

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

(APPELLATE JURISDICTION)

APPEAL NO. 270 OF 2013

Dated: 1ST October, 2014

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

IN THE MATTER OF

M/s Chadha Sugars & Industries Pvt Ltd.,
Village Kiri Afgana,
Tehsil Batala, Distt. Gurdaspur,
(Punjab) 143527

.... Appellant/Petitioner

VERSUS

1. Punjab State Electricity Regulatory Commission,
SCO: 220-221, Sector: 34-A,
Chandigarh - 160034
 2. Punjab State Power Corporation Limited (PSPCL),
The Mall, Patiala
(Punjab) - 147001
 3. Punjab Energy Development Agency,
Solar Passive Complex, Plot No. 1-2,
Sector 33-D, Chandigarh
- Respondents

Counsel for the Appellant(s) Mr. Rajesh Mittra

Counsel for the Respondent(s)... Mr. Sakesh Kumar for R-1

Mr. Anand K. Ganesan and
Ms. Swapna Seshadri for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present Appeal has been has been filed by M/s Chadha Sugars & Industries Pvt. Ltd. (in short, the '**Appellant-Petitioner**'), under Section 111 of the Electricity Act, 2003, against the impugned order, dated 16.8.2013, passed by the Punjab State Electricity Regulatory Commission (in short, the '**State Commission**') in Petition No. 23 of 2013 filed by the Appellant for revision of tariff rate in respect of sale of surplus power to the Distribution Licensee/ Punjab State Power Corporation Limited (PSPCL – Respondent No. 2 herein) under Section 86(1)(e) and Section 61 of the Electricity Act, 2003, **whereby the said petition of the Appellant-petitioner has been dismissed by the State Commission on the following grounds:**

- (a) that at the time of setting up of non-fossil fuel based co-generation project and its synchronization/commissioning on 20.12.2010, the petitioner was aware of the provisions of the NRSE Policy, 2006 and the Regulations in vogue i.e. the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009, which were adopted by the State Commission with State specific amendments in its order, dated 30.9.2010 (petition no. 32 of 2010 (Suo-Motu) (RE Regulations, 2009).
- (b) that the State Commission, in its order, dated 30.9.2010, also determined the tariff for various Renewable Energy technologies/projects including co-generation to be commissioned in FY 2010-11, which is the year of commissioning of the petitioner's project, as per the said Regulations.
- (c) that the tariff so determined by the Commission in the said order for FY 2010-11 for non-fossil fuel based co-generation

projects is Rs.4.57 per kWh [Rs.1.73 per kWh (fixed) + Rs.2.84 per kWh (variable)] with provision for annual escalation in variable tariff as per provisions in the Regulations. The tariff provided in the PPA is the same as mentioned above and the petitioner was aware of the same at the time of signing of PPA on 10.9.2012.

- (d) that the petitioner was granted generic tariff worked out by the Stated Commission on the basis of the capital cost and other parameters on normative basis for non-fossil fuel based co-generation projects as per RE Regulations, 2009 including fuel cost, operation & maintenance (O&M) expenses and its annual escalation, interest on working capital etc. as per the Regulations, biomass includes waste produced during agricultural and forestry operations and as a by-product of processing operations of agricultural produce etc.
- (e) that the PPA signed by the petitioner with the Distribution Licensee/PSPCL has no provision for revision of tariff except for variable cost for which annual escalation is already provided.
- (f) that the averments of the petitioner in the petition in respect of the provisions of Section 61 of the Electricity Act, 2003 and the contents of para 6.4 of the Tariff Policy, the Statement of Reasons issued along with RE Regulations, 2009 adopted by the State Commission, are clearly in accordance with the same. Thus, the State Commission's RE Regulations are in conformity with the provisions of Section 61 of the Electricity Act, 2003 and the Tariff Policy.
- (g) that the petitioner cannot request for re-opening of PPA signed as recently as on 10.9.2012. The purchase of power from NRSE Projects on long term basis by the Distribution Licensee/PSPCL is as per the provisions of the Electricity Act, 2003, Tariff Policy, National Electricity Policy and National Action Plan on Climate Change (NAPCC), which require the Commission and the licensee to encourage the RE Projects.

