

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

**Appeal no. 247 of 2013 &  
IA No. 333 of 2013**

**Dated: 31<sup>st</sup> July, 2014**

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

**In the matter of:**

**M/s. SLT Power & Infrastructure Projects Pvt. Limited,**  
Flat No. 501, Soundarya Residency,  
Street No. 8, Himayatnagar,  
Hyderabad-500 029

**... Appellant (s)**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**  
4<sup>th</sup> & 5<sup>th</sup> Floor, Singareni Bhavan, Red Hills,  
Hyderabad-500 004.
2. **The Government of Andhra Pradesh**  
Energy Department,  
D-Block, Floor-2, Room No. 359,  
Secretariat, Hyderabad-500 022.
3. **Transmission Corporation of Andhra Pradesh,**  
Vidyut Soudha, Khairatabad,  
Hyderabad-500 049,  
Andhra Pradesh
4. **A.P. Central Power Distribution Co. Ltd.,**  
Mini Compound, Hyderabad-500 004.
5. **Non-Conventional Energy Development  
Corporation of A.P. Ltd. (NEDCAP),**  
5/8-207/2, Paigah Complex,  
Nampally, Hyderabad-500 001

**...Respondent(s)**

Counsel for the Appellant(s): Ms. Swapna Seshadri

Counsel for the Respondent(s): Mr. K.V. Mohan for APERC  
Mr. P. Shiva Rao  
Mr. G.V. Brahamananda for R-2 to 6

## **JUDGMENT**

### **RAKESH NATH, TECHNICAL MEMBER**

This Appeal has been filed by SLT Power & Infrastructure Projects Pvt. Ltd. against the impugned order dated 8.8.2013 passed by the Andhra Pradesh Electricity Regulatory Commission (“State Commission”) in Petition no. 84 of 2013 dismissing the Petition for grant of tariff as per the State Commission’s tariff order dated 22.6.2013 for biomass energy generators.

2. The Appellant is a Non-Conventional Energy generator. The State Commission is the Respondent no. 1. The State Government, Transmission

Corporation of Andhra Pradesh and the Distribution Licensee are Respondent nos. 2 to 4 respectively.

3. The brief facts of the case are as under:

3.1 The State Commission by its order dated 20.3.2004 determined the tariff for procurement of power by the distribution licensee from various Non-Conventional Energy generators.

3.2 On 28.07.2004, the Appellant entered into a Power Purchase Agreement ("PPA") with APTRANSCO, the Respondent no. 2 for supply of power from their poultry waste based power project with 2 MW capacity at the prevailing tariff determined by the State Commission.

3.3 On 2.3.2005, the Appellant entered into an amendment in the PPA for the enhancement of the

project capacity from 2 MW to 3 MW with APTRANSCO. A copy of the PPA was sent to the State Commission for obtaining its consent. Simultaneously the Appellant also applied for permission to lay down 33 kV line for evacuation of power from its Project.

3.4 In January, 2006, the Appellant received a letter from the Distribution Licensee that they had to re-enter the PPA with them as per the Government order and that the PPA had been returned back without consent by the State Commission.

3.5 According to the Appellant, APTRANSCO and the Distribution licensee held number of meetings to persuade them to sign PPA at the tariff being offered by them which was lower than the generic tariff that was determined by the State Commission for Non-Conventional Energy generators. According to the

Appellant as the Distribution Licensee was not giving permission for construction of 33 kV line for evacuation of power from their Project, the Appellant was left with no option but to accept the tariff of Rs. 2.99 per unit offered by APTRANSCO and the Distribution Licensee (R-4).

3.6 Finally, on 2.2.2007 the Appellant entered into a PPA with the Distribution Licensee for supply of power from their 3.5 MW poultry waste based power plant. Immediately, thereafter the Appellant was given permission for the construction of 33 kV line for evacuation of power from their power project. Thereafter, the Appellant commissioned their power plant in December, 2007. The Appellant operated the power plant in January and February 2008 but as the cost of production came out to be more than the tariff offered by the Distribution Licensee, the Appellant

shut down the plant and since then, the plant has been under shut down.

