IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 237 OF 2013

Dated: 9th July, 2014

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

IN THE MATTER OF

1. Transtech Green Power Private Limited
D-28, South Extension Part-I,
New Delhi -110 049

2. SM Environmental Technologies Pvt. Ltd
F1/8, Okhla Industrial Area, Phase-I,
New Delhi – 110 010 .... Appellants/Petitioners

VERSUS

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan,
Near State Motor Garage,
Sahakar Marg, Jaipur-302 015

2. Jodhpur Vidhyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur-342 005
('JdVVNL' or 'Jodhpur Discom')

3. Jaipur Vidhyut Vitran Nigan Limited
Vidhyut Bhawan, Jan Path,
Jaipur-305 004
('JVVNL' or 'Jaipur Discom'

4. Ajmer Vidhyut Vitran Nigam Limited,
Old Power House, Hathi Bhata,
Ajmer-305004
('AVVNL' or 'Ajmer Discom')

5. Rajasthan Renewable Energy Corporation,
E-166, Yudhister Marg ,
C - Scheme, Jaipur-302001 .... Respondents

Counsel for the Appellant(s) … Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Mr. Arvind Kumar Gupta
Mr. Anshul Aggarwal
Mr. Abhishek Goyal
Mr. Ranjan Kumar

Counsel for the Respondent(s) … Mr. Bipin Gupta &
Mr. S.K. Bansal for R-2 to R-4

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. Transtech Green Power Private Limited and S.M. Environmental Technologies Pvt. Ltd, Appellants-Petitioners have filed this Appeal under Section 111 of the Electricity Act, 2003 against the Order dated 5.8.2013 passed by the Rajasthan Electricity Regulatory Commission (in short, the '**State Commission**') in Petition No. 362 of 2012, in the matter of M/s Transtech Green Power Private Limited & Anr. vs. Jodhpur Vidyut Vitran Nigam Limited & Ors., whereby the learned State Commission has adjudicated upon the dispute under Section 86(1)(f) of the Electricity Act, 2003, between the Appellants-Petitioners and the Respondents and held that the Respondent Nos. 2 to 4/Distribution Licensees (Discoms) need not give the benefit of netting off or banking to the Appellants and can recover the charges for use of electricity by the Appellants from the grid after a period of 42 days at the rate of temporary tariff as applicable to the large industrial consumers.

2. The main grievance of the Appellants-Petitioners in the instant Appeal is that the State Commission has ignored the Power Purchase Agreement (PPA) between the parties and held that the Appellants/biomass generating units cannot take the benefit of netting off or banking and must pay for the electricity taken from the grid after a period of 42 days at the rate of temporary tariff as applicable to the large industrial consumers. The State Commission, by the impugned order has applied the Regulation 90 of the

RERC (Terms and Conditions of Tariff) Regulations, 2009, which provides for start-up power respectively to all the power drawn by the Appellants from the Respondents Nos. 2 to 4 and also has imposed the levy retrospectively.

3. The relevant facts for the purpose of deciding this Appeal are:

(i) that the Appellants are biomass based power generating companies. Respondent No.1 is the State Electricity Regulator. Respondent No.2 to 4 are the Distribution Licensees (Discoms). Respondent No.5 is the Nodal Agency for the promotion of Renewable Energy Plants in the State of Rajasthan.

(ii) that the Appellants/biomass power generating companies filed a Petition being Petition No.362/2012 for adjudication of dispute under Section 86(1)(f) of Electricity Act, 2003 in respect of billing under clause 7.1 of PPA, along with prayer to stay the recovery of any amount pursuant to the impugned orders, dated 3.9.2012 and 11.9.2012, till final decision of the petition and also prayed to direct the Respondents to supply all relevant details of billing including computation of 42 days.

(iii) that the Appellants are generating companies, who have established 12 MW Bio-mass (Juliflora) based power station at Sanchore (Dist. Jalore) and 7.5 MW Biomass based plant at Chhipabarod (Dist. Baran) and a Power Purchase Agreement was duly executed between Appellants and Respondents-Discoms as beneficiaries on 30.7.2008 and 21.12.2009 respectively. Thus, Power Purchase Agreement was duly executed between Appellant No.1 with the Respondents-Discoms on 30.7.2008 and PPA between Appellant No.2 and Discoms was entered on 21.12.2009 for the sale and purchase of electricity from generating plant of the Appellants.