- (h) that there is no justification for considering the revision in tariff provided in the PPA, which is the same as the generic tariff determined by the State Commission in its order, dated 30.9.2010, in petition no. 32 of 2010 (Suo-Motu) for various RE technologies including that of the petitioner, namely; non-fossil fuel based co-generation projects commissioned in FY 2010-11, which is also the year of commissioning of the petitioner's project, as per RE Regulations, 2009, wherein the normative parameters have been fixed taking adequate care of the various concerns expressed by the petitioner.

Thus, the State Commission did not find any substance or merit in the Appellant's plea for revision of tariff considering high cost of rice husk, working capital, O&M expenses etc.

2. The relevant facts giving rise to the present Appeal are stated as under:

- (a) that the Appellant-Chadha Sugars & Industries Pvt. Ltd, had set up a 23 MW co-generation plant at Village Kiri Afgana, Tehsil Batala, Distt. Gurdaspur (Punjab) during the year 2010 to utilize the bagasse as fuel generated from its sugar mill. During off-season when bagasse stock are exhausted, the plant is shut down by the Appellant as the other fuel i.e. rice husk being available at Rs.4500 per MT, which is financially not viable. The Appellant – a co-generation plant, had been selling surplus power to the tune of 16 to 20.5 MW to Respondent No.2/Distribution Licensee (PSPCL), since the commissioning of the plant on short term basis upto March, 2012. Thereafter, the Appellant entered into a long term agreement with PSPCL w.e.f. 10.9.2012 as per terms of the order, dated 30.9.2010, passed by the State Commission in petition no. 32 of 2010 (Suo-Motu) (RE Regulations, 2009). Accordingly, the tariff for the year 2010-11 was fixed at Rs.4.57 per unit [Rs.1.73 per unit (fixed tariff) + Rs.2.84 per unit (variable tariff)].

- (b) that the Appellant, as per clause 2.1.1(i) of the Power Purchase Agreement, dated 10.9.2012, entered into between the Appellant and the Distribution Licensee/PSPCL, the Appellant company is, however, eligible for getting applicable tariff for the project commissioning year as per tariff orders notified by the State Commission from time to time.
- (c) that, although, the Appellant-petitioner has been selling power to PSPCL at the rates as per the Commission's order, dated 30.9.2010, but it has found that these rates are becoming unviable as the prevailing market rates for bagasse are of the order of Rs.2500 per MT and that of rice husk is Rs.4500 per MT for running the plant during off-season to improve upon plant load factor of the plant. Besides that, the cost of short term working capital loan has increased due to increase in the interest rates. The O&M charges have also risen due to high inflation and cost of labour. The variable cost works out to be over Rs.5.00 per unit. As it is not found workable to generate power during off season, the fixed charges work out to be Rs.3.50 per unit approximately.
- (d) that under Section 61 and 86(1)(e) of the Electricity Act, 2003, the State Commission, while determining the tariff, is to be guided by the need to promote co-generation and generation of electricity from renewable sources of energy and under para 6.4 of the Tariff Policy, preferential tariffs are to be determined by the State Commission for renewable energy projects. National Electricity Policy under para 5.2.20 requires adoption of suitable promotional measure for encouraging higher generation from renewable energy sources. The National Action Plan on Climate Change (NAPCC) had set up a target of purchase of 5% renewable energy for FY 2009-10 with 1% increase annually for next 10 years.
- (e) that the State Commission has erred in law and facts in overlooking the judgment passed by this Appellate Tribunal on

28.9.2006 in the case of M/s Rithwik Energy Systems and others vs. Transmission Corporation Ltd., Andhra Pradesh and others while dismissing the Appellant's petition seeking revision of tariff under Section 86(1)(e) and 61 of the Electricity Act, 2003 in respect of the sale of surplus power to the Respondent No.2/PSPCL from its 23 MW co-generation plant.