3.7 On 11.4.2012 the Appellant filed a Petition before the State Commission that they could not have been forced to sign the PPA at a tariff other than the tariff determined by the State Commission. By order dated 22.11.2012 the State Commission dismissed the Petition holding that they are not competent to fix the tariff if the other party is not agreeable for the same.

3.8 In the mean time, the tariff order of the State Commission dated 20.3.2004 regarding Non-Conventional Energy sources was carried in Appeal before the Tribunal as well as Hon'ble Supreme Court. Upon remand by the Hon'ble Supreme Court, the State Commission re-determined the tariff for the period 2004-09 by three separate orders communicated on

12.9.2011. Several Appeals were filed against the order dated 12.9.2011. By the judgment dated 20.12.2012 the Tribunal decided the norms and parameters that would be applicable to tariff for the period 2004-09 and remanded the matter to the State Commission to pass consequential orders. While remanding the matter, the Tribunal directed that they had decided the issues related to the generic tariff in the Appeal and they could not go into specific PPAs entered into between the developers and the Distribution Licensees and directed the State Commission to issue necessary direction in this regard and if the State Commission felt that the tariff determined as a consequence of this judgment was not applicable to some of the Appellants then such Appellants should be given an opportunity of hearing separately before taking final decision.

3.9 In pursuance of the Judgment dated 20.12.2012, the State Commission passed consequential orders on 22.6.2013 and also notified that the aggrieved parties, if any, regarding applicability of tariff may approach the State Commission by filing petitions.

3.10 In accordance with the liberty given by the Tribunal, the Appellant on 15.7.2013 approached the State Commission by filing a Petition. The State Commission by impugned order dated 8.8.2013 rejected the prayer of the Appellant and did not allow the revised tariff determined as per its order dated 22.6.2013 to them.

3.11 Aggrieved by the impugned order of the State Commission, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

(a) The Appellant's power plant was covered by the Tariff Order dated 20.3.2004 of the State Commission in which the State Commission decided that the tariff of the industrial waste to energy projects would be same as that of biomass projects and authorized waste to energy projects to enter into PPA with APTRANSCO at the rate given for sale of power from biomass power plants. In view of the tariff determination by the State Commission, no other tariff could have been made applicable for sale and purchase of electricity from the power plant of the Appellant to the Distribution Licensees.

(b) The statutory power to determine tariff by the State Commission cannot be taken away by execution

of a PPA between the parties. The State Commission ought to have considered the circumstances in which the PPA was entered into.

(c) The plant of the Appellant could operate only for two months after commissioning due to low and unviable tariff which APTRANSCO and the Distribution Licensee had forced on the Appellant to agree, as a result of which the Appellant's plant has been lying idle, while the Distribution Company has been purchasing high cost power in the short term market.

(d) The tariff of Rs. 2.99 per unit which was incorporated in the PPA does not even cover the variable cost of the Appellant and even servicing of loan is not possible.

(e) The transmission line permission was withheld to the Appellant for more than one year and

as soon as the PPA was signed on the negotiated tariff of Rs. 2.99 per unit, the permission was given to the Appellant.

(f) It has been held by this Hon'ble Tribunal in various cases that power of the State Commission for tariff fixation or applying the correct tariff to a generator cannot be taken away by the execution of PPA. In this regard, the following judgments have been referred to:

(1) Tarini Infrastructure Limited vs. Gujarat Urja Vikas Nigam Limited (2012 Indlaw APTEL 158)

(2) Techman Infra Ltd. vs. Himachal Pradesh Electricity Regulatory Commission & Ors. (Judgment dated 18.9.2009 in Appeal No. 50 of 2008).

(3) Uttar Haryana Bijli Vitran Nigam Ltd. vs. Haryana Electricity Regulatory Commission & Ors. 2012 ELR (APTEL) 1085.

(4) Konark Power Projects Limited, Karnataka vs. Bangalore Electric Supply Company Limited, Bangalore & Anr. 2012 ELR (APTEL 0429).

(5) Junagadh Power Projects Private Limited vs. GUVNL & Ors. (Full Bench Judgment dated 2.12.2013 in Appeals 132 & 133 of 2012).