(iv) that the Bio-mass plant of the Appellant No.1 and Appellant No.2 got commissioned on 28.7.2010 and 19.2.2010 respectively. Since the time of commissioning, the bills were being raised in accordance with the Power Purchase Agreement and were being paid for by the Appellants.

(v) that, suddenly, the Respondents/Discoms issued letters bearing no. 1653, dated 3.9.2012 and 1168, dated 11.9.2012, along with electricity bills towards the energy drawn by the Appellants when the power plants of the Appellants were not generating, during full or part of the day, due to various reasons. The billing on the Appellants was under temporary tariff applicable to Non-Domestic Service (NDS) category.

(vi) that the Respondents also started to unilaterally deduct the amounts from the monthly bills of the Appellants. The Appellants immediately sought the details of bills as to such a levy was being imposed by the Respondents by sending the letters, dated 10.9.2012 and 12.9.2012 respectively. The Appellants also made a request not to deduct any amount from their bills and to defer the disputed bills and settle the issue as per clause 12.1 of Power Purchase Agreement.

(vii) that, in the meanwhile, Appellants, under financial pressure also requested the Respondents to allow deduction in 12 equal installments so as to get time for referring this dispute to the State Commission, but the Respondents did not pay any heed to the Appellants' request and deducted an arrear of three years in one-go from August, 2012 from the generation bill on 18.9.2012 and 28.9.2012 without giving any details.

(viii) that the Appellants came to know that the said billing was being done by the Respondents under Clause 7.1 of the Power Purchase Agreement and Regulation 90(1) of the RERC (Terms and Conditions of Tariff) Regulations, 2009 (in short, **'Tariff Regulations, 2009**).

(ix) that the Appellants filed a petition, being Petition No. 362 of 2012 before the State Commission requesting to adjudicate their billing disputes and clarify on the following points:

(a) The energy drawn from the grid during plant shutdown by the power station (except for colony and office) is the auxiliary consumption.

(b) Billing, if any, effected under provisions of regulation 90 of Tariff Regulations, 2009, due to long period of shut down, resulting in non supply of electricity for continuous 42 days, shall be billed at temporary supply tariff on provisional basis subject to adjustment, when generation resumes.

(c) The days of power import by the Biomass plant due to failure of Grid/Discom's supply shall be excluded for counting the limit of 42 days for import of power.

(d) If the power supplied by the Biomass plant is more than the power imported on any day, such import of power shall be excluded for counting the limit for import of power.

(e) Billing shall be on net electricity supplied and regulation 90 of Tariff Regulations, 2009 will be applied as stated above.

(f) Category of service for billing at temporary supply tariff under regulation 90 of Tariff Regulations, 2009 shall be large industrial service.

(g) Temporary supply tariff will also be subject to voltage rebate.

(x) that in the aforesaid petition, the Appellants also requested the State Commission to consider suo-motu review to regulation 90 of Tariff Regulations, 2009 and amend the provisions therein by deleting the limit of 42 days to remove the difficulties being faced by Biomass power plants who have to import power for reasons beyond their control and face serious financial loss due to disparity between them and conventional power plants as well as other renewable energy power plants.

(xi) that the Respondents, by filing their reply, on 22.2.2013, took the stand before the State Commission that Regulation 90 of the Tariff Regulations, 2009, was applicable to the Appellants since, this would ensure that the Appellants supply adequate energy to the Respondents/Discoms. The Respondent No.5, by taking the same stand, filed a separate reply before the State Commission.

(xii) that the State Commission notified the RERC (Tariff Regulations), 2004 providing the norms and parameters for determination of tariff of various utilities. The State Commission, in the year 2007, amended the Tariff Regulations, 2004 and provided as under:-

> ***"113 Other Charges***
>
> *(a) Start-up power:*
>
> *Energy drawn during start up and backing down up to a maximum of 42 days in a financial year will be set off against the energy sale to the distribution licensee. Where sale to distribution licensee is not affected, such drawal will be billed on daily basis up to a maximum of 42 days at temporary supply tariff as applicable for large industrial power having contract demand as applied or actually recorded during previous 90 days, whichever is higher.*
>
> *An existing Renewable Energy (RE) power station will have the option to continue or opt out of existing arrangement/agreement, for the period of such arrangement/agreement. Such option will be exercised within 30 days of its demand by the distribution licensee.*
>
> *....."*