- (f) that two other similarly placed co-generation projects in the State of Punjab namely, M/s Rana Sugars Ltd and M/s A.B. Sugars Ltd., which are older to the Appellant's co-gen project by three years have been granted by the State Commission, vide its order, dated 30.11.2012, a rate of Rs. 4.95 per kWh [Rs.1.53 per kWh (fixed charges) + Rs.3.42 per kWh (variable charges)] against Rs.4.85 per kWh [Rs.1.73 per kWh (fixed charges) + Rs.3.12 per kWh (variable charges)] allowed to the Appellant, which is not only unjustified and discriminatory but anomalous also.
- (g) that the impugned order is silent on the various submissions made by the Appellant. The State Commission has failed to appreciate that the PPA can be reopened as per the decision of this Appellate Tribunal in case of M/s Rithwik Energy Systems and others vs Transmission Corporation Ltd., Andhra Pradesh and others.
- (h) that the State Commission has failed to consider the facts admitted by Respondent No. 2 & 3 while dealing with the case of generic tariff for the year 2013-14, that rice straw cannot be used for various reasons and that while fixing the fuel rate, contribution of rice straw should be excluded and that the whole matter needed to be reviewed afresh because of the problems associated with the use of rice straw.
- (i) that the State Commission has failed to appreciate that it was difficult for the Appellant company to visualize at that stage that the rise in fuel prices would be too steep that could unsettle the viability of the project.

- (j) that the State Commission has not taken cognizance of the order passed in the case of similarly placed co-generation plants of M/s Rana Sugars Ltd and M/s A.B. Sugars Ltd., which were only three years older to the Appellant's project, who have been provided higher rates than those provided under the State Commission's tariff order, dated 30.9.2010.
- (k) that the State Commission has erred in law in overlooking the judgment, dated 28.9.2006, passed by this Appellate Tribunal in the case of M/s Rithwik Energy Systems and others vs Transmission Corporation Ltd., Andhra Pradesh and others, wherein this Appellate Tribunal held as under:

"A distinction however must be drawn in respect of a case where a contract is reopened for the purpose of encouraging and promoting renewable sources of energy projects pursuant to the mandate of Section 86(1)(e) of the Electricity Act, 2003 which requires the State Commission to promote co-generation and generation of electricity from renewable sources of energy.... It is the bounden duty of the Commission to incentivize generation of electricity from renewable sources of energy and that PPA can be reopened for the purpose of giving thrust to non-conventional energy projects."

- (l) that the State Commission has failed to appreciate that clause 2.1.1(i) of the Power Purchase Agreement entitled the Appellant company to get the applicable tariff as per the tariff orders notified by the Commission from time to time and the Power Purchase Agreement with Respondent No.2 can be reopened as per the judgment, dated 28.9.2006, of this Appellate Tribunal in the case of M/s Rithwik Energy System.

3. We have heard Shri Rakesh Mitra, the learned counsel for the Appellant, Shri Sakesh Kumar, the learned counsel for Respondent No.1, Shri Anand K. Ganesan and Ms. Swapna Seshadri, the learned counsel for Respondent No.2. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission and written submissions.

4. The following issues arise for our consideration:
- (A) whether State Commission has failed to properly discharge its statutory functions under Section 61(h) and Section 86(1)(e) of the Electricity Act, 2003, while rejecting the Appellant's petition by the impugned order?
 - (B) whether the State Commission has erred in law in allowing a variable rate of Rs.3.12 per kWh to the Appellant Petitioner but Rs.3.42 per kWh to other similarly placed projects for the same year 2012-13 and onwards, which has discriminated between the two, when all input costs are same for all the generators?
 - (C) whether the State Commission has erred in dismissing the petition filed by the Appellant-petitioner for revision of tariff rate under Section 61 and Section 86(1)(e) of the Electricity Act, 2003, after having allowed two other petitions being Petition Nos. 52 & 53 of 2012 under the same sections of the Electricity Act, 2003 titled M/s Rana Sugars Ltd. vs State of Punjab & Ors. & M/s A.B. Sugars Ltd. vs. State of Punjab & Ors. on 30.11.2012?
5. Since all these issues are inter-connected, we are taking and deciding them together:
6. The contentions raised on behalf of the Appellant on these issues are as under:-
- (a) that the Appellant has been selling power to PSPCL/ Respondent No.2 at the rate as per the State Commission's order, dated 30.9.2010, but the Appellant has found that these rates are becoming unviable as the prevailing market rates for bagasse and rice-husk have increased to Rs.2500/MT and Rs.4500/MT respectively, and running of plant during off-season has become unviable.

