under Section 62 of the Act and after considering views of the stakeholders and various tariff parameters in accordance with 2004 Regulations has determined the tariff of new WPPs at Rs. 3.40/kWh from the COD of the WPP.

- iii. Now let us examine the provisions of the 2009 Order of the State Commission. The relevant extract from the same are reproduced below:

“I. Scope of the present Tariff determination: a) The Tariff determined in this order is applicable to all the new renewable energy projects, which are entering into power purchase agreements on or after 01.01.2010.

.....

II

(ii)

Hence, the Commission determines the tariff for wind projects at Rs.3.70 per unit without any

escalation for the first 10-year period from the date of signing of PPA.

.....

14. Date of effect of this order: i) The tariff as determined by the Commission in the present order shall be applicable to all the Power Purchase Agreements submitted to the Commission for approval on or after 01.01.2010, for a period of 10 years from the date of signing of PPA.

The tariff determined in the 2009 Order in accordance with the Act and the 2004 Regulations was applicable to all the new renewable energy projects, which were entering into PPAs on or after 1.1.2010 including WPPs for a period of 10 years from the date of signing of the PPA.

- iv. Here it also becomes important to examine the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations 2004 (“2004 Regulations”) based on which the 2005 and 2009 Orders were issued by the State Commission. The relevant extract of the same are reproduced below:

“5 Determination of Tariff for electricity from Renewable sources:

5.1 The Commission shall determine the tariff for purchase of electricity from renewable sources by a Buyer.

Provided that, the PPAs approved by the Commission including the PPAs deemed to have been approved under Section 27(2) of the Karnataka Electricity Reforms Act, 1999, prior to the notification of these regulations shall continue to apply for such period as mentioned in those PPAs.

.....

5.7 The tariff so determined by the Commission shall be applicable for a period of 10 years from the date as notified by the Commission.

5.8 The tariff so determined by the Commission is subject to review after 5 years and such revised tariff shall be applicable to agreements entered into after that date.”

From the above, it can be seen that the tariff determined for renewable energy projects under 2004 Regulations were applicable for the period of 10 years and was to be reviewed every 5 years and the revised tariff was to be applicable to the agreements entered into after that date.

- v. The State Commission has submitted that when it came to its notice about the applicability of the tariff vide this Tribunal's judgement in Appeal No. 218 & 219 of 2013 in which reference was made about M/s Savita Oil who was

given benefit of higher tariff despite its COD in the prior control period. The said judgement discussed the applicability of the generic tariff determined by the State Commission for different control periods.

We have gone through the said judgement and we find that the tariff between the Appellant and the Respondent therein agreed to the tariff of Rs. 3.40/kWh in the PPA based on 2005 Order and the Appellant was demanding tariff of Rs. 3.70/kWh as per 2009 Order as has been done in the case of Ms. Savita Oil an Appellant in the instant Appeal. This Tribunal in the said judgement has observed that the generator and the Distribution Licensee should enter into PPA before the commissioning of the project so that the energy from the generating project is supplied to the Distribution Licensee against a valid PPA immediately after the synchronization of the generating unit. Further this Tribunal has also observed that the Appellant therein was aware of the tariff applicable to the projects where COD is in the control period of 2005 Order and started supplying power to the Respondent therein. This Tribunal in the said judgement concluded as below:

“Even though the PPA was entered into on 4.2.2011, the parties started acting upon the terms and conditions of the PPA with effect from the COD of the two projects of the Appellant i.e. on 31.3.2009 and 27.8.2009 respectively. The tariff prevailing on the COD of the projects was Rs. 3.40 per unit as decided by the State Commission in its order dated 18.1.2005

and the same was agreed to in the PPA from the COD of the projects. Hence, we do not find any merit in the claim of the Appellant for higher tariff as per the tariff order dated 11.12.2009.”

- vi. The present case is opposite to that as discussed in Appeal Nos. 218 & 219 of 2013. The agreed tariff in PPA is Rs. 3.70/kWh as per 2009 Order and the State Commission has reversed it to Rs. 3.40/kWh as per 2005 Order based on the COD of the Appellants' WPP during 2005 Order control period. We feel that there should be common criteria for deciding the applicability of generic tariff to the renewable energy projects and that to our opinion shall be governed by the COD of the project happening in a particular control period.
- vii. The Appellants have contested that the PPAs were executed and approved by the State Commission pursuant to clarification dated 22.3.2010 issued by the State Commission on applicability of the tariff. Let us now analyse the clarification issued by the State Commission to the Respondent No. 2. The relevant extract is reproduced below:

“PPAs in respect of NCE projects which are submitted to the Commission on or after 01st January 2010, but COD of the project in such cases has taken place prior to 1st January, 2010 the tariff applicability in such projects will be as follows :

(1) Old tariff as determined in Commission's order dated 18th January, 2005 is applicable from the date of achieving COD upto the date of submission of the PPA to the Commission.

