

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

**(APPELLATE JURISDICTION)**

**APPEAL NOS. 251 OF 2013 AND 325 OF 2013**

**Dated: 19<sup>th</sup> May, 2015**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**IN THE MATTER OF**

**APPEAL NO. 251 OF 2013**

Timarpur-Okhla Waste Management  
Company Ltd (TOWMCL)  
28, Shivaji Marg,  
New Delhi – 110 015

..... Appellant/Petitioner

***VERSUS***

1. Delhi Electricity Regulatory Commission  
Viniyamak Bhawan, C Block  
Shivalik, Malviya Nagar,  
New Delhi 110017

2. BSES Rajdhani Power Limited,  
BSES Bhawan, Nehru Place,  
New Delhi – 110 009

..... Respondents

Counsel for the Appellant ... Mr. S.B. Upadhyay, Sr. Adv.  
Mr. Pawan Upadhyay  
Mr. Kaustuv P. Pathak

Counsel for the Respondent(s)... Mr. Dhananjay Baijal  
Mr. Nikhil Nayyar for R-1

Mr. Amit Kapur  
Mr. Vishal Anand  
Mr. Gaurav Dudeja for R-2

**APPEAL NO. 325 OF 2013**

Timarpur-Okhla Waste Management  
Company Ltd (TOWMCL)  
Old NDMC Compost Plant,  
Behind CRRI, Mathura Road  
New Delhi – 110 025

..... Appellant/Petitioner

**VERSUS**

1. Central Electricity Regulatory Commission  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chandralok Building,  
36, Janpath, New Delhi 110001

2. National Load Dispatch Centre  
C/o Power System Operation Corporation Limited  
(POSOCO), B-9, Qutub Institutional Area,  
Katwaria Sarai, New Delhi 110016

3. BSES Rajdhani Power Limited,  
BSES Bhawan, Nehru Place,  
New Delhi – 110 009

..... Respondents

Counsel for the Appellant ... Mr. S.B. Upadhyay, Sr. Adv.  
Mr. Pawan Upadhyay  
Mr. Kaustuv P. Pathak

Counsel for the Respondent(s)... Mr. Manu Seshadri  
Mr. Ankit Mida for R-1  
  
Mr. Arjun Krishnan for R-2  
  
Mr. Amit Kapur  
Mr. Vishal Anand  
Mr. Gaurav Dudeja for R-3

**J U D G M E N T**

**PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

1. The Appeal No. 251 of 2013 under Section 111 of the Electricity Act, 2003, has been preferred by Timarpur-Okhla Waste Management Company Limited (in short, the '**Appellant**'), challenging only a part of the tariff

Order, dated 31.7.2013, passed by the Delhi Electricity Regulatory Commission (in short, the **'State Commission'**)/Respondent No.1 herein, in Petition No. 1 of 2013, whereby the State Commission has while conducting the True-up for FY 2011-12, Review and Provisional True-up for FY 2012-13 and approving the Annual Revenue Requirement of the Respondent No.2 (BSES Rajdhani Power Limited)/Distribution Licensee for its Distribution (Wheeling and Retail Supply) business for FY 2013-14 has allowed the Respondent No.2 to fulfill part of its Renewable Purchase Obligation (RPO) by purchasing 50 MU power from the Appellant at Rs. 2.60 per unit. The Appellant is the Power Generating Company, Respondent No.1/DERC is the State Regulatory Commission and Respondent No.2/BSES Rajdhani Power Ltd. is the Distribution Licensees (hereinafter referred to as **'BRPL'**).

2. The Appeal No. 325 of 2013 under Section 111 of the Electricity Act, 2003, has been preferred by Timarpur-Okhla Waste Management Company Limited (in short, the **'Appellant'**), challenging the Order, dated 18.9.2013, passed by the Central Electricity Regulatory Commission (in short, the **'Central Commission'**)/Respondent No.1 herein, in Petition No. 246/MP/2012, whereby the Central Commission relied on the tariff order, dated 31.7.2013, passed by the Delhi Electricity Regulatory Commission regarding 'True-up for FY 2011-12, Aggregate Revenue Requirement and Distribution Tariff (Wheeling & Retail Supply) for FY 2013-14', considered the 8 MW power supplied by the Appellant towards fulfillment of Renewable Purchase Obligation (RPO) of the Respondent No.3 (BSES Rajdhani Power Limited) (hereinafter referred to as **'BRPL'**) at a price of Rs.2.60 per unit and, further, directed the Appellant to either take steps for resolution of the dispute regarding the same in accordance with the Dispute Resolution Mechanism provided under Article 22 of the Energy Purchase Agreement (EPA) or to approach the State Commission for a clarification as to whether 8 MW of Energy covered under the EPA with the Respondent No.3/BRPL qualifies to be considered as meeting the Renewable Purchase Obligation of the said Distribution Licensee. The

Appellant is the Power Generating Company, Respondent No.1 is the Central Electricity Regulatory Commission, Respondent No. 2 is the National Load Dispatch Centre and Respondent No.3/BSES Rajdhani Power Ltd. is the Distribution Licensee.

3. The main grievances of the Appellant in these Appeals No. 251 of 2013 and 325 of 2013 against the respective impugned orders are:

**A.No.251/2013**

- (a) that the State Commission while passing the tariff order, dated 31.7.2013, failed to appreciate that the issue as to whether the power purchased by the Respondent No.2 from the Appellant under EPA, dated 22.1.2010, can be treated towards fulfillment of the Renewable Purchase Obligation of the Respondent No.2 was pending adjudication of Petition No. 23 of 2013 and Petition No. 246 of 2012 before it and before the Central Commission respectively and, therefore, the State Commission ought to have considered the contentions of the Appellant before allowing the said power to be treated towards the Renewable Purchase Obligation of the Respondent No.2 vide the tariff order, dated 31.7.2013, as the said tariff order may make the aforesaid petitions, being Petition Nos. 23 of 2013 and 246 of 2012, infrustuous without any hearing.
- (b) that the State Commission ought to have granted an opportunity of personal hearing to the Appellant in view of its letter, dated 27.5.2013, before passing the tariff order, dated 31.7.2013, wherein it incorrectly recorded presence of the representative of the Appellant in the personal hearing. The notice for personal hearing on 17.5.2013, was received by the Appellant company only on 22.5.2013 and, therefore, there was no occasion for the Appellant to attend the public hearing. Due to violation of principle of natural justice and also contrary to

Section 86(3) of the Electricity Act, 2003, impugned part of the tariff Order, dated 31.7.2013, is liable to be set aside.