- (b) that the cost of short term working capital loan has also increased due to increase in the interest rates.
- (c) that the O&M charges have also risen due to high inflation and cost of labour. Due to these reasons, the variable cost works out to be over Rs.5.00 per unit. It is quite unworkable to generate power during off season; the fixed charges work out to be Rs.3.50 per unit approximately.
- (d) that the State Commission has erred in law in overlooking the judgment, dated 28.9.2006, passed by this Appellate Tribunal in the case of M/s Rithwik Energy Systems and others vs. Transmission Corporation Ltd., Andhra Pradesh and others while dismissing the Appellant's petition seeking revision of tariff under Section 86(1)(e) and 61 of the Electricity Act, 2003 in respect of the sale of surplus power to the Respondent No.2/Distribution Licensee from its 23 MW co-generation plant.
- (e) that the Respondent No.2 & 3, admitted before the State Commission that rice straw cannot be used for various reasons and that while fixing the fuel rate, contribution of rice straw should be excluded and the whole matter needed to be reviewed afresh because of the problems associated with the use of rice straw. But the State Commission has failed to consider the plea raised on behalf of the Respondents No. 2 & 3 before the State Commission, while dealing with the case of generic tariff for the year 2013-14.
- (f) that the State Commission, has further erred in laws in dismissing the petition filed by the Appellant by the impugned order seeking revision of tariff under Section 86(1)(e) and 61 of the Electricity Act, 2003, after having allowed two other petitions being Petition No. 52 & 53 of 2012, titled M/s Rana Sugars Ltd. vs. State of Punjab & Ors. as well as M/s A.B. Sugars Ltd. vs. Stte of Punjab & Ors. on 30.11.2012. Those two similarly placed co-generation plants were set up three years after that of the co-generation plant of the Appellant and

those two co-generation plants were allowed Rs.3.42/kWh as variable charge as against the variable charge of Rs.3.12/kWh allowed to the Appellant. This disparity in the variable charges made by the State Commission is not, only unjustified and discriminatory, but anomalous too. The Appellant's co-generation plant should have been granted the same variable charge as allowed to the other similarly placed aforesaid co-generation plants because the fuel price of all the co-generation plants remains the same.

- (g) that the State Commission has also erred in adopting annual PLF of 80% while working out fixed cost on the assumption that the T.G. sets of sugar plants would run during off season also. In practice, this is not workable because the bio fuel – rice husk available in the market used to sell @ Rs.4500/- MT (or even more) making the operation of the plant unviable, which plea was raised by the Appellant before the State Commission and was not refuted by the Distribution Licensee in reply. In the interest of justice and fair play, the State Commission should have either worked out variable component @ Rs.4500/- MT as working capital or O & M expenses should have been allowed for actual period of operation instead of full year provided PLF is also considered and fixed charges are fixed accordingly. Besides that, variable charges should, at least, be the same for a particular year for all similarly situated projects.
- (h) that the State Commission has erred in law in ignoring the judgment of this Appellate Tribunal, dated 28.9.2006, in the case of Rithwik Energy Systems Ltd. vs. Transmission Corporation of Andhra Pradesh Ltd. & Others, wherein it was observed that it is the bounden duty of the Commission to incentivize the generation of energy from renewable sources of energy and that PPA can be reopened for the purpose of giving thrust to non-conventional energy projects.

- (i) that, lastly, this Appellate Tribunal should set-aside or modify the impugned order, dated 16.8.2013, passed by the State Commission to the extent impugned herein namely; Rs.5/- per kWh as variable charges plus Rs.3.50 per kWh as fixed charges with consequential reliefs to the Appellant.

