IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO.183 OF 2015

Dated : 15th March, 2016

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

In the matter of:-

STAR WIRE (INDIA) VIDYUT PRIVATE LIMITED,
8C/6, WEA, Abdul Aziz Road, IIIrd Floor, Karol Bagh, New Delhi – 110 005. **... Appellant**

AND

1. **HARYANA ELECTRICITY REGULATORY COMMISSION**,
Bays No.33-36, Sector-4, Panchkula, Haryana – 134 112.

2. **HARYANA POWER PURCHASE CENTRE,**
Shakti Bhawan, Sector – 6, Panchkula, Haryana – 134 109. **... Respondents**

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Raghu Vamsy
Mr. Raunak Jain

Counsel for the Respondent(s) : Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Shubham Arya for **R-2**.

JUDGMENT

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON:

1. In this Appeal, the Appellant has challenged order dated 8/12/2014 passed by Respondent No.1 - the Haryana Electricity Regulatory Commission (**"the State Commission"**) in Case No.HERC/PRO-52 of 2014.

2. The Appellant has set up a biomass based renewal power plant with an aggregate capacity of 9.9. MW in the State of Haryana. Respondent No.2 - Haryana Power Purchase Centre (**"HPPC"**) is engaged in the business of bulk purchase of electricity in the State of Haryana. It acts on behalf of the two distribution licensees in Haryana i.e. UHBVNL and DHBVNL. The Appellant has duly executed a Power Purchase Agreement (**"PPA"**) dated 22/6/2012 with HPPC.

3. The State Commission on 3/2/2011 notified the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff from Renewable Energy Sources

Certificate) Regulations 2010 (**"RE Regulations"**). RE Regulations, provide for the norms and parameters for determination of tariff of various renewable energy project developers.

4. On 5/9/2011 in exercise of powers conferred under Section 181 of the Electricity Act, 2003 (**"the said Act"**) the State Commission amended the RE Regulations, vide HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 (1st Amendment) Regulations, 2011 ("**RE Regulations (1st Amendment)"**). By the said amendment, the State Commission inserted Regulation 73 in respect of Wheeling Charges which reads as follows:

> ***"73. Grid connectivity and wheeling charges:*** *(1) The State Transmission Utility or the transmission licensee other than STU or the distribution licensee, as the case may be, shall bear the cost of EHV/HV transmission line up to a distance of 10 KM from the interconnection point. In case the distance between the interconnection point and point of grid connectivity is more than 10 KMs then cost of the*

transmission line for the distance beyond the 10 KMs shall be shared equally between the renewable energy developer and the licensee.

(2) ***Unless otherwise exempted by the Commission*** *the wheeling charges shall be levied @ 2% of energy fed to the grid by the renewable energy developer in case the power is purchased by the distribution licensee. In all other cases wheeling charges or transmission charges, as the case may be, shall be levied at the rates determined by the Commission from time to time."*

5. Facts, which made the Appellant file a petition in the State Commission, need to be stated. M/s. Puri Oil Mills Ltd. filed a petition under Section 86(a) and 94(f) of the said Act read with Regulation 78 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 for re-determination of tariff for their two canal based mini hydro power projects. In respect of waiver of wheeling charges the State Commission held that such concession cannot be extended to power project developers other than solar power projects under JNNSM scheme. Aggrieved by this order M/s. Puri Oil Mills Ltd. filed an appeal being Appeal No.90 of 2013 in this Tribunal. This Tribunal by its judgment dated

09/4/2014 allowed the appeal only with respect to levy of wheeling charges and directed HPPC to refund the amount deducted from the bills of M/s. Puri Oil Mills Ltd. towards wheeling charges. It may be stated here that on 08/10/2014 the civil appeal carried from judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd.*** was dismissed by the Supreme Court. Thus the judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd.*** was confirmed by the Supreme Court. It has assumed finality.

6. The Appellant filed a petition before the State Commission against Respondent No.2 i.e. HPPC stating that the judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd.*** is equally applicable to the Appellant as the total power generated by the Appellant is delivered to the HPPC at the delivery point i.e. the switchyard of the power plant of the Appellant and, therefore, the Appellant deserves to be given similar relief and wheeling charges already recovered from the Appellant should be refunded on the similar lines. The Appellant prayed for the refund of the amount deducted from

the bills towards wheeling charges. The State Commission held that wheeling charges are leviable on the Appellant in accordance with Regulation 73(2) of the RE Regulations (1st Amendment). The State Commission further observed that the Appellant's case is distinguishable from the facts of ***M/s. Puri Oil Mills Ltd.*** as in that case the plea regarding levy of wheeling charges as per Regulations 73(2) of the RE Regulations (1st Amendment) was not raised by the parties. This Tribunal also referred to the judgment of the Supreme Court in ***PTC India Limited v. Central Regulatory Commission***[1] (**"*PTC India*"**) and held that Regulation 73 of the RE Regulations (1st Amendment) shall prevail and its validity can only be challenged by seeking judicial review under Article 226 of the Constitution of India. In the circumstances, the State Commission dismissed the Appellant's petition and upheld the levy of wheeling charges. Being aggrieved by the said judgment, the Appellant has filed this appeal under Section 111 of the said Act.

