

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

Appeal No. 247 of 2015

Dated: 25th January, 2017

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

In the matter of :-

M/s Vandana Vidhyut Ltd.
Sirgitti Industrial Area,
Sector-B, Bilaspur
Chhattisgarh- 495 001

... Appellant

Versus

- 1. Chhattisgarh State Power Distribution Company Ltd.**
Dagania, Raipur
Chhattisgarh- 492 013 **...Respondent No.1**
- 2. Chhattisgarh State Electricity Regulatory Commission**
Irrigation Colony, Shanti Nagar,
Raipur
Chhattisgarh – 492 001 **...Respondent No.2**

Counsel for the Appellant(s): **Mr. Raunak Jain**
Ms. Swapna Seshadri
Mr. Ishaan Mukherjee
Mr. Ashwani Kumar Gupta
Ms. Mandakini Ghosh
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Counsel for the Respondent(s): **Ms. Suparna Srivastava**
Ms. Aditi Sharma
Ms. Anushka Arora
Mr. Arvind Banerjee

Mr. C K Rai
Mr. Umesh Prasad
Mr. Paramhans for R-2

JUDGMENT

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

1. The present Appeal is being filed by M/s. Vandana Vidyut Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 04.09.2015 (“**Impugned Order**”) passed by the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No.17 of 2015, in the matter concerning the deduction of payment to the Appellant by Respondent No.1 for the month of October, 2014.
2. The Appellant, M/s Vandana Vidhyut Ltd. is an 8 MW rice husk based biomass power generating company in the State of Chhattisgarh supplying power to Respondent No.1.
3. The Respondent No.1, Chhattisgarh State Power Distribution Company Ltd. (CSPDCL) is the distribution company in the State of Chhattisgarh and is responsible for distribution of electricity within its licensed distribution area.
4. The Respondent No 2 is the State Electricity Regulatory Commission for the State of Chhattisgarh exercising jurisdiction and discharging functions in terms of the Electricity Act 2003.

5. Facts of the present Appeal:

- a) The Appellant has installed Biomass Power Plant with initial installed capacity of 6 MW. The plant of the Appellant was commissioned on 1.12.2001. The Power Purchase Agreement (PPA) was signed on 02.09.2000 with erstwhile Madhya Pradesh Electricity Board (MPEB). The duration of the PPA was for a period of 10 years. After the reorganisation of the state of Madhya Pradesh (MP) into MP and Chhattisgarh the rights and obligations of the PPA were transferred to the successor entity i.e. Respondent No.1. When the installed capacity of the power plant was enhanced from 6 to 8 MW, a Supplementary Agreement dated 24.4.2003 was entered between Appellant and the Respondent No.1 .The PPA expired on 08.10.2011. As per the PPA the tariff was fixed at the rate of Rs 2.25 / kWh for the entire duration of PPA i.e. 10 years without any escalation based on the policy of the State Govt.
- b) The State Commission on 11.11.2005 issued the tariff order and other related conditions for biomass based power plants, based on petition no. 7/2005 filed by Chhattisgarh Biomass Energy Developers Association. In this order, the State Commission specified that the existing biomass based power plants including that of Appellant will continue to supply power to Respondent No. 1 as per their executed PPAs. This order was applicable for biomass based power projects which were to commence power generation of electricity on or after 01.04.2005.

- c) Chhattisgarh Biomass Energy Developers Association filed an appeal with this Tribunal against the order dated 11.11.2005 of the State Commission on certain aspects like modification related to tariff, wheeling and other charges etc. This Tribunal vide judgement dated 07.09.2006 set aside some part of State Commission's order and remanded matter back to the State Commission. Respondent No. 1 filed appeal no. 12/2007 with Hon'ble Supreme Court challenging the order of this Tribunal. The said appeal was dismissed by Hon'ble Supreme Court vide judgement dated 15.01.2007 saying that matter was already remitted to the State Commission. Hon'ble Supreme Court clarified that Respondent No. 1 was at liberty to raise all the contentions before the State Commission which was to decide the same untrammelled by any observations made in the judgement of this Tribunal.
- d) After detailed proceedings, the State Commission vide order dated 15.01.2008 re-determined the tariff of biomass plants on basis of norms as directed by this Tribunal and considering various parameters of tariff fixation. In this order it was held by the State Commission that the stand taken by the Respondent No. 1 in respect of PPAs (in instant case that of the Appellant) which were entered into before the Electricity Act, 2003 came into force, as legal and logical. The State Commission did not interfere with these PPAs. The PPAs entered into after the State Commission's order dated 11.11.2005 may be modified as per this order of the State Commission. Accordingly both the tariff orders dated 11.11.2005 and 15.01.2008 did not affect the terms of power

supply agreed by the Appellant with Respondent No. 1 under the PPA.

