

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

**IA No. 235 of 2011 (in Appeal No. 150 of 2011),
IA No. 252 of 2011 (in Appeal No. 166 of 2011),
IA No. 253 of 2011 (in appeal No. 168 of 2011),
IA No. 257 of 2011 (in Appeal No. 172 of 2011)
and
IA No. 258 of 2011 (in Appeal No. 173 of 2011)**

Dated: 1st February, 2012

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. P.S. Datta, Judicial Member**

In the matter of

**IA No. 235 of 2011
(in Appeal No.150 of 2011)**

M/s SLS Power Limited

... Appellant (s)

Versus

- 1. Andhra Pradesh Electricity Regulatory Commission ... Respondent (s)**
- 2. Transmission Corporation of Andhra Pradesh Ltd.**
- 3. Central Power Distribution Company of Andhra Pradesh Ltd.**

4. **Southern Power Distribution Company of Andhra Pradesh Ltd.**
5. **Northern Power Distribution Company of Andhra Pradesh Ltd.**
6. **Eastern Power Distribution Company of Andhra Pradesh Ltd.**
7. **Indian Renewable Energy Development Agency**
8. **Non-Conventional Energy Development Corporation of A.P. Ltd.**

Counsel for the Appellant (s) : Mr. M.G. Ramachandran
Ms. Swapna Seshadri

Counsel for the Respondent (s) : Mr. Ravi Shankar for R-1
Mr. A. Subba Rao
for R 2 to 6

IA No. 252 of 2011
(in Appeal No.166 of 2011)

1. **Biomass Energy Developers Association** ... **Appellant (s)**
2. **Suryateja Power Projects Pvt. Ltd.**
3. **Balaji Agro Oils Ltd.**
4. **Gowthami Bio Energies Pvt. Ltd.**
5. **The Gowthami Solvent Oils Pvt. Ltd.**
6. **Indur Green Power Pvt. Ltd.**
7. **Jocil Ltd.**
8. **Jyothi Bio Energy Ltd.**
9. **Greenko Energies Pvt. Ltd.**
10. **Sri Kalyani Agro Industries**

11. **Matirx Power Pvt. Ltd.**
12. **My Home Power Ltd.**
13. **Om Shakti Renergies Ltd.**
14. **Perpetual Energy Systems Ltd.**
15. **Ritwik Power Projects Ltd.**
16. **Roshini Powertech Ltd.**
17. **Satyamahrshi Power Corpn. Ltd.**
18. **Shalivahana Green Energy Ltd.**
19. **Shree Papers Ltd.**
20. **Sree Rayalaseema Green Energy Ltd.**
21. **Satyakala Power Projects Pvt. Ltd.**
22. **Saro Power & Infrastructure Ltd.**
23. **Suchand Powergen Pvt. Ltd.**
24. **Veeraiah N C Power Projects Ltd.**
25. **Velagapudi Power Generation Ltd.**
26. **Varam Power Projects Ltd.**

Versus

1. **Andhra Pradesh Electricity ... Respondent (s)
Regulatory Commission**
2. **Central Power Distribution Company
of Andhra Pradesh Ltd.**
3. **Southern Power Distribution Company
of Andhra Pradesh Ltd.**
4. **Northern Power Distribution Company
of Andhra Pradesh Ltd.**
5. **Eastern Power Distribution Company
of Andhra Pradesh Ltd.**
6. **Transmission Corporation of Andhra
Pradesh Ltd.**
7. **State of Andhra Pradesh**

Counsel for the Appellant (s) : Mr. K. Gopal Choudary

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Mr. A. Subba Rao
Mr. A.T. Rao
Mr. Yusuf Khan

IA No. 253 of 2011
(in Appeal No.168 of 2011)