(xiii) that, simultaneously, the State Commission in the year 2007 also amended the RERC (Open Access) Regulations, 2004 and provided as under-

> ***"12. Open Access Agreement***
>
> *[(1) An open access consumer will enter into a commercial agreement with the open access supplier. The agreement shall provide, among other things, the eventuality of premature termination of agreement and its consequences on the contracting parties.*
>
> *(2) An open access consumer will enter into a commercial agreement with the Rajasthan Vidyut Prasaran Nigam (RVPN) for use of the transmission system.*
>
> *(3) (a) An open access consumer shall enter into a commercial agreement with the distribution licensee for use of the distribution system. This agreement may provide for: -*
>
> *(i) High Tension (HT) power supply from distribution licensee;*
>
> ***(ii) Stand by supply to meet the outage contingency of generating unit supplying electricity will be admissible only for annual maintenance outage, other planned outage and forced outage for a period not exceeding 42 days per annum in the aggregate.***

(b) The contract demand for HT supply agreement and standby supply agreement will be in KW and also in KVA. Further an existing open access consumer may opt for HT power supply at the pre-open access contract demand or a reduced contract demand from any date during the first year of open access. However, subsequent option for reduced contract demand will be exercised only after one year.

....."

(xiv) that thereafter, the State Commission issued the draft of the Tariff Regulations, 2009 where the Regulation 113 of the Tariff Regulations, 2004 figured as draft. In the final Tariff Regulations, 2009, Regulation 90 provides as under:

"90. Other Charges

(1) ***Start-up power:***

Energy drawn during start up and backing down up to a maximum of 42 days in a financial year be set off against the energy sale to the distribution licensee within state thereafter energy drawn be billed at temporary tariff on daily basis. Where sale to distribution licensee is not affected, such drawal be billed on daily basis.

....."

(xv) that the learned State Commission, after going through the rival submissions, and perusal of the material, rejected all the submissions of the Appellants-Petitioners and passed the impugned order, dated 5.8.2013. While disposing-off the petition, it directed that the billing needs to be done accordingly and the bills of the past period should be modified by the Discoms in accordance with this order.

4. We have heard Mr. Anand K. Ganesan, Ms. Swapna Seshadri and Mr. Arvind Kumar Gupta, learned counsel for the Appellants-Petitioners and Mr. Bipin Gupta, learned counsel for the Respondents. We have deeply gone through the evidence and other material available on record including the impugned order.

5. The following issues arise for our consideration:

A. whether the Regulation 90 of the Tariff Regulations, 2009 notified by the State Commission can at all be applied to the

biomass generating plants of the Appellants which are supplying power to the distribution company and not through open access?

B. whether Regulation 90 of the Tariff Regulations, 2009 which deals with start-up and backup power, can at all be applied to the biomass generating units when the power is used for other activities such as chipping of fuel etc ?

C. whether the State Commission can merely justify the application of Regulation 90 on the Appellants/Biomass Sector by explaining away the non-application thereof to thermal stations and not even dealing with the applicability of the same to the wind and solar sector?

D. whether the State Commission can ignore the manner in which the Power Purchase Agreement was interpreted and acted upon by both sides since the commissioning of the plant till September 2012 and give a new interpretation?

E. whether the term '42 days' has to be given a contextual interpretation namely, by cumulating the time periods for which the start up power is actually drawn by the biomass plants including each time block for which such supply is drawn or a pedantic interpretation to benefit the Respondents?

F. whether even if power is drawn by the generating company during one time block of 15 minutes in a day, one day out of the *'42 days period'* can be said to be exhausted?

G. whether the State Commission has committed illegality in allowing the retrospective levy of charges by the Respondents ?

H. whether the Appellants are to be billed at temporary tariff for large-industrial consumers for the so called excess drawl from the grid ?

6. Issue-wise considerations are as follows:

7. **ISSUE NOS. A, B, C & H**

7.1 Since, the issue nos. A, B & C are inter-connected, therefore, we are taking them up together. On these issues, the learned counsel for the Appellants-Petitioners have made the following submissions:

(i) that the State Commission failed to appreciate that Regulation 90 of the Tariff Regulations, 2009, was incorporated without any discussion on the same or notifying any statement of objects and reasons and is not intended to apply to the present case.