- e) On 22.05.2008, for the first time the State Commission notified the tariff Regulations for plants based on non-conventional energy sources hereinafter referred as 'RE Tariff Regulations, 2008'. These regulations were applicable only to those biomass power plants which had been set up after the passing of the regulations. These regulations were not applicable to PPAs executed prior to the date of notification of these regulations. The tariff of such plants shall be based on executed PPAs in terms of the State Commission's order dated 15.01.2008. These RE Tariff Regulations made provision of scheduling power where biomass generators were required to give monthly schedule for energy proposed to be sold to a distribution licensee at least 15 days in advance.

- f) On 27.07.2012, the State Commission notified regulations for plants based on non-conventional energy sources hereinafter referred as 'RE Tariff Regulations, 2012' These regulations are applicable to renewable energy based generating stations established in the state of Chhattisgarh for projects achieving COD after April 01, 2012. These regulations also provides that biomass/ non-fossil fuel based co-generation plants with installed capacity 10 MW and above shall be subjected to scheduling and merit order despatch principles. Such projects below 10 MW shall be treated as 'Must Run'.

- g) The PPA of the Appellant with Respondent No. 1 expired on 8.10.2011. Chhattisgarh Biomass Energy Developers Association with other biomass power generators filed petition no. 22/2011 before the State Commission for revision and determination of tariff for financial year 2010-11 and subsequent years. Vide order dated 28.12.2011 the State Commission with respect to variable charges decided that the variable charges determined by CERC for 2011-12 shall be made applicable for biomass generators in the state of Chhattisgarh. It also decided that variable charges for 2012-13 as and when decided by CERC shall also be applicable to biomass generators in the state of Chhattisgarh. In this way the variable charges determined by the State Commission vide order dated 28.12.2011 became applicable to the Appellant as and when fresh PPA is entered between the Appellant and Respondent No.1. CERC vide order dated 27.03.2012 notified energy charges for sale of power from plants based on renewable energy sources. The State Commission vide order dated 28.05.2012 adopted the CERC approved variable charges for year 2012-13.
- h) The Respondent no.1 challenged the order dated 28.12.2011 & 28.5.2012 before this Tribunal vide Appeal nos. 66/2012 and 144/2012. One of the grounds of appeal was regarding fixation of limit upto which normal tariff was payable to biomass power producers, which had been done by the State Commission by adopting different parameters i.e. schedule and plant load factor. This Tribunal vide order dated 02.01.2014 in Review Petition No. 10/2013 in the said appeals, granted liberty to Respondent No. 1 to raise issue regarding difficulty caused to Respondent No. 1 in implementation of the order of the State Commission regarding

monthly billing of normal tariff for supply of energy above 70% of the scheduled energy before the State Commission by filing a separate petition and the State Commission to consider the same on merits. Respondent No. 1 filed petition no. 14/2014 (M) before the State Commission based on the order of this Tribunal. In this petition, the Respondent No. 1 prayed for full rate of fixed charges to be paid for biomass generators if load factor is from 70% to 100%. It also prayed that fixed charges to be fixed @30 paise per unit shall be paid for any power below 70% and above 100% load factor as per order dated 28.12.2011 of the State Commission.

- i) The Appellant entered into fresh PPA with the Respondent No.1 on 18.1.2013 (effective from 1.3.2013) for sale of power from 8 MW biomass based power project for a period of 20 years. As per RE Tariff Regulations, 2012, the Appellant filed a petition no. 10/2013 (T) before the State Commission for determination of project specific fixed cost. Vide interim order dated 10.7.2013, the State Commission granted the interim approval of the PPA dated 18.1.2013 and also determined interim/ provisional tariff-fixed and variable charges for the year 2012-13 and 2013-14 subject to final decision on fresh PPA entered between the Appellant & Respondent No.1. Vide order dated 19.02.2014, the State Commission approved this PPA with certain modifications. Vide order dated 04.03.2014, the State Commission determined the project specific tariff of the Appellant based on the RE Tariff Regulations, 2012. Respondent No. 1 has filed appeal no. 202/2015 against the order dated 04.03.2014 of the State Commission before this Tribunal challenging certain aspects of

capital cost determination. The said appeal was dismissed by this Tribunal vide judgement dated 17.11.2015.

- j) The Appellant filed Petition No. 17/ 2015 (D) with the State Commission on being aggrieved with the deduction made by Respondent No. 1 from power purchase bill of the Appellant for the month of October, 2014. The deduction was made by Respondent No.1 as the Appellant failed to adhere to the advance scheduling for supply of power as submitted to Respondent No.1.
 - k) The State Commission vide Impugned Order dated 04.09.2015 dismissed the petition filed by the Appellant on the ground that the Appellant's plant achieved COD in year 2001 at that time no Regulations were existing. The RE Regulations, 2012 therefore are not applicable to the Appellant. The State Commission also agreed to the submissions of Respondent No. 1 that as per clause 4(b) of the PPA dated 18.01.2013 entered upon by the Appellant with Respondent No.1, except for tariff, all other terms and conditions shall be governed as per the Commission's order dated 11.11.2005 read with order dated 15.01.2008, 15.04.2010, 28.12.2011 and 28.5.2015 and amendments made thereof.
6. Aggrieved by the Order dated 04.09.2015 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:
- i. The State Commission has kept the Appellant out of purview of tariff and norms specified under various orders of the State Commission saying that the Appellant's plant was commissioned prior to the commencement of the Electricity Act, 2003.

