

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 207 OF 2014

Dated: 13th August, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF

Green Infra Wind Farm Assets Limited
Having its registered office at 2nd Floor, Tower II,
NBCC Plaza, PushpVihar,
Sector 5, Saket,
New Delhi 110017

.... **Appellant/Petitioner**

VERSUS

1. Jaipur Vidyut Vitran nigan Limited
VidyutBhawan, Janpath,
Jaipur 302005
(Through its Chairman & Managing Director)
2. Rajasthan Electricity Regulatory Commission
Vidhyut Viniyamak Bhawan, Sahakar Marg,
Near State Motor Garage, Jaipur **Respondents**

Counsel for the Appellant ... Mr. Sanjay Sen, Sr. Advocate
Mr. Vishal Gupta
Mr. Kumar Mihir

Counsel for the Respondent(s)... Mr. Bipin Gupta and
Mr. S.K. Bansal for R-1

Ms. Bindu Das
Mr. R.P. Aggaral
Mr. S.N. Singh for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by Green Infra Wind Farm Assets Limited (in short, the '**Appellant/Petitioner**'), against the Order, dated 17.6.2014, passed by the Rajasthan Electricity Regulatory Commission, Jaipur (in short, the '**State Commission**)/Respondent No.2 herein, in Petition No. RERC-430 of 2013, whereby the learned State Commission refused to modify the tariff which was based on the draft tariff order issued by the State Commission and was incorporated in the Power Purchase Agreement (PPA), dated 6.9.2012, on the insistence of the Respondent No. 1/Distribution Licensee in Rajasthan under the impression that the same shall be modified once the final tariff order is issued by the State Commission.

2. The Appellant/petitioner is a Renewable Energy Generator. The Respondent No.1, being a distribution licensee under the Electricity Act, 2003, is engaged in the business of distribution and supply of electricity in 12 nominated districts in the State of Rajasthan. The Respondent No.2 is the State Electricity Regulatory Commission which is authorized to discharge functions under the various provisions of the Electricity Act, 2003.

3. The main grievance of the Appellant in the instant Appeal is that the State Commission failed to enforce its own final tariff order, dated 7.9.2012, to the detriment of the Appellant, which is a renewable energy generator. The State Commission clearly erred in giving primacy to the draft tariff order, which was only a proposal and had no sanctity in law over the final tariff order, dated 7.9.2012, issued by the State Commission. Further, it was imperative on the State Commission to enforce its final tariff order passed under Section 62 of the Electricity Act, 2003 (in short, the '**Act, 2003**') and failure to do so is contrary to the provisions of the Act, National Electricity Policy and National Tariff Policy. This approach of the State Commission clearly resulted in the Appellant being discriminated vis-

à-vis those project developers who are not availing the benefit of Accelerated Depreciation (AD) like Appellant and are getting the higher tariff than the Appellant.

4. The relevant facts for the purpose of deciding this Appeal are as under:

- (a) that the Appellant/petitioner, namely; Green Infra Wind Farm Assets Limited, is a Company incorporated under the Companies Act, 1956 and is, inter-alia, engaged in the business of generation and sale of Wind Energy in the State of Rajasthan.
- (b) that in terms of the provisions of the Act, 2003, National Electricity Policy and the National Tariff Policy, the Government of Rajasthan issued a Policy for promoting Generation of Electricity through Non-Conventional Energy Sources–2004 (hereinafter referred as the '**State Policy**'). The Appellant then setup a wind energy based power plant of 45 MW capacity under the said State Policy (as amended) and also agreed to sell the entire generation of the said power plant to the Respondent No.1/distribution licensee.
- (c) that the State Commission on 8.6.2012, issued a draft order in the matter of determination of levelized generic tariff for sale of electricity from wind power plants in the state to Distribution Licensee for FY 2012-13 and sought comments/suggestions as required under Section 64(2) of the Act, 2003. The levelized generic Tariff proposed for FY 2012-13 under the said draft order was as under:

S.No.	Particulars	Tariff (Rs/ KWh) if Higher Depreciation Benefit is not availed.	Tariff (Rs/ KWh) if Higher Depreciation Benefit is availed.
(1)	(2)	(3)	(4)
1.	Wind Power Plants located in Jaisalmer, Jodhpur & Barmer Districts	5.18	4.90
2.	Wind Power Plants located in districts other than Jaisalmer, Jodhpur & Barmer districts.	5.44	5.14

The said draft order provided that the above tariff is levelised for 25 years and that any persons desirous of offering suggestions/comments on the aforesaid tariff proposal may send the same by 02. 07.2012. Thus, the draft tariff order was clearly a proposal on which the suggestions/comments were invited. The said draft order inter-alia also proposed that:

“16. Considering that considerable capacity of the wind projects already stands commissioned in the State, the Distribution licensees, in the interest of the consumers, must strive to procure wind energy at a generic tariff being lower of the two streams namely, with or without higher depreciation benefit by giving preference, while finalising/signing PPA, to developers/generators offering the lower rate among the said two tariff streams. However, if capacity in excess of RPO is to be contracted, the licensee must obtain prior approval of the Commission based on reasons and full justification before contracting for capacity in excess of RPO requirement.

