

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.132 & 133 of 2012

Dated 2nd January, 2013

**Present Hon'ble Mr. Justice Partha Sakha Datta, Judicial Member
Hon'ble Mr. V J Talwar, Technical Member**

Appeal No. 132 of 2012

In the matter of

M/s. Junagadh Power Projects Pvt. Ltd.
Plot No. 51, 1st Floor, Vithal Rao Nagar,
Madhapur
Hyderabad

... Appellant

Versus

1. Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan
Race Course, Vadodara 390 007
2. Gujarat Energy Transmission Corporation Ltd.
Sardar Patel Vidyut Bhawan
Race Course, Vadodara 390 007
3. Gujarat Energy Development Agency
4th floor, Block No. 11 & 12
Udyog Bhavan, Sector-11
Gandhinagar, Gujarat
4. State Load Despatch Centre
132kv, Gotri Sub-Station Compound,
Gotri Road, Vadodara 390 021

5. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower
Opposite Nehru Bridge, Ashram Road
Ahmedabad-380 009

... Respondents

Appeal No.133 of 2012

In the matter of

M/s. Amreili Power Projects Ltd.
4th Floor, My Home Plaze, 10-5-6/B,
Masab Tank
Hyderabad-500028

... Appellant

Versus

1. Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan
Race Course, Vadodara 390 007
2. Gujarat Energy Transmission Corporation Ltd.
Sardar Patel Vidyut Bhawan
Race Course, Vadodara 390 007
3. Gujarat Energy Development Agency
4th floor, Block No. 11 & 12
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Gandhinagar, Gujarat
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132kv, Gotri Sub-Station Compound,
Gotri Road, Vadodara 390 021

5. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower
Opposite Nehru Bridge, Ashram Road
Ahmedabad-380 009

...Respondents

Counsel for Appellant

Mr. Sanjay Sen & Ms. Shikha Ohri

Counsel for Respondent

Mr. M.G. Ramachandran &
Ms. Swapna Shesadri for R-1

Order

1. These two appeals listed above have been filed against the Order of the Gujarat Electricity Regulatory Commission dated 10.5.2012 were heard together but we desist from deciding these appeals on merit but simply state the facts in as much as an identical matter is pending before the Full Bench of this Tribunal.
2. M/s Junagadh Power Projects Limited and M/s Amreli Power Projects Limited are the Appellants in Appeal No. 132 of 2012 and Appeal No. 133 of 2012 respectively. The Appellants are the generators having each setup 10 MW Biomass based generating plants in Saurashtra Region of Gujarat. Gujarat Urja Vikas Nigam Limited (GUVNL) is the 1st Respondent. 2nd Respondent Gujarat Electricity Transmission Company (GETCO) is the transmission licensee and the State Transmission Utility in the State of Gujarat. Gujarat Energy Development Agency (GEDA) is the nodal agency for development of Renewable and non-conventional sources of energy in the State of

Gujarat. 4th Respondent is the State Load Despatch Centre established under Section 31 of the Electricity Act 2003 (the Act). Gujarat Electricity Regulatory Commission (Commission) is the 5th Respondent.

3. The Appellant had filed a petition before the Commission on 10th August 2011 for redetermination of biomass fuel cost, to give benefit of additional 21 Paise allowed by the Commission in Petition No. 985 of 2009 and to exempt the petitioner from applicability of Intra-state ABT mechanism. The Commission passed Impugned Order on 10.5.2012 rejecting the claim of the Appellant with regard to redetermination of tariff in view of hike in fuel price.
4. Aggrieved by the Impugned Order of the Commission dated 10.5.2012 the Appellant has filed this Appeal.
5. The relevant facts are as under:
 - I. The Commission passed an Order being Order No. 2 of 2007 on 17.8.2007 determining price for procurement of power by the distribution licensees from Biomass based generation projects. This order of the Commission had control period of three years.
 - II. On 10.2.2010 the Commission floated a discussion paper on “Determination of Tariff for Procurement of Power by Distribution Licensees and others form Biomass based Power Generators and other commercial issues” seeking comments from all the stake holders.

- III. The Commission on 17.5.2010 passed an order determining Tariff for Procurement of Power by Distribution Licensees and others from Biomass based Power Generators and other commercial issues.
- IV. M/s Junagadh Power Project Limited, the Appellant in Appeal no. 132 of 2012 entered in to Power Purchase Agreement (PPA) with 1st Respondent GUVNL on 26.11.2010. Similarly, M/s Amreli Power Projects Limited, the Appellant in Appeal No. 133 of 2012 entered in to PPA with the 1st Respondent on 28.9.2010. In both these agreements the 1st Respondent GUVNL agreed to pay levelised tariff as determined by the Commission in its Order 17.5.2011 for full life time of the period i.e. for 20 years.
- V. On 7.2.2011 the Commission partially modified the parameters with respect to Capital Cost and higher Station Heat Rate fixed in its order dated 17.5.2010 in a petition being no. 985 of 2009 allowing additional 21 paise/kWh for initial 10 years and then additional 25 paise for balance 10 years for Biomass Generators with Air Cooled Condenser.
- VI. The Appellants wrote to 1st Respondent GUVNL for giving the benefit of 21 paise/kWh allowed by the Commission in its order dated 7.2.2011 in petition no. 985 of 2009 and requested for amendment in the PPA in line with the Commission's order.
- VII. On 10th June 2011 both the Appellants filed petition before the Commission for redetermination of biomass fuel cost, to give benefit of additional 21 Paise allowed by the Commission in