(2) The new tariff as determined in the Commission's order dated 11th December, 2009 is applicable only from the date of submission of the PPA to the Commission, provided the PPA is submitted to the Commission on or after 1st January, 2010."

From the above it is clear that the State Commission has clarified that the WPP whose COD occurred before the submission of the PPA to the State Commission, its tariff before submission of the PPA will be according to 2005 Order and subsequently the tariff would be applicable as per 2009 Order with a condition that PPA should have been submitted to the State Commission on or after 1.1.2010.

- viii. We also observe that the same State Commission has approved PPA at the tariff of Rs. 3.40/kWh for the PPAs signed post 1.1.2010 in subject matter in Appeal Nos. 218 & 219 of 2013 after which the State Commission realised its mistake in issuing the said clarification and applicability of tariff for renewable energy projects which are commissioned in different control periods.

- ix. We also observe that the 2004 Regulations envisage determination of tariff of renewable projects for a period of 10 years with a provision of review every 5 years. To our mind it means that once a tariff is made applicable to a particular project it remains in force for a period of 10 years. The provision of review of tariff every 5 years is kept in order to capture the dynamics of the market and making applicable the tariff so determined to the new projects coming in a particular control period.
- x. There is no doubt that the tariff as per the 2005 Order was applicable to the projects commissioned in the control period envisaged in 2005 Order i.e. up to 31.12.2009. There is also no doubt that the scope of 2009 Order speaks about its applicability to new projects although there was no specific linkage in approval of the PPAs by the State Commission and its applicability to the new projects. The 2009 Order also speaks about the tariff for the projects which has completed 10 years and there is no specific linkage to the approval of PPAs for such projects.
- xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it is not linked to the date of signing/approval of the PPA. If the PPA is approved

at a later date or in other control period the tariff is applicable from the COD date as per prevalent regulation at that time.

- xii. In the instant cases there has been delay in signing of the PPAs by the parties and subsequently submitting the same for approval before the State Commission. This Tribunal is not required to go into the details of reasons for delay in signing of the PPAs as it is not a matter of adjudication before us. However, the parties are again advised to enter into PPA before synchronisation of the project with the grid.
- xiii. The State Commission has also submitted that the interest of the consumers cannot be compromised due to mistake in issuing clarification based on the request of the Respondent No. 2 and that too administrative in nature and not a judicial order. The State Commission is empowered to correct its mistake at any time from the date of the knowledge in the interest of justice and equity and also taking into consideration to safeguard the interest of the consumers as envisaged in the preamble of the Electricity Act, 2003.
- xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD in some other control period.

xv. The Appellants have relied on the Konark Case judgement & other judgements/ orders of this Tribunal and the State Commission to put their case forcibly. The Respondents have also relied on various judgements/ orders to enforce their contentions. However, this Tribunal has arrived to the conclusion as above purely based on the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order and judgement of this Tribunal in Appeal No. 218 & 219 of 2013. Accordingly, the reliance placed by learned counsel appearing for the Appellants and the Respondents not germane to facts and circumstances of the case. Therefore, they are not being dealt with.

xvi. After thorough evaluation of the entire relevant aspects of the Appeals, material on record, we are of the considered view in the light of the observations made above that there is no legal infirmity in the Order of the State Commission. Further, we do not find any error much less material irregularity nor we find any error of law in the Impugned Order passed by the State Commission.

Impugned Order passed by the State Commission strictly is in consonance with the relevant provisions of the Electricity Act and Regulations. Therefore, the Appeals filed by the Appellants deserve to be dismissed as devoid of merits.

xvii. Accordingly, having regard to the facts and circumstances of the case as stated above the issues are answered against the Appellants.

ORDER

Having regard to the legal and factual aspects of the matter as stated above, we are of the considered opinion that issues raised in the present Appeals are devoid of merit.

Hence, the Appeals being Appeal No. 221 of 2016, Appeal No. 222 of 2016, Appeal No. 309 of 2016, Appeal No. 310 of 2016 and Appeal No. 317 of 2017 are hereby dismissed. Accordingly, all the connected IAs stand disposed of as such.

The Impugned Orders dated 31.3.2016 and 7.4.2016 passed by the State Commission are hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **7th day of May, 2018.**

(Justice N. K. Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member