[1] (2010) 4 SCC 603

7. We have heard Mr. Buddy Ranganadhan learned counsel for the Appellant. We have perused the written submissions filed by him. The gist of his submissions is as under:

(a) The judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd.*** is applicable to this case. The State Commission should have therefore waived wheeling charges in light thereof. This Tribunal having interpreted a provision of the said Act and having defined the extent and ambit of "wheeling" under the said Act, the State Commission cannot seek to expand meaning of "wheeling" by taking recourse to its regulations.

(b) Under Regulation 2(2) of the RE Regulations any term used in regulations but not defined therein would take the meaning assigned to it under the said Act. Since the term "wheeling" has not been defined under the said regulations it would take the meaning assigned to it under the said Act.

(c) If the said Act prohibits something and the State Commission's regulations mandate the doing of such thing, the State Commission ought to exercise its power to relax as available under the regulations to ensure that the provisions of the said Act are complied with. (See: Judgment of this Tribunal in ***India Glycols Limited v. USER***[2]).

(d) In the circumstances the present appeal deserves to be allowed.

8. We have heard Ms. Ranjitha Ramachandran, learned counsel for Respondent No.2. We have also perused the written submissions filed by her. Gist of the submissions is as under:

(a) In terms of the RE Regulations read with the subsequent amendments, the clear inference is that "wheeling

[2] Judgment dated 1/10/2014 in Appeal Nos.112, 130 and 136 of 2014

charges" payable are related to the connectivity and construction of the line from the place of generation to the existing Distribution/Transmission System. The circumstances under which the concept of wheeling charges liability exists is important. Generally the first or last mile connectivity line is constructed at the cost and expense of the person seeking connectivity. This would mean that the capital cost of the line is entirely payable by the person seeking connectivity. Thus, if the line constructed is within 10 kms. for the generator, it should ordinarily be borne by the generator as per the above principle. For conventional power projects, the entire cost of the line, whether within 10 kms. or above, has to be entirely borne by the Project Developers. In the case of RE Generator, as a promotional measure, the above modification is made in the RE Regulations wherein if the line constructed is within 10 kms., the licensee bears the cost. If it is more than 10 kms., the cost beyond 10 kms. is shared between the generator and the distribution licensee. When the generator is selling to third party, the

charges are determined by the State Commission. However when the RE Generator is selling the electricity to the distribution licensee in the State, as an alternate to the payment of the capital cost incurred by the licensee for construction of the line, a provision is made that at the option of the RE Generator the wheeling charges at 2% of energy fed by the generator into the grid be levied. The RE Generator thus takes the advantage of not having to pay the capital cost of the line laid down and in lieu thereof pays the charges which has been given the nomenclature of "wheeling charges". It cannot be that the RE Generator will not pay the capital cost of the line and also will challenge the alternate of wheeling charges and thus have undue advantage at the cost of the consumers at large.

(b) In case the RE Generator is selling electricity other than to distribution licensees, the wheeling charges as determined by the State Commission shall be applicable.

(c) The wheeling charges of 2% of energy fed is applicable irrespective of whether the line being constructed under Section 73(1) is by the State Transmission Utility, transmission licensee or distribution licensee. The validity of such wheeling charges of 2% of energy fed in relation to construction of the line as provided under the RE Regulations cannot be a subject matter of the present proceedings.

(d) This aspect regarding payment of wheeling charges gets clarified in the RE Regulations (3rd Amendment), 2014 wherein an option is given to the generators to pay the entire cost of the line in one go or in installments not exceeding 12 months without interest. Since the generators are incurring the cost of construction of line, the wheeling charges at 2% of energy fed shall not be levied upon full payment.

(e) Subsequently by RE Regulation (4th Amendment), 2015 the State Commission has provided as under:

> *"(2) The Wheeling Charges shall not be leviable on the Renewable Energy Generators from the date of notification of these Regulations, if the entire energy injected into the grid is purchased by the distribution licensee.*
>
> *Provided the delivery point of power is the switchyard of the power plant of the IPP and the metering point is also the inter-connection point i.e. the point where the switchyard of the power plant connects with the power evacuation line of the licensee(s).*
>
> *Provided further that wheeling charge and transmission charge at the rate determined by the Commission from time to time shall be levied in case the power is supplied to a third party i.e. other than the distribution licensee(s) in Haryana."*

(f) The Appellant had specifically agreed to pay the wheeling charges as per the RE Regulations in the PPA dated 22/6/2012 entered into with Respondent No.2. Clause 2.1.4 reads as under:

"2.1.4 Wheeling charges will be levied as per HERC guidelines/regulations for renewable energy projects as amended from time to time."

