

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 239 AND 246 OF 2013

Dated: 24th July, 2014

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

IN THE MATTER OF

APPEAL NO. 239 OF 2013

1. **Biomass Energy Developers Association,**
E-506, Keerti Apartments, Behind Sarathi Studios,
Ameerpet, Hyderabad 500073, represented by its President,
Sri M. Ravikanth, son of Ramachandra Rao, aged about 50
years, resident at Hyderabad.
2. **Gowthami Bio Energies Pvt Ltd,**
E-506, Keerti Apts., Behind Sarathi Studios Ameerpet,
Hyderabad 500073, represented by its Managing Director,
Sri M. Ravikanth, son of Ramachandra Rao, aged about 50
years, resident at Hyderabad.
3. **Balaji Agro Oils Ltd.,**
74-2-19, Old Checkpost Centre, Krishna Nagar, Vijayawada
520007, represented by its Managing Director, Sri V. Suraj
Kumar, son of Sri V. Venkataramaiah, aged about 45 years,
resident at Vijayawada.
4. **Bollineni Castings & Steel Ltd.,**
6-2-913/914, Progressive Towers, 1st Floor, Khairatabad,
Hyderabad 500004, represented by its Managing Director,
Sri B. Sandeep, son of Sri B. Seenaiiah, aged about 34
years, resident at Hyderabad.
5. **The Gowthami Solvent Oils Pvt Ltd**
Post Box No.7, Pydiparru, Tanuku- 534211 West Godavari
District, represented by its Joint Managing Director, Sri B.
Sriman Narayana, son of Sri B. Papaiah, aged about 55
years, resident at Tanuku.
6. **Indur Green Power Pvt Ltd,**
NSL Icon, Plot No.1 to 4, 4th Floor, 8-2-684/2/A, Road No-
12 Banjara Hills, Hyderabad-500034, represented by its
Managing Director, Sri K.Ramakoteswara Rao, son of Sri
K.Perraiah, aged about 57 years, resident at Hyderabad.

7. **Jocil Ltd,**
Box No.216, Arundalpet, Guntur - 522002, represented by
Managing Director, Sri J.Muralimohan, son of late Sri
Chandramouli, aged about 64 years, resident at Guntur.
8. **Jyothi Bio Energy Ltd,**
4th.Floor, Mayank Towers, Raj Bhavan Road, Hyderabad -
500082, represented by its Executive Director, Sri N.Padma
Rao, son of Sri N. Koteswara Rao, aged about 55 years,
resident at Hyderabad.
9. **Greenko Energies Pvt. Ltd.,**
Plot No.1071, Road No.44, Jubilee Hills, Hyderabad-
500034, represented by its Director, Sri Ch. Anil Kumar, son
of Sri C. Surendranath, aged about 39 years, resident at
Hyderabad.
10. **Sri Kalyani Agro Industries,**
Prathipadu- 534146, Penatapadu Mandal Tadepalligudem,
W.G.Dist. , represented by its Managing Director, Sri V.
Narayana Rao, son of Sri Subba Rao, aged about 50 years,
resident at Tadepalligudem.
11. **Matrix Power Pvt Ltd,**
8-2-277/12, Road No.3, Banjara Hills, Hyderabad-500034,
represented by its Managing Director, Sri K. Abhiram
Reddy, son of Sri K. V. Krishna Reddy, aged about 39
years, resident at Hyderabad.
12. **Perpetual Energy Systems Ltd,**
NSL Icon, Plot No.1 to 4, 4th Floor, 8-2-684/2/A, Road No-
12 Banjara Hills, Hyderabad-500034, represented by
Managing Director, Smt. K. Asha Priya, wife of Sri M.
Prabhakar Rao, aged about 51 years, resident at
Hyderabad.
13. **Ritwik Power Projects Ltd,**
Flat No.201,Plot No.20, Sri Chaitanya Residency, Sagar
Society, Road No.2, Banjara Hills, Hyderabad-500034,
represented by its Director, Sri D. Raghava Rao, son of Sri
D. Ch. Subba Rao, aged about 53 years, resident at
Hyderabad.
14. **Satyamaharishi Power Corpn Ltd,,**
Flat No.202,Plot No.20, Sri Chaitanya Residency, Sagar
Society, Road No.2, Banjara Hills, Hyderabad-500034,
represented by its Director, Sri D. Raghava Rao, son of Sri
D. Ch. Subba Rao, aged about 53 years, resident at
Hyderabad.
15. **Shalivahana Green Energy Ltd,**
7th Floor, Minerva Complex, S.D.Road, Secunderabad-
500003, represented by its Managing Director, Sri M.
Komaraiah, son of Sri Venkataiah, aged about 54 years,
resident at Secunderabad.