- ii. As per clause 4(a) of the PPA dated 18.01.2013, the Appellant was required to approach the State Commission for determination of fixed charge on project specific basis. The State Commission has determined the tariff of the Appellant based on its petition as per norms under RE Regulations, 2012.
- iii. The State Commission vide order dated 19.2.2014 directed modification of clause 4(b) of the PPA dated 18.1.2013 to the extent that except for the tariff and scheduling, other terms and conditions shall be governed as per the Commission's order dated 11.11.2005 read with order dated 15.1.2008, 15.4.2010, 28.12.2011 and 28.5.2012 and amendments made thereof.
- iv. The State Commission has erred by relying on liberty granted by this Tribunal to the Respondent No. 1 in terms of its judgement dated 02.01.2014 in R.P. No. 10/2013. This Tribunal has granted liberty *"regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy..."*
- v. Under regulations 11.1 and 11.2 of RE Regulations, 2012, the Appellant's plant to be treated as 'MUST RUN' and should not be subjected to scheduling. Accordingly the money withheld by the Respondent No. 1 is illegal.

7. QUESTIONS OF LAW

The Appellant has raised the following questions of law in the present appeal:

- a. **Whether the Appellant is a 'MUST RUN' station and whether the provisions of 'Scheduling' are inapplicable in the case of the Appellant under RE Regulations, 2012?**
- b. **Whether the Regulations framed by the State Commission under Section 181 of the Electricity Act, 2003, in exercise of its regulatory functions, shall have supremacy over the tariff orders passed by the State Commission under Sections 61, 62 and 86 of the Electricity Act, 2003, in discharge of its statutory functions?**
- c. **Whether the State Commission is bound by its own Regulations framed in exercise of Regulatory functions under Section 181 of the Electricity Act, 2003 while performing its statutory functions?**
- d. **Whether the Judgement dated 02.01.2014 in R.P. No. 10/2013 passed by this Tribunal and the liberty granted to the distribution licensee therein "*regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy....*" has any applicability in the facts and circumstances of the instance case?**

8. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
9. The learned counsel for the Appellant has made following arguments/submissions for our consideration :
 - a) The State Commission has kept the Appellant out of purview of tariff and norms specified under orders dated 11.11.2005 and 15.01.2008 saying that Appellant's plant was commissioned prior to the commencement of the Electricity Act, 2003.
 - b) Regulations 3.1 & 3.2 of RE Regulations, 2012 provide that on completion of initial validity period, a generator was entitled to seek application of the RE Regulations, 2012 and its specified norms.
 - c) As per clause 4(a) of the PPA dated 18.01.2013, the Appellant was required to approach the State Commission for determination of fixed charge on project specific basis and energy charge was to be adopted as per prevailing tariff orders passed by the State Commission.
 - d) The State Commission has determined the tariff of the Appellant based on its petition as per norms under RE Regulations, 2012. The order has been challenged by the Respondent No.1 before this Tribunal in Appeal No. 202 of 2014 which was dismissed by this Tribunal. However, the issue of applicability of RE Regulations, 2012 and its norms on the Appellant was not contested by the Respondent No.1 in the above mentioned Appeal No. 202 of 2014.

- e) The State Commission vide order dated 19.02.2014 while approving PPA directed modification of clause 4(b) of the PPA dated 18.01.2013 to the extent that except for the tariff and scheduling, all other terms and conditions shall be governed as per the Commission's order dated 11.11.2005 read with order dated 15.01.2008, 15.04.2010, 28.12.2011 and 28.05.2012 and amendments made thereof. It means that the plant of the Appellant is 'MUST RUN' as per RE Regulations, 2012. The Appellant filed the petition before the State Commission based on the order dated 19.02.2014 but the State Commission has not dealt with the same in Impugned Order.
- f) Once the project specific tariff of the Appellant is determined under RE Regulations, 2012 as per fresh PPA dated 18.01.2013, the benefits arising out of these regulations cannot be denied. Under regulations 11.1 and 11.2 of RE Regulations, 2012, the Appellant's plant to be treated as 'MUST RUN' and should not be subjected to scheduling.
- g) Even if the issue of 'scheduling' is decided against the Appellant, the Regulations framed by the State Commission shall over ride the orders passed by the Commission to the extent they are inconsistent with the Regulations. In this regard, the Appellant cited the judgement of the Hon'ble Supreme Court in the case of PTC India Ltd. V. Central Electricity Commission (2010) 4 SCC 603.
- h) The Appellant further submitted that the State Commission is bound by its own Regulations framed under Electricity Act, 2003 while performing its statutory functions and cannot act contrary to

the same. Once the RE Regulations, 2012 are in place and as per these regulations, the Appellant's power plant is to be treated as 'MUST RUN', the State Commission has no power to deny benefits arising out of the said RE Regulations, 2012.