- (c) that the impugned part of the tariff order of the State Commission which allows the power procured from the Appellant at a rate much lower than the average pooled purchase cost of the Respondent no.2 to be taken into consideration for fulfillment of the Renewable Purchase Obligation of the Respondent No.2.

**A.No.325/2013**

- (d) that tariff fixed under the EPA was a preferential tariff and the Central Commission has illegally relied on the tariff order of the DERC which allows the power procured from the Appellant at the rate much lower than the average pooled purchase cost of the Respondent No.3/Distribution Licensee to be taken into consideration for fulfillment of the Renewable Purchase Obligation of the Respondent No.3 and by the impugned order, the Central Commission has wrongly directed the Appellant to invoke Clause 22 of the EPA or to approach the State Commission for a clarification on the said issue.
- (e) that the Central Commission erred in not appreciating that Section 86(1)(e) and 61(h) of the Electricity Act, 2003 mandated promotion of electricity and in furtherance of the said provisions, the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012 were framed introducing the REC Mechanism, which was subsequently amended vide the 2<sup>nd</sup> amendment regulations, dated 10.7.2013, to include the tariff determined through competitive bidding under Section 63 of the Act under the ambit of preferential tariff. However, the Central Commission failed to appreciate that 2<sup>nd</sup> Amendment Regulations cannot be applied in a retrospective manner in

order to exclude the project of the Appellant from the REC Mechanism, by treating its tariff determined much prior to introduction of the said 2<sup>nd</sup> REC Amendment Regulations as well as introduction of 1<sup>st</sup> REC Regulations by DERC as well as Central Commission.

- (f) that the Central Commission also failed to appreciate that the Energy Purchase Agreement, dated 22.1.2010, executed between the Appellant and the Respondent No.3/Distribution Licensee did not contemplate treatment of the Power procured by the Respondent No.3 from the Appellant there-under towards fulfillment of Renewable Purchase Obligation of the Respondent No.3. Further, M/s Indraprastha Energy and Waste Management Company Limited, a Joint Venture Company of the Government of National Capital Territory of Delhi and IL & FS which initiated and held the bidding process vide letter, dated 19.11.2012, has, inter-alia, clarified the position on the bidding process and the status of the project stating that:

“8. It is therefore clarified that as per the RFP, the Okhla Waste to Energy Project was not intended to enable BRPL to discharge Renewable Purchase Obligations.”

- (g) that the Central Commission failed to appreciate that the State Commission, vide its earlier order, dated 29.8.2012, in Petition No., 31/2012 in the Petition of M/s Delhi MSW Solutions Limited in relation to the Bawana Waste to Energy Plant (‘Bawana DERC Order’) has held that the project of the Appellant herein was entitled to sell RECs in the market on account of green attributes of its Power Generation. Accordingly, there was no reason for the Central Commission to ignore the same and accept the subsequent order of the State Commission to allow the Power of the Appellant to be treated towards fulfillment of the Renewable Purchase Obligation of the Respondent No.3. Further, the Central Commission erred to take judicial notice of the order, dated 31.7.2013, passed by the

DERC in petition no. 1 of 2013 on its own without holding any hearing on the same and further without granting the Appellant any opportunity of hearing in order to advance its contentions with respect to the said order of the DERC. Such a unilateral reliance placed by the Central Commission on the order, dated 31.7.2013, passed by the State Commission is clearly violative of principle of natural justice and the portion of that impugned order, dated 18.9.2013, is liable to be set aside.

4. The National Electricity Policy and National Tariff Policy also provide for promotion of Renewable energy and for giving them preferential tariff. The project of the Appellant is of much more significant importance as compared to Solar Power Generation or Wind Power Generation. In the case of Solar Projects or Wind Power Projects, there is only a conversion of solar power or wind power without any treatment of waste etc. In the case of Waste to Power Project, it is environmental friendly and provides much needed treatment of Urban/Municipal Waste, which itself, is an important social objective and additionally power is generated. The project of the Appellant is being set up at an old compost plant site converted into Municipal Solid Waste (MSW) dumping site of the Municipality thereby utilizing the dumping site in the most efficient and environment friendly manner. The project activity reduces emission of methane, a powerful contributor to climate change and any leachate that would have been generated. Such project activity directly results into more cleaner and healthy environment thereby reducing the possible health hazards that would emerge from mere dumping of waste and thus lead to improved public health. In view of the nature of the project namely, the project being non-conventional energy development project involving the use of Municipal Solid Waste to generate electricity, it is necessary to encourage the developer with a tariff and by registering the same under the REC Mechanism to provide sufficient additional incentives to induce necessary investment. The technology required for such project is also new and needs to be procured and used at significant cost. The project clearly comes into the provisions of Section 61(1)(h) read with Section 86(1)(e) of the Act and

is also a part of the declared policies of the Central Government and State Government and the Central Electricity Regulatory Commission and State Electricity Regulatory Commissions.

5. The interpretation of scope and ambit of Regulation 5 of the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (hereafter referred to as '**Central REC Regulations, 2010**') vis-à-vis Regulation 4(2) of the DERC (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012 (hereinafter referred to as '**State Regulations**') is involved in these two Appeals filed by the same Appellant, a Power Generating Company.