1. **The South Indian Sugar Mills Association** ... **Appellant (s)**
2. **Parrys Sugar Industries Ltd.**
3. **The Jeypore Sugar Company Ltd.**
4. **Sagar Sugars & Allied Products**
5. **Ganapathi Sugars**
6. **Gayatri Sugars**
7. **Navabharat Ventures Ltd.**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission** ... **Respondent (s)**
2. **Transmission Corporation of Andhra Pradesh Ltd.**
3. **Central Power Distribution Company of Andhra Pradesh Ltd.**
4. **Southern Power Distribution Company of Andhra Pradesh Ltd.**
5. **Northern Power Distribution Company of Andhra Pradesh Ltd.**
6. **Eastern Power Distribution Company of Andhra Pradesh Ltd.**

Counsel for the Appellant (s) : Mr. Challa Kodanda Ram,
Sr. Adv.
Mr. Rambabu
Mr. O. Swaroop

Counsel for the Respondent (s) : Mr. Ravi Shankar for R-1
Mr. A. Subba Rao for
R 2 to 6

IA-257 of 2011
(in Appeal No.172 of 2011)

M/s. Sardar Power Private Limited ... Appellant (s)

Versus

- 1. Andhra Pradesh Electricity Regulatory Commission ...Respondent(s)**
- 2. Central Power Distribution Company of Andhra Pradesh Ltd.**
- 3. Southern Power Distribution Company of Andhra Pradesh Ltd.**
- 4. Northern Power Distribution Company of Andhra Pradesh Ltd.**
- 5. Eastern Power Distribution Company of Andhra Pradesh Ltd.**
- 6. Transmission Corporation of Andhra Pradesh Ltd.**
- 7. State of Andhra Pradesh**

Counsel for the Appellant (s) : Mr. K. Gopal Choudhary

Counsel for the Respondent(s) : Mr. K.V. Mohan for R-1
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Mr. A. Subba Rao &
Mr. A.T. Rao for R-2 to R-6
Mr. Ravi Shankar for R-7

IA-258 of 2011
(in Appeal No.173 of 2011)

1. **M/s K.M. Power Private Limited** **Appellant (s)**
2. **PMC Power Pvt. Ltd.**
3. **Manihamsa Power Projects Ltd.**
4. **Srinivasa Power Pvt. Ltd**
5. **Bhavani Hydro Power Projects Pvt. Ltd.**
6. **NCL Industries Ltd.**
7. **Janapadu Hydro Power Projects Pvt. Ltd.**
8. **Saraswathi Power & Industries Pvt. Ltd.**

Versus

1. **Andhra Pradesh Electricity** ...**Respondent(s)**
Regulatory Commission
2. **Transmission Corporation of**
Andhra Pradesh
3. **Central Power Distribution Company**
of Andhra Pradesh Ltd.
4. **Southern Power Distribution Company**
of Andhra Pradesh Ltd.
5. **Northern Power Distribution Company**
of Andhra Pradesh Ltd.
6. **Eastern Power Distribution Company**
of Andhra Pradesh Ltd.

- 7. Indian Renewable Energy Development Agency (IREDA)**
- 8. Non-Conventional Energy Development**
- 9. The Government of Andhra Pradesh**

Counsel for the Appellant (s) : Mr. M.G. Ramachandran,
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Ms. Swapna Seshadri

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Mr. A. Subba Rao &
Mr. A.T. Rao R-2 to R-6
Mr. Yusuf Khan

ORDER

The above IAs have been filed by renewable energy generators in appeals challenging the order dated 12.09.2011 passed by the Andhra Pradesh Electricity Regulatory Commission ('State Commission') in RP No.84/2003 in OP No.1075/2000 upon remand from the Hon'ble Supreme Court. In the impugned order the

Chairman and the two Members of the State Commission have given three different and divergent orders on the tariff applicable to the renewable energy sources.

2. The appellants in appeal nos. 150/2011 and 166/2011 are the biomass generators and in appeal no.168/2011 bagasse based generator, while the appellants in appeal nos. 172 of 2011 and 173 of 2011 have set up mini hydro generating plants. The respondents are the State Commission, transmission licensee and the distribution licensees in the state of Andhra Pradesh.
3. The brief facts of the cases are as under:-

3.1 The State Commission by its order dated 20.06.2001 determined the tariff applicable to the renewable energy generators for supply to distribution licensees. The tariff determined was Rs.2.25 per kwh with the year 1994-95 as the base year with 5% increase year-on-year up to 31.03.2004. Subsequently, the appellants signed Power Purchase Agreements (PPAs) with the respondent transmission corporation for supply of energy at the tariff determined by the State Commission.