16. **Satyakala Power Projects Pvt Ltd,**
Ganguru- 521139, Penamaluru Mandal, Krishna Dist. ,
represented by its Managing Director, Sri Bhavani Prasad ,
son of Sri Veeraraghavaiah, aged about 53 years, resident
at Vijayawada.
17. **Saro Power & Infrastructure Ltd,**
19-2-217/2, Mir Alam Tank Road, Hyderabad - 500064,
represented by its Managing Director, Sri Mirza Hasan
Ahmed, son of late Mirza Ansar Ahmed, aged aout 48
years, resident at Hyderabad.
Appellants
18. **Suryateja Power Projects Pvt Ltd,**
Giri Sikara Apartments, Flat No. A3, 6-3-600/2/B,
Padmavathi Nagar, Khairatabad, Hyderabad- 500004,
represented by its Managing Director, Sri B. Jayarami
Reddy , son of Sri Papi Reddy, aged about 66 years,
resident at Hyderabad.
19. **Veeraiah N C Power Projects Ltd,**
Kurumaddali- 51157, Pamarru Mandal, Krishna Dist. ,
represented by its Joint Managing Director, Sri P. Poorna
Veeraiah, son of Sri P. Bhupatirayudu, aged about 42 years,
resident at Gudivada.
20. **Velagapudi Power Generation Ltd,**
74-2-12A, Ashok Nagar, Vijayawada - 520007, represented
by its Managing Director, Sri V. Sambasiva Rao, son of Sri
Venkateswara Rao, aged about 61 years, resident at
Vijayawada.
21. **Varam Power Projects Ltd,**
8-4-120/3, Raja Complex, G.T.Road, Srikakulam - 532001,
represented by its Managing Director, Sri A.V. Narasimham,
son of Sri Satyanarayana, aged about 65 years, resident at
Srikakulam.
22. **Vijaya Agro Products Pvt Ltd,**
Enikepadu - 521108, Vijayawada, represented by its
Chairman, Sri M. Rajaiah, son of Sri Akkappa Naidu, aged
about 70 years, resident at Vijayawada.

..... **Appellants****VERSUS**

1. **Andhra Pradesh Electricity Regulatory Commission,**
#11-4-660, 4th Floor, Singareni Bhavan, Red Hills,
Hyderabad 500004.
2. **Central Power Distribution Company of Andhra Pradesh
Ltd.,**
Corporate Office, 6-1-50, Mint Compound, Hyderabad
500063, represented by its Managing Director.
3. **Southern Power Distribution Company of Andhra
Pradesh Ltd.,**
19-13-65/A, Srinivasapuram, Tiruchanoor Road, Tirupati
517503, represented by its Managing Director

4. **Northern Power Distribution Company of Andhra Pradesh Ltd.,**
Corporate Office, 2-5-31/2, Vidyut Bhavan, Nakkalgutta,
Hanamkonda, Warangal 506001, represented by its
Managing Director
5. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,**
P&T Colony, Seethammadhara, Visakhapatnam 530013,
represented by its Managing Director. **Respondents**
- Counsel for the Appellant(s) ... Mr. K. Gopal Choudhary
- Counsel for the Respondent(s) ... Mr. K.V. Mohan and
Mr. K.V. Balakrishnan for R-1
Mr. A. Subba Rao for R-2 to R-5

APPEAL NO. 246 OF 2013

1. **Agri Gold Projects Limited,**
40-6-3, Plot No. 6,
Nimmagadda Soma Sankara Rao Street,
Old Revenue Colony, Labbipet, MG Road,
Vijaywada – 520010, Andhra Pradesh
2. **Clarion Power Corporation Limited,**
40-6-3, Plot No. 6,
Nimmagadda Soma Sankara Rao Street,
Old Revenue Colony, Labbipet, MG Road,
Vijaywada – 520010, Andhra Pradesh
3. **Rithwik Energy Systems Limited,**
40-6-3, Plot No. 6,
Nimmagadda Soma Sankara Rao Street,
Old Revenue Colony, Labbipet, MG Road,
Vijaywada – 520010, Andhra Pradesh
4. **Sai Renewable Power Private Limited,**
381/1, Kamavarapukota,
West Godavari District – 534449, Andhra Pradesh
5. **M/s SLS Power Limited,**
No. 30, 14th Cross, 2nd Phase,
Mahalakshmiapuram, Behind Nandhini Theatre,
Bangalore-560086 **Appellants**

VERSUS

1. **Andhra Pradesh Electricity Regulatory Commission,**
4th & 5th Floor, Singareni Bhavan, Red Hills,
Hyderabad 500004.
2. **Transmission Corporation of Andhra Pradesh,**
Vidyut Soudha, Khairatabad,
Hyderabad-500049

3. **Southern Power Distribution Company of Andhra Pradesh Ltd.**, Represented by its Managing Director, Upstairs, Hero Honda Showroom, Renigunta Road, Tirupati-517501

4. **Eastern Power Distribution Company of Andhra Pradesh Ltd.**, Represented by its Managing Director, Sai Shakti, Opp: Saraswati Park, Daba Gardens, Visakhapatnam-530013

..... **Respondents**

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

Counsel for the Respondent(s) ... Mr. K.V. Mohan and
Mr. K.V. Balakrishnan for R-1