6. The relevant facts giving rise to the instant Appeals are as under:

- (a) that that on 22.1.2010, the Appellant and the Distribution Licensee/BRPL entered into the Energy Purchase Agreement (EPA) and in terms of thereof, the BRPL agreed to purchase 50% ex-bus energy, after the auxiliary consumption of up to 22% of the Appellant's plant from the Appellant's 16 MW waste management energy plant on monthly basis for a period of 25 years for onward supply to the consumers of the BRPL. The EPA was entered by the Appellant with the BRPL in pursuance of a competitive bidding process held by the Government of National Capital Territory of Delhi primarily to deal with the menace of urban/municipal waste by converting waste to energy and to sell power to BRPL to the extent provided in the EPA (Appeal No 251 of 2013).
- (b) that on 27.7.2011, the aforesaid EPA, dated 20.1.2010, was amended vide an amendment, dated 27.7.2011, regarding the quantum of power to be supplied by the Appellant to BRPL to the effect that minimum 50% of generation on daily basis subject to 60 MU per year shall be supplied to BRPL, it means that the Appellant is under an obligation to supply minimum



50% of energy generated from its plant on daily basis which is subject to 60 MU per year. It implies that the rest of the 50% power remaining with the Appellant is surplus energy which can be utilized by the Appellant for captive use or third party sale including BRPL. At no point of time whether at the time of bidding for the project or at the time of signing of the EPA or in the EPA itself, the parties had agreed that the power procured by BRPL from the Appellant would be treated or considered towards fulfilment of the renewable power purchase obligation (RPO) of BRPL. In fact M/s Indraprastha Energy and Waste Management Co Ltd, a joint venture company of the Government of NCT Delhi through Department of Power and of M/IL&FS, the consultant who conducted the bidding for the project vide its letter, dated 19.11.2012, had clarified that as per the RFP, the Okhla waste-to-energy project was not intended to enable BRPL to discharge renewable polities obligation (Appeal No. 325 of 2013).

- (c) that on 1.9.2012, the Appellant started commercial production of electricity from municipal solid waste. Out of the total capacity of 16 MW, the Appellant is selling 8 MW to BRPL (Respondent/Distribution Licensee) and the remaining 8 MW is sold in open access at negotiated price.
- (d) that the Appellant had obtained accreditation from the State Agency and, thereafter, applied to the Central Agency (NLDC) for grant of REC as per clause 5 of the Central Renewable Energy Regulations 2010. Since the Central Agency was reluctant in granting of REC for entire 16 MW power, the Appellant applied to the Central Commission seeking relief of grant of full REC by the Central Agency. By order, dated 18.9.2013, the Central Commission directed the Central Agency (NLDC) to grant REC with respect to 8 MW power sold in the open access at negotiated price and for remaining 8 MW power

sold to BRPL, the Central Commission ordered the Appellant, vide its impugned order, dated 18.9.2013, to follow the procedure given in Article 22.1 of the EPA for resolution of disputes. The said order, dated 18.9.2013, is subject matter of Appeal No. 325/2013.

- (e) that Article 22.1 of the EPA provides for resolution of disputes and for arbitration and runs as under:

“In the event of any dispute or difference between the parties concerning performance of this agreement and/or the rights and liabilities of the parties in respect of which a procedure for the resolution is not otherwise provided for in this agreement, the following provisions shall apply;

- (a) Head (PMG), BRPL on behalf of procurer and the authorised representative of the generating company would be empowered to indicate explicitly, the nature and material particulars of the dispute/ dissatisfaction and the relief sought, and serve a notice thereof on the other with copy to the Procurers Head (SO), BRPL under whose jurisdiction the plant is located,
- (b) On receiving such information, the Head (O&M) BRPL and of Procurer shall be required to personally meet the authorised representative of the generating company and the Divisional Head, O& M of the concerned division as his own office separately and/or together within 15 days of the date of receipt of such notice and attempt in good faith to resolve the dispute to the mutual satisfaction of the two parties within the stipulation dictated by the letter and the spirit of the agreement.
- (c) If the dispute is not resolved by way of settlement being arrived at and duly signed by each of the above officers within 30 days of the date of receipt of the notice described in clause (a) above, the matter may be referred by either or both the above, designated officers of the two parties to the Procurer's CEO BRPL, who has direct supervisory jurisdiction over The Head, (PMG, BRPL) referred to above, with information to the Chief Executive of the Generating Company within 15 days of receipt of such notice, the CEO, BRPL and the chief executive of the generating company would be required to meet at the former's office and endeavour to settle the dispute within a further period of 30 days i.e. within a total period of 45 days from the initial date of receipt of the notice by the Head, BRPL.

- (d) If the said dispute/dissatisfaction remains unresolved, either party can file a petition before DERC whose decision will be final and binding on both the parties. DERC shall be empowered to determine the exact nature and modalities of the procedure to be adopted in resolving the matter”
- (f) that on 10.12.2012, the BRPL filed the aforesaid petition being Petition No. 1 of 2013 before the State Commission for approval of True-up for FY 2011–12, review and provisional True-up for FY 2012–13 and Annual Revenue Requirement for distribution (Wheeling and Retail Supply) business for FY 2013–14. In response to public notice, dated 2.2.2013, the Appellant filed a detailed representation before the DERC. The State Commission on 13.5.2013 sent a notice of hearing to be held on 17.5.2013 to the Appellant which was received by the Appellant on 22.5.2013 consequently, the Appellant could not attend the hearing held on 17.5.2013 before the State Commission and then the Appellant sent a letter, dated 27.5.2013, seeking another opportunity for personal hearing. Despite the said request of the Appellant vide letter, dated 27.5.2013, the State Commission did not give any opportunity of public hearing to the Appellant and passed the impugned order, dated 31.7.2013, wherein the State Commission allowed the Distribution Licensee/BRP to fulfil its Renewable Purchase Obligation (RPO) by procuring 50 MU renewable energy from the Appellant at the rate of Rs 2.60 per unit. The impugned order, dated 31.7.2013 of the State Commission is based on the submission made by the BRPL that an arrangement had been made for purchase of 50MU power from the Appellant/TOWMCL (Non-Solar) and balance non-solar through either Renewable Energy Certificates on IEX/Competitive bidding. The Commission, in the impugned order, noted that BRPL is getting power from Thyagraja Solar Plant. The Commission has considered availability of 1.00 MU of energy at @ Rs.4.50/unit from this plant provisionally for fulfilment towards RPO of BRPL. The rate of non-solar energy

from TOWMCL has been considered at Rs.2.60/unit as approved by the Commission in MYT order, dated 13.7.2012. The State Commission, therefore, considers that BRPL has to purchase the balance of Renewable Energy or purchase Renewable Energy Certificate(s) or combination or both to meet the RPO obligations for FY 2013-14

7. We have heard Mr. S.B. Upadhyay, the learned Sr. Counsel for the Appellant and Mr. Dhananjay Bajjal and Mr. Amit Kapur, learned counsel for the Respondent No. 1 and 2 respectively in Appeal No. 251 of 2013 and Mr. Manu Seshadri, Mr. Arjun Krishnan and Mr. Amit Kapur, learned counsel for the Respondent No. 1, 2 and 3 respectively in Appeal No. 325 of 2013. We have deeply gone through the evidence and other material available on record including the impugned order passed by the Central Commission and written submissions.