3.2 The State Commission determined the tariff applicable w.e.f. 01.04.2004 by order dated 20.03.2004.

3.3 Several appeals were filed against this order by the renewable energy generators. The Tribunal by its judgment dated 02.06.2006 in appeal no. 1 of 2005 and batch allowed the appeal and set aside the State Commission's order dated 20.03.2004.

3.4 AP Transco and the distribution licensees filed appeals before the Hon'ble Supreme Court challenging the judgment of the Tribunal. Hon'ble Supreme Court by its judgment dated 08.07.2010 set aside the judgment of the Tribunal and remanded the matter to the State Commission directing it to hear the non-conventional energy generators afresh and determine the tariff.

3.5 Pursuant to the order of remand by the Hon'ble Supreme Court, the State Commission concluded the hearing in the matter on 07.12.2010. However, the three Members of the State Commission gave three different orders. On 12.09.2011, the Secretary to the State Commission communicated all the three orders passed by the Members of the State Commission.

3.6 Aggrieved by the above order, the appellants have filed these appeals. The IA nos. 235/2011, 252/2011, 253/2011, 257/2011 and 258/2011 have been filed by the appellants with the prayer to allow interim tariff to the renewable energy generators, applicable from 01.04.2004 onwards, pending disposal of the appeals by the Tribunal.

3.7 Since the IAs are seeking interim orders against the same impugned order, a common order is being rendered.

4. The Ld. Counsel for the appellants have submitted as under:-

4.1 The appellants have a very strong prima facie case in their favour. The balance of convenience also lies in their favour and against the respondents.

4.2 The financial viability of the renewal energy projects set up by them has been very badly affected due to the present unsustainable tariff being paid by the distribution licensees.

4.3 During the pendency of the matter before the Hon'ble Supreme Court the State Commission passed an order in regard to the variable cost i.e. price of fuel from 01.04.2009 onwards, subject to the orders of the Hon'ble Supreme Court. In the said order the State Commission did not determine any tariff for hydel projects on the ground that there was already an existing tariff passed for 10 years of operation in the year 2004. Thus, even after 01.04.2009, while the biomass generators have been receiving variable charges payments on the basis of revised fuel cost, the fixed cost was still on the basis of the unrevised tariff and the tariff for hydro projects had not been revised.

4.4 While some appellants have prayed for interim tariff based on parameters suggested by them, others

have requested for adoption of tariff determined by Shri C.R. Sekhar Reddy, Member, State Commission in the interim period till the disposal of the appeals. However, the appellant in IA no. 258 of 2011 has prayed for continuation of tariff of Rs.3.84 per kwh prevailing on 31.03.2004 for the mini hydro projects.

5. Ld. Counsel for the respondents 2 to 6 has made the following submissions:

5.1 Section 92(3) of the Electricity Act, 2003 stipulates that all questions which come up before any meeting of the appropriate Commission shall be determined by a majority of the Members present and in the event of equality of votes, the Chairman or in his absence the person presiding shall have a second or

casting vote. In the present case the three Members of the State Commission have given three orders on different dates and these orders have been communicated by the Secretary of the State Commission on 12.09.2011. Therefore, there is no order in the eye of law. The three orders of the Members of the State Commission have to be set aside with direction to the State Commission to determine the tariff de novo. In the circumstances, the prayer in IAs could not be granted by the Tribunal.

5.2 At present the appellants are getting tariff as per the order of the State Commission dated 31.03.2009 determining the tariff w.e.f. 01.04.2009. In the event of success in the appeals, the appellants will be entitled to the amount which was due to them for

the period 01.04.2004 to 31.03.2009. Therefore, the application in interim relief can not be granted as it will amount to deciding the appeal itself at this stage.