At the time of the PPA, the RE Regulations (1st Amendment) were in force and the Appellant was aware that the Regulations provided for 2% of energy fed as wheeling charges in relation to the construction of the transmission or distribution line to the place of generation. The Appellant, having willingly and knowingly, agreed to pay the wheeling charges cannot now seek to evade its obligations under the PPA. It is not open to the Appellant to wriggle out of the terms of the contract entered into and that too in accordance with the Regulations (See the judgment passed by the Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Emco Limited & Anr.**[3])

[3] Judgment dated 2/2/2016 in Civil Appeal No.1220 of 2015

(g) The wheeling charges have been claimed by Respondent No.2 from the Appellant under Regulation 73(2) of the RE Regulations (1st Amendment) and Clause 2.1.4 of the PPA dated 22/06/2012.

(h) It is a well settled principle that the regulations framed by the State Commission are binding and the orders of the State Commission are to be in conformity with the same. Validity of the regulations cannot be subject to challenge in appeal under Section 111 of the said Act (See ***PTC India***).

(i) The Appellant has not challenged the RE Regulations and has accepted the same. The Appellant had further specifically agreed to pay the wheeling charges as per the RE Regulations. It is not open for the Appellant to contend that even though the RE Regulations have not been set aside, the same are to be ignored by this Tribunal. By not applying the RE Regulations, this

Tribunal would in effect be setting aside the regulations which it cannot do.

(j) In the present case, there is no conflict between the said Act and the RE Regulations. The requirement of RE Generators to pay charges in regard to transmission or distribution lines being constructed is not contrary to any provision of the said Act. The payment of wheeling charges in lieu of the above cannot be said to be in conflict with the said Act. The alternate of wheeling charges was given as an option to accommodate RE Generator in lieu of well accepted concept of payment of the capital cost of the last or first mile connectivity. Further the delivery point under the PPA was duly agreed on the basis of the existing RE Regulations which provided for 2% of energy fed as wheeling charges and which the Appellant had agreed to pay. It is not open for the Appellant to now use the terms of the PPA to evade its obligations under the RE Regulations.

(k) In ***M/s. Puri Oil Mills Ltd.***, this Tribunal has held the wheeling charges not to be payable only on the basis that the delivery point is the switchyard of the generator. However it has not been contended nor considered that the licensee is required to construct a line from the generator to the interconnection point to the existing system and for such construction, costs are recoverable from the generator. This Tribunal had not considered the RE Regulations notified by the State Commission and the provisions of the PPA providing for the levy of the wheeling charges. In the present case, Respondent No.2 has relied on the specific provision of the RE Regulations for claiming wheeling charges as well as the specific agreement of the Appellant to pay such wheeling charges.

(l) This Tribunal did not consider that 2% of energy fed as wheeling charges is related to the connectivity and construction of line from the place of generation to the existing Distribution/Transmission System. Under the

RE Regulations, as a concession, the line is constructed by the licensees at their own cost if it is within 10 Kms. exclusively for the generator. If it is more than 10 Kms., the cost is shared. For conventional projects, the entire cost whether within 10 Kms. or above has to be entirely borne by the Project Developers. In view of the above, a provision is made that wheeling charges at 2% of energy fed would be levied if the generator is selling electricity to the distribution licensees. This is clear from the fact that both the provisions are encased within the same Regulation 73 of the RE Regulations.

(m) Therefore, the judgment of ***M/s. Puri Oil Mills Ltd.*** is not applicable to the present case.

(n) The 2% of energy is levied as wheeling charges specifically on renewable generators who are supplying power to the distribution licensee at the bus bar. The above wheeling charges would not be applicable in case of conventional power projects or renewable power

projects supplying to third parties. Therefore, there can be no claim for waiver or exemption of wheeling charges on the basis of conditions, which are the very basis for imposition of wheeling charges. In other words, a condition imposed on a renewable generator supplying electricity to the distribution licensee under the RE Regulations cannot be exempted merely on the basis that it is a renewable generator supplying electricity to the distribution licensee. If the Appellant's contention is accepted, then every renewable generator supplying power to the distribution licensee would be entitled to waiver of wheeling charges and Regulation 73(2) would be rendered otiose.

(o) The power to relax is a discretionary power and has to be exercised judicially and only when the circumstances so call for it. The Appellant has failed to establish the existence of the circumstances, which would warrant the exercise of the power to relax. It is reiterated that merely because the Appellant is a renewable generator supplying

electricity to the distribution licensee cannot be ground for relaxation when the regulation is specifically applicable to the renewable generators supplying electricity to the distribution licensee.