(6) Cellular Operators Association of India v. Union of India (2003) 3 SCC 186

(7) Tata Power Company Limited vs. Reliance Energy Company Limited (2009) 16 SCC 659

(8) M/s. Sunstar Overseas Limited, New Delhi vs. Kerala State Electricity & Anr. Board) Decision dated 7.8.2008 in DP No. 69 of 2008).

5. In reply, Respondent nos. 3 and 4 have submitted as under:

(a) The Appeal is infructuous since no Appeal was filed against the order dated 24.11.2012 of the State Commission in respect of the same issue i.e. applicability of generic tariff to the Appellant's project de hors the tariff as per the negotiated PPA. Since the said order dated 24.11.2012 has attained finality, the present Appeal does not survive.

(b) The Appellant also failed to challenge the order dated 27.9.2005 of the State Commission in which the State Commission passed the orders giving liberty to the Distribution Licensees to enter into long term PPA considering the tariff decided in the order dated 20.3.2004 as maximum ceiling. The said order has also attained finality and on this ground also Appeal fails.

(c) There are no merits in the Appeal. In the year 2004, there were no Tariff Regulations and the State Commission by order dated 27.9.2005 decided that the Distribution Licensees could enter into long term PPAs with NCE developers with ceiling of tariff as decided in the order dated 20.3.2004. Subsequently, on 2.2.2007, the Appellant entered into PPA for supply of power. Thereafter, the State Commission passed orders recording PPA and granting consent. The Appellant without demur acted upon the said PPA and commenced supply of power from January 2008 and supplied power even during February 2008. For the first time on 20.2.2009, the Appellant made a request for increase in tariff. However, the plant was closed after February 2008 and has been under shut down since then.

(d) The Appellant filed a Petition being O.P. no. 69 of 2012 before the State Commission with a prayer for grant of tariff as per the State Commission's order dated 20.3.2004, but the same was rejected by the order dated 24.11.2012. The Appellant has also failed to challenge the order dated 24.11.2012 passed in O.P. no. 69 of 2012.

(e) There is no material available on record to show that the PPA dated 2.2.2007 was entered into by force.

(f) The findings of the Tribunal in various cases referred to by the Appellant are not applicable in the present case.

6. We have heard Ms. Swapna Seshadri, learned counsel for the Appellant and Shri P. Shiva Rao, learned counsel for the Respondent no. 3 & 4. In light

of the rival submissions of the parties, the following questions would arise for our consideration:

(i) Whether the State Commission is empowered to modify the existing concluded PPA dated 2.2.2007 between the Appellant and the Distribution Licensee to revise the tariff agreed to in the PPA in the circumstances of the case?

(ii) Whether the Appellant was forced to enter into the PPA dated 2.2.2007 at a tariff lower than that determined by the State Commission for the NCE Project?

(iii) Whether the State Commission should have allowed the generic tariff as determined by its order dated 22.6.2013 for biomass based projects consequent to remand by this Tribunal to the Appellant's non-conventional energy project?

(iv) Whether the State Commission should have intervened in the matter to revise the tariff with a view to revive operation of the non-conventional energy project of the Appellant which has been lying idle due to unviable tariff since February 2008 to resume supply of power to the Distribution Licensee?

7. The above issues are interconnected and, therefore, being dealt with together.

8. Let us first examine the findings of the State Commission in the impugned order dated 8.8.2013. The State Commission after recording the clause 2.2 of the PPA dated 2.2.2007 entered into between the parties regarding tariff, has held as under:

*“7. In view of the clear provisions contained in Article 2.2 and Schedule IA as to what tariff is applicable for the petitioner herein, the Commission*

*is unable to allow any tariff other than the tariff that forms part of the PPA signed by both the parties and consented by the Commission vide letter dated 19-01-2007 read with letter dated 23-03-2007. As such the prayer of the petitioner to direct the respondents to apply the Tariff issued by the Commission in the order dated 22-06-2013 to the petitioner herein cannot be granted.*

*8. Accordingly, the petition is liable to be dismissed in limine”.*

9. Thus, the State Commission has declined to interfere in the matter in view of the tariff agreed to between the parties in the PPA dated 2.2.2007.