5.3 During the period from June, 2005 to 31.03.2009, the respondents paid 50% of the differential amounts (between tariff paid prior to 01.04.2004 as per 2001 order and tariff payable in terms of the State Commission's order dated 20.03.2004) to the appellants in addition to the tariff payable as per the State Commission's order dated 20.03.2004 in compliance with the interim order passed by the High Court during the pendency of the Writ Petitions, by this Tribunal during the pendency of the appeals and by the Hon'ble Supreme Court during the pendency of the Civil Appeals.

5.4 The balance of convenience is in favour of the respondents 2 to 6.

6. We have considered the submissions made by the Ld. Counsel for the parties. We find that the dispute regarding tariff applicable to renewable energy generators with effect from 01.04.2004 has been pending since the year 2004. After long drawn legal proceedings right up to the Apex Court resulting in order of remand to the State Commission with direction for determination of tariff after hearing the renewable energy generators, the matter has not been resolved. It is very unfortunate that the three Members of the State Commission on reconsideration of the matter on remand by the Hon'ble Supreme Court, have given three separate

and divergent orders fixing different tariffs. The three orders have been communicated to the parties by the Secretary of the State Commission on 12.09.2011. During the proceedings of these appeals we would like to go into the conduct of the State Commission which led to this peculiar situation and pass suitable orders for guidance of the State Commission in future. However, for the present we will restrict this order to the interim relief claimed by the appellants.

7. In this regard, we reproduce below the observations and findings of the Hon'ble Supreme Court in its judgment dated 08.07.2010.

“50. We find some substance in this submission and are of the view that it is a matter of some concern, even for the State Government. All these projects, admittedly, were established in

furtherance to the scheme and the guidelines provided by the Central Government which, in turn, were adopted with some modification by the State Government. The State Electricity Board implemented the said scheme and initially and permitted sale of generated electricity to third parties, however, subsequently and after formation of the Regulatory Commission which, in turn, took over the functions of the State Electricity Board, the incentives were modified and certain restrictions were placed. The reasons for these restrictions have been stated in the affidavit filed on behalf of the appellants which, as already noticed by us, is not a matter to be examined by this Court in exercise of its extra-ordinary jurisdiction. These matters, essentially, must be examined by expert bodies particularly, when such bodies are constituted under the provisions of a special statute.

51. *The basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the regulatory responsibilities of the Regulatory Commission from the Government and of harmonizing and rationalizing the provisions of the existing laws relating to electricity in India, on the other hand. The object and reasons of Electricity Act, 2003 as well as the Reform Act, 1998 are definite indicators of such legislative intent. The basic objects of these enactments*

were that the said Regulatory Commission may permit open access in distribution of energy as well as the decentralize management of power distribution through different bodies. The Reform Act, 1998 stated in its objects and reasons that the set-up of power sector in force, at that time, was virtually integrated and functional priorities were getting distorted due to resource-crunch. This has resulted in inadequate investment in transmission and distribution which has adversely affected the quality and reliability of supply. The two corporations proposed thereunder were to be constituted to perform various functions and to ensure efficiency and social object of ensuring a fair deal to the customer. These objects and reasons clearly postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency in performance and economic utilization of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as the Regulatory Commission. The policy decisions of these constituents are to be in conformity with the object of the Act. Thus, it is necessary that the Regulatory Commission, in view of this object, take practical decisions which would help in ensuring existence of these units rather than their extinguishment as alleged. (emphasis provided)

- 52 (a) The order of the Tribunal dated 02.06.2006 is hereby set aside.