(ii) that the State Commission failed to appreciate that Regulation 90 only refers to start up and back-up power and is only for such consumption. Since the generating plant of the Appellants is connected to the system of the Discoms, there may be several other works connected and power consumption on account of same, e.g. - chipping of fuel, charging of switching station etc. Regulation 90 cannot in any event apply to the consumption of this nature.

(iii) that the State Commission failed to appreciate that the Regulation 90 of the Tariff Regulations, 2009 has been taken from Regulation 113 of the Tariff Regulations, 2004, which was introduced in the year 2007 by an amendment contemporaneously with the amendments to the Open Access Regulations, 2004 by providing Regulation 12 relating to Open Access Agreement.

(iv) that the State Commission failed to appreciate that the intention of Regulation 113 of the Tariff Regulations, 2004 and also Regulation 90 of the Tariff Regulations, 2009 was also to apply to open access consumers to enter into a commercial agreement with the distribution licensee and not to the Appellants.

(v) that the State Commission failed to record that the Respondents in their reply, for the first time, have also spelled out the methodology adopted by them as under-

> *"So far as the regulation provides that if a renewable generator has imported any energy beyond 42 days then all the imported energy was required to be paid by the generators on temporary tariff on daily basis. The procedure of billing was cumbersome and it was not possible to find out that when 42 days have been used by the generator and therefore, the bills have been raised on being audited by the concerned sub division and the concerned Superintending Engineer (M&P), the bills against the imported energy beyond 42 days as per Regulation 90 and PPA clause 7.1 have been issued."*

The Respondents have not implemented Regulation 90 (1) on any other generating plant, either thermal generating stations or other non-conventional energy plants, namely wind and solar energy plants.

(vi) that the State Commission erred in explaining the reason as to why Regulation 90 is not being applied to thermal generating plants by stating that since there are multiple units and if one units shuts down, the power can be drawn from the other unit. The Regulation 90 cannot be selectively applied to one class of generators and at the most it can only be for start-up and back-up and not for drawal of power for any other purpose.

(vii) that the State Commission erred in holding that there is a conflict between Article 5.2 of the Power Purchase Agreement, which provides for billing of the net energy and Regulation 90 of the Tariff Regulations, 2009. In fact, Regulation 90 does not apply to the Appellants' generating companies. The Power Purchase Agreement provides for netting off of the electricity supplied by the Respondents to the Appellants and vice versa. In fact, Regulation 90 providing for start-up or back-up supply cannot be used to deny the benefit of netting of the electricity as contemplated in the Power Purchase Agreement.

(viii) that the State Commission failed to appreciate that the parties had interpreted and applied the Power Purchase Agreement in a particular manner till September 2012 and are bound by the

same. The State Commission cannot retrospectively change the Power Purchase Agreement between the parties.

(ix) that the State Commission erred in recording that but for Regulation 90, the drawl of power by the Appellants would become an unauthorized use of electricity. The Appellants were bonafide proceeding on the basis that netting off of energy/electricity is allowed and therefore, did not apply for obtaining HT connection. If the Appellants had known that the Respondents would retrospectively raise such claims and the same would be authorized by the State Commission, the simplest thing for the Appellants would have been to take an alternative HT connection without opting or asking for any netting off.

(x) that the State Commission failed to appreciate that Regulation 90 cannot be applied selectively and in fact is impossible of being applied to all generators. The State Commission has wrongly sought to explain the thermal generating stations who have multiple units as being authorized to draw electricity from each other in the case of start-up or back-up. The Regulation 90 ought to be applied to all the generators as it is the statutory Regulations.

(xi) that the State Commission further failed to appreciate that if Regulation 90 is applied to the other non-conventional energy developers, namely wind and solar plants, the consequences would be disastrous. For instances, wind power plants would draw from the grid on each on the 365 days in the year. According to the Impugned Order of the State Commission, after 42 days, the Respondents No. 2 - 4 will start charging for the drawal at the rate of 1.5 times the large supply rates and make payment for the gross generation at the tariff determined by the State Commission. At the end of the month, the wind power developers would have to pay the Respondents 2 - 4 for supplying power to the grid. Further, for Solar Developers, it would be an ideal

situation. The tariff being received by Solar Plants is Rs. 11 per unit (approximately) and 1.5 times the large supply tariff is Rs. 8.50 per unit (approximately). Since the Impugned Order states that netting off will not be allowed, after a period of 42 days, the Solar Developers will draw from the grid and pay for such drawal at Rs. 8.50 and charge for the gross generation supplied to the grid at Rs. 11 per unit. This is highly illogical and arbitrary.