- i) The State Commission has erred by relying on liberty granted by this Tribunal to the Respondent No. 1 in terms of its judgement dated 02.01.2014 in R.P. No. 10/2013 wherein this Tribunal has granted liberty "*regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy...*" In the instant case, the Respondent No. 1 has applied provisions of Scheduling for supply of energy by the Appellant in the given month below 70% of the scheduled energy. In the instant case, this judgment of this Tribunal is not relevant as the difficulty faced by Respondent No. 1 was for energy supply above 70% of the scheduled energy. There was no difficulty at all in respect of monthly billing for supply of energy below 70% of the scheduled energy. As per RE Regulations 2012, the generator being less than 10 MW, normal tariff was payable to him even if supply is below 70% in a given month.
- j) 'MUST RUN' status has been accorded to small biomass power plants in the state of Chhattisgarh and favourable decisions in the past have been taken by the State Commission to promote generation of electricity from the renewable sources. Respondent No. 1 is bound by their Renewable Purchase Obligations (RPO). The small biomass power plants are helping the Respondent No. 1 to fulfil its RPO obligations, which otherwise remain un-fulfilled every year. For this reason 'MUST RUN' status has been accorded

to these biomass power plants and they have been exempted from provisions of scheduling.

- k) Accordingly the Appellant's power plant is to be treated as 'MUST RUN' and the money withheld by the Respondent No. 1 is illegal and is to be returned with interest to the Appellant.

10. The learned counsel for the Respondent Nos. 1 & 2 has made following arguments / submissions on the issues raised in the present Appeal for our consideration:

- a) The Appellant's power plant was declared commercial before the advent of Electricity Act, 2003 and was based on State Governments Policy for generation from non-conventional energy sources. The tariff order dated 11.11.2005 was to be applicable for those biomass based projects which were to commence power generation on or after 01.04.2005. The power plant of the Appellant which was already supplying electricity, this order was not applicable to it. The Appellant continued to supply electricity to Respondent No. 1 at fixed rate of Rs. 2.25/kWh without escalation as provided under PPA. This order also provides that for changes in the existing PPA if desired by the Appellant/ Respondent, approval of State Commission was necessary. However, none of them approached the State Commission.

- b) Chhattisgarh Biomass Energy Developers Association filed Appeal No. 20/2006 against the State Commission's order dated 11.11.2005. This Tribunal vide Judgement dated 07.09.2006 set aside some part of State Commission's order dated 11.11.2005 and against which the Respondent No. 1 filed Appeal before

Hon'ble Supreme Court. The said Appeal was dismissed by Hon'ble Supreme Court with liberty to Respondent no.1 to raise all contentions before State Commission which was to decide the same untrammelled by any observations made in judgement of this Tribunal.

- c) The State Commission vide order dated 15.01.2008 re-determined the tariff of biomass plants on basis of norms as directed by this Tribunal and after considering various parameters of tariff fixation for a period of 10 years from 2005-06 and was subject to review after 5 years on request of the Appellant/Respondents No.1. On the observation of this Tribunal's judgement regarding compliance with provisions of Section 86 (1) (e) of the Electricity Act, 2003, during the hearing Respondents strongly contended that the provisions of the Electricity Act, 2003 and National Electricity Policy can be made applicable only to those non-conventional energy sources which have been set up after the Electricity Act, 2003 came into force. It cannot be made applicable to power producers which set up earlier based on provisions of State / Central Govt. policies. These generators are contractually bound to supply electricity as per the terms of the agreements entered into with the Respondent no.1. These agreements are saved under Section 185 of the Electricity Act, 2003. The State Commission considered the stand of the Respondents in respect of PPAs entered before Electricity Act, 2003 came into force as logical and legal and did not interfere with those agreements. Accordingly, the Appellant continued to supply power to Respondent No.1 in terms of the PPA till its expiry on 08.10.2011. The tariff orders

11.11.2005 and 15.01.2008 did not affect the terms of power supply by the Appellant to the Respondent no.1.