- (b) *We hold that the Andhra Pradesh Electricity Regulatory Commission has the jurisdiction to determine tariff which takes within its ambit the purchase price' for procurement of the electricity generated by the Non-conventional energy developers/generators, in the facts and circumstances of these cases.*
- (c) *We hereby remand the matters to the Andhra Pradesh Electricity Regulatory Commission with a direction that it shall hear the Non-conventional energy generators afresh and fix/determine the tariff for purchase of electricity in accordance with law, expeditiously.*
- (d) *It shall also re-examine that in addition to the above or in the alternative, whether it would be in the large interest of the public and the State, to permit sale of generated electricity to third parties, if otherwise feasible.*
- (e) *The Andhra Pradesh Electricity Regulatory Commission shall consider and pronounce upon all the objection that may be raised by the parties appearing before it, except objections in relation to its jurisdiction, plea of estoppel and legitimate expectancy against the State and / or APTRANSCO and the plea in regard to PPAs being result of*

duress as these issues stand concluded by this judgment.

- (f) *We make it clear that the order dated 20.06.2001 passed by the Andhra Pradesh Electricity Regulatory Commission has attained finality and was not challenged in any proceedings so far. This judgment shall not, therefore, be in detriment to that order which will operate independently and in accordance with law.*
- (g) *We also hereby direct that State of Andhra Pradesh shall be added as party respondent in the proceedings and the Andhra Pradesh Electricity Regulatory Commission shall grant hearing to the State during pendency of proceedings before it.”*

Thus the Hon'ble Supreme Court had directed the State Commission to hear the non-conventional energy generators afresh and fix/determine the tariff expeditiously. However, in view of the three divergent orders and tariffs fixed by the three Members of the State Commission, the objective of re-determination of tariff has not been achieved. In

the meantime, the appellants who are developers of renewable sources of energy are suffering financially.

8. The Electricity Act, 2003 under section 61(h) and 86(1)(f) casts upon the State Commission the responsibility to promote development of renewal sources of energy. However, in view of the stalemate caused due to the three divergent tariff orders passed by the Members of the State Commission on remand order by the Hon'ble Supreme Court, the interests of the existing renewal energy generators have been adversely affected. The present stalemate is also not in the interest of development of new and renewable sources of energy in the state.

9. Ld. Counsel for the respondents 2 to 6 has argued that the order was pertaining to the period from 01.04.2004 to 31.03.2009 only and will not affect the current payments w.e.f. 01.04.2009 for which the tariff has been decided by a separate order of the State Commission dated 31.03.2009. On the other hand, the Ld. Counsel for the appellants have argued that the order dated 31.03.2009 was for determination of the fuel charges for biomass based project. The fixed charges for the biomass based project were not determined and were being paid at the old rates. Further, the tariff for mini hydro projects was also not determined in the order dated 31.03.2009 as the State Commission felt that their tariff was determined by the 2004 order for a period of 10 years.

10. We find that the fixed charges determined in the impugned order for biomass and bagasse projects are for a period of ten years. Also, the tariff for the hydro projects is also for a period of ten years. Thus, the impugned order may have an impact on the tariff of the bagasse/biomass projects and hydro projects beyond 31.03.2009.
11. We have examined the findings of the three Members of the State Commission. Shri Radha Kishan, Member in his order dated 13.06.2011 has decided that the tariff for the non-conventional energy projects will be Rs.2.25 per kwh with 5% escalation per annum with 1994-95 as base year, for a period of 10 years from the date of commissioning of the project as decided by the State Commission in its 2001 order. He also

recommended payment of interest @ 9% per annum for the amounts payable to the NCE developers.

12. Shri A. Raghotham Rao, Chairman and Shri C.R. Sekhar Reddy, Member in their orders dated 19.08.2011 and 02.09.2011 respectively have specified the norms for determination of tariff. Though most of the norms specified by the two Members are same, the difference is in respect of specific fuel consumption for biomass and bagasse projects, Return on Equity from mini hydro projects and the incentive for biomass/bagasse and mini hydro projects. While the incentive decided by Shri A. Raghotham Rao, Chairman is 25 paise/kwh, that decided by Shri C R Sekhar Reddy, Member is 35 paise/kwh. Shri C R Sekhar Reddy, Member has decided higher specific fuel consumption for

biomass and bagasse projects and higher ROE for mini hydro projects resulting in higher tariffs compared to that decided by the Chairman. However, the tariff determined by the Chairman is also higher than the tariff determined earlier by the State Commission in its order dated 20.03.2004.