10. Let us examine the findings of this Tribunal in the other cases on this issue.

11. In *Tarini Infrastructure Limited vs. Gujarat Urja Vikas Nigam Limited* (2012 Indlaw APTEL 158), this

Tribunal has held as under:

*“16. It is trite law that under the Electricity Act, 2003 the jurisdiction vests with the Commission for determination of tariff. A contract entered into between the parties is definitely binding on the parties but only in so far as the conditions contained in a contract are not repugnant and do correspond to the provisions of law. If the contract is the outcome of duress or coercion or where the contract does not conform to the law it is the latter that prevails over the former. Promotion of generation of electricity through renewable resources of energy is a laudable feature of the Act, 2003 and the Commission has a duty to ensure that the project developers intending to install power project through renewable resources of energy are encouraged in the enterprise, and while doing so it at the same time, does not sacrifice the interest of the ultimate end-users.*

*17. Thus..... These functions together with the other functions of the State Commission as laid*

*down in s. 86 of the Act make it clear that so far as determination of tariff is concerned a power purchase agreement if to be concluded by and between a developer and a distribution licensee cannot be the final say in the matter. A power purchase agreement is always subordinate to the provisions of the Act which empowers the State Commission to determine tariff, to promote generation from renewable sources of energy, to promote competition, efficiency and economy and to ensure transparency while exercising its functions. S. 61 lays down the broad philosophy in the matter of determination of tariff.”*

*“20. .... No doubt, the provision of S. 86 (1) (b) permits execution of power purchase agreement between the licensee for distribution and supply with the generating companies but the right is not absolute in as much as the Commission has the statutory duty and power to regulate electricity purchase and procurement process of distribution licensees including the price at which procurement is proposed through agreements. It can not be gainsaid that a Power Purchase Agreement is*

*subordinate to the provision of S. 86(1) which is again subject to and must correspond to the provision of 61 and 62 of the Act. The Act provides for determination of tariff on commercial principles with optimum investments reflecting the cost of supply of Electricity and at the same time safeguarding the interest of the consumers which must not be forgotten, that it is more so when it is generation of electricity through renewable sources of energy so that the developers get encouraged. The provisions of sub-s. (2) of s. 86 are reiteration of the provision of s. 61.”*

*“22. It is a fact.....If the PPA does not take cognizance of components of tariff including capital cost and if intervening circumstances do happen, the Commission has authority to re-open the PPA”.*

*“24.The Govt. of India.....Determination of tariff is a statutory function and a contract cannot take away the jurisdiction conferred on the statute.*

*25. The facts and circumstances of the case and*

*the analysis rendered above impel us to hold that the Commission was not justified in holding that since the PPA is a concluded agreement between the parties re- determination of the tariff sought by the petitioner is not permissible.....”*

12. In *Uttar Haryana Bijili Vitran Nigam Ltd. vs. Haryana Electricity Regulatory Commission & Ors.* [2012 ELR (APTEL) 1085], this Tribunal held that:

*“14. From the above, it is clear that there is a specific finding that the tariff fixed by the State Commission at the time of approval of the PPA was subject to the review and the Regulations framed by the State Commission have an overriding effect over the existing contracts over the PPA. Therefore, even when the PPA did not provide for a specific clause for revision of the project cost, the State Commission under the Regulations was empowered to re-determine the tariff fixed by it under section 62 of the Act.”*

13. In *Konark Power Projects Limited, Karnataka vs.*

Bangalore Electric Supply Company Limited,  
Bangalore & Anr. [ 2012 ELR (APTEL) 0429], this  
Tribunal held as under:

*“18. Summary of our findings:*

*(a) The State Commission as indicated in the impugned order has power to modify the tariff for concluded PPA in larger public interest.*

*(b) The guiding principles laid down in S. 61 of the 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of 'just' tariff.”*

14. In Junagadh Power Projects Private Limited vs. GUVNL & Ors. in Judgment dated 2.12.2013 in Appeals 132 & 133 of 2012, the full Bench of this Tribunal held that:

*"29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. The State Commission has the duty to incentivise the generation of electricity from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company. In fact the State Commission has itself in the case of Abellon Clean Energy by order dated 7.2.2011 modified the tariff determined earlier in the generic tariff order dated*

*17.5.2010. In the order dated 17.5.2010, there was no separate tariff for biomass projects with air cooled condensers and a common tariff was decided irrespective of the type of cooling used. However, the State Commission re-determined the tariff decided in order dated 17.5.2010 and allowed increase in tariff for biomass plants with air cooled condenser.”*

.....