17. A generator claiming the higher tariff worked out as above for projects not availing higher depreciation benefit would have to furnish an undertaking in advance to the buyer regarding higher depreciation benefit not being availed and this would have to be followed for each financial year by a certificate of the Chief Executive or the person responsible for filing Income Tax return of the generating unit to the effect that higher depreciation benefit has not been claimed/availed in that financial year”

- (d) that the Appellant, in terms of the State Policy, exercised the option for sale of 100% electricity produced from its power plant to the Respondent No.1, being the distribution licensee. The Respondent No.1, based on the draft tariff order, insisted for an undertaking from the Appellant to the effect that it will be availing Accelerated Depreciation (AD) irrespective of the fact that in reality the Appellant did not want to avail AD. The availing of AD or not is a choice given to the generator by the Central Government and it has to be on the volition of the generator and not the insistence of any party or person.

However, the Respondent No.1 went on to insist for an undertaking from the Appellant that it will be availing AD (even contrary to the draft tariff order) as the draft tariff order emphasized Discoms to procure power at lower of the two steams. Accordingly, the Appellant had to furnish an undertaking on the basis of the aforesaid draft order dated 8.6.2012, to the following effect:

- i) The petitioner will not avail GBI/ Tariff subsidy and if it avails the tariff will be reduced accordingly.
 - ii) The Petitioner agrees for the tariff applicable for projects availing higher depreciation even though it opts not to avail higher depreciation.
 - iii) The Petitioner will not avail REC for the capacity contracted under PPA.
- (e) that the Accelerated Depreciation (AD) is an incentive offered by the Central government for promotion of renewable energy and to encourage investment in the renewable energy sector and the choice to avail it or not rests with the renewable energy generator like the Appellant herein. Once the generator conveys its option to the distribution licensee about its choice, latter has no authority in law to insist the generator to do otherwise as precondition to the signing of the Power Purchase Agreement (PPA).
- (f) that the Appellant sent a letter, dated 8.8.2012, to the Respondent No.1 requesting to permit for signing of PPA without insisting on the aforesaid undertaking. The Appellant, in the said letter, dated 8.8.2012, further gave an undertaking that it would undertake to comply with all the requirements of the final wind tariff order by the State Commission from the date of commissioning of the Project.

- (g) that the Respondent No.1 did not agree with the aforesaid request of the Appellant conveyed through its letter, dated 8.8.2012, and then, the Appellant left with no choice, gave an undertaking, dated 27.8.2012, stating that the Appellant will avail higher depreciation benefit and will follow the same for each financial year with a certificate that higher depreciation benefit has been claimed/ availed in that financial year. In case, if higher depreciation benefit is not availed, even though, the Appellant shall claim generic tariff, being lower of the two streams namely; with or without higher depreciation benefit as per tariff order of the State Commission. However, para 17 of the draft tariff order did not require any undertaking from any power producer who will be availing the benefit of higher depreciation. The undertaking which was required to be given as per the draft tariff order was only from the power producers who were not to avail the higher depreciation benefit. Apart from the fact that the distribution licensee cannot insist on such undertaking as a condition precedent for signing the PPA as it impinges on the choice of the renewable energy generator to avail AD or not is also contrary to the proposal in draft tariff order which only suggested/proposed an undertaking from the generators who have exercised the choice of not availing AD.
- (h) that the Appellant provided such undertaking as that was the only option to commission the plant and also on the understating that the PPA shall be governed by the final tariff order which shall be consistent with the overall policy of promotion of Renewable Energy (RE) and the law.
- (i) that pursuant to the aforesaid undertaking, the Appellant then entered into a Power Purchase Agreement, dated 6.9.2012, with the Respondent No.1, a distribution licensee for a period of 20 years from the date of commercial operation (COD) of the plant.