8. The following issues arise for our consideration:

**(A) Whether the Appellant would be entitled for grant of REC for generation of 8 MW electricity generated by the Appellant Company from municipal solid wastes as a renewable energy source and supplied to the distribution licensee/BRPL as per Central Renewable Energy Regulations, 2010?**

**(B) Whether the Distribution Licensee/BRPL would be entitled to meet its target of RP obligation by purchase of 50% of energy generated by the Appellant by virtue of the Energy Purchase Agreement, dated 20.1.2010?**

9. Since, both the issues are interconnected, we are taking and deciding them together.

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

(a) that Regulation 5 of the Central REC Regulations, 2010 provides for Eligibility and Registration for Certificates. According to the said Regulation 5, a generating company

engaged in generation of electricity from renewable energy source shall be eligible to apply for registration for issuance of and dealing in certificate if it firstly had obtained accreditation from state agency; secondly, it does not have any power purchase agreement for the electricity related to such generation to sell electricity at a preferential tariff determined by the appropriate commission; thirdly, it sells the electricity generated either 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 the distribution licensee or to any other licensee or to an open access consumer at a mutually agreed price or through power exchange at market determined price. After fulfilling the eligibility criteria, the generating company may apply for registration with the Central agency according to the prescribed procedure and then the Central agency shall accord registration to such applicant within 15 days from the date of application for such registration, provided that an applicant shall be given a reasonable opportunity of being heard before his application is rejected with reasons to be recorded in writing.

- (b) that the Appellant had been granted accreditation by the State agency. It does not have any EPA to sell electricity at preferential rates since the price has not been determined by the Commission rather, it has been adopted by the Commission after a competitive bidding as required under section 63 of the Electricity Act 2003 and the tariff is less than the pooled price. To this extent, the Central Commission's finding in the impugned order, dated 18.9.2013, in Appeal No. 325 of 2013 is not correct when it holds that the tariff adopted by the Commission through competitive bidding under section 63 of the Electricity Act 2003 would not be considered as preferential tariff.

- (c) that by a subsequent modification, dated 10.7.2013, a Second Amendment was carried out to Regulation 5 (1) of the Central REC Regulations, 2010 by which sub-clause (b) of clause (1) of Regulation 5 was substituted to the effect that it does not have any power purchase agreement for the capacity related to such generation to sell electricity with the obligated entity for the purpose of meeting its renewable purchase obligation at a tariff determined under section 62 or adopted under section 63 of the Act by the appropriate Commission.
- (d) that the BRPL/Distribution Licensee is an obligated entity which would mean the entity mandated under section 86(1)(e) of the Electricity Act, 2003 to fulfil the renewable purchase obligation. The principal objective of the second amendment to the said regulation was to provide clarity on applicability of the regulations to eligible entity and bring in certain essential checks and balances in REC related process.
- (e) that according to the Regulation 5, there should be an EPA specifically designed to sell electricity with the obligated entity for the purpose of meeting its renewable purchase obligation at a tariff determined under section 62 or adopted under section 63 of the Electricity Act, 2003 by the appropriate commission in order to deprive a generating company from grant of REC and, in the present case, there is no such EPA executed by the Appellant in favour of the BRPL to sell electricity generated by it to meet the RPO obligations of the obligated entity.
- (f) that the said notification, dated 10.7.2013, amending the Regulation 5 of the Central RE Regulations, 2010 is clarificatory in nature and shall have retrospective effect and shall relate back to the date of the original Regulation 2010, as held by the Hon'ble Supreme Court in *Zile Singh vs State of Haryana* 2004 (8) SCC 1, holding that presumption against retrospective operation is not applicable to the declaratory statute. In

determining the nature of the Act, regard must be had to the substance rather than to the form. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as mean of the previous Act. Thus, if a statute is curative or mere declaratory of the previous law, retrospective operation is generally intended and amending Act may be purely declaratory of the principal Act which was already implicit. Thus, the aforesaid clarificatory amendment will have retrospective effect.

- (g) that in the absence of any agreement/EPA for treating the purchase of electricity by the BRPL and, further, the price at which the power is purchased being less than the pooled cost, such power purchase cannot be treated to offset the RP obligation of an obligated entity. No such agreement in EPA exists that BRPL is entitled to fulfil its RPO out of their EPA, dated 20.1.2012, entered with the Appellant.
- (h) that none of the clauses of the EPA speaks of any obligation of the Appellant to sell the electricity to BRPL to meet its target of RP obligations. It is rightly so because at the time of execution of the EPA, the DERC Regulations, 2012 were not even in existence.
- (i) that the DERC (Renewable purchase obligation and renewable energy certificate framework implementation) Regulations, 2012 came by notification, dated 1.10.2012. It defined obligated entity to mean the distribution licensee, captive user an open access consumers in the National Capital Territory of Delhi which is mandated to fulfil renewable purchase obligation under these Regulations. DERC Regulations, 2012 defined Renewable Purchase Obligation (RPO) to mean the requirement as specified under the said regulations under section 86(1)(e) of the Electricity Act, 2003 for the obligated entity to purchase electricity from renewable energy sources. Further, Clause 4 (2)

of the said DERC Regulations, 2012 provided that every obligated entity shall meet its RPO target by way of its own generation or by way of purchase from other licensees/sources or by way of purchase of RECs or by way of combination of any of the above options. Any long-term power purchase agreement shall be made only with the prior approval of the Commission.