- d) Further the State Commission notified RE Regulations 2008 on 22.5.2008 which were applicable only to those biomass power plants which had been set up after passing the Regulations. These Regulations made provision for scheduling of power of biomass power plants. These plants were required to schedule power to be supplied from and after the date of commercial operation, on monthly basis. These generators were required to give monthly schedule for energy proposed to be sold to a distribution licensee - Respondent No.1 at least 15 days in advance.
- e) The State Commission on 27.07.2012 notified RE Regulations, 2012 which are applicable to projects established in Chhattisgarh achieving COD after 1st April, 2012 under long term PPA for 20 years or more for sale of electricity to Respondent no.1. These Regulations also provide that in case of existing RE projects having long term PPA of 20 years or more with Respondent No.1 which have achieved COD before 1st April, 2012, applicable tariff and other terms and conditions shall be governed by respective RE Tariff orders and their amendments issued by the State Commission from time to time. On completion of validity of prevailing tariff orders for such projects, the new tariff will be decided on basis of norms specified in RE Regulations, 2012 on generic/ project specific basis on the request of the Appellant or Respondent No.1. Thus in terms of the above, the Appellant's power plant does not even qualify as an existing renewable energy project having long term PPA of 20 years with Respondent No.1.

- f) The PPA of the Appellant with Respondent No. 1 expired on 8.10.2011. Chhattisgarh Biomass Energy Developers Association with other biomass power generators filed petition no. 22/2011 before the State Commission for revision and determination of tariff for financial year 2010-11 and subsequent years. Vide order dated 28.12.2011, the State Commission with respect to variable charges decided that the variable charges determined by CERC for 2011-12 shall be made applicable for biomass generators in the state of Chhattisgarh. It also decided that variable charges for 2012-13 as and when decided by CERC shall also be applicable to biomass generators in the state of Chhattisgarh. In this manner, the variable charges determined by the State Commission vide order dated 28.12.2011 became applicable to the Appellant as and when fresh PPA is entered between the Appellant and Respondent No.1. CERC vide order dated 27.03.2012 notified energy charges for sale of power from plants based on renewable energy sources. The State Commission vide order dated 28.05.2012 adopted the CERC approved variable charges for year 2012-13.
- g) The Respondent no.1 challenged the order dated 28.12.2011 & 28.5.2012 before this Tribunal vide Appeal nos. 66/2012 and 144/2012. One of the grounds of appeal was regarding fixation of limit upto which normal tariff was payable to biomass power producers, which had been done by State Commission by adopting different parameters i.e. schedule and plant load factor. This Tribunal vide order dated 02.01.2014 in Review Petition No. 10/2013 in the said appeals granted liberty to respondent no. 1 to raise issue regarding difficulty caused to Respondent No. 1 in

implementation of the order of the commission regarding monthly billing of normal tariff for supply of energy above 70% of the scheduled energy before the State Commission by filing a separate petition and the State Commission to consider the same on merits. Respondent No. 1 filed petition no. 14/2014 (M) before the State Commission based on the order of this Tribunal. In this petition, the Respondent No. 1 prayed for full rate of fixed charges to be paid for biomass generators if load factor is from 70% to 100%. It also prayed that fixed charges @30 paise per unit shall be paid for any power below 70% and above 100% load factor as per order dated 28.12.2011 of the State Commission. The said petition is presently pending adjudication before the State Commission. The State Commission had observed that the present mechanism needs to be reviewed and biomass plants had to be treated equally without any discrimination related to scheduling provisions. Accordingly amendments are to be done in RE Tariff Regulations, 2012.

- h) The Appellant entered into fresh PPA with the Respondent No.1 on 18.01.2013 (effective from 01.03.2013) for sale of power from 8 MW biomass based power project for a period of 20 years. As per RE Tariff Regulations, 2012, the Appellant filed a petition no. 10/2013 (T) before the State Commission for determination of project specific fixed cost. Vide interim order dated 10.07.2013, the State Commission granted the interim approval of the PPA dated 18.1.2013 and also determined interim/ provisional tariff charges for the year 2012-13 and 2013-14 subject to final decision on fresh PPA entered between Appellant & Respondent No.1. Vide order dated 19.02.2014, the State Commission approved this PPA with

certain modifications. Vide order dated 04.03.2014, the State Commission determined the project specific tariff of the Appellant based on the applicable norms. As per the terms of this PPA, the Appellant has agreed for a mechanism of advance scheduling for supply of energy, being fully aware of RE Regulations, 2012 / legal position. It was also agreed in the PPA that except tariff, all other terms and conditions shall be applicable as per various State Commission's orders dated 11.11.2005, 15.01.2008, 15.04.2010, 28.12.2011 and 28.05.2012 and amended from time to time. In the Petition filed by the Respondent No. 1 for approval of the PPA, the State Commission vide order dated 19.02.2014 has held that the provisions with respect to scheduling as exist in the order dated 15.1.2008 shall continue with respect to Appellant's biomass plant. Also, in the order dated 04.03.2014 on the Appellant's tariff petition, the State Commission observed that condition of advance scheduling shall be applicable to the Appellant's power plant. Since the Appellant has not challenged the provision of advance scheduling, it has reached finality. The Appellant was also giving schedules to Respondent No. 1 as per the State Commission's orders without raising any objections.