Mr. A. Subba Rao
Mr. K.L.D.S. Vinober for R-2 to R-5

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

The Appellants, in both the Appeals, are the Association of biomass energy developers in the State of Andhra Pradesh, and its Members, who are biomass energy developers in Andhra Pradesh, have preferred these Appeals being Appeal Nos. 239/2013 and 246/2013, under Section 111 of the Electricity Act, 2003 against the order of the Andhra Pradesh Electricity Regulatory Commission (in short, the '**State Commission**'), dated 6.8.2013, passed suo-motu under the Electricity Act, 2003 in Original Petition being O.P. No. 5 of 2009 to give consequential effect to the State Commission's Order dated 31.03.2009 based on the Hon'ble Tribunal's common judgment, dated 20.12.2012, in Appeal No 166/2011 & batch and common order, dated 30.04.2013, in Review Petition being R.P. No. 4/2013 & batch.

2. Since, both the aforementioned Appeals, being Appeal Nos. 239/2013 and 246/2013, have emanated from the same impugned order, dated 6.8.2013, passed by the same Andhra Pradesh Electricity Regulatory

Commission, in the same suo-motu proceedings, we are deciding them together by this common judgment.

3. In Appeal No. 239/2013, the 1st Appellant is the Association of biomass energy developers in Andhra Pradesh, and the 2nd to 27th Appellants are Members of the 1st Appellant Association, who have established Biomass-based Power Plants at various locations in Andhra Pradesh and supplying the energy generated therefrom to the distribution licensees in Andhra Pradesh, the Respondent No.1 is the State Electricity Regulatory Commission and Respondents Nos. 2 to 5 are the distribution licensees in Andhra Pradesh, whereas in Appeal No. 246/2013, all the five Appellants are Biomass Energy Developers, Respondent No.1 being State Electricity Regulator, Respondent Nos. 3 & 4 are Distribution Licensees in the State of Andhra Pradesh and Respondent No.2 is the company coordinating the power purchase in the State of Andhra Pradesh.

4. The instant Appeals raise significant issues and questions of law with regard to the payment of interest on the differential amounts payable by the Respondents-Distribution Licensees to the Appellant Generating Companies, consequent to the revision of the variable cost component of tariff for the period 2009-10 to 2013-14.

5. The relevant facts giving rise to these two Appeals are as follows:

- (a) that the State Commission had passed an order, dated 20.6.2001, in O.P. No. 1075/2000 holding that the non-conventional energy generators in Andhra Pradesh shall sell the power generated by them only to the APTRANSCO which was the bulk supply and distribution and retail supply licensee at that time. The Commission determined the price to be paid as Rs 2.25 per unit with 1994-95 as the base year and with 5% increase year-on-year for the period immediately following its order up to 31.3.2004, and stating that it would thereafter

review the incentives to be given to nonconventional energy generators with effect from 1.4.2004.

- (b) that the Commission determined the tariff/purchase price with effect from 1.4.2004 by an order, dated 20.3.2004, in R.P. No. 84/2003 in O.P. 1075/2000 whereby the tariff/purchase price was drastically reduced payable for the electricity generated by non-conventional energy projects with effect from 1.4.2004. The Commission had determined the tariff comprising fixed cost component for the 1st 10 years of operation based on the nth year of operation of a biomass power plant and a variable cost component for each financial year common to all biomass power plants. Aggrieved by the said order, dated 20.3.2004, of the State Commission, appeals were eventually filed before this Appellate Tribunal and this Appellate Tribunal, vide judgment, dated 2.6.2006, in Appeal No 1/2005 & batch, allowed the appeal setting-aside the State Commission's order, dated 20.3.2004, stating that the price, immediately before the order of the State Commission, would continue to apply until the State Government determines some other price which is then to be approved by the State Commission. The APTRANSCO and the DISCOMs and the State Commission filed Civil Appeal 2926/06 before the Hon'ble Supreme Court.
- (c) that the State Government notified the Third Transfer Scheme with effect from 9.6.2005, whereby the bulk supply undertaking of APTRANSCO stood transferred and vested in the Discoms. Consequently, all Power Purchase Agreements (PPAs) continued to subsist with the distribution licensees and the biomass plants established subsequently entered into PPAs with the Discoms. The State Commission determined the Renewable Power Purchase Obligation (RPPO) in O.P. 9/2005, whereby the Discoms were obliged to purchase 5% of the total energy

consumption in their respective areas of supply from the renewable energy sources.