- (j) that the State Commission held that the BRPL as an obligated entity was entitled to meet its target of RPO by purchase of 8 MW of power from the Appellant's generating plant. However, such provision of the DERC Regulations, 2012 is not consistent with the Regulation 5 of the Central RE Regulations, 2010, which makes the Appellant eligible for grant of REC for full generation of 16 MW of power from its generating plant and in that case, the provision of the Regulation 5 of the Central RE Regulations, 2010 shall prevail and supersede Regulation 4(2) of the DERC Regulations, 2012.
- (k) that the State Commission has ignored its order, dated 29.8.2012, in Petition No. 31 of 2012 in DMSL vs Tata Power in which it was held in paragraph 7 that the developer would be free to sell RECs in the market on account of the green attributes of such power generation.
- (l) that the Appellant was not afforded an adequate and reasonable opportunity to present its case as the State Commission's notice, dated 13.5.2013, for hearing to be held on 17.5.2013 was received by the Appellant on 22.5.2013. Due to non-service of the aforesaid notice of the State Commission, the Appellant could not attend the hearing on 17.5.2013 and when the Appellant sent a letter, dated 27.5.2013, seeking another opportunity for appearance before the State Commission, the State Commission ignored the request of the Appellant and proceeded to decide the said petition even without waiting that



another petition, being Petition No. 246/MP/2012, on similar issue, was already pending before the Central Commission.

- (m) that the principle of natural justice requires any authority to provide an opportunity of hearing to the party likely to be affected by its order before pronouncing the judgment as held in *Goldeberg vs Kelly*, 1970 (397) US 254 and also by this Appellate Tribunal in the case of *Vemagiri Power Generation Ltd. vs Transmission Corporation of AP*, 2007 ELR (APTEL) 1580.
- (n) that the learned Central Commission fell in error while recording that once the cost of generation is recovered through tariff, such generator is not entitled for REC. The Central Commission further committed error while recording in the impugned order that there is a dispute between the Appellant and the BRPL that needs to be resolved by the Appropriate Forum before registration could be considered, whereas, as per the terms of EPA, a dispute between the procurer/BRPL and the Appellant can be said to arise only if any party has served a notice with regard to the Article 22.1 of the EPA. Therefore, in the instant matter, no such notice under the Article 22.1 of the EPA has been served by either of the parties.
- (o) that the Central Commission neither considered nor appreciated that the generation of electricity was commissioned on 1.9.2012 and only, thereafter, the Appellant can supply the power to the procurer. Therefore, the average pooled purchase cost of BRPL should have been considered as per the ARR on True-up for FY 2010-11 which was Rs.3.80/unit and thus, the Tariff set by the order of the State Commission, dated 20.1.2011, @ Rs.2.49/unit was much lower than the same. Thus, on any account, the tariff fixed by bidding process was not more than the APPC of BRPL and cannot be taken as a preferential tariff.

- (p) that the Central RE Regulations, 2010, by virtue of Clause 6(e) of the Regulations, state that tariff period under these Regulations shall be considered from the date of commercial operation of the renewable energy generating stations. Thus, the tariff of the Appellant determined under the competitive bidding process, shall be considered along with APPC of BRPL for the year 2011-12, as the commercial date of operation of the project of the Appellant was 1.9.2012. Therefore, it cannot be said that the tariff determined, as submitted above, is a preferential tariff.
- (q) that the Central Commission fell in error while passing the impugned order, as amendments brought in the Central RE Regulations, 2010 vide notification dated 10.7.2013, could not have been applied retrospectively as held in *M/s Ferro Alloys Corporation Limited vs. Odisha Electricity Regulatory Commission Bidyut Niyamak Bhawan and North Eastern Electricity Supply Company of Orissa* reported in 2013 ELR (APTEL) 1342 observing that *“It is a cardinal principle of construction that every statute is prima-facie prospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only”*. Further, the Hon’ble Supreme Court in the matter of *State of Madhya Pradesh vs. Tikam Das* (1975) 2 SDCC 100 held that subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute. It is well settled law that already accrued rights cannot be taken away by applying the amendments in the rules with retrospective effect as the same amounts to arbitrariness and untenable in eyes of law.

11. **Per contra**, the following submissions have been made on behalf of the Respondent/BRPL/Distribution Licensee on these issues:

- (a) that the learned Delhi Commission, in the impugned order, dated 31.7.2013, which is the subject matter in Appeal No. 251 of 2013, has rightly treated the power procured by BRPL/Distribution Licensee from the power generating company i.e. Timarpur Okhla in fulfilment of BRPL's Renewable Power Obligation (**RPO**). Further, the learned Central Commission, vide its impugned order, dated 18.9.2013, which is the subject matter in Appeal No. 325 of 2013, has rightly rejected the prayer of the Appellant seeking registration of the 8 MW capacity supplied to BRPL under Energy Purchase Agreement (**EPA**), dated 20.1.2010, for the Renewable Energy Certificate mechanism. Further, the learned Central Commission, vide its impugned order, dated 18.9.2013, correctly and rightly having relied on the tariff order, dated 31.7.2013, passed by the Delhi Commission directed the Appellant to take steps for resolution of the dispute regarding the same in accordance with the Dispute Resolution Mechanism provided under Article 22 of the Energy Purchase Agreement (EPA) or to approach the State Commission for a clarification as to whether 8 MW of Energy covered under the EPA with the BRPL qualifies to be considered as meeting the Renewable Purchase Obligation of the BRPL.
- (b) that the main contention of the Appellant, namely; Timarpur Okhla is that the Appellant is entitled to get registered under Renewable Energy Certificate mechanism, since it complies with the pre-requisite specified under Regulation 5 of the CERC REC Regulations, 2010. According to the Appellant, the Appellant is not selling power to BRPL at preferential tariff but at a tariff adopted by the Delhi Commission after competitive bidding and as per Article 5(1)(b) of the Central REC Regulations, 2010, as clarified by the Second Amendment,

dated 10.7.2013, a generating company to be registered under REC mechanism, it should not have a PPA/EPA specifically designed to sell electricity to the obligated entity for purpose of meeting its Renewable Purchase Obligation. Further contention of the Appellant is that the EPA was executed between the Appellant and BRPL on 20.1.2010, when DERC (RPO) Regulations, 2012, requiring BRPL to meet RPO, was not even in existence and based on Regulation 4(2) of the DERC RPO Regulations, 2012, Delhi Commission has held that BRPL, as an obligated entity, was entitled to meet its target of RPO by purchase of 8 MW power from the Appellant. According to the Appellant, Regulation 4(2) of the DERC RPO Regulations, 2012 is not consistent with the Regulation 5 of the Central REC Regulations, 2010 and in this view of the matter, Regulation 5 of Central REC Regulations shall prevail upon Regulation 4(2) of the DERC RPO Regulations. All these contentions of the Appellant are without any basis and misplaced and are liable to be rejected.