7.2 ***Per-contra***, the learned counsels for the Respondents have taken the following pleas:-

(a) that billings were raised by the Appellant/petitioner company on monthly basis in regard to their energy sold after deducting the energy received by them. So far as the regulation provides that if a renewable generator has imported any energy beyond 42 days, then all the imported energy was required to be paid by the Generator on temporary tariff on daily basis. The procedure of billing was cumbersome and it was not possible to find out that when 42 days have been used by the generator and therefore, the bills have been raised on being audited by the concerned sub-division and the concerned Superintending Engineering (M&P), the bills against the imported energy beyond 42 days as per Regulation 90 and Power Purchase Agreement clause 7.1 have rightly and legally been issued.

(b) that clause 5 of Power Purchase Agreement speaks only of payment and payment to the generator. The generator issues monthly bill and, therefore, initially the net bills are being raised, but ultimately as per clause 7 of the Power Purchase Agreement and regulation 90 of the Regulations, 2009, beyond 42 days cannot be presumed at any point of time and this could only happen after financial year and under audit, it can transpire that on what day 42 days have expired and, thereafter, any import has to be charged on temporary tariff and therefore, the charges which have been sought to be levied against the

Appellant/petitioner, are in consonance with the Power Purchase Agreement and Regulations.

(c) that the correct fact is that billings were raised by the Appellant/petitioner companies on monthly basis in regard to their energy sold after deducting the energy received by them. So far as the Regulation 90 provides that, if a renewable generator has imported any energy beyond 42 days, then all the imported energy was required to be paid by the Generator on temporary tariff on daily basis. The procedure of billing was cumbersome and it was not possible to find out that when 42 days have been used by the generator and, therefore, the bills have been raised on being audited by the concerned sub-division and the concerned Superintending Engineering (M&P), the bills against the imported energy beyond 42 days as per Regulation 90 and Power Purchase Agreement clause 7.1 have been issued.

(d) that it is further submitted that the Commission had directed to recast the dues in terms of impugned order and the same has been done and recast dues have been informed to the Appellant/petitioner, which they are depositing in installments as per their request.

(e) that the Commission has in detail examined the issue and had passed certain direction for revising the bills which has been done and also accepted by the Appellants/petitioners and in respect to which already documents have been submitted with reply.

(f) that the Appellants/petitioners themselves had admitted in petition that Regulation 90 is applicable on them and had, therefore, only sought review of the Regulation. Since, Regulation 90 has not been challenged by the Appellants in appropriate forum, therefore, till Regulation exists, there can be no grounds, which can be raised challenging the regulation in Appeal.

(g) that the Commission has already excluded the period in computation of 42 days when the outages are not due to failure of

the Generator but due to other reasons as mentioned in para 14(8) of the Order.

(h) that in the petition itself, the Appellants have claimed the tariff of industrial consumers as would be evident from para 16 & 17 of the petition.

8. We have perused the clause 5.2 of the Power Purchase Agreement and also Regulation 90(1) of Tariff Regulations, 2009, and we observe that generally the billing is required to be done as per the provisions of Power Purchase Agreement. However, it is well settled that in case there is conflict between the provision of the Power Purchase Agreement and the Regulations, the provisions of regulation would prevail. Accordingly, the billing under Clause 7.1 of the Power Purchase Agreement read with Regulation 90(1) of the Tariff Regulations, 2009 would prevail and, therefore, we are unable to accept the Appellants' contention that the impugned orders are violative of clause 5.2 of the Power Purchase Agreement.

8.1 Now, we are to decide the point of treatment of power imported for activities other than start up and backing down. The Appellants' contention that the energy drawn during shutdown for running auxiliary and other consumption is distinct from energy drawn during start up and backing down and, therefore, such energy drawal, beyond 42 days, has wrongly been billed by the Discoms, at temporary tariff, by applying the Regulation 90(1) dealing with startup power of Tariff Regulations, 2009, is also not a valid and meritful contention and the same is not acceptable to us.