- (d) that during the pendency of the Civil Appeals before the Hon'ble Supreme Court, the State Commission, initiated suo motu proceedings in O.P. 5/2009, and eventually passed an order, dated 31.03.2009, determining, inter alia, the variable cost component of tariff for the period from 1.4.2009 to 31.3.2014 by revising the fuel cost but otherwise applying the same operational parameters as in the order, dated 20.03.2004, subject to the outcome of the pending appeals before the Hon'ble Supreme Court.
- (e) that the Hon'ble Supreme Court, vide judgment, dated 8.7.2010, in C.A. No. 2926/2006 and batch, set-aside the order, dated 2.6.2006, of this Appellate Tribunal and remanded the matter back to the State Commission for determination of the price/tariff afresh, with certain other directions.
- (f) that pursuant to the remand from the Hon'ble Supreme Court, the State Commission heard the parties afresh and passed order, dated 12.9.2011, which comprised of three separate orders of the Chairman and the two other Members, which were variously differing with each other and which did not yield any clear majority view.
- (g) that aggrieved by the said State Commission's order, dated 12.09.2011(R.P. No. 84/2003 in O.P. No. 1075/2000, upon remand from the Hon'ble Supreme Court by Final Judgment & Order dated 08.07.2010 in C.A. 2926/2006 & batch) the Appellants filed Appeal No 166/2011 and other appeals before this Appellate Tribunal.
- (h) that this Appellate Tribunal, partly allowed the appeal by judgment, dated 20.12.2012, in Appeal No 166/2011 & batch,

inter alia, determining the operational parameters to be applied for bio mass power plants for the determination of tariff. The Review Petition against the same filed by the Appellants was disposed of by an Order, dated 30.04.2013, in RP No 4/2013 & batch with clarifications, modifications, directions and liberties by this Appellate Tribunal.

- (i) that whilst the review petition was pending before this Appellate Tribunal, and without prejudice to the same, the 1st Appellant filed on 15.2.2013, an I.A. No 23 of 2013 in O.P. No 5 of 2009, praying that the State Commission may be pleased to (a) re-open the main O.P. No 5 of 2009 for re-hearing the same, and (b) allow the Petitioners to make further and additional submissions, and (c) thereafter, considering such further and additional submissions as may be made, determine the fixed cost for the first 10 years of operation for an appropriate control period from and beyond 1.4.2009 on the basis of the principles and methodology in the judgment dated 20.12.2012, of this Appellate Tribunal and revise the variable cost for an appropriate control period from and beyond 1.4.2009 by taking the fuel cost as determined in the order dated 31.3.2009 and applying the operational parameters for Auxiliary consumption, SHR and, GCV and other relevant factors as determined in the Tribunal's judgment, dated 20.12.2012, and determining afresh the fuel cost escalation on the principles and methodology decided in the said judgment dated 20.12.2012 and any further orders therein or thereupon. That I.A. was dismissed as infructuous by an order dated 07.08.2013 in view of the suo-motu order dated 06.08.2013 passed by the State Commission, which is impugned herein.
- (j) that the State Commission re-determined the tariff vide order dated 22.6.2013, and re-fixed the tariff for biomass based (including industrial waste), bagasse based co-generation and

mini-hydel plant as per the directions of this Appellate Tribunal. The State commission also gave clear directions for payment to the distribution companies including the interest on the arrears, the period for payment and the manner of monthly installment in which the payment was to be made.

- (k) that the learned State Commission, suo motu passed the impugned order, dated 06.08.2013, to give consequential effect to the State Commission's order, dated 31.03.2009, in O.P. No 5/2009 as stated above. Being aggrieved by the impugned suo-motu order, dated 6.8.2013, the Appellants, who are Biomass Energy Developers in the State of Andhra Pradesh, have filed the instant Appeals stating that the State Commission has failed and omitted to allow interest on the differential amount payable in consequences in the impugned order, dated 6.8.2013

6. The main relief sought by the Appellants in these two Appeals is to allow the Appeals, setting-aside the State Commission's impugned order, dated 6.8.2013, and also to allow the interest on the arrears of the differential amounts payable by the Respondent licensees consequent upon the impugned order from the original due date for the payment for the energy supplied from 01.04.2009 in each billing month up to the date of payment of the whole and/or any part of the said arrears at a rate of 13.31% per annum with monthly rests, or at such rate as may be applicable on the basis of the provisions in the CERC Regulations of 2009 and 2012 for each of the financial years within the period from 1.4.2009 to 31.3.2014 with monthly rests, and in any case not less than 12% with monthly rests.

7. We have heard Mr. K. Gopal Choudhary, Mr. Anand K. Ganesan and Ms. Swapna Seshadri, the learned counsel for the Appellants-Petitioners and Mr. K.V. Mohan, Mr. K.V. Balakrishnan and Mr. A. Subba Rao, the learned counsel for the Respondents. We have deeply gone through the

evidence and other material available on record including the impugned order.

8. The only issue arising for our consideration is whether the State Commission, in the impugned order, dated 6.8.2013, ought to have allowed interest on the arrears of the differential amounts payable by the Respondents-Distribution Licensees, consequent to the impugned order, dated 6.8.2013, giving consequential effect to the State Commission's order, dated 31.3.2009, in OP No. 5/2009, based on this Appellate Tribunal's judgments/orders, dated 20.12.2012 and 30.04.2013 in review.

9. The following contentions have been raised on behalf of the Appellants in these Appeals:

- (a) that the impugned order, ought to have allowed interest on the arrears of the differential amounts payable by the Respondent-Distribution Licensees, consequent to the re-determination of the variable costs for the period from 1.4.2009 at the appropriate rate of interest for the said period.
- (b) that this Appellate Tribunal, in its judgment, dated 20.12.2012, in Appeal No. 166/2011 and batch with regard to the interest to be allowed on the arrears and the payment thereof had observed as follows:

“35.5 The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time.