(p) In ***India Glycols Limited***, the issue in consideration was whether the fossil fuel based co-generation plants were obliged to procure electricity from renewable energy sources as per the Renewable Purchase Obligation (**"RPO"**). The relevant regulation in the above appeal was the UERC (Compliance with Renewable Purchase Obligation) Regulations 2010. The 'Obligated Entity' in the above UERC Regulations who are obliged to procure minimum percentage of their total electricity requirement from renewable energy sources is defined under Regulation 2.1 as under:

> "*l. "Obligated Entity" means the distribution licensee, captive user and open access consumer in the State, which is mandated to fulfill renewable purchase obligation under these regulations;*"

(q) The regulation did not specifically provide for inclusion of fossil fuel based co-generation plant. The State Commission interpreted the above definition to include fossil fuel based co-generation plant. This interpretation was contrary to the decision of this Tribunal in ***Century Rayon v. M*aharashtra Electricity Regulatory Commission**[4] wherein the Tribunal had held that any obligation for purchase of electricity from the renewable sources can be imposed only on distribution licensee and not on captive consumers who are generating electricity through co-generation irrespective of the fuel used. Thus the fossil fuel based co-generation plants cannot be imposed with RPO. In the above context, this Tribunal in the ***India Glycols Limited*** held that the State Commission ought to have interpreted the above regulation in accordance with the decision of this Tribunal in ***Century Rayon***. However in the present case, the RE Regulations specifically provides for

[4] Judgment dated 26/4/2010 in Appeal No.57 of 2009

payment of wheeling charges @ 2% of energy fed into the grid under Regulation 73(2). This is in view of the obligation under Section 73(1) for the connectivity and construction of the line from the place of generation to the existing distribution/transmission licensee. It is on this basis that the PPA dated 22/06/2012 was signed wherein the Appellant had specifically agreed under Clause 2.1.4 to pay the wheeling charges as per the regulations.

(r) The contention of the Appellant that the term 'wheeling' is defined under the said Act and the said definition would apply to RE Regulations is not correct. The opening part of Section 2 of the said Act *inter alia*, states as under:

> *"Section 2. (Definitions): --- In this Act, unless the context otherwise requires--"*

The context to the contrary is clearly evident for reasons detailed herein. In the present case, the circumstance

under which the charges have been imposed in the present case is relevant. Ordinarily the line between the generating station to the inter connection point of the transmission or distribution system of the licensee is to be set up by the generating company as the dedicated transmission line or the capital cost therefore incurred is paid by the generating company. Such line being exclusively laid down at the instance of the generating company, the entire capital cost is to be paid for by the generating company and is not to be loaded on the general body or users and consumers. This has been specifically provided under the Haryana Electricity Regulatory Commission (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012.

(s) The above regulations, inter alia provide as under:

"5. Eligibility for connectivity. – (1) A consumer or a person seeking connectivity for a load of 10 MW and above or a generating station or a captive generating plant having installed capacity of 10 MW and above shall be eligible to obtain connectivity at 33 kV or above. A consumer or a person seeking connectivity for a load of less than 10 MW or a generating station or a captive generating plant having installed capacity of less than 10 MW shall be eligible to obtain connectivity at 33 kV or below

6. (8) In case a dedicated line in the transmission system or distribution system is required to be constructed or where augmentation of the transmission system and or distribution system is to be carried out for grant of connectivity, the nodal agency shall, within 30 days from the date of receipt of application, inform the applicant about the broad design features, estimated cost and the timeframe for completion of the dedicated line or the system augmentation. The cost of construction of dedicated line or the augmentation of the transmission or distribution system and associated facilities shall be borne by the applicant. Requisite steps to be taken in this regard shall be as mentioned in the detailed procedure."

(t) In the case of RE Generation, 'RE Regulations (1st Amendment)' facilitate the connectivity charges for the benefit of Renewable Sources.

(u) Thus in case the transmission line is to be laid down upto the distance of 10 Kms. the entire capital cost is not loaded on to the generating company and in case of distance in excess of 10 Kms. the cost is shared 50:50 and in consideration of such concession thereof, the charges equivalent to 2% of the energy is adjusted. This is notionally designated as wheeling charges at 2% of the energy. This does not amount to wheeling charges in the general sense of such charges determined as tariff under Section 62 of the said Act for open access on the transmission or distribution of electricity. Since the charges are in lieu of the capital cost contribution which is otherwise to be made, the charges are notionally called wheeling charges but adjusted in percentage terms of energy quantum and not in terms of wheeling charges in monetary terms decided by the State Commission for wheeling of electricity.

(v) The Appellant cannot take advantage of the above scheme of facilitating by non loading on the Appellant of the capital cost of laying down the line but will not be required to comply with the condition of adjustment of 2% energy. This claim of the Appellant is unjust, unfair and a burden on the general consumers.