11. After having a careful examination of all the issues brought before us on the issues raised in Appeal and submissions made by all the parties for our consideration, our observations are as follows:-
 - a. The present case pertains to decision of the State Commission vide its Impugned order dated 04.09.2015 by holding that RE Regulations, 2012 are not applicable to the Appellant as its plant

achieved COD in the year 2001 and upheld the disallowance of Rs. 33,05,188 by the Respondent No. 1 to the Appellant.

- b. **On the Question No (a) i.e. Whether the Appellant is a ‘MUST RUN’ station and whether the provisions of ‘Scheduling’ are inapplicable in the case of the Appellant under RE Regulations, 2012?, we observe as follows:**
- i. As per the Appellant, the provisions of scheduling under RE Regulations, 2012 are applicable to it and as such, its plant must be treated as ‘MUST RUN’ under these regulations.
- ii. The Appellant is relying on the following amendment to the clause of the PPA as directed by the State Commission.

“4(b) The other terms & conditions (except tariff and scheduling) shall be applicable as incorporated in the Commission’s order dated 11.11.2005 read with order dated 15.01.2008, 15.04.2010, 28.12.11 and 28.05.12 and amended time to time.”

Thus as per the Appellant the scheduling shall be as per the provisions RE Regulations, 2012 and should be treated as ‘MUST RUN’ and the relevant extracts of the Regulations 2012 are reproduced below;

“11.1 All renewable energy power plants, except for biomass/non-fossil fuel based co-generation plants with installed capacity of 10 MW and above, shall be treated as ‘MUST RUN’ power plants and shall not be subjected to scheduling and merit order despatch principles.

11.2 The biomass power generating station and co-generation projects with installed capacity of 10 MW and

above shall be subjected to monthly scheduling because of categorisation into firm and non-firm power.”

In terms of the above provisions of the PPA and RE Tariff Regulations, 2012, the Appellant is claiming that its 8 MW biomass plant is a ‘MUST RUN’ plant.

- iii. Let us now examine the relevant clauses of RE Regulations, 2012 as reproduced below:

“3.1 These Regulations shall apply for all Renewable Energy (hereinafter referred to as "RE") projects achieving COD within the State of Chhattisgarh after April 01, 2012 for generation and sale of electricity from such RE projects to distribution licensees under long term PPA for 20 years or more within the Chhattisgarh State and where tariff, for a generating station or a unit thereof based on renewable sources of energy, is to be determined by the Commission under Section 62 read with Section 86 of the Act.

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3.2 In case of existing RE projects having long term PPA with distribution licensee of 20 years or more, which have achieved COD before April01, 2012, applicable tariff and other terms and conditions, shall be governed by respective RE Tariff Orders and amendments thereof as issued from time to time by the Commission for the duration of the Tariff Period as stipulated under respective RE Tariff Orders. However on completion of validity of prevailing tariff orders for such projects, the new tariff will be decided on basis of norms specified in these regulations on generic/project specific basis on the request of generators or licensees. Further in such cases for redetermination of the tariff after

currency of the tariff order, the capital cost shall be allowed as specified in the then prevailing Orders.”

The above provisions of the regulations clearly spell out the applicability of these regulations and their extent. Regulation 3.1 clearly spells out that these regulations are applicable for RE projects achieving COD after 1st April 2012 and having long term PPA for 20 years or more. The Regulation 3.2 specifically spells out that for RE projects which have achieved COD before 1st April, 2012, applicable tariff and other terms and conditions, shall be governed by respective RE Tariff Orders and amendments thereof as issued from time to time by the State Commission for the duration of the Tariff Period as stipulated under respective RE Tariff Orders. On completion of the validity of the specific tariff orders, the generator or licensee can request for project specific tariff determination by the State Commission. The case under consideration is for the project which has achieved COD in the year 2001 i.e. before 1st April 2012, hence shall be governed by the provisions of Regulation 3.2.

- iv. On the Appellant's reliance on clause 4(b) of PPA, it is important to note the context in which the changes in clause 4(b) of the PPA were made as per the State Commission's order dated 19.02.2014.

The clause 4 (b) in PPA dated 18.1.2013 is as below:

“4(b) The other terms & conditions (except tariff) shall be applicable as incorporated in the Commission's order dated 11.11.2005 read with order dated 15.01.2008, 15.04.2010, 28.12.11 and 28.05.12 and amended time to time.”