35.6 As the interest rate has been decided as 12% determination of tariff, the same rate may be applied for calculation of interest/carrying cost. The interest will be due from the date the payment is due and shall be compounded on quarterly basis.

35.7 *The State Commission shall also set a time period within which the payment of arrears and interest will be paid to the developers by the distribution licensees.*"

- (c) that the State Commission, while re-determining the variable cost to be paid for the period from 01.04.2009 in the impugned order, in consequence of this Appellate Tribunal's judgment, dated 20.12.2012, ought to have consequentially allowed interest on the arrears amount as carrying cost. The State Commission erred in not advertng to the same and not providing interest on the arrears. The interest is to be provided at a rate relevant to the period from 1.4.2009 to 31.3.2014 as per the prevailing interest rates of the banks during that period; and in any case not less than 12%.
- (d) that clause 17(3) of the CERC Regulations 2009, for the period 2009-10 to 2011-12, provides for the norm of interest on working capital as follows :
- "3. Interest on Working Capital shall be at interest rate equivalent to average State Bank of India short term PLR during the previous year plus 100 basis points."*
- (e) that clause 17(3) of the CERC Regulations, 2009, for the period 2012-13 to 2014-15, provides for the norm of interest on working capital as follows:
- "3. Interest on Working Capital shall be at interest rate equivalent to average State Bank of India Base Rate prevalent during the first six months of the previous year plus 350 basis points."*
- (f) that the Reserve Bank of India has directed that all banks shall apply monthly rests, and accordingly all banks apply interest at monthly rests and the interest rates are on the basis of such monthly rests. Accordingly, the interest rate to be allowed on the arrears of differential amounts payable by the Respondent licensees, consequent upon the impugned consequential order is to fixed considering the working capital interest rate provisions for each financial year as per the CERC Regulations, the SBI Prime Lending Rate and the Base Rate as applicable

and the RBI directives governing application of interest, compounded monthly.

- (g) that in line with the dispensation given by this Appellate Tribunal, the Appellants should receive the fixed costs as per the calculation made in the order, dated 22.6.2013 of the State commission and the variable costs in two periods, namely, upto 31.3.2009, as per the order, dated 22.6.2013, and from 1.4.2009, as per the order, dated 6.8.2013.
- (h) that there are no clear directions in the order, dated 6.8.2013 of the State Commission, for payment of arrears, payment of interest on the arrears, time period for payment and consequences of non-payment.
- (i) that this Appellate Tribunal had clearly directed the State Commission to decide on interest on arrears, time frame for payment and applicability of tariff to individual developers in the judgment, dated 20.12.2012. Pursuance to the judgment, dated 20.12.2012, and review order, dated 30.4.2013, of this Appellate Tribunal, the State Commission re-determined the tariff vide its order, dated 22.6.2013 for biomass gas based (including industrial waste) bagasse based co-generation and mini-hydel plant. According to the Appellants, the State Commission, inspite of the order, dated 22.6.2013, had decided all these aspects but even after such decision, the Respondents have not paid the amounts due to the Appellants. Therefore, in the impugned order, dated 6.8.2013, the State Commission, having omitted to deal with the issues of payment and arrear, has created immense difficulties for the Appellants.

10. **Per-contra**, the counter submissions on behalf of the Respondents are as under:

- (a) that the learned State Commission rejected the IA No. 22/2013 filed by the Respondents to defer the hearings of the remand

proceedings for tariff determination for Non-Conventional Energy (NCE) projects till the disposal of Civil Appeals Nos. 1376 to 1385 of 2013 before the Hon'ble Supreme Court, which Appeals are posted for final hearing there.

- (b) that with respect to the interest part on the payment, as claimed by the Appellants, the Hon'ble Supreme Court, in Civil Appeal Nos.2451, 2452, 2493, 3972 and 4231 of 2007 in the matter M/s NTPC Ltd. vs. M.P. State Electricity Board & ors. vide judgment, dated 29.9.2011, reported at (2011) 11 SCR 651, held as under:

"30.

As held by us hereinabove, claim for interest could not be covered under Section 62(6). The provision for interest has been introduced by Regulations subsequent to the period which was under consideration before the Commission. If we apply the propositions in Rallia Ram (Supra) and Watkins Mayor (supra), we find that the terms of the supply agreement, the governing Regulation and notifications did not contain any provision for interest. The industry practice did not provide for it as well. In view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution.

31. *In the circumstances, it is not possible to accept the submission that the Appellate Tribunal erred in any way in declining to award interest under Section 62(6) of the Act. There was however, an error on its part in granting the same under the concept of equity, justice and fair-play. Hence, we allow the appeals filed by the NTPC and dismiss those which are filed by the Electricity Boards. Civil Appeal No. 2451, 2452 and 2493/2007 are allowed. Civil Appeal No. 3972 and 4231/2007 are dismissed. Parties will bear their own costs".*

Hence, the claim of the Appellants for interest on payment is not at all tenable.