7. **Per-contra**, the following submissions have been made by Shri Sakesh Kumar on behalf of the Respondent No.1 and Shri Anand K. Ganesan and Ms. Swapna Seshadri on behalf of the Respondent No.2:-

- (a) that the claim of the Appellant to the instant petition was for a higher tariff to be applied to the Appellant than the tariff as applicable for the other similarly situated projects in the State of Punjab.
- (b) that the State Commission has, by the impugned order, rejected the Appellant's claim/petition and up-held the tariff of Rs.4.57 per kWh [Rs.1.73 per kWh (fixed charges) + Rs.2.84 per kWh (variable charges)] for the FY 2010-11. The variable cost is subject to revision based on annual escalation as provided for in the tariff terms and conditions.
- (c) that the Appellant is only seeking a higher tariff which is unjust and not admissible to the similar placed project in the State of Punjab.
- (d) that the Appellant is a generating company having established a 23 MW cogeneration plant in the State of Punjab. The generating station was commissioned by the Appellant on 20.12.2010, which utilizes bagasse as a fuel sourced from the sugar mill of the Appellant and other biomass fuels when bagasse is not available.
- (e) That the Appellant supplied electricity to the Respondent No.2/PSPCL to the tune of 16 to 20.5 MW on short term basis from the date of commissioning on 20.12.2010 up to March, 2012. Thereafter, the Appellant desired to supply electricity to

the Respondent No.2 on long term basis and for that purpose, the Appellant entered into a PPA with the Respondent No.2/Distribution Licensee on 10.9.2012 providing for the terms and conditions for supply of electricity by the Appellant to the Respondent No.2/PSPCL.

(f) that the PPA, dated 10.9.2012, inter-alia, provides as under:

“2.1.0 Sale of energy by Generating Company

2.1.1 The PSPCL shall purchase and accept all energy made available at the interconnection point from the Co-Generation facility, pursuant to the terms and conditions of this Agreement at the following rates approved by the Commission in its generic levellised generation tariff renewable energy power projects (other than Solar) order dated 30.09.10, which is set out below:

i) The applicable tariff for Non-Fossil Fuel based Co-Generation project is Rs.4.57P (Rs. 1.73P/Unit for fixed tariff + Rs.2.84P/Unit for variable tariff) as applicable to projects to be commissioned in FY 2010-11. However, the Company shall be eligible for getting the applicable tariff for the project commissioning year as per further tariff orders notified by PSERC. The variable tariff for subsequent years will be worked out as per para (v) below for tariff period of 13 years from the actual Date of Commercial Operation. At the end of the above specified tariff period, the tariff payable for the balance term of the Agreement, till the useful life of 20 years of the project, shall be as determined by the commission. In case there delay in determining the tariff by commission, the tariff payable shall be the last escalated tariff for the 13th year till the Commission determines the new tariff.”

.....

iv) As per the RE Regulations, for each subsequent year of Tariff Period following the year of commissioning, the Company has opted for a normative escalation factor of 5% per annum for determination of variable charge component of the tariff.

Or

Firm have also the choice to opt for fuel price escalation based on CERC’s fuel price indexation mechanism.

v) The escalated tariff will be applicable from 1st day of April of each year. The rate would be uniform throughout the day for the entire year. No additional payment shall, on any account be payable by the PSPCL. This power shall be scheduled by PSPCL on first charge basis.”