Petition No. 985 of 2009 and to exempt the petitioner from applicability of Intra-state ABT mechanism.

VIII. The Commission passed Impugned Order on 10.5.2012 rejecting the claim of the Appellant with regard to redetermination of tariff in view of hike in fuel price.

IX. Hence the present Appeal.

6. The learned Counsel for the Appellant made the following submissions:

I. Admittedly, the Commission has determined a generic tariff for biomass projects in the State of Gujarat by its order dated 17.05.2010. At the time when the said order was passed, there were no biomass projects in the State. On the basis of the said order, 4 projects have been established and the aggregate capacity is around 40 MWs. Out of the 4 projects, 2 projects, which are subject matters of the present appeals have been shut down. The third project (Bhavnagar) has also approached the Commission for revision of fuel cost, which if not revised will also close down. The fourth project M/s. Abellon Clean Energy Limited is not selling power to the GUVNL and therefore, is not affected by the tariff fixed by the Commission by its generic tariff order.

II. When the Commission proceeded to fix tariff by its order dated 17.05.2010, for purposes of determining the fuel cost the Commission was pleased to place reliance on the cost data

provided by GEDA. Admittedly, the aforesaid assumption of fuel cost has undergone a significant change. From Rs. 1500/- per tonne, the fuel cost at present is around Rs. 3479/- per tonne. However, the Commission, in its Impugned Order, has ignored the tremendous increase in the cost of biomass fuel has been accepted even by GEDA. CERC in its Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 has indicated the aggregate fuel cost as Rs. 2476/- per tonne.

- III.* The Commission while accepting the increase in fuel cost chose not to interfere in the matter only on the ground that PPA with 1st Respondent has been entered in to based on the levelised tariff determined in its statutory order dated 17.5.2010.
- IV.* The levelised tariff is does not in any manner change the application of law. In this particular matter, while levelizing the tariff the Commission has considered a 5% increase in cost of biomass on an annual basis. However, in reality the cost has doubled in two years.
- V.* In a cost plus regime, the generator is entitled to recover all actual costs in terms of the Section 61 (1) (d) and Section 62 (4) of the Electricity Act, 2003.
- VI.* Under Section 62(4), the law permits a generator to approach the Commission for an adjustment of tariff as a result of increase in fuel cost more than once a year. This means that

fuel cost adjustment has to be on a dynamic basis through a fuel cost adjustment formula. Since for biomass projects there is no fuel cost adjustment formula the only option available to the generator is to approach the Commission on the basis of actual fuel cost increase, which needs to be factored in tariff. This is a statutory right available under the law and cannot be taken away. Under the cost plus regime, the generator can approach the Commission at any time for re-determination of tariff on the basis of established principles and existence of power purchase agreement cannot in any manner take away the statutory jurisdiction of the Commission to determine tariff.

VII. The levelisation formula has to be reworked or alternatively to the extent of fuel cost, the levelisation has to be withdrawn and actual fuel cost has to be allowed. The Commission can permit levelisation of fixed costs. However, should there be any uncontrollable costs the same has to be permitted on the principles that are established under the various MYT Regulations for conventional energy projects.

VIII. The Commission fell into error by ignoring the fact that the Appellants were not seeking a review of Order No. 5 of 2010 dated 17.05.2010. The power and jurisdiction of the State Commission to determine tariff is by virtue of the provisions of the Electricity Act, 2003 and the Appellants were not required to pray for a review of the the Commission's earlier order dated 17.5.2010. Sections 61, 62, 64, and 86(1)(a),(b) and (e) of the Electricity Act, 2003 enable the Commission to determine tariff

throughout the term of the power purchase agreement. The power and jurisdiction of the Commission is controlled by the provisions of the statute.