Further, the power purchase price as per clause 5 of the power purchase agreement was as under:

“1. The price to be paid by the Discom, net of all GoR and Local Taxes and duties as may be leviable on generation and/ or sale of electricity for all electricity made available and sold by the Power Producer to Discom shall be based on the tariff specified by RERC”

- (j) that the tariff for Wind Power Projects in Districts, other than Jaisalmer, Barmer and Jodhpur Districts, will be lower of the two streams, namely; with or without higher depreciation benefit as per tariff order of the State Commission for FY 2012-13. It is clear from the above that the PPA itself recognised the supremacy of the final tariff order as the tariff and its terms were required to be as per the final tariff order. The draft tariff order being only a proposal and not a binding tariff order cannot prevail over the final tariff order.
- (k) that the State Commission, subsequently, after hearing the objections and suggestions of the stakeholders, vide its final order, dated 7.9.2012, determined the levelized generic tariff for the wind power projects for FY 2012-13 and held that both the tariff, i.e. with or without availing accelerated depreciation, would be valid tariff for the purpose of signing of Power Purchase Agreements (PPAs) by the Discoms.
- (l) that it is, thus, abundantly clear that the State Commission, after hearing the objections dropped its suggestion/observation proposed in the draft tariff order which stated that “Discoms must strive to procure wind energy at a generic tariff being lower of the two streams namely, with or without higher depreciation benefit by giving preference, while finalising/signing PPA, to developers/generators offering the lower rate among the said two tariff streams.”

- (m) that the State Commission, vide the final tariff order, dated 7.9.2012, fixed the levelized Generic Tariff for wind power projects in the following manner:

S. No.	Particulars	Tariff (Rs/Kwh) if higher depreciation is not availed	Tariff (Rs/Kwh) if higher depreciation is availed
(1)	(2)	(3)	(4)
1.	Wind Power Plants located in Jaisalmer, Jodhpur and Barmer Districts	5.18.	4.89
2.	Wind Power Plants located in Districts other than Jaisalmer, Jodhpur and Barmer Districts	5.44.	5.13

- (n) that after the final tariff order, dated 7.9.2012, having been passed by the State Commission, the Appellant sent a letter, dated 13.9.2012, to the Respondent No.1 seeking amendments in the Power Purchase Agreement, dated 6.9.2012, in terms of the final tariff order, dated 7.9.2012, for changing the term of the Power Purchase Agreement to 25 years and for substituting the Annexure B of the Power Purchase Agreement with the following:

“ANNEXURE B

Schedule: Tariff for Wind Power projects as per RERC order dated 07.09.2012.

Particular	Jaisalmer, Barmer and Jodhpur Districts	Other Districts
Levelised Tariff	Rs. 5.18 / Kwh	Rs. 5.44 / Kwh

.....”

- (o) that the Appellant further stated in its letter dated 13.9.2012, that the undertaking, dated 27.8.2012, given prior to the signing of the Power Purchase Agreement, was no longer valid as it was given in terms of the draft tariff order, dated 8.6.2012, and, therefore, it gave the above stated revised undertaking, dated 13.9.2012, stating as follows:

“1. We will not avail higher depreciation benefit and this will follow for each financial year with a certificate that higher depreciation benefit has not been claimed/ availed in that financial year.

2. We will not avail any benefit of REC in respect of capacity contracted under this PPA for supply of Power as per applicable tariff opted as above.”

- (p) that the Respondent No.1 did not raise any objection to the said revised undertaking, dated 13.9.2012, furnished by the Appellant. Thus, it was clear that the Respondent No.1 had accepted the said revised undertaking and the tariff of Rs. 5.44 per Kwh was to be applied to the PPA, dated 6.9.2012.
- (q) that the Appellant, further, send a letter, dated 20.9.2012, to the Respondent No.1 seeking amendments in the Power Purchase Agreement. Further to the aforesaid undertaking, dated 13.9.2012, the Appellant raised its bill/ invoice, dated 25.10.2012, for supply of 45 MW power from its project for the month of September 2012 at the rate determined by the final tariff order, dated 7.9.2012, i.e. Rs. 5.44/ Kwh.
- (r) that the Respondent No.1, after receipt of the invoice raised by the Appellant for supply of power during the month of September 2012, sent a letter, dated 26.10.2012, to the Appellant stating that the Appellant claimed power purchase price of Rs. 5.44/Kwh, but as per clause No. 5 of the PPA, the Appellant had given an undertaking/consent of lower tariff of the two streams namely; with or without higher depreciation benefit as per tariff order of the State Commission for FY 2012-13 and in context to letter, dated 14.9.2012, the Appellant have to furnish the insurance as per clause no. 10.2 of the PPA before or at the time of first invoice further seeking clarification in the said matter along with desired documents.
- (s) that the Respondent No.1 malafidely trying to rely on undertaking given by the Appellant pursuant to the draft order

of the State Commission inspite of the clear position of law that the draft tariff order or the undertaking given in pursuance thereof cannot be considered for fixing the tariff and the Tariff has to be fixed as per the final tariff order of the State Commission.