- (g) that the State Commission had, by order, dated 30.9.2010, determined the generic levelised generation tariff for renewable energy projects in the State of Punjab and the order, dated 30.9.2010, was applicable to projects to be commissioned in the FY 2010-11. In the order, dated 30.9.2010, the State Commission adopted the norms and parameters as stipulated by the Central Commission with such modifications as necessary for the State of Punjab.
- (h) that in its order, dated 30.9.2010, the State Commission determined the tariff for non-fossil fuel based co-generation projects at Rs.4.57 per unit with the fixed cost of Rs.1.73 per unit and variable cost of Rs.2.84 per unit applicable for the year 2010-11. Further, the variable charges were subject to escalation as provided in the tariff order itself of the State Commission.
- (i) that since the generating station of the Appellant was commissioned in the FY 2010-11, the tariff as determined by the State Commission in its order, dated 30.9.2010, was adopted and incorporated in the PPA entered into between the parties.
- (j) that after agreeing to supply electricity to the Respondent No.2 at the generic tariff as determined by the State Commission and execution of the PPA, the Appellant in the month of April, 2013, filed a petition being Petition No. 23 of 2013 before the State Commission seeking revision and redetermination of the tariff and claiming the tariff of Rs.8.50 per unit (Rs.3.50/unit as fixed charges and Rs.5.00/unit as variable charges) and the said petition has been dismissed, by the impugned order, dated 16.8.2013, passed by the State Commission.
- (k) that the Appellant did not provide any detail whatsoever in the impugned petition and merely sought for the increase citing the decision of this Appellate Tribunal in M/s Rithwik Energy

Systems & Ors vs. Transmission Corporation of Andhra Pradesh, and claiming that renewable energy sources should be incentivized and provided higher tariff.

- (l) that since the State Commission has determined the tariff applicable to all the generators in the State to be commissioned in the relevant year and then there was no justification for the Appellant to seek differential tariff for its co-generation project particularly after having signed the PPA at the tariff as determined by the State Commission.
- (m) that there is no provision for revision of tariff except for variable cost which was already taken care of in the tariff order of the State Commission. Further, the Appellant was also being entitled to tariff including interest on working capital for 4 months storage of fuel whereas the Appellant was running the plant only in the season and not storing fuel. Further, escalation for the Operation & Maintenance expenses was also included in the levelised tariff determined by the State Commission.
- (n) that the Appellant is only seeking to have an undue enrichment by claiming a higher tariff at the cost of the Respondent No.2 and the consumers in the State, without providing any details and specifications and also without there being any justification for the increase in tariff for the Appellant as a special case when the tariff order passed by the State Commission was generic in nature and was accepted by the Appellant as such.
- (o) that the Appellant has not given any justification or details in the Memo of Appeal whatsoever on merits as to why the tariff should be reopened. The only ground of challenge in the Appeal by the Appellant is that the State Commission has the power to reopen the PPAs and two other generators, who are getting a different higher tariff and that too without giving details of the

date of commissioning of those co-generators, the tariff order applicable and the terms and conditions of the PPAs, etc.

- (p) that the Appellant has simply contended that its tariff is Rs.8.50 per unit. No details of fuel purchase, equipment purchase, the mix of fuel being used, the bills of fuel purchase etc., have been given.
- (q) that the Appellant, before this Appellate Tribunal as well as before the State Commission, has failed to discharge the onus of proving the claims of higher cost being incurred, the Appeal is liable to be dismissed.

8. We have considered the rival submissions of the parties deeply and cautiously. This Appellate Tribunal, in its judgment, dated 28.9.2006, in the case of M/s Rithwik Energy Systems Ltd. vs. Transmission Corporation of Andhra Pradesh Ltd. & Others, held that a contract/PPA can be reopened for the purpose of encouraging and promoting renewable sources of energy projects pursuant to the mandate of Section 86(1)(e) of the Electricity Act, 2003, which requires the State Commission to promote co-generation and generation of electricity from renewable sources of energy. It is also the bounden duty of the Commission to incentivize generation of electricity from renewable sources of energy and that PPA can be reopened for the purpose of giving thrust to non-conventional energy projects. It does not mean that every contract/PPA may be reopened for the purpose of encouraging and promoting renewable sources of energy projects, but it depends upon the facts and circumstances of individual case. It is true that the State Commission, if it finds the case fit for consideration, in which PPA should be reopened, it can, in order to incentivize the generation of electricity from renewable sources of energy, reopen the PPA for encouraging non-conventional energy projects. Before applying the principles of law laid down by us in our judgment, dated 28.9.2006, as stated above, the legal provisions may be fully satisfied in toto and they cannot be read in isolation.