However, the State Commission while approving the PPA has observed as follows:

“7.1 Regarding new clause 4(b), the order dated January 15, 2008 was passed as per directions of the Hon'ble Tribunal and the same directions has been continued for the biomass plants, which came before the RE Tariff Regulations 2012. Same provisions has been specified in the Order dated 28.11.2012. Hon'ble ATE in its judgment dated 02.01.2014 in appeal no RP 10 of 2013 has ordered as follow;

“In view of the submissions made by the Learned Counsel for the State Commission, we grant liberty to raise the issue regarding difficulty caused to the Review Petitioner/Appellant in implementation of the order of the State Commission regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy before the State Commission by filing a separate petition and the State Commission shall consider the same on merits.”

In the view of the above, same provision will continue for this plant also till the time the Commission issues order in compliance to the Hon'ble ATE judgment. In the view of the above deliberations, clause 4 (b) modification be done as follows;

“4(b) The other terms & conditions (except tariff and scheduling) shall be applicable as incorporated in the Commission's order dated 11.11.2005 read with order dated 15.01.2008, 15.04.2010, 28.12.11 and 28.05.12 and amended time to time.”

Thus the modification in para 4(b) of the PPA was carried out by the State Commission in view of the compliance to this Tribunal's judgement as brought out above and not on the contentions raised by the Appellant with respect to regulation 11.1 & 11.2 of RE Tariff Regulations, 2012 issued on 27.07.2012.

Based on the petition filed by the Respondent No.1 as per this Tribunal's directions the State Commission has carried out the amendment to RE Tariff Regulations, 2012 on 21.03.2016 in the form of second amendment to RE Tariff Regulations, 2012. These regulations made all the biomass power plants to be subjected to scheduling and merit order dispatch principles prospectively irrespective of their capacity.

- v. Based on the order dated 19.02.2014 while approving the PPA, State Commission also directed as below:

“Based on the judgement in this order, modification required needs to be incorporated by way of a supplementary agreement between petitioner and respondent.”

Accordingly the 1st Supplementary PPA dated 12.02.2015 was signed between Appellant and the Respondent No.1. This supplementary PPA has been placed on record by the Appellant, does not contain any modifications to clause 4(b). It means the original clause 4 (b), quoted at para 11 b. iv above as per PPA signed on 18.1.2013 is in force and rightly quoted by the State Commission in the Impugned Order. The advance scheduling mechanism as contained at clause 3 of the PPA and State Commission's order from time to time in this regard shall be applicable.

- vi. It is also observed that, at para 15.2 of the order dated 4.3.2014 on the Appellant's tariff petition, the State Commission observed as below:

"15.2 Scheduling:

Petitioners Submission

During hearing on 16.01.2014, the petitioner submitted that their biomass plant capacity is less than 10 MW and hence as per clause 11.2 of RE Tariff Regulations 2012, it is "must run" plants and not subject to 'scheduling'.

CSPDCL's Submission

Respondent has submitted that RE Tariff Regulations 2012 are applicable to those power plants which have declared commercially operated after 01.04.2012. As petitioner's plant achieved COD in the year 2001 when no regulations were existing, above provision of the RE Tariff Regulations 2012, cannot be made applicable. Respondent has further submitted that as per clause 4(b) of the PPA except for tariff, all other terms and conditions shall be governed as per the Commission's order dtd. 11.11.2005, read with order dtd. 15.01.2008, 15.04.2010, 28.12.2011 and 28.05.2012 and amendments made therein from time to time. Thus, the petitioner should be subjected to scheduling, and fixed charges shall be payable as per clause 11.1 of the Commission's order dtd. 28.12.2011.

Commission's view

The order dated January 15, 2008 was passed as per directions of the Hon'ble Tribunal and the same directions has been continued for the biomass plants, which are came before the RE Tariff Regulations 2012. Same provisions has been specified in the Order dated 28.11.2012. Hon'ble ATE in its judgment dated 02.01.2014 in appeal no RP 10 of 2013 has ordered as follow;

"In view of the submissions made by the Learned Counsel for the State Commission, we grant liberty to raise the issue regarding difficulty caused to the Review Petitioner/Appellant in implementation of the order of

the State Commission regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy before the State Commission by filing a separate petition and the State Commission shall consider the same on merits.” In the view of the above, same provision will continue for this plant also till the time the Commission issues order in compliance to the Hon’ble ATE judgment.”

From the above, it is clear that condition of advance scheduling shall be applicable to the Appellant’s power plant and the Appellant has not challenged the provision of advance scheduling. This has reached finality. The Appellant was also giving schedules to Respondent No. 1 as per the State Commission’s orders.

vii. In view of our discussions as above, we agree to the contentions of the Respondent Nos. 1 and 2 that the Appellant’s plant does not fall in the category of ‘MUST RUN’ and hence the Impugned Order of the State Commission is affirmed on that aspect.

viii. Accordingly this issue is decided against the Appellant.

c. **On Question No (b) i.e. Whether the Regulations framed by the State Commission under Section 181 of the Electricity Act, 2003, in exercise of its regulatory functions, shall have supremacy over the tariff orders passed by the State Commission under Sections 61, 62 and 86 of the Electricity Act, 2003, in discharge of its statutory functions?, we decide as follows:**

i. In favour of the above question, the Appellant has quoted the Hon’ble Supreme Court’s Judgement in case of PTC India Ltd.