- (t) that the Appellant, subsequently, raised further invoices for the months of October, 2012, November, 2012 and December, 2012 and submitted the same to the Respondent No.1 along with its letter, dated 26.12.2012, mentioning that the invoices submitted are interim in nature as the amendments in the Power Purchase Agreement, pursuant to the final tariff order, dated 7.9.2012, were to be carried out. The Appellant once again sent a letter, dated 31.1.2013, to the Respondent No.1 seeking amendments in the Power Purchase Agreement in terms of the final tariff order, dated 7.9.2012. This letter was responded back by the Respondent No.1 to the letter, dated 11.4.2013, stating that the Power Purchase Agreement executed on 6.9.2012 is final.
- (u) that the State Commission, further, on 17.5.2013 determined the levelised generic tariff for the wind power projects for FY 2013-14.
- (v) that the Appellant, thereafter, wrote a letter, dated 4.6.2013, to the Respondent No.1 submitting a revised undertaking in terms of the final tariff order, dated 17.5.2013, passed by the State Commission and further seeking release of all the outstanding payments details of which were given in the letter.
- (w) that, thereafter, the Appellant filed the aforesaid petition being Petition No. RERC-430 of 2013, before the State Commission, seeking a direction that the final tariff order, dated 7.9.2012, passed by the State Commission will prevail over the draft tariff order, dated 8.6.2012, of the State Commission. In the said

petition, the Appellant inter-alia also prayed that the undertaking given by the Appellant, pursuant to the draft tariff order, be declared as null and void after passing of the final tariff order, dated 7.9.2012, by the State Commission and that the applicable tariff for the project of the Appellant be Rs.5.44/Kwh.

- (x) that the stand of the Respondent No.1 before the State Commission, in response to the petition was that since the parties had entered into a valid PPA, dated 6.9.2012, and, further, the Appellant had given an express undertaking that even if the Appellant does not claim the higher depreciation, then also it will claim generic tariff being lower of the two streams and, further that once the parties have entered into a valid PPA, the same cannot be amended as being sought by the Appellant.
- (y) that the learned State Commission, vide its impugned order, dated 17.6.2014, partly rejected the aforesaid petition of the Appellant holding that the reading of the two orders of the State Commission together makes it clear that ultimate tariff determined by the State Commission in the final order is not different than the one in the draft order. Para 15 of the final tariff order further states that both the tariffs i.e. with or without availing higher depreciation would be valid tariffs which means that the tariff incorporated in the PPA signed by the Appellant/petitioner continues to be valid. The State Commission clearly held in the impugned order that order, dated 17.5.2013, has no application to the Appellant/petitioner's case as he has opted for lower tariff with or without higher depreciation. The State Commission, in the impugned order, further observed that it is true that the petitioner signed the PPA and gave an undertaking based on the draft order, but the same did not get altered on account of

the final order of the State Commission, dated 7.9.2012, and, therefore, no modification of tariff incorporated in the PPA can be allowed. This impugned order has been challenged before us in the instant Appeal by the Appellant/petitioner

5. We have heard Mr. Sanjay Sen, the learned Senior Counsel for the Appellant and Mr. Bipin Gupta, the learned counsel for the Respondent No.1 and Ms. Bindu Das, the learned counsel for the Respondent No.2 and gone through the written submissions filed by the rival parties. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission and written submissions.

6. The following issues arise for our consideration:

- (A) Whether the draft tariff order, dated 8.6.2012, had any legal sanctity for purchasing power by the distribution licensees?**
- (B) Whether the draft tariff order can have primacy over the final tariff order, dated 7.9.2012, passed by the State Commission?**
- (C) Whether the undertaking given by the Appellant in accordance with the draft tariff order, dated 8.6.2012, will survive once the State Commission has passed the final tariff order, dated 7.9.2012?**
- (D) Is the Appellant not entitled to the higher tariff for not availing the Accelerated Depreciation (AD) only on the basis of its undertaking, dated 27.8.2012, when the said undertaking cannot survive after the passing of the final tariff order?**