- (c) that the State Commission in its order, dated 20.3.2004, examined the issue of tariff in a scientific manner by considering several parameters, operational norms and cost of fuel, etc. for various categories of NCE projects, namely; Biomass, Bagasse, Mini Hydel, Industrial Waste to Energy, Wind and Municipal Solid Waste (MSW). The NCE developers filed appeals before this Appellate Tribunal against the State Commission's order, dated 20.3.2004, and this Appellate

Tribunal allowed batch of appeals, vide judgment, dated 2.6.2006, holding as under:

- (i) The Commission has no jurisdictions to re-fix the purchase price for present NCE developers resorting to tariff fixation under Sections 62, 64 read with 86 of Electricity Act, 2003.*
 - (ii) The Commission has no authority to alter the policy direction issued by the GoAP and bound by the policy direction of the GoAP.*
 - (iii) The NCE project developers are entitled for promissory estoppels and legitimate expectancy.*
 - (iv) The NCE developers were compelled by duress to enter into PPAs."*
- (d) that APTRANSCO and DISCOMs, being aggrieved against this Appellate Tribunal's judgment, dated 2.6.2006, filed Civil Appeals Nos. 2926/2006, etc. before the Hon'ble Supreme Court and the Government of Andhra Pradesh filed application, stating that there was no policy directions in force, and that the guidelines issued under G.O.Ms. No. 93 and G.O.Ms. No. 112 were having limited operational period, which had expired.
- (e) that during the pendency of case before the Hon'ble Supreme Court, the State Commission passed a tariff order, dated 31.3.2009, determining variable cost for the period from 2009 to 2014.
- (f) that the Hon'ble Supreme Court, finally decided the Civil Appeals Nos. 2926/2006, etc. filed by the APTRANSCO and DISCOMs vide judgment and order, dated 8.7.2010, set-aside the order, dated 2.6.2006 of this Appellate Tribunal and observed as under:
- (i) The finding of Appellate Tribunal that the State Commission has no jurisdiction is incorrect, and that learned State Commission has power and jurisdiction to determine the tariff, as has been done by the State Commission.

- (ii) The finding of Appellate Tribunal that tariff paid under order, dated 20.6.2001, shall be continued even after 31.3.2004, is not tenable.
 - (iii) The finding of Appellate Tribunal that there was duress to compel NCE developers to enter into PPAs after 20.6.2001, is without basis and material.
 - (iv) There is no promissory estoppels to NCE developers emanating from the guidelines of Ministry of Non-Conventional Energy Sources (MNES) and G.O.Ms. No. 93 & G.O.Ms. No. 112 of GoAP as found by Appellate Tribunal.
 - (v) There is also no legitimate expectation from the order of the learned State Commission, dated 20.6.2001, to NCE developers, as found by Appellate Tribunal.
- (g) that during the pendency of cases, the APDISCOMs have paid an amount of about Rs.223 crores to NCE Developers as per the interim orders passed by the Hon'ble High Court, this Appellate Tribunal and Hon'ble Supreme Court. These additional amounts are over and above the amounts paid as per State Commission's order, dated 20.3.2004. Although, the Hon'ble Supreme Court vide its judgment, dated 8.7.2010, set aside the order of this Appellate Tribunal and remanded the matter back to the State Commission, the additional payments made by the APDISCOMs as per interim orders, were retained by the developers.
- (h) that in the light of the order of the Hon'ble Supreme Court, dated 8.7.2010, the State Commission heard NCE Developers & ors. and, thereafter, the Chairman and Members of the State Commission passed three different orders on three different dates viz. 13.6.2011, 19.8.2011 and 2.9.2011, but no order of

the Commission/Authority, was passed at all. In fact, by the time of pronouncement of three orders i.e. 12.9.2011, the Member (Technical) retired on 15.6.2011 and there was no Authority to pronounce such order after his retirement.

- (i) that the Appellants' contention for payment of interest on differential amounts payable, in pursuance of the impugned order, dated 6.8.2013, is wholly wrong and unsustainable, as the amount payable to the Appellants is determined for the first time by the State Commission. Therefore, when there is no amount determined payable to the NCE developers, grant of interest for the past period on the ground that they are entitled to the said amount from that date, is wholly unsustainable.
- (j) that the interest amount to be paid to the developers/Appellants, is around Rs.156.0 crores, which is huge burden on APDISCOMs and the State Commission has rightly rejected the interest as the State Commission revised the variable cost duly adopting the parameter.

11. Before we proceed to decide this issue, it is necessary to mention here that the State Commission vide its main order, dated 31.3.2009 in OP No. 5/2009, inter-alia, had determined the variable cost component of tariff in respect of Bagasse (co-generation) projects and Biomass based project (including industrial waste), since no tariff rate structure was available in the order, dated 20.3.2004, for the purchase of power from the sources by the APDISCOM w.e.f. 1.4.2009 onwards. Hence, while determining the variable cost tariff in order, dated 31.3.2009, the State Commission did not revisit the various parameters towards fixation of variable cost except in respect of cost of fuel, which changes with time.