9. We shall now deal with the rival contentions. Since the Appellant has claimed parity with the judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd***., it is necessary at the outset to refer to it. M/s. Puri Oil Mill Ltd., is a generating company. It had set up two small canal based hydro power plants with installed capacity of 1.4. MW each. HPPC which was Respondent No.2 therein is responsible for procurement of power for the distribution licensees. M/s. Puri Oil Mills Ltd. filed a petition before the State Commission for re-determination of tariff for its projects and sought amendment of the PPA executed by it with HPPC. The State Commission dismissed the petition and also review petition filed by M/s. Puri Oil Mills Ltd. Aggrieved by the said orders M/s. Puri Oil

Mills Ltd. filed a petition in this Tribunal. The submission which is relevant for the present purpose is regarding levying of wheeling charges. The State Commission in its order dated 15/5/2007 which formed the basis of signing of the PPA between the parties provided for levy of wheeling charges at 2% of the energy fed in the grid. It was submitted before this Tribunal that the PPA provided for delivery point at the generation switchyard of M/s. Puri Oil Mills Ltd.'s plants and the distribution licensee was responsible for building the interlinking line only upto 10 Kms. from the generating station to the 33 kV sub-station of the distribution licensee. It was pointed out that the metering was being done at the generator's premises and the distribution licensee was the direct beneficiary of the power and therefore there is no justification for levying transmission charges. This was opposed by the Respondents therein. This Tribunal framed the following issue on the basis of rival submissions.

"Whether the Respondent No.2 is entitled to claim wheeling charges @ 2% even though the

entire energy from the Appellant's project is being supplied to the distribution licensees?"

While answering the above issue, this Tribunal referred to Section 2(76) of the said Act, which defines the term "wheeling". It reads thus:

> *(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;*

This Tribunal observed that M/s. Puri Oil Mills Ltd. was supplying entire energy generated at its power plants for use by the distribution licensee and was not wheeling any power for captive use or for sale to third party. Having regard to the definition of the term "wheeling" this Tribunal held that distribution system facilities are being utilized by the distribution licensee for taking power from M/s. Puri Oil Mills Ltd.'s power plant for supply to its consumers and therefore wheeling charges could not be levied on M/s. Puri Oil Mills

Ltd. This Tribunal observed that wheeling charges will be payable by M/s. Puri Oil Mills Ltd. only when it supplies power to a third party. In the circumstances, this Tribunal directed HPPC to refund the amount deducted from the bills of M/s. Puri Oil Mills Ltd. towards wheeling charges. As we have already noted the Supreme Court has dismissed the appeal filed against this judgment. This judgment has therefore assumed finality.

10. What emerges from ***M/s. Puri Oil Mills Ltd.*** is that the delivery point of the Appellant-generator therein was at the generation switchyard of its plant. The distribution licensee was responsible for building interlinking line from the generating station of the Appellant therein to the sub-station of the distribution licensee. The distribution licensee was taking power from the Appellant's plant to supply it to its consumers. The Appellant therein was supplying the entire energy generated at its power plant for use by the distribution licensee and was not wheeling any power for captive use or sale to third party.

11. It is necessary to examine whether facts of the present case are similar. In this case, the Appellant is supplying the entire power at its bus bar to the distribution licensee for which the State Commission has determined the ex-bus tariff and the delivery point of the power is the switchyard of the power plant of the Appellant. The Appellant is not wheeling any power for captive use or for sale to third party. The Appellant is, therefore, right in claiming parity with ***M/s. Puri Oil Mills Ltd.*** The Appellant's case is similar to the case of ***M/s. Puri Oil Mills Ltd***.

12. The next question which arises is whether the wheeling charges can be waived having regard to ***M/s. Puri Oil Mills Ltd.*** when in this case Regulation 73(2) of the RE Regulations (1st Amendment) states that unless otherwise exempted by the Commission the wheeling charges shall be levied (a) 2% of energy fed to the grid by the renewable energy developer in case the power is purchased by the distribution licensee and in all other cases wheeling charges or transmission charges,

as the case may be shall be levied at the rates determined by the Commission from time to time.

13. We have already quoted definition of the term 'wheeling' incorporated in the said Act. It is clear from this definition that 'wheeling' means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62. As already noted, the Appellant is not wheeling any power for captive use or sale to third party. The Appellant is supplying the entire power at its bus bar to the distribution licensee. The delivery point of the power is the switchyard of the power plant of the Appellant. When the generator sells energy "at the bus bar" to the distribution licensee, the evacuation line is not used by the generator at all since the energy or the electricity stands transferred to the distribution licensee before the line is used. In this situation it is the distribution licensee which is using its own line for conveyance of its own electricity. Hence, there

is no question of the Appellant-generator "wheeling" power or paying any charge for it.