7. Since, all the issues are interconnected; we are taking and deciding them together.

8. The following contentions have been made on behalf of the Appellant on these issues:

- (a) that the State Commission issued the draft tariff order, at the same time invited suggestions/objections from the stakeholders adopting the procedure under Section 64(2) of the Electricity Act, 2003. The State Commission after accepting the contentions of the investors, had changed its draft order wherein, it had proposed that Discoms may procure wind energy at a generic tariff which is lower between the two tariff options available to the investors i.e. with higher depreciation and without higher depreciation. Thus, the State Commission accepted the objections of the stake holders that such a preference will remove the level playing field between the two categories of the investors i.e. those who can avail the benefit of higher depreciation and those who cannot and, therefore, it will create appreciable adverse effect on competition in the renewable energy sector. The stand taken by the Respondents apart from being contrary to the State Commission's binding final tariff order is also anti competitive and violative of Section 60 and 66 of the Electricity Act, 2003.
- (b) that the draft order provided that only a generator claiming the higher tariff worked out as above for projects not availing higher depreciation benefit would have to furnish an undertaking to the aforesaid effect. Thus, there was no occasion for the Respondent No.1 to insist upon the undertaking from the Appellant that it will avail higher depreciation being even contrary to the draft order of the State Commission.
- (c) that the State Commission failed to appreciate the law laid down by this Appellate Tribunal in its judgment, dated 28.9.2006, in Appeal No. 90 of 2006 in the case of Rithwik Energy Systems Ltd. Vs. Transmission Corporation of Andhra Pradesh Limited & Ors that the PPAs can be reopened for the promotion of the renewable energy. Hence, the State Commission ought to have directed the Respondent No.1 to

amend the PPA in terms of its final tariff order otherwise the Appellant will suffer huge financial loss by not getting a higher tariff fixed for the projects who are not availing accelerated depreciation despite, undisputedly, not availing the benefit of accelerated depreciation. Accordingly, the PPA can be re-opened for the purpose of giving thrust to non-conventional power projects and, therefore, the State Commission ought to have allowed the petition filed by the Appellant.

- (d) that the actions of the distribution licensee to act upon the draft tariff order was clearly to take advantage by virtue of its dominant position over the generating company as there was no occasion for the Respondent No.1 to insist upon an undertaking which was not required to be given by a generating company.
- (e) that the State Commission erred in holding that the distribution licensee has not abused its dominant position in the lack of any material evidence. Further the State Commission erred in not realizing that a generating company has to commission its plant once it is ready for commissioning and the distribution licensee should not have insisted upon a condition for signing PPA which was not as per law.
- (f) that the distribution licensee/Respondent No.1, based on a draft tariff order, dated 8.6.2012, of the State Commission insisted that project developers such as the Appellant should sign a PPA based on the lower of the two levelised generic tariff for wind power. The draft tariff order, dated 8.6.2012, sets out two kinds of tariff for wind power plant. The first kind of tariff is for those projects which have not availed the benefit of higher depreciation and these projects are entitled to a higher tariff. The Appellant's project has not availed benefit of higher depreciation, the Appellant's project falls under serial no. 2 in para 14 of the draft order and is entitled to a tariff of Rs.5.44

per kwh. For projects which have availed higher depreciation benefit, the tariff is much lower at Rs.5 per Kwh.

- (g) that two separate kinds of tariff have been provided for the reason that some projects are in the position to avail the benefits of higher depreciation, while other projects are not in a position to avail the benefits of higher depreciation. Higher depreciation is to the benefit of a company which has book profits. The depreciation amount is treated as an expense and helps in reducing the profits, which then helps in reducing the amount of tax that is to be paid. Therefore, higher depreciation benefit is a tax benefit for profitable companies or those companies which have book profit and have a higher tax payment obligation. In order to promote investment in renewable power generation, this incentive was given by the Government.
- (h) that in some companies, such as the Appellant, which are new and do not have any book profits, the Appellant cannot avail the benefit of higher depreciation. Therefore, the Appellant, because of its inability to absorb the benefit of higher depreciation is entitled to a higher tariff.
- (i) that the distribution licensee, in the light of observation in para 16 of the draft tariff order, dated 8.6.2012, of the State Commission, insisted that generator should agree to the lower tariff even if they have not taken the benefits of higher depreciation. This is illegal and not permissible because two kinds of tariff were provided keeping in view the specific nature/background of generators. The first category which had the ability to avail the benefit of higher depreciation and another category who were unable to avail the benefits of higher depreciation. The Appellant protested to this demand of the distribution licensee, which protest is recorded in its letter, dated 8.8.2012.