12. The tariff order, dated 31.3.2009, of the State Commission, was made, inter-alia, also subject to the final order of the Hon'ble Supreme Court in Appeal pending before the Hon'ble Supreme Court against the

order of the Appellate Tribunal, dated 2.6.2006. The Hon'ble Supreme Court, vide judgment, dated 8.7.2010, in C.A. Nos. 2926/2006 & batch, set-aside the judgment, dated 2.6.2006, of this Appellate Tribunal and remanded the matter to the State Commission directing to rehear the non-conventional energy generators afresh and fix/determine the tariff for purchase of electricity. Consequently, the State Commission heard the parties afresh and passed three different orders which were communicated under cover of a letter, dated 12.9.2011, which could not see the light of the day because of the reasons mentioned above. It may further be noted here that in pursuance to the orders, dated 20.12.2012 and 30.4.2013, of this Appellate Tribunal, the State Commission determined the tariff vide its order, dated 22.6.2013, for the Biomass (also applicable for industrial waste), bagasse based co-generation and Mini-Hydel power plants.

13. While the tariff for Biomass (also applicable for industrial waste) and Bagasse based co-generation consisted of fixed cost (for 1st year of operation to 10th year of operation) and variable cost (for FY 2004-05 to 2008-09), the tariff for Mini Hydel projects consists of fixed cost only. In the light of the orders/judgments of this Appellate Tribunal, the State Commission was bound to give consequential effect to its tariff order, dated 31.3.2009, and to the extent applicable based on the operating parameters as directed by this Appellate Tribunal.

14. Thereafter, the State Commission re-determined the tariff vide order, dated 22.6.2013, and re-fixed the tariff for biomass based (including industrial waste), bagasse based co-generation and Mini-Hydel plant, as per the directions of this Appellate Tribunal as mentioned above. The learned State Commission, suo-motu passed the impugned order, dated 6.8.2013, to give effect to the State Commission's order, dated 31.3.2009, in OP No.5/2009, as stated above.

15. The main grievance of the Appellants before us is that the State Commission's impugned order, dated 6.8.2013, should be set-aside

because it has not allowed the interest to the Appellants on the arrears of the differential amounts payable by the Respondents-Distribution Licensees, consequent upon the impugned order from the original due date for the payment for the energy supplied from 1.4.2009. We have detailed counter submissions and the different litigations up to the Hon'ble Supreme Court above and ultimately, impugned order, dated 6.8.2013, of the State Commission to give consequential relief to the State Commission's order, dated 31.3.2009, based on the judgments/orders, dated 20.12.2012 and 31.4.2013 in review of this Appellate Tribunal.

16. The relevant part of the impugned order, dated 6.8.2013, is reproduced as under:-

"7. Now the task before the Commission is to give consequential effect to the order dated 31.03.2009 to the extent applicable based on the operating parameters (relying to variable cost and to the extent applicable) determined in Hon'ble APTEL order dated 20.12.2012 and order dated 30.04.2013. For that purpose the relevant operating norms are as extracted hereunder:

A. Biomass Power Plants

(a)	Threshold PLF	80%
(b)	Auxiliary consumption	10%
(c)	Specific fuel consumption	1.36 kg/kWh based on station heat rate of 4500 kCal/kWh and GCV of 3300 kCal/kg.

B. Bagasse based cogeneration

(a)	Threshold PLF	55%
(b)	Auxiliary consumption	9%
(c)	Specific fuel consumption	1.6 kg/kWh based on station heat rate of 3600 kCal/kWh and GCV of 2250 kCal/kg.

8. Based on the above operating norms, the revised variable cost is hereby determined and is as follows:

Biomass (also applicable for Industrial Waste):

Financial Year	Rs/unit
2009-10	3.03
2010-11	3.18
2011-12	3.34
2012-13	3.51
2013-14	3.68

Bagasse based co-generation:

Variable Cost:

<i>Financial Year</i>	<i>Rs/unit</i>
2009-10	1.67
2010-11	1.75
2011-12	1.84
2012-13	1.93
2013-14	2.03

9. This order is for giving consequential effect to the order dated 31.03.2009 in O.P. No. 5 of 2009 based on Hon'ble APTEL order dated 20.12.2012 and 30.04.2013. Other terms and conditions of the order dated 31.03.2009 remains un-modified."