- (c) that the Appellant is not eligible for registration under CERC REC Regulations for power contracted with BRPL. Further, the contention of the Appellant that second amendment, dated 10.7.2013, to the CERC REC Regulations is clarificatory in nature and has retrospective effect is incorrect and not acceptable. The Appellant to be eligible for registration under REC mechanism, must demonstrate that it has fulfilled all the conditions as specified under Regulation 5(1) of the CERC REC Regulations, 2010 (as amended on 10.7.2013), that firstly, it has obtained accreditation from the state agency; secondly, it does not have PPA with obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under 62 or adopted under Section 63 of the Electricity Act, 2003 by the Appropriate Commission and; thirdly, it sells the electricity generated to the distribution

licensee of the area in which it is located at the pooled cost of power purchase of such distribution licensee as determined by the Commission; or to any other licensee or to an open access consumer at mutually agreed price or through power exchange at market determined price and; fourthly, it does not sell electricity generated from the plant to an obligated entity for compliance of the renewable purchase obligation by such entity.

- (d) that admittedly, the second amendment to the CERC REC Regulations is explanatory in nature and, hence, is applicable retrospectively. The Appellant is not eligible for registration under REC mechanism *qua* 8 MW power capacity tied up with BRPL, since it does not fulfill the aforesaid conditions.
- (e) that under Section 86(1)(e) of the Electricity Act, 2003, the function of the State Commission to promote cogeneration and generation of electricity from renewable source of energy by providing suitable measures for connectivity with the grid, sale of electricity to any person and also specify RPO obligation. Accordingly, the project was conceived and approved by the Delhi Commission in order to encourage green (renewable) power for the state of Delhi.
- (f) that, alternatively, the EPA was executed to supply electricity without any renewable benefits, the EPA was overridden by the DERC RPO Regulations notified by the Delhi Commission on 1.10.2012 and in terms of Regulations 4 and 9 of the Delhi RPO Regulations, the power purchased by BRPL from the Appellant's project has to be considered towards fulfilment of BRPL's RPO obligation. As such, only new renewable energy projects commissioned after notification of the DERC RPO Regulations can choose to sell electricity to distribution licensee by separating electricity component from renewable energy component. The Appellant's project is a renewable power

project specifically established to supply green power in the State of Delhi and as such, it cannot now seek such a dispensation.

- (g) that it is trite law that Regulations are statutory/delegated legislation, which is binding and enforceable. Regulations under Section 181 of the Electricity Act, 2003 form part of the regulatory framework and all existing contracts shall have to be aligned with the said regulations as held by Constitution Bench of Hon'ble Supreme Court in PTC India Ltd. vs. Central Electricity Regulatory Commission (2010) 4 SCC 603, as under:

"79. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the inter-State trading of electricity can be done by making of regulations under Section 178 of 2003 Act. Power to fix the trading margin under Section 178 is, therefore, a legislative power and the Notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. **These Regulations make an inroad into contractual relationships between the parties.** Such is the scope and effect of the impugned Regulations which could not have taken place by an Order fixing the trading margin under Section 79(1)(j). Consequently, the impugned Regulations cannot fall within the ambit of the word "Order" in Section 111 of the 2003 Act.

...

92. Summary of Our Findings:

(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) **A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations."**

- (h) that clause 2.4 of the EPA, dated 20.1.2010, entered into between the parties provides that the parties shall comply with all the regulation issued by DERC from time to time. Clause 2.4 of the EPA is extracted herein-below:-

“2.4 The generating company and Procurer shall comply with all the regulations issued by DERC from time to time including but not limited to Delhi Electricity Grid Code, Open Access regulations, SLDC regulations to the extent they are applicable to them.”

Accordingly, the electricity purchased by BRPL from the Appellant was rightly adjusted by the Delhi Commission towards BRPL’s RPO obligation and the Appellant estopped from taking any contrary stand.

- (i) that there is no force in the submission of the Appellant that the CERC REC Regulations will prevail over the DERC RPO Regulations since there is no inconsistency between Regulation 4 of the DERC RPO Regulation and Regulation 5 of the CERC REC Regulations. Regulation 5 of the CERC REC Regulations is clear that a generator will not be eligible for registration under REC mechanism if it is selling the electricity to obligated entity for purpose of fulfilment its RPO obligation. In the present case, the Appellant is selling the electricity to BRPL for fulfillment of BRPL’s RPO and as such, the Appellant is not eligible to seek registration under REC mechanism for the quantum of capacity being supplied to BRPL.
- (j) that the Appellant is unable to meet the criterion as specified under Regulation 5(1)(c)(i) of the CERC REC Regulations, 2010 as detailed under:-
- (i) On 29.01.2008, Jindal Urban Infrastructure Limited (“**JUIL**”) emerged as successful bidder. The tariff quoted by JUIL was Rs. 2.49 for year 2009-10 and levellised tariff of Rs. 2.833 to undertake and implement the Project.