14. If the definition of term 'wheeling' incorporated in the said Act is taken into consideration, wheeling charges cannot be levied on the Appellant but Regulation 73(2) of the RE Regulations (1st Amendment) which we have quoted hereinabove states otherwise. Thus, there is an apparent conflict between the regulation and the provision of the said Act. There can be no dispute that when the regulations are in the field they need to be followed and measures taken by the Appropriate Commission have to be in conformity with the said regulations. It is also true that the validity of the regulations cannot be subject to challenge in appeal under Section 111 of the said Act. The validity of the regulations may, however, be challenged by taking judicial review under Article 226 of the Constitution of India. This has been so stated by the Constitution Bench of the Supreme Court in ***PTC India*** and, therefore, this legal position is not open to any debate.

15. What needs to be now answered is what is to be done when this Tribunal notices that there is an apparent conflict between a regulation framed by the Appropriate Commission and a clear provision of the said Act. In this connection, we may usefully refer to the judgment of this Tribunal in ***Damodar Valley Corporation v. Central Electricity Regulatory Commission and Ors.***[5]. We would like to refer to the concurring judgment of Justice Anil Dev Singh, the then Chairperson of this Tribunal. While concurring with the judgment of Mr. Khan, Technical Member, Justice Anil Dev Singh expressed his views with regard to the impact of the fourth proviso to Section 14 and effect of Sections 61, 62 and the relevant provisions of the said Act on the provisions of the Damodar Valley Corporation Act 1948 (**"DVC Act"**) having a bearing on the tariff particularly Part IV of the DVC Act. It is not necessary to burden this judgment with unessential facts of that judgment. Suffice it to say that inconsistencies were noticed between Regulation 21(ii) of the Central Electricity

[5] Judgment dated 23/11/2007 in Appeal No.271 of 2007 & other appeals.

Regulatory Commission (Terms & Conditions of Tariff) Regulations 2004 (**"the Regulations, 2004"**) and Section 40 of the DVC Act. Following extracts from the said judgment would show how this Tribunal dealt with a situation where there was inconsistency between the provisions of the DVC Act and the Regulations, 2004 relying on the judgment of the Supreme Court in ***Bharathidasan University v. All India Council for Technical Education***[6].

> *"11. In case the Parliament while enacting the Act of 2003, wanted the Rules and Regulations framed thereunder to prevail over provisions of the DVC Act which were inconsistent therewith, it would have expressly stated so. That is however, is not the case. The Parliament did not confer such a privilege to the Rules and Regulations framed under the Act of 2003 so as to nullify the statutory provisions of the DVC Act. The operation of Section 40 and other provisions cannot be curtailed by Regulations framed by the CERC. Such of the Regulations which are restricting the operation of the provisions of the DVC Act that are not inconsistent with the provisions of the Act of 2003 must be ignored as the Regulations or Rules cannot prevail over the legislation.*
>
> *xxx xxx xxx*

[6] (2001) 8 SCC 676

14. In saying that the Regulations cannot be framed in violation of the statute, we are not holding them to be ultra-virus of the DVC Act but we are ignoring such of the Regulations which are contrary to the DVC Act as DVC Act being a legislation made by the Parliament must operate in so far as its provisions are not contrary to the provisions of the Act of 2003.

*15. In **Bharathidasan University v. All India Clouncil for Technical Education, (2001) 8 SCC 676**, the Supreme Court held that the courts are bound to ignore the Rules or Regulations which are not in conformity with the statutory provisions. In this regard it was observed as follows:-*

> *"The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party is sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a*

myth to state that Regulations made under Section 23 of the Act have "constitutional" and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforce against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions (para14)".

16. In view of dicta laid down by the Supreme Court in the above decision, Regulation 21(ii) of the Regulations will have to be ignored, being contrary to Section 40 of the DVC Act. ……."

It may be stated here that appeal against this judgment is admitted by the Supreme Court. The Supreme Court has, however, not stayed it.

16. Similar view has been taken by this Tribunal in ***Himachal Pradesh State Electricity Board v. M/s.***

Himalaya International Ltd. & Ors.[7]. The relevant paragraphs could be quoted.

> *"(13) It would be wrong to read sub regulation 1 as one laying down that all disputes which the Commission has to decide within the afore said sections of the Act can be referred to arbitration. In fact, such a regulation would be contradictory to the provisions of the Act. Section 181 of the Act under which the regulations have been framed gives power to the State Commission to "make regulation consistent with this Act and the regulations generally to carry out the provisions of this Act". Since the Act does not give an omnibus power to refer all disputes required to be adjudicated upon by the Commission to arbitration, a regulation saying so would be inconsistent with the Act. The only way to interpret Regulation 53 is to read it as one providing for the procedure for appointment of an arbitrator and not the provision giving substantive power for appointment of an arbitrator. To hold that Regulation 53 confers power on the Commission to refer all disputes require to be adjudicated upon by the Commission to arbitration would be contrary to the very power under which the regulation has been framed. Mr. M.G. Ramachandran submits that if the Regulation 53 actually intends to do so then the same needs to be ignored by the court and in his support refers to a judgment of Supreme Court in the case of Bharathidasan University Vs. All India Council for Technical Education."*