Vs. Central Electricity Commission (2010) 4 SCC. Hon'ble Supreme Court at para 43 & 59 of the judgement has held as below:

“43. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of “general application”, a Regulation stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations. However, that would not mean that a regulation is a precondition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with “generality” even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act. Trading is an activity recognized under the said 2003 Act. While deciding the nature of an Order (decision) vis-à-vis a Regulation under the Act, one needs to apply the test of general application. On the making of the impugned Regulations 2006, even the existing Power Purchase Agreements (“PPA”) had to be modified and aligned with the said Regulations. In other words, the impugned Regulation makes an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned Regulations 2006 have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations under Section 178 and not by passing an Order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word “order” in Section 111 of the 2003 Act cannot

include the impugned Regulations 2006 made under Section 178 of the 2003 Act.”

“59. 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.”

This judgement of Hon'ble Supreme Court clearly specifies that the tariff orders issued by Appropriate Commission are to be in consonance with the regulations framed by them under the Electricity Act, 2003 and the contracts have also to factor in the aspects of regulations.

- ii. Thus in terms of the ruling of the Hon'ble Supreme Court, it is clear that the Regulations framed by the State Commission under Section 181 of the Electricity Act, 2003, in exercise of its regulatory functions, have supremacy over the tariff orders passed by the State Commission under Sections 61, 62 and 86 of the Electricity Act, 2003, in discharge of its statutory functions.
- iii. In the present case, the RE Tariff Regulations, 2012 framed by the State Commission under Section 181 of the Electricity Act

itself explains its applicability or otherwise as discussed in para 11 b. above.

- iv. We are, therefore, in agreement with the findings of the State Commission in its Impugned Order.

- d. **On Question No (c) i.e. Whether the State Commission is bound by its own Regulations framed in exercise of Regulatory functions under Section 181 of the Electricity Act, 2003 while performing its statutory functions?, we decide as follows:**
 - i. We agree with the submission of the Appellant that the State Commission is bound by its own Regulations framed in exercise of regulatory functions under Section 181 of the Electricity Act, 2003 while performing statutory functions.
 - ii. As per our observations at 11 c. above in the present case, the State Commission while issuing the Impugned Order has acted as per the provisions on the RE Tariff Regulations, 2012.
 - iii. Hence, this issue is decided accordingly.

- e. **On Question No. (d) i.e. Whether the Judgement dated 02.01.2014 in R.P. No. 10/2013 passed by this Tribunal and the liberty granted to the distribution licensee therein “regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy....” has any applicability in the facts and circumstances of the instance case? we observe as follows;**

- i. The State Commission's order dated 15.01.2008 was passed as per directions of this Tribunal's judgement 7.9.2006 and the same directions have been continued by the State Commission for biomass plants which came before RE Regulations, 2012. According to this order dated 15.01.2008 at para 9.6, the variable cost plus 30 p would be applicable only to the supply of less than 70% of the scheduled energy. Further the supplier may provide and be paid normal tariff for supply of energy above 70% of schedule without a cap of 105%. At the end of the financial year, energy delivered above 100% PLF be billed at the same rate as for supply below 70% of the scheduled energy i.e. @ 30p.

- ii. Respondent No. 1 filed Review Petition (10/2013) in Appeal no. 66/2012 with this Tribunal citing difficulty in implementation of the order of the State Commission for purchase of electricity from biomass power plants for 2010-11 and subsequent years as it uses two variables i.e. Scheduled Energy and PLF for payment purposes. While passing the Judgement dated 02.01.2014 in R.P. No. 10/2013, this Tribunal at para 9 observed as follows:

“In view of the submissions made by the Learned Counsel for the State Commission, we grant liberty to raise the issue regarding difficulty caused to the Review Petitioner/ Appellant in implementation of the order of the State Commission regarding monthly billing at normal tariff for supply of energy above 70% of the scheduled energy before the State Commission by filing a separate petition and the State Commission shall consider the same on merits.”

In view of the above the Judgement dated 02.01.2014 in R.P. No. 10/2013 passed by this Tribunal has applicability in the facts and circumstances of the case.

- ii. We also observe that the petition filed by the Respondent No.1 as per this Tribunal's directions has been decided by the State Commission and issued second amendment to RE Tariff Regulations, 2012 on 21.03.2016.
- iii. Hence, this issue does not warrant our interference with the findings of the State Commission in its Impugned Order.

ORDER

We are of the considered opinion that the issues raised in the present appeal do not have any merit as discussed above. The Appeal is hereby dismissed.

The Impugned Order dated 04.09.2015 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **25th January, 2017**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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