- (ii) At the relevant point of time i.e. FY 2007-08, the pooled cost of power purchase for BRPL was approx. Rs. 2.46 per unit which is evident from the True-up order, dated 28.5.2009, passed by the Delhi Commission for BRPL for FY 2007-08.
- (k) that the Appellant has suppressed/concealed material facts and information from this Appellate Tribunal regarding the fact that the project capacity is 20.9 MW and not 16 MW (Project Report submitted for CDM Benefit which has been approved) and there is no approval taken by the Appellant for enhancing the Project capacity. This fact has been admitted by the Appellant in its additional written submissions, dated 25.2.2015, that it has installed capacity of 20.9 MW and not 16 MW. In the light of these facts, the Appeal deserves to be dismissed as the Appellant has suppressed material facts as held by the Hon'ble Supreme Court in *S.J.S. Business Enterprises (P) Ltd. vs. State of Bihar & Others: (2004) 7 SCC 166*.
- (l) that on the one hand, the Appellant is availing CDM benefit on project capacity of 20.9 MW instead of 16 MW and, on the other hand, the Appellant is trying to get registered under Renewable Energy Certificate mechanism to enhance its profit. Such conduct of the Appellant is liable to be deprecated and the Appeals should be dismissed.
- (m) that the Delhi Commission's order, dated 29.8.2012, is not applicable in the present case due to following reasons:
- (i) It was passed in respect of a third party - M/s. Delhi MSW Solutions Ltd.
- (ii) Timarpur Okhla's name was referred to in the order as an example for the distribution licensees, to enter into PPA on such terms and conditions which are not significantly different from already existing EPA.



(iii) The observation of Ld. Delhi Commission in the second part of the para 7 i.e., the developer would be free to sell RECs in the market on account of the green attributes of such power generation, was specific to the M/s. Delhi MSW Solutions Ltd. It cannot by any stretch be extended to apply to the present case.

(iv) The said Order was passed before Ld. Delhi Commission specified its RPO Regulations on 1.10.2012

(n) that the Appellant has wrongly alleged that the notice for hearing to be held on 17.5.2013 was received by it after the date of hearing, i.e., on 22.05.2013. The Appellant has concealed and suppressed the fact that on 19.5.2013 and 20.5.2013, the Delhi Commission published Public Notice in leading newspapers indicating the venue, date and time of public hearing to be held on 3.6.2013 and 4.6.2013. The same facts are recorded by the Delhi Commission at para 1.22 of the impugned order. Further, the fact that the letter was received by the Appellant on 22.5.2013, cannot be a ground of challenge to the impugned order since, the Public Notice had been issued in 7 leading newspapers in different languages namely, Hindustan Times (English) on 19.3.2013, Times of India (English) on 19.3.2013, Indian Express on 19.3.2013, Dainik Jagran (Hindi) on 20.3.2013, The Hindu on 20.3.2013, The Educator (Punjabi) on 20.3.2013 and Milap (Urdu) on 20.3.2013, well before passing the impugned order by the Delhi Commission.

(o) that admittedly, the presence of representative of the Appellant during the public hearing conducted by the Delhi Commission on 17.5.2013 has been recorded in the impugned order of the Delhi Commission. Now, the Appellant is estopped from submitting that it was not present in the said public hearing

since the order is conclusive with regard to the record of proceeding.

- (p) that even assuming that the Appellant's plant is eligible for registration and issuance of Renewable Energy Certificates, the grant of promotional tariff will act as bar for issuance of Renewable Energy Certificate. The Appellant could not have simultaneously sought registration under REC mechanism and grant of promotional tariff before different Commissions. The Appellant, even after filing the Petition No. 22 of 2013 on 25.3.2013 before Delhi Commission, i.e., during the pendency of Petition No. 246 of 2013, did not disclose the same to the learned Central Commission. This fact was disclosed for the first time at the time of arguments on 9.7.2013 before the Central Commission.
- (q) that that the following promotional steps were taken to promote Timarpur Okhla's Plant:
- (I) Delhi Commission notified DERC (Renewable Purchase Obligations and Renewable Energy Certificate Framework Implementation) Regulations, 2012 making it obligatory on the distributions licensees, captive user(s) and open access consumers to buy minimum prescribed percentage of their total consumption from the renewable sources.
  - (II) Delhi Commission has prescribed various promotional conditions in favour of the developer while allowing the deviations in the proposed bid documents from the bid documents issued by the Central Government.
  - (III) The developer was bestowed with several advantages to promote generation of electricity from MSW. Some of the advantages bestowed on the developer to keep the tariff from the said Plant competitive are as following:
    - (i) Supply of requisite quantity of garbage (raw material required for the said Plant) free of cost;

- (ii) Land leased by NDMC on nominal rate;
- (iii) Several clearances like clearance from Airport Authority of India; Delhi Development Authority, DGCA, Central Ground Water Board were taken even before issuing the bid.
- (iv) DPR was prepared even before issuance of bid documents;
- (v) Ld. Delhi Commission directed that no royalty of 5 Paise per Unit will be payable to MCD/NDMC;
- (vi) Ld. Delhi Commission further directed that the whole CDM will be available to the said Plant;
- (vii) MNRE came out with Policy to support Waste to Energy projects with capital Grants upto Rs. 10 Crores.

12. In addition to the submissions made on behalf of the BRPL/Distribution Licensee, Mr. Nikhil Nayyar, the learned counsel for the Delhi Commission has submitted as under:

- (a) that Regulation 9 dealing with renewable energy comprising of the DERC RPO Regulations, 2012 clearly provides that only 'new' Renewable Energy Projects that come into operation after the RPO Regulations come into force will have the option of choosing between Preferential Tariff and Renewable Energy Certificates and the projects which opt for preferential tariff shall have to continue with the same tariff pricing structure until the validity of Power Purchase Agreement ceases. Thus, the Appellant's power projects was already operational and the PPA was already inforce and, now, cannot ask for a preferential tariff with respect to the energy already being sold under preexisting PPA. The PPA between the Appellant and the BRPL pre-dates the RPO Regulations and under the Regulations the present BRPL is tasked with ensuring that BRPL fulfills its

obligations under Regulation 4. Since, BRPL had been purchasing renewable energy from the Appellant, the quantum of that purchase has been included in the true up for the financial year as a purchase that goes towards meeting the Renewable Purchase Obligations. The impugned order of the Delhi Commission is in complete conformity of the DERC RPO Regulations, 2012.