[7] Judgment dated 11/9/2007 in Appeal No.78 of 2007

After reproducing the above quoted paragraph from ***Bharathidasan University***, this Tribunal observed as under:

> *"(14) We have said above that Regulation 53 actually intends to provide for a procedure for appointment of an arbitrator and that does not actually confer a power for making a reference to arbitration. Any other interpretation to the Regulation will be contrary to the intention of 181 of the Act and liable to be ignored following the judgment of* ***Bharathidasan University (supra)****."*

17. Again in ***M/s. Rohit Ferro Tech Limited, Kolkata & Ors. v. M/s. West Bengal Electricity Regulatory Commission & Anr.***[8], after referring to the Supreme Court judgment in ***Bharathidasan University***, this Tribunal observed that there is a difference between WBERC (Tariff) Regulations, 2007 and Section 64 of the said Act, which provides for a public hearing for a particular purpose. This Tribunal observed that if the said Act were to require a public hearing for a particular purpose, as provided under Section 64 of the said Act, the State Commission would not dispense with

[8] 2011 ELR (APTEL) 1375

such requirements arbitrarily without adducing any reasons for the same. This Tribunal followed the Supreme Court judgment in ***Bharathidasan University***. The relevant observations of this Tribunal could be quoted.

> *"19. In this context, it would be worthwhile to refer to the judgement of the Hon'ble Supreme Court in Bharathidasan University vs. All India Council for Technical Education reported in (2001) 8 SCC 676 in which it is held that the courts are bound to ignore Rules or Regulations which are not in conformity with the statutory provisions. The relevant observations are as follows:*
>
> > *"The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party is sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or*

> *authority and validity which it is shown and found to obviously and patently lack".*
>
> *20. So this decision would make it clear that if the Regulations which may have the force of law cannot prevail over the main statutory provisions. That apart, as laid down by the Hon'ble Supreme Court in the PTC case reported in (2010) 4 SCC 603, this Tribunal can adjudicate upon an Appeal involving 'interpretation' of Regulations. It is a settled position of law that "reading down" is a process of "interpretation" and that did not amount to challenge the vires of the Regulations."*

18. Thus, if the regulation is in conflict with the provisions of the said Act and is contrary to the same, this Tribunal will have to overlook at it so as to give primacy to the clear provisions of the said Act. In doing so, this Tribunal is not holding that a regulation, which is contrary to the provisions of the said Act is *ultra vires*. Such an approach does not violate the law laid down by the Supreme Court in ***PTC India***.

19. There is another angle of looking at this case. Regulation 69 of the RE Regulations (1st Amendment) contains power to relax. It reads thus:

> *"**69. Power to Relax.** – The Commission may by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected may suo moto relax any of the provisions of these regulations or on an application made before it by an interested person."*

20. This provision gives the State Commission power to relax any regulation for the reasons to be recorded in writing. This provision obviously gives flexibility / freedom to the Appropriate Commission to deal with certain peculiar circumstances where the Commission may have to relax its regulations. In this connection, we may refer to ***India Glycols Limited.*** In that case, the issue was as to whether the Commission could require fossil-fuel based co-generators to procure renewable energy under the Commission's Regulations, when this Tribunal has in ***Century Rayon*** interpreted Section 86(1)(e) of the said Act to mean that fossil-fuel based co-generators were not obliged to procure renewable energy. In short, the question was whether the said Act as interpreted by this Tribunal prohibited something,

[i.e. fossil-fuel based co-generators being fastened with RPO], the Commission could, by relying upon its regulation, require such thing to be done. This Tribunal held that in such a situation, the State Commission was competent enough to exercise the power to relax in order to give effect to the judgment of this Tribunal in ***Century Rayon***.

21. Counsel for HPPC contended that since the definition of "obligated entity" under the UERC Regulations did not specifically include fossil-fuel based co-generators the State Commission interpreted fossil-fuel based co-generators as being included within obligated entity. Counsel further contended that in ***India Glycols Limited,*** it was an interpretation of the Commission versus an interpretation of this Tribunal. On this issue, we find substance in Mr. Buddy Ranganadhan's submission that this contention is ex-facie wrong since the definition of "obligated entity" included "captive users". The expression 'captive users' obviously included co-generators who were consuming their own power whether generated from fossil-fuel or otherwise. If a captive

user was already generating energy from a renewable source, there could have been no question of any further RPO on such generators. Hence, only a "fossil fuel" based co-generator could have fallen within the category of "captive user". Therefore, there was no question of any alleged "interpretation" by the Commission as is sought to be argued by the HPPC now. In that case, the fossil-fuel based co-generators had sought "exemption" from the RPO only on the strength of the principle laid down in this Tribunal's judgment in ***Century Rayon***. There was no case set up by those co-generators that they were otherwise exempt from the definition of obligated entity de-hors the ***Century Rayon*** principle. Hence, the principle laid down in the ***India Glycols Limited*** would squarely apply to the present case.