13. We also notice that the tariff as determined by the Chairman is the lowest of all.

14. The tariffs as determined by the Shri A. Ranghotham Rao, Chairman for different types of renewable energy projects are as under:-

Shri A. Raghotham Rao, Chairman

I BIOMASS UNITS

Fixed cost

| Year of operation since commencement of unit | Fixed Cost Rs/Unit |
|-----------------------------------------------------|---------------------------|
| 1 st | 1.71 |
| 2 nd | 1.68 |
| 3 rd | 1.65 |
| 4 th | 1.62 |
| 5 th | 1.59 |
| 6 th | 1.58 |
| 7 th | 1.56 |
| 8 th | 1.53 |
| 9 th | 1.48 |
| 10 th | 1.11 |

Variable cost

| Financial Year | Variable Cost Rs/Unit |
|-----------------------|------------------------------|
| 2004-2005 | 1.66 |
| 2005-2006 | 1.76 |
| 2006-2007 | 1.86 |
| 2007-2008 | 1.97 |
| 2008-2009 | 2.09 |

II. BAGASSE BASED CO-GENERATION PLANTS.

Fixed cost

| Year of operation since commencement of unit | Fixed Cost Rs/Unit |
|-----------------------------------------------------|---------------------------|
| 1 st | 1.82 |
| 2 nd | 1.79 |

| | |
|------------------|------|
| 3 rd | 1.76 |
| 4 th | 1.73 |
| 5 th | 1.70 |
| 6 th | 1.67 |
| 7 th | 1.64 |
| 8 th | 1.62 |
| 9 th | 1.56 |
| 10 th | 1.12 |

Variable cost

| Financial Year | Variable Cost Rs/Unit |
|-----------------------|----------------------------------|
| 2004-2005 | 1.31 |
| 2005-2006 | 1.38 |
| 2006-2007 | 1.44 |
| 2007-2008 | 1.52 |
| 2008-2009 | 1.59 |

III. MINI HYDEL UNITS

TARIFF

| Year of operation since commencement of unit | Tariff Rs/Unit |
|---------------------------------------------------------|---------------------------|
| 1 st | 3.49 |
| 2 nd | 3.39 |
| 3 rd | 3.29 |
| 4 th | 3.20 |
| 5 th | 3.10 |
| 6 th | 3.01 |

| | |
|------------------|------|
| 7 th | 2.92 |
| 8 th | 2.83 |
| 9 th | 2.74 |
| 10 th | 2.66 |

The incentive decided by the Chairman is 25 paise/kwh.

17. We find that the Members of the State Commission in their respective orders have admitted the need for revision of the tariff and have decided tariffs which are higher than that determined by the State Commission's order dated 20.03.2004. The appellants have also explained financial difficulties being experienced by them.

18. We also feel that the balance of convenience lies in favour of the appellants whose tariffs have not been determined due to stalemate caused by the three different orders by the three Members, despite a

clear direction by the Hon'ble Supreme Court. Thus, we are of the opinion that there is a need to pass an order to allow interim tariff to be applicable till the final disposal of the appeal.

19. Keeping in view the interests of both the parties, we decide that the tariffs including the incentive and terms and conditions as determined by the Chairman in his order dated 19.08.2011 shall be made effective in the interim period till the final disposal of the appeals. The respondent distribution licensees are also directed to make payment of arrears to the appellants on the basis of difference in tariff as determined by Shri A. Raghotham Rao, Chairman, and the tariff already paid within 30 days of the date of this order. We are not giving any interim order regarding payment of interest which

will be considered in the final judgment. However, any delay in making payment of arrears by the respondent distribution licensees beyond 30 days will attract a simple interest @ 1% per month. This is subject to adjustment as a result of findings of this Tribunal on the final disposal of the appeal.

20. IAs are disposed of with the above directions.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

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