*“31. Considering all the above factors, we feel that this is an appropriate case where the State Commission should examine and consider to re-determine the biomass fuel price. It should not be considered as a review of its earlier order dated 17.5.2010. In fact this should be considered as re-determination of tariff invoking the powers of the State Commission under the Electricity Act, 2003 to review the tariff in the circumstances of the case to avert closure of the biomass fuel based projects in the State.”*

15. The findings of the Tribunal in the above cases clearly establish that the State Commission has a duty to

encourage development of renewable sources of energy. The State Commission has powers to modify a concluded PPA between the distribution licensee and the generating company and revise the tariff keeping in view the circumstances of the case which are uncontrollable and revision of tariff is necessary to meet the objective of the Act and where the tariff of a renewable project agreed to between the parties is unviable resulting in closure of the power plant. However, the Commission has to keep in view the guiding principles laid down in Section 61 of the Electricity Act, 2003 while determining the tariff.

16. Let us now examine the sequence of events which led to entering of the PPA dated 2.2.2007 between the parties.

i) On 20.3.2004, the State Commission revised the tariff for non-conventional energy projects for the period 2004 onwards. According to this order, the tariff applicable to waste to energy project i.e. the plant of the

Appellant, was to be same as determined for the bio-mass based projects.

ii) On 28.7.2004, the Appellant entered into a PPA for 2 MW capacity with the Respondent No.2 - APTRANSCO by which the tariff of the plant was agreed on the prevailing tariff determined by the State Commission.

iii) On 2.3.2005, the Appellant entered into an amended PPA for the enhanced capacity of 3 MW poultry waste based plants with APTRANSCO. A copy of the PPA was sent to the State Commission for obtaining its consent. Simultaneously, the Appellant also applied for permission to lay down 33 kV line for evacuation of power from its project.

(iv) On 27.9.2005 the State Commission in the matter of specifying for purchase of electricity from renewable energy sources in area of distribution licensees directed that the distribution licensees could

enter into long term PPA with Non-Conventional Energy developers and ceiling for the tariff of such purchases shall be as per the tariff order dated 20.3.2004.

(v) In January, 2006, the Appellant received a communication from the Distribution Licensee that the Appellant had to re-enter the PPA as per the Government Order. On 7.1.2006, the Appellant submitted a representation to the CMD of Distribution Company stating that any revision in the tariff would adversely affect the functioning of the project and offered to re-enter the PPA for 3 MW as per the Tariff Order passed by the State Commission. On 27.1.2006, the Appellant was invited by the Distribution Licensee for discussions. Thereafter, the Distribution Licensee held a number of meetings with the Appellant for negotiation of tariff.

(vi) On 4.2.2006, the Appellant submitted a letter to the State Commission requesting for consent of PPA. However, on 6.3.2006, the Appellant received a letter from the Secretary of the State Commission that all the PPAs which had not been consented by the State Commission may be re-examined in the light of order dated 27-09-2005 and further only the concerned Distribution Licensee can enter into a PPA and not the APTANSCO. In the meantime, the Appellant continued to pursue the sanction of 33 kV transmission line for evacuation of power from their project. However, the approval was not given.

vii) Thereafter, number of meetings were held between the Distribution Licensee and the Appellant and finally the Appellant agreed to sign the PPA at a tariff of Rs. 2.99/- per unit.

viii) Accordingly, on 2.2.2007, the Appellant entered into a PPA with the Distribution Licensee for 3.5 MW. Immediately thereafter, on 15.2.2007, the Appellant got the permission for laying 33 kV transmission line for evacuation of power.