- IX. The Commission is under a statutory obligation to determine tariff and the power to determine tariff cannot be made subject to any contract. On the contrary, the Commission even after it has determined tariff has the power to re-determine the same as provided under Section 62(4) of the Electricity Act, 2003. The Commission has the power “to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State”. Therefore, it is quite clear that the Commission has the jurisdiction to re-determine tariff in an appropriate case. The Commission while passing the impugned order failed to consider the fact that this power cannot be curtailed by a power purchase agreement or by incorrect application of technical hurdles such as absence of a review petition under Order 47 Rule 1.
- X. The Commission has not fully addressed the concerns of the Appellants with regard to the additional benefit of 21 paise in terms of the order dated 07.02.2011 passed in Petition No. 985 of 2009. By this order, the Commission revised the generic tariff fixed for biomass based generating plants (vide order No. 5 of 2010) and held that the projects with air cooled condensers will

be entitled to an additional benefit of 21 paise on year on year or levelised basis. Since the Commission allowed additional capital cost and higher SHR for plants with air-cooled condensers, the additional benefit of 21 paise was allowed. However, Respondent No. 1 illegally and incorrectly denied the benefit of this order to the Appellants. The Appellants were compelled to approach the Commission praying for the additional benefit of Rs. 21 paise. However, the Commission in the impugned order held that the PPA entered by the Appellant would require to be amended.

XI. The Appellants' power plant are already reeling under an economic crisis, if the additional 21 paise benefit is given to the Appellants by Respondent No. 1 on a year to year basis instead of a levelised tariff, the Appellants will be forced to shut down their project.

XII. The learned Counsel for the Appellant has placed reliance on the following authorities:

i. India Thermal Power Ltd. vs. State of M.P. & Ors.(AIR 2000SC 1005),

ii. Transmission Corporation of Andhra Pradesh Ltd. and Anr. etc. etc. Vs. Sai Renewable Power Pvt. Ltd. and Ors. etc. (2011)11SCC34;

iii. This Tribunal's Judgment dated a8.9.2009 in M/s. Techman Infra Ltd. vs. HPERC in Appeal No. 50 & 65 of 2009 (2009 ELR (APTEL) 1025);

- iv. This Tribunal's Judgment dated 28.9.2006 in Rithwik Energy System vs. Transmission Corporation of Andhra Pradesh (2008 ELR (APTEL) 237); and***
- v. This Tribunal's Judgment dated 7.1.2010 in HPSEB vs. UERC & Anr. In Appeal No. 183 of 2009.***
- vi. This Tribunal's Judgment dated 10.2.2012 in Konark Power Projects Ltd. vs. Bangalore Electric Supply Co. Ltd. & ors. in Appeal No. 35 of 2011***
- vii. This Tribunal's Judgment dated 31.5.2012 in Tarini Infrastructure Limited Vs GUVNL & othr in Appeal No. 28 of 2010 and Appeal No. 29 of 2010.***

7. Per-contra, the learned Counsel for the 1st Respondent GUVNL contended that the Commission has taken correct view in the Impugned Order and made following submissions:

- i. By seeking review and re-fixation of biomass price, the Appellants in the petitions before the State Commission as well as in the appeals, is indirectly seeking the review of the State Commission's Order dated 17.05.2010 fixing the biomass price & generic tariff and the prayer for increase in Biomass price has already been rejected by the State Commission vide Order dated 16.11.2010 in Review Petition No. 1045 of 2010 filed by Gujarat Biomass Energy Developers Association. The present appeal ought to be dismissed on this ground alone.
- ii. In any event, the PPAs signed between the Appellants and the GUVNL was pursuant to the Order dated 17.05.2010 passed by

the State Commission after inviting suggestions / objections from the Stakeholders in which the State Commission had determined the preferential tariff applicable for supply of Power from Biomass based power project.

- iii. In terms of the Article 5 of the PPA, the tariff terms and conditions were as per the tariff determined by the State Commission in the Order dated 17.5.2010 determined under Section 62 read with Section 86(1) (a) of the Electricity Act, 2003 and as a generic tariff order for all Biomass Projects in the State of Gujarat. This has, in the impugned Order, been modified by the State Commission to the extent that the tariff as per the subsequent Order dated 7.2.2011 of the State Commission would be applicable.
- iv. The Appellants by way of the present appeal cannot circumvent the process of generic tariff determination by the State Commission including the issue of biomass price by challenging the impugned Order. It is also relevant to note that the Appellants did not challenge either the Order dated 17.05.2010 or the Order dated 16.11.2010 passed by the State Commission at the relevant time. Instead, the Appellants approached the GUVNL by letters dated 2.9.2010 and 28.9.2010 stated that the Appellants intended to sign a PPA with GUVNL for supply of 10 MW power from their Biomass power projects in line with State Commission's Order dated 17.05.2010. The Appellants decided to opt for tariff as decided

by the State Commission in the Order dated 17.05.2010 applicable for those not claiming accelerated depreciation.