8.2 We agree and approve the finding recorded by the State Commission in the impugned order to the effect that the power drawn by the generator in situations like tripping of the plant in the event of plant shutdown(s) for the maintenance of the interconnection system and associated transmission lines, as may be mutually agreed, failure of grid supply including failure of Discoms resulting in outage /shutdown of the generating unit is to be excluded in computation of 42 days.

8.3 The Appellants in their petition, had clearly admitted that Regulation 90 of Tariff Regulations, 2009 is applicable to them and requested the State Commission to review or amend this regulation, so as to suit the requirement of the Appellants' Biomass Based Power Plant. Before this Appellate Tribunal, the Appellants have argued that they were proceeding assuming that netting off of energy/electricity is allowed to them and, therefore, they did not apply for any HT connection and if they had known that the Discoms would retrospectively raise such claims and the same would be approved by the State Commission, the Appellants would have taken a alternative HT connection without opting or asking for any netting off. In this view of the matter, we are of the opinion that so long as Regulation 90 of Tariff Regulations, 2009, is in existence, the same would be applicable unless modified or amended by the State Commission.

8.4 The bills were raised by the Appellants on monthly basis in regard to the energy sold by them after deducting the energy received by them. As per Regulation 90 of Tariff Regulations, 2009, if a renewable energy generator has imported any energy beyond 42 days, then all the imported energy was required to be paid by the Generator on temporary tariff on daily basis. We are of the view that bills against the imported energy beyond 42 days, as per Regulation 90 of Tariff Regulations, 2009 and Power Purchase Agreement (Clause 7.1) entered into between the Appellants and the Discoms, have rightly and legally been issued. The Appellant generators issued monthly bill and, therefore, initially the net bills are being raised as per Clause 7 of the Power Purchase Agreement and Regulation 90 of Regulations, 2009. We are, thus, of the view that the charges, which have been sought to be levied against the Appellants, are in consonance with the Power Purchase Agreement and Tariff Regulations, 2009.

8.5 We do not find any merits in any of the submissions made on behalf of the Appellants and we agree to the Respondents' submissions and also agree to the findings/conclusions recorded by the State Commission in the

impugned order on these issues. **We approve the same findings. All these issues, namely; Issue Nos. A, B, C & H, are decided against the Appellants.**

9. **ISSUE NO. D**

9.1 The main contention of the Appellants is that the parties had interpreted and applied the Power Purchase Agreement, in a particular manner till September, 2012 and still bound by the same.

9.2 We are unable to accept the interpretation of Regulation 90(1) of Tariff Regulations, 2009, made by the Appellants for the purpose of including shutdown as well. Shutdown and outage are also in the purview of the Regulation 90(1). Regulation 90 of the Tariff Regulations, 2009, provides only for drawl of power up to 42 days but it does not envisage the minimum number of hours or time blocks during a day, wherein no power is to be drawn for computation of the day. We, therefore, do not find any merit in the Appellants' contention on this score.

9.3 Further, we are unable to accept the Appellants' contention that banking is implied and reflected in Power Purchase Agreement in the payment clause 5.2, which provides for billing of net energy cannot be accepted. The provision of clause 5 of Power Purchase Agreement is to regulate billing and payment on monthly basis, which is to be adjusted as per provision of Clause 7.1 of Power Purchase Agreement read with regulation 90(1) of Tariff Regulations, 2009. We are quite alive to the fact that most of the biomass plants, like that of the Appellants, are stand alone plants and, require power from Discoms when such plants are not in operation. The licensee has to act in accordance with the provisions of the regulation, which is in the nature of subordinate legislation and, therefore, Regulation 90(1) of Tariff Regulations, 2009, cannot be ignored on the ground that similar regulation does not exist for conventional power projects.

9.4 After considering different aspects on this issue, we agree to the interpretation made by the State Commission in the impugned order. The interpretation has legally and correctly been made. **This issue i.e. Issue No. D, is also decided against the Appellants.**

10. **ISSUE NOS. E, F & G**

10.1 Since, the issue nos. E, F & G are inter-connected, therefore, we are taking them up together.

10.2 The State Commission has noted that the Discoms have incorrectly applied the temporary tariff as applicable to HT and DS category. The correct application of tariff would be temporary tariff as applicable to large industrial consumers and needs to be modified accordingly. Thus, the State Commission has, by the impugned order, directed the Distribution Company – Respondent No. 2 to 4 for correct application of tariff as per temporary tariff, as applicable to large industrial consumers and has directed the Discoms to modify the bills accordingly.