ix) The Appellant generated power during January and February 2008 and supplied the same to the Distribution Licensee but as the cost of raw material, operation and maintenance costs, spares, etc. was coming out to be more than Rs. 2.99 per unit and there was no money left for servicing of loan, the power plant had to be shut down after two months of operation.

x) On 11.4.2012 the Appellant filed a Petition before the State Commission requesting for revision of tariff as determined by the State Commission in its

tariff order. However, the State Commission by order dated 24.11.2012, dismissed the Petition.

xi) On 22.6.2013, the State Commission passed the tariff order re-determining the tariff of NCE generators for the period 2004-05 as per the remand order of the Tribunal. In terms of the judgment of the Tribunal, the State Commission notified that the parties aggrieved by the applicability of the order may approach the State Commission.

xii) The Appellant, therefore, approached the State Commission with regard to revision of tariff as determined by the order dated 22.6.2013. The Petition of the Appellant was rejected by the State Commission in view of the tariff agreed to between the parties as per the PPA.

17. The Appellant has not furnished any material to establish coercion or force by the Distribution licensee to enter into PPA at a tariff lower than the tariff determined by the State Commission for procurement of power by the distribution licensees from NCE generators. However, the above sequence of events would indicate that the Distribution Licensee had used its dominant position to enter into a PPA with the Appellant at a tariff which was less than the generic tariff determined by the State Commission. The first PPA dated 28.7.2004 was entered into at the prevailing tariff as determined by the State Commission. The prevailing tariff at the time of signing the first PPA was the tariff determined by order dated 20.3.2004. Again on 2.3.2005 an amended PPA was signed for 3 MW capacity at the tariff determined by the State Commission. However, in January 2006 i.e. after about

nine months, the Appellant was asked to re-enter into PPA. Thereafter, a number of meetings took place between the Appellant and the Distribution Licensee regarding tariff. The approval for the evacuation line of the Appellant was not given till they agreed to sign the PPA at a tariff of Rs. 2.99 per kWh, a rate lower than that decided in the tariff order of the State Commission.

18. It is correct that the State Commission in its order dated 27.9.2005 had held that the distribution licensees could enter into PPA with NCE developers and the ceiling for the tariff of such purchases would be the generic tariff determined in its order dated 20.3.2004.

However, the negotiated tariff had to be such at which the Appellant could meet all its prudent expenditure in operation and maintenance, fuel cost, etc., service loan and get a reasonable return. As pointed out by the Appellant the tariff provided for in the PPA was not adequate to meet the operation and

maintenance expenses, fuel cost, and other expenditures necessary to operate the plant and they were not even able to service debt.

19. The Appellant's power plant is a renewable energy based plant and the same has been under shut down since February, 2008 as they have not been able to recover even their operating expenses for the tariff. According to Sections 61(h) and 86(1)(e) of the Electricity Act, 2003, the State Commission has to promote co-generation and generation of electricity from renewable sources of energy as per the provisions of the Act. The State Commission has also to safeguard the consumers' interest and at the same time ensure recovery of cost of electricity in a reasonable manner. Therefore, the State Commission has to also ensure that a renewable energy generator is not forced to remain under shut down for want of a viable tariff.

Admittedly, the State Commission determined the tariff at which the distribution licensees had to procure power from NCE generators by its order dated 20.3.2004 as per the provisions of the Act. Admittedly the tariff at which PPA was signed by the Distribution Licensee with the Appellant was lower than the tariff determined by the State Commission. The tariff has since been re-determined by the State Commission by its order dated 22.6.2013 on remand by this Tribunal. Admittedly the revised tariff for biomass plants which is also applicable to the industrial waste to energy plants is higher than the tariff determined in the State Commission's earlier order dated 20.3.2004.

20. It is correct that the Distribution Licensees were directed by the State Commission by its order dated 27.9.2005 to enter into long term PPA with NCE developers with ceiling of tariff for such purchases as

per the tariff order dated 20.3.2004. The Distribution licensee in its wisdom agreed to purchase power from the Appellant at Rs. 2.99 within the ceiling of tariff determined under the tariff order dated 20.3.2004, with the intention to keeping their power procurement rate lower in the interest of consumers. However, this rate did not work out to be viable for the sustained operation of the NCE power plant of the Appellant which had to be closed down after 2 months of operation.