- v. In view of the fact that no challenge was preferred to the Order dated 17.05.2010 or 16.11.2012, either by the Appellants or any other parties and in fact PPAs were signed on the said basis, the Orders became final and binding on all concerned parties. In the present appeal, the Appellants cannot be permitted to indirectly challenge the Orders dated 17.05.2012 or 16.11.2012 by only contending that these are technicalities. That the Electricity Act, 2003 provides under Section 111 a remedy to any person aggrieved to challenge the Order of the Appropriate Commission. Having chosen not to do so, the Appellants cannot be permitted to clandestinely challenge the findings in the said Orders by way of the present appeal.
- vi. The Commission had by Order dated 10.05.2012 partly allowed the petitions of the Appellants and had provided the relief of applying the subsequent Order dated 7.02.2011 passed by State Commission in the Petition No. 985 of 2009 filed by M/s. Abellon Clean Energy Ltd for determination of project specific tariff and directed the 1st Respondent GUVNL to pay the additional amount to the Appellants as per Order dated 7.2.2011. The above Order dated 10.05.2012 has been passed despite the Commission having earlier dismissed the Review Petition No 1045 of 2010 filed by the Gujarat Biomass Energy Developers Association seeking the exact same relief.

- vii. The Appellants are now seeking re-determination of the fuel cost and also non application of the year or year tariff option provided to GUVNL in the Order dated 7.02.2011 despite wanting to take the benefit of the additional 21 paise allowed in the Order dated 7.2.2011. These claims of the Appellants are totally outside the principal claim before the State Commission based on the relief allowed by the State Commission in its Order dated 7.2.2011 in Abellon Case. The Appellants cannot claim reliefs based on the Order dated 7.2.2011 but reject the condition of year on year tariff provided in the said Order.
- viii. The stand of the Appellants and the arguments advanced raised in regard to this issue are inconsistent and without any basis. On one hand, the Appellants are relying on the Order dated 7.2.2011 and seeking to get the benefit of the additional 21 paise in the tariff despite signing the PPA dated 28.9.2010 and agreeing to the tariff as per the Commission's Order dated 17.5.2010. On the other hand, the Appellants are stating that the option given by the State Commission in the Order dated 7.2.2011 to GUVNL to shift to year on year tariff ought not to be given.
- ix. The Commission in the Order dated 7.2.2011 consciously took the position that the Commission is giving a higher tariff to biomass producers using air-cooled condenser and to balance the interest of the utilities and the consumers, the State Commission left the option to GUVNL to shift to year or year tariff for procurement of power.

8. It is inferred from the above submissions of the Appellants that their main grievance is relating to exponential increase in the cost of Biomass fuel during last two years and the Commission has provided only 5% increase per annum the cost of biomass. With this meagre permitted increase in the cost of fuel, the running of the plant of biomass fuel has become unviable. The Appellant has prayed for some mechanism for fuel price adjustment as is available to generating stations running on fossil fuel under Section 62(4) of the Act.

9. At this stage it would desirable to mention that the Indian Biomass Power Association had filed a petition being No. OP3 of 2012 invoking original jurisdiction of this Tribunal under Section 121 of the Act and has prayed for directions to be issued to some of the Commission to provide for fuel price adjustment formula for Biomass based generating stations in line with the requirement of Section 62(4) of the Act. The petitioner Indian Biomass Power Association has made the Ministry of Power and Ministry of MNES as Respondents. This Tribunal vide its Order dated 5.12.2012 has issued notices to the Respondents in the petition and also to some State Commission including the Gujarat Commission the 5th Respondent in this Appeal. Copy of the Tribunal's order dated 5th December 2012 is reproduced below:

“Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

O.P. No. 3 of 2012

Dated : 5th December 2012

*Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. V.J. Talwar, Technical Member*

Indian Biomass Power Association Appellant (s)

Versus

Ministry of Power, Government of India & Anr. Respondent (s)

Counsel for the Appellant(s): Mr. Ganesan Umapathy

ORDER

Issue notice to the Respondents. Since the direction is sought for to certain Commissions, issue notice to the Commissions, namely, Andhra Pradesh, Chhattisgarh, Gujarat, Madhya Pradesh, Orissa, Rajasthan and Tamil Nadu. Dasti service is permitted. Registry is also directed to issue notice to the Respondents as well as to the above stated Commissions.

Post the matter on 29.01.2013.”

10. In the light of above mentioned development and in view of the fact that the similar matter relating to provision of fuel price adjustment mechanism for Biomass generators, involving the Ministry of Power and Ministry of MNES and also various State Commission, is pending for consideration before Full Bench of this Court, we feel that it would be appropriate to refer this matter also to the Full Bench of this Tribunal.

11. The appeal is, accordingly, placed before the Hon'ble Chairperson of this Tribunal for referring this Appeal to Full Bench to be dealt along with OP3 of 2012.

(V J Talwar)
Technical Member

(Justice Partha Sakha Datta)
Judicial Member

Dated: 2nd January, 2013

REPORTABLE/~~NOT REPORTABLE~~