10.3 We are also unable to accept the Appellants' contention that the fixed charges under temporary tariff should not be levied because the Appellants have spent towards the complete cost of laying evacuation line and technical infrastructure. The fixed and variable charges is a composite tariff and, therefore, has to be applied compositely as per the Regulations.

10.4 On these issues, the Appellants' contentions are as under:

(a) that the term 42 days has to be given a contextual interpretation. It cannot be that on a particular day, the generating plant draws start up power in, one 15 minutes time block or 4x15 minute time block, and then one day gets exhausted. Therefore, the 42 days needs to be interpreted, if at all, by cumulating the time period for which the startup power is actually drawn by the Appellants' plants including each time block for which such supply is drawn.

(b) that Discoms' contention that the purpose of prescribing 42 days period in Regulation 90 is to make sure that plants necessarily run for 323 days in a year enabling Discoms to fulfill its RPO is completely fallacious. This purpose was never clarified by the Discoms during the proceedings at the time of 2007 Amendment to the Tariff Regulations, 2004 and also the proceedings related to the notification of Tariff Regulation, 2009.

(c) that tariff for the Biomass based plants has been determined by the State Commission prescribing PLF as 80% and 12% as auxiliary consumption. Therefore, in order to recover the tariff with 80% PLF, the plant can remain out of service for 73 days. However, if the plant does not generate up to 80% PLF, then generator loses its recovery of fixed charge proportionately.

(d) that there is no consistency in the data submitted by the Discoms and this clarifies that the interpretation of the 42 days sought to be given by the Discom is an afterthought and impossible to compute.

10.5 ***Per-contra,*** the learned counsel for the Respondents have tried to defend the impugned order of the State Commission saying that the learned State Commission has rightly observed that Regulation 90 of the Tariff Regulations, 2009 provides only for drawl of power up to 42 days but it does not envisage the minimum number of hours or time blocks during a day, wherein no power is to be drawn for computation of the day.

10.6 After considering the counter submissions on these issues and findings recorded by the State Commission in the impugned order, we find ourselves in conformity with the findings recorded by the State Commission in the order, and we approve the same. We observe that the provision in Tariff Regulations, 2009, regarding billing for temporary supply tariff is general and do not specify the category to charge tariff, the State Commission has, by the impugned order, rightly directed the distribution licensees for correct application of tariff as per temporary tariff, as applicable to large industrial

consumers to the Appellants projects and has rightly directed the Appellant to modify the same accordingly.

10.7 The learned State Commission, has rightly interpreted the period of 42 days, finding place in Regulation 90 of the Tariff Regulations, 2009 and the regulation does not specify any period of time block for billing purpose. Regulation 90 of the RERC (Terms and Conditions of Tariff) Regulations, 2009, provides for drawal of power up to 42 days and it does not envisage the minimum number of hours or time block during a day, wherein power is drawn for computation of the day. According to provision of Regulation 90(1) of Tariff Regulations, 2009, energy drawn during start up and backing down up to a maximum of 42 days in a financial year will be set off against the energy sale to the distribution licensee and, thereafter, energy drawn is to be billed as temporary tariff on daily basis. Where sale to distribution licensee is not affected, such drawal will be billed on daily basis. Thus, the energy drawn during startup and backing down up to maximum 42 days in a financial year is to be set-off, first against the energy sale to the distribution licensee and, thereafter, energy drawn is to be billed as temporary tariff on daily basis.

10.8 Thus, the interpretation of the period of 42 days occurring in Regulation 90(1) of Tariff Regulations, 2009, is to be interpreted as per the provisions provided under this regulation and not otherwise. Therefore, the Appellants' contention that 42 days has to be given a contextual interpretation by cumulating the time periods for which the start up power is actually drawn by the biomass plants including each time block for which such supply is drawn is without any substance and against the spirit of Regulation 90(1) of Tariff Regulations, 2009. This contention of the Appellants is accordingly spurned.