21. The tariff order dated 20.3.2004 was challenged by some NCE generators in this Tribunal and the Tribunal set aside the tariff order dated 20.3.2004. The judgment of the Tribunal was challenged by the distribution licensees in the Hon'ble Supreme Court. The Hon'ble Supreme Court set aside the judgment of this Tribunal and directed the State Commission to

determine the tariff. Thereafter, the Members of the State Commission gave three orders for tariff which were challenged by some NCE generators in this Tribunal. This Tribunal by judgment dated 20.12.2012 decided the norms of tariff and remanded the matter to the State Commission. On remand, the State Commission by order dated 22.6.2013 re-determined the tariff for bio-mass based and other NCE generators for the period 2004-09. The tariff now determined for biomass plants which is also applicable to industrial waste to energy projects is higher than that determined by order dated 20.3.2004. This has vindicated the claim of the Appellant that the tariff given under the PPA was unviable.

22. In view of the facts and circumstances of the case and the analysis made by us, as narrated above, we feel that this is a fit case for intervention by the State

Commission to ensure that a reasonable tariff is allowed to the Appellant to enable them to revive their waste to energy generating plant which has been shut down since February 2008 to resume power supplies to the Distribution Licensee which has been facing power shortage due to which it has to procure expensive power from different sources. However, we are not inclined to pass the order that the tariff as determined by the State Commission by its order dated 22.6.2013 should be made applicable for the past period i.e. January and February 2008 when the Appellant supplied energy to the Distribution Licensee as per the terms of the PPA. But, there is a case made out for revising the tariff of the Appellant by the State Commission prospectively. We, therefore, direct the State Commission to pass consequential orders

revising the tariff for power supply by the Appellant to the Distribution Licensee, after hearing the parties.

**23. Summary of our findings:**

**(i) The findings of the Tribunal in the various cases clearly establish that the State Commission has a duty to encourage development of renewable sources of energy. The State Commission has powers to modify a concluded PPA between the distribution licensee and the generating company and revise the tariff keeping in view the circumstances of the case which are uncontrollable and revision of tariff is necessary to meet the objective of the Act and where the tariff of a renewable project agreed to between the parties is unviable resulting in closure of the power plant. However, the Commission has to keep in view the**

**guiding principles laid down in Section 61 of the Electricity Act, 2003 while determining the tariff.**

**(ii) The sequence of events in the present case would indicate that the Distribution Licensee had used its dominant position to enter into a PPA with the Appellant at a tariff which was less than the generic tariff determined by the State Commission. As a result of the unviable tariff, the Appellant's Non-Conventional Energy Power Plant has been shut down since February, 2008 as they have not been able to recover their operating expenses for the tariff. The upward revision of tariff by the State Commission for NCE generators by the State Commission by order dated 22.6.2013 has vindicated the claim of the Appellant that their tariff was unviable.**

**(iii) According to Section 61(h) and 86(1) (f) of the Electricity Act, 2003, the State Commission has to promote generation of electricity from renewable sources of energy. In view of the facts and circumstances of the case and the analysis made by us, we feel that it is a fit case for intervention by the State Commission to ensure that a reasonable tariff is allowed to the Appellant to enable it to revive its waste to energy project which has been under shut down since February 2008. However, we are not inclined to pass the order that the tariff as determined by the State Commission by its order dated 22.6.2013 should be made applicable for the past period i.e. January and February 2008 when the Appellant supplied energy to the Distribution Licensee as per the terms of the PPA. But, there is a case made out for**

**revising the tariff of the Appellant by the State Commission prospectively. We, therefore, direct the State Commission to pass consequential order after hearing the parties.**

24. In view of above, the Appeal is allowed and the impugned order is set aside. Accordingly, the matter is remanded back to the State Commission for passing the consequential order in terms of the directions given above. However, there is no order as to costs.

25. Pronounced in the open court on this

**31<sup>st</sup> day of July, 2014.**

**( Rakesh Nath)  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

**REPORTABLE/~~NON-REPORTABLE~~**

Vs