- (b) that, in the light of the observation of the Hon'ble Supreme Court in PTC India vs. Central Electricity Regulatory Commission (2010) 4 SCC 603 neither the pre-existing contract nor a subsequent interpretation of the same can override the Regulations themselves.
- (c) that the specific changes in the 'Standard Request for Proposal (RFQ) Document' were allowed by the Delhi Commission vide its order, dated 14.8.2007, to reflect this reality and, therefore, there can be no quarrel that the Delhi Commission was right to include the energy supplied by the Appellant to BRPL towards the Delhi Commission's RPO obligations in the impugned true up order.

### **OUR DISCUSSION AND CONCLUSION:**

13. According to the Appellant, the Appellant is not selling power to BRPL at preferential tariff but at a tariff adopted by the Delhi Commission after competitive bidding and as per Article 5(1)(b) of the Central REC Regulations, 2010, as clarified by the Second Amendment, dated 10.7.2013, a generating company to be registered under REC mechanism, it should not have a PPA/EPA specifically designed to sell electricity to the obligated entity for purpose of meeting its Renewable Purchase Obligation. Further contention of the Appellant is that the EPA was executed between the Appellant and BRPL on 20.1.2010, when DERC (RPO) Regulations, 2012, requiring BRPL to meet RPO, was not even in existence and based on Regulation 4(2) of the DERC

RPO Regulations, 2012, Delhi Commission has held that BRPL, as an obligated entity, was entitled to meet its target of RPO by purchase of 8 MW power from the Appellant. According to the Appellant, Regulation 4(2) of the DERC RPO Regulations, 2012 is not consistent with the Regulation 5 of the Central REC Regulations, 2010 and in this view of the matter, Regulation 5 of Central REC Regulations shall prevail upon Regulation 4(2) of the DERC RPO Regulations.

14. The Appellant is not eligible for registration under CERC REC Regulations for power contracted with BRPL. Further, the contention of the Appellant that second amendment, dated 10.7.2013, to the CERC REC Regulations is clarificatory in nature and has retrospective effect is incorrect and not acceptable. The Appellant to be eligible for registration under REC mechanism, must demonstrate that it has fulfilled all the conditions as specified under Regulation 5(1) of the CERC REC Regulations, 2010 (as amended on 10.7.2013), that firstly, it has obtained accreditation from the state agency; secondly, it does not have PPA with obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under 62 or adopted under Section 63 of the Electricity Act, 2003 by the Appropriate Commission and; thirdly, it sells the electricity generated to the distribution licensee of the area in which it is located at the pooled cost of power purchase of such distribution licensee as determined by the Commission; or to any other licensee or to an open access consumer at mutually agreed price or through power exchange at market determined price and; fourthly, it does not sell electricity generated from the plant to an obligated entity for compliance of the renewable purchase obligation by such entity. The Appellant is not eligible for registration under REC mechanism *qua* 8 MW power capacity tied up with BRPL, since it does not fulfill the aforesaid conditions.

15. The EPA was executed to supply electricity without any renewable benefits, the EPA was overridden by the DERC RPO Regulations notified by the Delhi Commission on 1.10.2012 and in terms of Regulations 4 and 9 of

the Delhi RPO Regulations, the power purchased by BRPL from the Appellant's project has to be considered towards fulfilment of BRPL's RPO obligation. As such, only new renewable energy projects commissioned after notification of the DERC RPO Regulations can choose to sell electricity to distribution licensee by separating electricity component from renewable energy component. The Appellant's project is a renewable power project specifically established to supply green power in the State of Delhi and as such, it cannot now seek such a dispensation

16. Accordingly, the electricity purchased by BRPL from the Appellant was rightly adjusted by the Delhi Commission towards BRPL's RPO obligation and the Appellant estopped from taking any contrary stand.

17. There is no force in the submission of the Appellant that the CERC REC Regulations will prevail over the DERC RPO Regulations since there is no inconsistency between Regulation 4 of the DERC RPO Regulation and Regulation 5 of the CERC REC Regulations. Regulation 5 of the CERC REC Regulations is clear that a generator will not be eligible for registration under REC mechanism if it is selling the electricity to obligated entity for purpose of fulfilment its RPO obligation. In the present case, the Appellant is selling the electricity to BRPL for fulfillment of BRPL's RPO and as such, the Appellant is not eligible to seek registration under REC mechanism for the quantum of capacity being supplied to BRPL.

18. Regulation 9 dealing with renewable energy comprising of the DERC RPO Regulations, 2012 clearly provides that only 'new' Renewable Energy Projects that come into operation after the RPO Regulations come into force will have the option of choosing between Preferential Tariff and Renewable Energy Certificates and the projects which opt for preferential tariff shall have to continue with the same tariff pricing structure until the validity of Power Purchase Agreement ceases. Thus, the Appellant's power projects was already operational and the PPA was already inforce and, now, cannot ask for a preferential tariff with respect to the energy already being sold under

preexisting PPA. The PPA between the Appellant and the BRPL pre-dates the RPO Regulations and under the Regulations the present BRPL is tasked with ensuring that BRPL fulfills its obligations under Regulation 4. Since, BRPL had been purchasing renewable energy from the Appellant, the quantum of that purchase has been included in the true up for the financial year as a purchase that goes towards meeting the Renewable Purchase Obligations. The impugned order of the Delhi Commission is in complete conformity of the DERC RPO Regulations, 2012.

19. In view of the above discussions, we do not find any merit in the contentions of the Appellant. The contentions raised on behalf of the Respondents are meritorious and legal. Consequently, both the issues are decided against the Appellant and the Appeals are liable to be dismissed.

### **ORDER**

The instant Appeals, being Appeal Nos. 251 of 2013 and 325 of 2013, are hereby dismissed and the impugned orders, impugned therein, are hereby upheld. There shall be no order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 19<sup>TH</sup> DAY OF MAY, 2015.**

**(Justice Surendra Kumar)**  
**Judicial Member**

**(Rakesh Nath)**  
**Technical Member**

**√ REPORTABLE/NON-REPORTABLE**

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