10.9 The relating contention of the Appellants that power is drawn by the generating company during one time block of 15 minutes in a day, one day out of the 42 days period cannot be said to be exhausted, is also against the provisions of the said Regulation 90(1) of the Tariff Regulations, 2009, and is not acceptable. The Regulation does not specify maximum hours for which

power drawn for start-up etc. can be set off against the energy sale to the distribution licensee but specifies maximum days in a Financial Year. Thus, the contention of the Appellants that drawal of power for short duration in a day would not be counted in 42 days limit is not valid.

10.10 The State Commission has not allowed the charges by the Respondents retrospectively but, as per the provisions of Regulation 90(1) of the Tariff Regulations, 2009. We agree to the findings recorded by the State Commission in the impugned order so far as these issues nos. E, F & G are concerned and we approve the same findings. **All these issues, namely; Issue Nos. E, F & G are also accordingly decided against the Appellants**.

11. In the light of the above, the Appeal is without merits and is liable to be dismissed as all the submissions of the Appellants are without any force.

12. **SUMMARY OF OUR FINDINGS:**

12.1 The Regulation 90 of Tariff Regulations, 2009 are fully applicable to the Biomass Generating Plants like that of the Appellants, who are supplying power to the distribution licensees.

12.2 The power drawn by the Biomass based power generating company in situation like tripping of the plant in the event of plant shutdown(s) for the maintenance of the interconnection system and associated transmission lines, as may be mutually agreed, failure of grid supply including failure of Discoms resulting in outage/shutdown of the generating unit is to be excluded in computation of 42 days occurring in Regulation 90(1) of the Tariff Regulations, 2009.

12.3 Regulation 90 of the Tariff Regulations, 2009, shall be applicable till its existence and till the same is not amended or modified by the State Commission by adopting the legally provided procedure. Since, the same is in existence; the Biomass based generating companies like that of the Appellants are bound by the same and the State Commission is fully justified in applying the same till its existence in the relevant State Tariff Regulations.

12.4 As per Regulation 90 of Tariff Regulations, 2009, if a renewable energy generator has imported any energy beyond 42 days, then all the imported energy was required to be paid by the generators on temporary tariff on daily basis. The bills against the imported energy beyond 42 days as per Regulation 90 and PPA clause 7.1, entered into between the Appellants and the distribution licensees, issued monthly and raised accordingly are proper and legal. Thus, in this view of the matter, charges, sought to be levied against the Appellants, are in consonance with PPA and Tariff Regulations, 2009. In case of any controversy or dispute between the Tariff Regulations and the PPA, the Tariff Regulations of the concerned State Commission or Central Commission, shall prevail over the PPA and the Tariff Regulations shall apply.

12.5 Regulation 90(1) of the Tariff Regulations, 2009 provides for drawal of power or energy during start up and backing down up to a maximum of 42 days in a financial year, is to be set off against the energy sold by the power generator to the distribution licensee within the State and, thereafter, energy drawn is to be billed as temporary tariff on daily basis. Where sale to distribution licensee is not affected, such drawal will be billed on daily basis. Thus, the energy drawn during startup and backing down up to maximum 42 days in a financial year is to be set-off first against the energy sale to the distribution licensee and, thereafter, energy drawn is to be billed as temporary tariff on daily basis. The Regulation 90(1) of Tariff Regulations, 2009 does not envisage the minimum number of hours or time blocks during a day, wherein power drawn is not to be counted for computation of the day.

12.6 The State Commission has rightly recorded a finding that the distribution licensees have incorrectly applied the temporary tariff as applicable to High Tension (HT) and Domestic Service Tariff (DST) category and the correct application of tariff would be temporary tariff as applicable to large industrial consumers. Thus, the State Commission has rightly and legally directed the distribution licensees – Respondent No.2 to 4, for correct application of tariff as per temporary tariff, as applicable to large industrial consumers for biomass based power generating companies like that of the

Appellants and has rightly directed the distribution licensees to modify the bills of the Appellants accordingly.

12.7 Non-applicability of Regulation 90 on conventional and solar & wind has to be taken up by the Appellants at appropriate forum as they cannot challenge the Regulations in the Tribunal being subordinate Legislation.

13. In view of the above discussion, the instant Appeal is, being without merits, dismissed and the impugned order dated 5.8.2013 passed by the Rajasthan Electricity Regulatory Commission is hereby affirmed. No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 9TH DAY OF JULY, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√ **REPORTABLE/~~NON-REPORTABLE~~**

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