- (j) that the Appellant had no objection but to agree to the undue influence of the distribution licensee for the reason that the Appellant's project was ready and on the verge of commissioning. The Appellant had a bank liability for which repayment would start on commissioning of the project. Consequently, on the basis of such demand made by the distribution licensee, the Appellant furnished an undertaking on 27.8.2012.
- (k) that only after the undertaking was furnished, the Respondent licensee signed a PPA on 6.9.2012 within a period of one week of giving an undertaking is not contemplated either in the Regulation or Tariff Order. In fact, the giving of undertaking demonstrates that the Appellant is a victim of dominant position of the Respondent No.1.
- (l) that a reading of the terms of the undertaking (which the Appellant was coerced to sign the PPA on lower tariff), the Appellant had clearly mentioned that the final tariff and the terms & condition shall be as per the final tariff order. The Appellant also insisted that the PPA shall be subject to the approval and scrutiny of the State Commission. Therefore, the agreement was only tentative and subject to the final tariff order which was not in existence either on the date of undertaking or on the date of execution of PPA. The final tariff order was in fact issued one day after signing the PPA i.e. on 7.9.2012.
- (m) that while the tariff in the draft tariff order and final tariff order is same. The Commission, in the final tariff order, after taking into consideration the views of the stakeholders, pleased to modify its earlier observation in para 16 of the draft tariff order.
- (n) that the PPA cannot be entered on the basis of a draft tariff order, this goes to the very root of the price fixed in the PPA.

The price has to be aligned to the final tariff order. The PPA is subject to a regulatory approval based on the final tariff order.

- (o) that there is no legal basis for seeking an undertaking from a developer. In fact, such an undertaking demonstrates abuse of dominant position and the developer was coerced to sign the PPA on the basis of a draft order.
- (p) that the two categories of tariff were given to the generators so that they could choose the most suitable option. The option was given to the generator. It cannot be used by the distribution licensee to force the developer to accept or chase the lower of the two categories.

9. **Per contra**, the following submissions have been made on behalf of the Respondent No.1/distribution licensee on these issues:

- (a) that the Appellant is claiming modification of PPA, dated 6.9.2012, on the ground that the Appellant is not claiming higher depreciation, therefore, the higher tariff that is without claiming higher depreciation, may be allowed after being revised in the PPA, dated 6.9.2012. The Appellant, further, claims that the impugned order, dated 17.6.2014, of the State Commission may be set-aside to the extent of rejecting the prayer of modification of tariff.
- (b) that the Appellant is contending that, vide order, dated 8.6.2012, the State Commission had virtually directed the distribution licensee to procure wind energy at a generic tariff, which is lower between the two tariff options available to the power procurers i.e. with higher depreciation or without higher depreciation is not at all provided in the order, rather the draft order only provides that the preference may be given so as to secure the interest of the consumers which is also the ultimate object of the Electricity Act, 2003. This contention of the

Appellant is without force because the draft order, at that time itself had provided two different modes and two different rates, one with higher depreciation and the other without higher depreciation and, thus, even in the draft order, the two modes were available for the generator and the Appellant, present generator, having given the undertaking and entered into the PPA on 6.9.2012, had categorically agreed to sell the energy at the lower tariff with express undertaking that it would be the lower of the two streams with or without higher depreciation. Further, the said undertaking furnished by the Appellant categorically stated that even if the Appellant does not claim the higher depreciation, then also the Appellant will claim the generic tariff being lower of the two streams and, on the basis of that undertaking, the PPA had been executed with open eyes by the Appellant on 6.9.2012.

- (c) that the Appellant had, in unequivocal terms, entered into PPA to sell energy to the distribution licensees at the rate lower of the streams between the two options irrespective the fact whether the Appellant claims higher depreciation or not and, in such situation, looking to the interest of the consumers of the Discoms, the Discoms had signed the PPA. The Appellant, after taking note of his interest in unequivocal terms, stated that he would supply power on the lower tariff of the two tariffs whether he claims higher depreciation or not. Now, the Appellant had claimed the change in PPA for the reasons that he is not in a position to claim higher tariff and the Appellant cannot be permitted to rescind from its undertaking and the PPA. The learned State Commission, in its final order, dated 7.9.2012, also provided two streams, which were also existed in the draft order of the State Commission. Thus, having opted for lower stream and having entered into PPA with lower stream, now, the Appellant cannot be permitted to rescind from the undertaking and the PPA, which were final in nature. Further, the said PPA

and undertaking is not contrary to either the draft order, dated 8.6.2012 or to tariff order, dated 7.9.2012. In the final tariff order, dated 7.9.2012, the State Commission had only stated that both the tariffs are valid tariffs for entering into PPA. Thus, if any person entered into a PPA, with open eyes, on lower tariff now cannot be permitted to rescind or withdraw from the PPA just to claim higher tariff. The draft tariff order had been confirmed by the State Commission, vide its tariff order, dated 7.9.2012, wherein it had been held that both the tariffs are valid tariffs.