17. The clear position, as is evident and emerged from the above discussion, is that the learned State Commission, vide its order, dated 22.6.2013, pursuant to the judgments/orders, dated 20.12.2012 and 30.4.2013 in review, of this Appellate Tribunal, determined the tariff for Biomass, bagasse based co-generation and mini-hydel plants. Since the beginning, there was no final determination of tariff due to pendency of the issue in the Appellate Tribunal and in the Hon'ble Supreme Court and as a result of the decisions of the Hon'ble Supreme Court and this Appellate Tribunal, the State Commission succeeded in determining the tariff finally, vide its order, dated 22.6.2013, which order, we have discussed above in detail in this judgment. Thereafter, the State Commission was bound to pass the impugned order, dated 6.8.2013, in order to give consequential relief to its tariff order, dated 31.3.2009, in OP No. 5/2009. The impugned order, dated 6.8.2013, clearly provides that other terms & conditions of the order, dated 31.3.2009, of the State Commission remain unmodified. Since the Hon'ble Supreme Court, vide judgment, dated 8.7.2010, passed in C.A. Nos. 2926/2006 and batch, filed by the APTRANSCO and DISCOMS, set-aside the judgment/order, dated 2.6.2006, passed by this Appellate Tribunal, and directed the State Commission to rehear the parties and determine the tariff afresh. The State Commission was bound to give effect to the order of the Hon'ble Supreme Court, dated 8.7.2010,

and ultimately, the State Commission was bound to comply with the judgments/orders, dated 20.12.2012 and 30.4.2013 in review, of this Appellate Tribunal in Appeal no. 166/2011.

18. After a litigation from pillar to post, the State Commission, finally succeeded in determining the tariff vide its order, dated 22.6.2013, as stated above. The impugned order, dated 6.8.2013, has been passed to give consequential relief to the State Commission's order, dated 31.3.2009.

19. We are unable to accept the Appellants' contention for payment of interest on differential amounts payable, in pursuance to the impugned order, dated 6.8.2013, because the amount payable to the Appellants, has been determined for the first time by the State Commission in its order, dated 22.6.2013. Therefore, when there was no amount determined payable to the non-conventional developers, the amount of interest for the past period on the ground that they are entitled to the said amount from the back date, is wholly unsustainable.

20. We may further note that during the pendency of the cases, the APDISCOMS have paid an amount of about Rs.233 crores to non-conventional developers/Appellants, as per the interim orders passed by the Hon'ble High Court, this Appellate Tribunal and Hon'ble Supreme Court. These additional amounts are over and above the amounts paid as per State Commission's order, dated 20.3.2004. Although, the Hon'ble Supreme Court, vide its judgment, dated 8.7.2010, set-aside the order of this Appellate Tribunal and remanded the matter back to the State Commission for determination/fixation of tariff, the additional amount paid by the APDISCOMS as per interim orders had been retained by the developers/Appellants.

21. We may observe that the State Commission vide its tariff order, dated 20.3.2004, determined the tariff/purchase price w.e.f. 1.4.2004. It had determined the fixed cost component for 10 years for the non-

conventional developers/Appellants and variable cost component for each Financial Year. This Appellate Tribunal, in Appeal No. 1/2005 & batch, vide judgment, dated 2.6.2006, against the State Commission's order, dated 20.3.2004 gave direction to apply the same price till the Government determines the same. We may further note that the State Commission in suo-motu proceeding in OP No. 5/2009, vide its order, dated 31.3.2009, determined variable cost component of tariff for the period from 1.4.2009 to 31.3.2014 by revising the fuel cost applying the same parameters as prescribed in its order, dated 20.3.2004 and that too subject to the outcome of the Civil Appeals pending before the Hon'ble Supreme Court.

22. In view of the matter before us, we do not find any force or merits in the Appellants' contention that the State Commission, in the impugned order, ought to have allowed the interest on the differential amounts payable by the Respondents-Distribution Licensees to the Appellants-Generating Companies, consequent to the revision of the variable cost component of the tariff for the period 2009-2014, vide State Commission's tariff order, dated 31.3.2009.

23. Since, the State Commission has made final determination of tariff vide its tariff order, dated 22.6.2013, the Appellants are not entitled to any interest over the differential amount, if any, payable by the APDISCOMS to the Appellants, who are Biomass energy developers in the State of Andhra Pradesh. On the basis of above discussions, we do not find any merit in the contentions raised on behalf of the Appellants, and we agree to all the findings recorded by the learned State Commission in the impugned order and we approve the same. **The only issue is decided against the Appellants.** The instant Appeals do not have any merits and are liable to be dismissed.

24. **SUMMARY OF OUR FINDINGS:**

If the tariff remains in dispute in litigation before this Appellate Tribunal, Hon'ble High Court or Hon'ble Supreme Court, and the tariff is finally determined by the respective State Commission or Central Commission, no power generating company or distribution licensee is entitled to any interest over any differential amount, if any, payable in that regard because as a result of the judgment of the Higher Forums or Higher Courts, State Commission or Central Commission is bound to give effect to the same and fix or determine tariff accordingly, in which case no interest can be said to be payable on any differential amount, if any, payable by the generating company or the distribution licensee. We are fortified in holding this view in the light of M/s NTPC v M.P. State Electricity Board & Ors. (2011) 11 S.C.R. 651.

25. Consequently, the instant Appeals being Appeal Nos. 239 of 2013 and 246 of 2013 are dismissed as they have no merits and the impugned order, dated 6.8.2013, passed by the Andhra Pradesh Electricity Regulatory Commission is hereby affirmed. No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 24TH DAY OF JULY, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ **REPORTABLE/NON-REPORTABLE**

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