22. It is true that clause 2.1.3 of the PPA says that wheeling charges will be levied as per HERC Regulations for renewable energy as amended from time to time. This is a general provision. But, once the State Commission relaxes the regulation to bring it in conformity with Section 2(76) of the

said Act, there is no question of the Appellant trying to commit breach of any of the terms of the PPA or trying to wriggle out of the provisions of the PPA. If Regulation 73(2) is relaxed to bring it in conformity with the provisions of the said Act, the Appellant will not be liable to pay wheeling charges.

23. It is pertinent to note that the State Commission has taken note of the inconsistency between the provision of the said Act and its regulation and subsequently amended Regulation 73(2) of the RE Regulations (1st Amendment). The amended provision reads thus:

> *"21. Amendment of Regulation 73(2) of the Principal Regulations:-*
>
> *The Regulation 73(2) of the Principal Regulations shall be substituted by the following Regulations:*
>
> *"(2) The Wheeling Charges shall not be leviable on the Renewable Energy Generators from the date of notification of these Regulations, if the entire energy injected into the grid is purchased by the distribution licensee.*
>
> *Provided the delivery point of power is the switchyard of the power plant of the IPP and the*

metering point is also the inter-connection point i.e. the point where the switchyard of the power plant connects with the power evacuation line of the licensee(s).

Provided further that wheeling charge and transmission charge at the rate determined by the Commission from time to time shall be levied in case the power is supplied to a third party i.e. other than the distribution licensee(s) in Haryana."

24. Thus, relaxation of Regulation 73(2) would be an absolutely just step to resolve the inconsistency.

25. Extensive submissions have been advanced by Ms. Ramachandran on various factual aspects. In our opinion, it is not necessary to go into them because the legal position is settled by the judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd.*** which is confirmed by the Supreme Court. Since the Appellant's case is similar to ***M/s. Puri Oil Mills Ltd.***, the State Commission should have given similar relief to the Appellant by using its "power to relax" conferred on it under Regulation 69 of the RE Regulations and relaxing Regulation 73(2) of the RE Regulations (1st Amendment).

26. It is true that power to relax is a discretionary power and has to be exercised judicially and only when the circumstances call for its exercise. In our opinion, in this case, the circumstances did call for its exercise. The State Commission should not have ignored this Tribunal's judgment in ***M/s. Puri Oil Mills Ltd.*** The State Commission was not called upon to decide the validity of Regulation 73(2). That would be in teeth of the Supreme Court's judgment in ***PTC India***. The State Commission should have merely relaxed Regulation 73(2) in deference to ***M/s. Puri Oil Mills Ltd.*** and having regard to definition of the term "wheeling" contained in the said Act, it should have waived the wheeling charges. Such exercise of discretionary power to relax would have been a judicial exercise. By not exercising the discretionary power to relax, the State Commission has caused injustice.

27. There is one more aspect of the matter which we must mention before closing as we feel that that substantiates the view that we are taking. Under Regulation 2(2) of the RE

Regulations any term used in the RE Regulations and not defined therein would take the meaning assigned to it under the said Act. Since the term 'wheeling' has not been defined under the said regulations, it would take the meaning assigned to it under the said Act. Thus, definition of the term "wheeling" incorporated in Section 2(76) of the said Act becomes relevant.

28. In the ultimate analysis and in the view that we have taken, we pass the following order:

(i) We set aside the impugned order.

(ii) In tune with the judgments of this Tribunal in ***Damodar Vally Corporation***, ***M/s. Himalaya International Ltd.*** and ***M/s. Rohit Ferro Tech Ltd.***, we overlook Regulation 73(2) of the RE Regulations (1st Amendment) and hold that in view of the judgment of this Tribunal in ***M/s. Puri Oil Mills Ltd.*** and in view of the

definition of term "wheeling" incorporated in Section 2(76) of the said Act, levying wheeling charges on the Appellant is illegal. We further hold that the Appellant is not liable to pay wheeling charges.

(iii) We direct HPPC to refund the amount deducted from the bills of the Appellant towards wheeling charges. The said amount should be refunded within a period of 60 days from today, failing which the said amount shall carry simple interest at 12% per annum till payment.

(iv) The above direction be also treated as relaxation from payment of wheeling charges by exempting the Appellant under Regulation 69 of the HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and

Renewable Energy Certificate) Regulations, 2010.

29. The Appeal is disposed of in the aforestated terms.

30. Pronounced in the Open Court on this 15th day of March, 2016.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/~~NON-REPORTABALE~~**