- (d) that in the PPA, dated 6.9.2012, itself, the Appellant had clearly admitted to claim the lower of the two tariffs, which would be provided by the State Commission. In its order, dated 7.9.2012, for FY 2012-13, the tariff of the lower stream is Rs.5.13/unit, thus, the Appellant is wrong in contending that he is entitled for amendment in PPA as he is not claiming higher depreciation.
- (e) that the draft order of the State Commission provided that the tariff for wind power plants located in districts other than Jaisalmer, Jodhpur and Barmer would be Rs.5.44/unit, if higher depreciation is not availed and it would be Rs.5.14/unit, if higher depreciation is availed. The final order of the State Commission provided the tariff for wind power plants located in districts other than Jaisalmer, Jodhpur and Barmer Districts, would be Rs.5.44/unit, if higher depreciation benefit is not availed, and it would be Rs.5.13/unit, if higher depreciation benefit is availed. Thus, the Appellant's tariff could be only Rs.5.13/unit as per the PPA. The draft order as well as final order provides for two options and since, the Appellant with open eyes, having availed the lower tariff, cannot now be permitted to withdraw from PPA to claim higher tariff as the

PPA executed between the parties is neither contrary to draft order or the final tariff order.

10. **OUR DISCUSSION AND CONCLUSION:**

10.1 The Appellant furnished an undertaking on 27.8.2012 to the Respondent No.1/distribution licensee, wherein the Appellant stated as follows:

“1. We will not avail any benefit or GBI/tariff subsidy under any development scheme. In case any benefit of GBI/tariff subsidy under any government scheme is availed, the applicable tariff would get reduced to the extent of GBI/tariff would get reduced to the extent of GBI/tariff subsidy so availed. For this purpose we shall furnish a certificate from the Chartered Accountant that the benefit of GBI/tariff subsidy has not been availed.

2. We will avail higher depreciation benefit and this will follow for each financial year with a certificate that higher depreciation benefit has been claimed/availed in that financial year. In case if higher depreciation is not availed even though we shall claim generic tariff being lower of the two streams namely with or without higher depreciation benefit as per tariff order of RERC.

3. We will not avail any benefit or REO in respect of capacity contractd under this PPA for supply of power as per applicable tariff opted as above.

“This undertaking is given on the understanding that the final tariff and terms & conditions shall be as per the final tariff order issued by Rajasthan Electricity Regulatory Commission (RERC) in this respect and same shall be applicable to PPA.”

10.2 In the PPA, dated 6.9.2012, the power purchase price is provided in clause 5 read with annexure-B which is as follows:

“5. Power Purchase Price

i) The price to be paid by the Discom, net of all GoR and local taxes and duties as may be leviable on generation and/or sale or electricity for all electricity made available and sold by the Power Producer to Discom shall be based on the tariff specified by RERC as per attached annexure-B.

ii) The Power Purchase Agreement shall be subject to RERC scrutiny/approval as may be required under regulatory process/directions.”

10.3 The learned State Commission, while passing the impugned order, dated 17.6.2014, dismissed the petition of the Appellant and observed as under:

“13. Reading the two orders of the Commission together makes it clear that ultimate tariff determined by the Commission in the final order is no different than the one in the draft order. This is made clear in para 15 of the final order wherein it is specifically stated that both the tariff i.e. with or without availing higher depreciation would be valid tariff. This in effect means that the tariff incorporated in the PPA signed by the Petitioner continues to be valid.

.....

16. We are in agreement with the submission of the respondents. The order, dated 17.5.2013, has no application to the petitioner’s case as petitioner has opted for lower tariff with or without higher depreciation.

17. The respondents have also submitted that Commission in final order had only stated that both the tariffs are valid tariffs for signing the PPA. Thus, in a way, the Commission has left it to the Discom and to the generator to enter into PPA with both options and, thus, none of the options have been taken away. The above in our view deserves acceptance in view of the discussions made in the paras supra.

.....

23. Thus, from the above draft as well as final orders, it is established that the Commission has provided levelised tariff for 25 years in both the orders as per note (ii) of regulation 83(6)(b)(viii) of RERC Tariff Regulations 2009. Therefore, the terms of PPA of the Petitioner should be 25 years as per prevalent Regulation. The Respondent as well as Petitioner is directed to amend the PPA term for 25 years.”

10.4 The relevant portion of the final tariff order, dated 7.9.2012, is reproduced below for a ready reference:

15. In the light of the submissions made by the stakeholders as well as Discoms, the Commission is of the view that the matter needs to be re-considered. Commission has also taken note of the submission of the stakeholder that after withdrawal of AD benefit, IPPs are expected to invest more in wind generation, who would not be able to avail benefit of higher depreciation. In order to address the concerns of developers as well as Discoms, the Commission has reviewed the matter and decided that both the

tariff i.e. with or without availing higher depreciation would be valid tariff for the purpose of signing of Power Purchase Agreements (PPAs) by the Discoms.”

10.5 The main contention of the Appellant in this Appeal is that the State Commission has committed illegality in not reopening the said PPA for the promotion of renewable energy by not following this Appellate Tribunal's judgment, dated 28.9.2006, in Appeal No. 90 of 2006 in the case of Rithwik Energy Systems Ltd. vs. Transmission Corporation of Andhra Pradesh Limited & Ors. We find that it is true that the renewable energy generation should be promoted and, judgment of this Appellate Tribunal, dated 28.9.2006, should be complied with in letter and spirit but, there are certain conditions in our aforesaid judgment, dated 28.9.2006, and when the said conditions are not fulfilled, no PPA can be ordered to be reopened just in the name of promotion of any renewable energy generation. We do not find any force in this contention of the Appellant.

10.6 The next contention of the Appellant is that by exercising its dominant position, the Respondent No.1/distribution licensee succeeded in compelling the Appellant to agree to the condition of furnishing an undertaking and, since, the said project of the Appellant was ready for commissioning and the power to be generated had to be sold and on the commissioning of the project, the repayment of bank loans automatically starts, the Appellant had no option but to sign the undertaking compelled by the Respondent No.1/distribution licensee. The said undertaking bears no legal sanctity as the Respondent No.1 exercised its undue influence over the Appellant to agree to the tariff lower of the two streams, irrespective of the fact, whether it availed accelerated depreciation or not. We found that simply these are the bald allegations, which are being made by the Appellant against the Respondent No.1/distribution licensee and there is no proof showing exercise of any such kind of undue influence by the Respondent No.1 upon the Appellant to agree to the said undertaking. Even the facts and circumstances of the matter before us do not point out towards the exercise of undue influence by the Respondent

No.1/distribution licensee. There are documentary evidence on record including PPA showing that there was no exercise of undue influence by the distribution licensee upon the Appellant/petitioner compelling latter to agree to furnish such undertaking of sale of power at the lower tariff of the two tariffs. Thus, this contention of the Appellant is sans merit. There appears to be no material change between the draft tariff order and the final tariff order passed by the State Commission. Since, the PPA had been entered into between the Appellant and the Respondent No.1 for supply of electricity to be generated from the generating station of the Appellant in pursuance of the draft tariff order, the same has legal sanctity and is binding upon the parties. We do not find any illegality or irregularity or perversity in the impugned order passed by the State Commission partly rejecting the petition of the Appellant. The prayer of the Appellant seeking modification of the tariff in the PPA has rightly been rejected by the impugned order. As per the provisions of the Electricity Act, 2003, while fixing tariff, the interest of the consumer is also to be kept in mind and when the generator agrees to sell power at a lower tariff, there appears to be no reason to allow any modification in the said PPA just on the ground that the PPA had been entered in pursuance of the draft tariff order. We agree to the findings recorded in the impugned order of the State Commission.

10.7 We hold that in the facts and circumstances of the case before us, the draft tariff order had legal sanctity for purchasing power by the distribution licensee. Further, there is no question of primacy of the final tariff order over the draft tariff order in the facts and circumstances of the present matter. There is no ambiguity or discrepancy or contradiction in between the terms and conditions of the draft tariff order and the final tariff order passed by the State Commission. In fact, both the orders are same without any material change. In these facts and circumstances, we further hold that the Appellant is not entitled to the higher tariff just on the ground it had not availed the accelerated depreciation on the basis of its undertaking, dated 27.8.2012. **In view of the above discussions, all**

the issues are decided against the Appellant and the present Appeal is liable to be dismissed.

ORDER

The instant Appeal, being Appeal No. 207 of 2014, is hereby dismissed and the impugned Order, dated 17.6.2014, passed by the Rajasthan Electricity Regulatory Commission, is hereby upheld. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 13TH DAY OF AUGUST, 2015.

**(T. Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ **REPORTABLE/NON-REPORTABLE**

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