9. It is undisputed that the Appellant - a co-generation plant was commissioned on 20.12.2010, which utilizes bagasse as a fuel sourced from the sugar mill of the Appellant and other biomass fuel when bagasse is not available. The Appellant supplied electricity to Respondent No.2/Distribution Licensee/PSPCL on short term basis from the date of commissioning on 20.12.2010 up to March, 2012. Thereafter, the Appellant desired to supply electricity to the Respondent No.2 on long term basis and then the Appellant entered into a PPA with Respondent No.2 on 10.9.2012 providing for the terms and conditions for sale or supply of electricity. As per clause 2.1.1(i) of the aforesaid PPA, dated 10.9.2012, the applicable tariff for non-fossil fuel based co-generation projects is Rs.4.57 per kWh [Rs.1.73 per kWh (fixed tariff) + Rs.2.84 per kWh (variable tariff)] as applicable to projects to be commissioned in the FY 2010-11 with a provision for annual escalation in variable tariff. Since, the said co-generation plant of the Appellant was commissioned during the FY 2010-11, the tariff determined by the State Commission is Rs. 4.57 per kWh with a provision for annual escalation in variable tariff as per provisions in the Regulations. The tariff provided in the PPA is the same as mentioned above and the Appellant was aware of the same at the time of signing of PPA on 10.9.2012.

10. The Appellant was granted generic tariff worked out by the State Commission on the basis of the capital cost and other parameters on normative basis for non-fossil fuel based co-generation projects as per RE Regulations, 2009 including fuel cost, operation & maintenance cost and annual escalation, interest on working capital, etc. as per the Regulations.

11. The PPA signed by the Appellant with the Distribution Licensee, has no provision for revision of tariff except for variable cost for which a provision for annual escalation is already provided. The PPA between the Appellant and the Respondent No.2, signed as recently as on 10.9.2012 with fixed tariff as Rs.1.73 per kWh and Rs.2.84 per kWh as variable tariff with annual escalation in variable tariff. The Appellant has filed the

instant petition being Petition No. 23 of 2013 on 13.4.2013 before the State Commission, just after 7 months of the execution of the aforesaid PPA, asserting therein that he had setup 23 MW Co-generation plant during the year 2010-11 to utilize the bagasse, as a fuel, generated from its sugar mill. During off-season, when bagass stocks are finished, the plant is shut as other bio-fuels are not financially viable as the main fuel i.e. rice husk is available at Rs.4500/- per MT. Due to increase in the price of rice-husk, the running of plant during off season has become unviable. However, the said co-generation plant, as per clause 2.1.1(i) of the PPA, dated 30.9.2010, is eligible for getting applicable tariff for the project commissioning year as per tariff orders notified by the State Commission from time to time. But, the said co-generation plant of the Appellant, as per the aforesaid PPA, has been granted fixed tariff for the FY 2010-11 @ Rs. 4.57 per kWh [Rs.1.73 per kWh (fixed tariff) + Rs.2.84 per kWh (variable tariff)]. The cost of short term working capital loan has also increased during the last few years due to increase in interest rate and O&M charges have also risen due to high inflation and cost of labour. The variable cost of power on prevailing prices of bagasse and other variable components works out to be over Rs.5/- per unit. Due to these factors, the fixed charges work out @ Rs.3.50 per unit approximately. As per Sections 61(h) and 86(1)(e) of the Electricity Act, 2003, and the judgment, dated 28.9.2006 of this Appellate Tribunal in the case of M/s Rithwik Energy Systems Ltd. vs. Transmission Corporation of Andhra Pradesh Ltd. & Others, the revised remunerative tariff be fixed keeping in view the prevailing rates of bagasse/rice husk so that the said co-generation plant do not suffer losses by selling power at the existing rates while trying to optimize generation from its TG set.

12. Thus, the main contention in the petition of the Appellant before us is that due to increase in the price of biomass fuel like rice-husk, during off season when bagasse stocks are finished, increase in cost of short term working capital loan and also increase in O&M charges and cost of labour, the revised remunerative tariff of the co-generation plant be fixed so as to make the plant viable. The other contention of the Appellant is that the

State Commission has provided/allowed higher rates of tariff to M/s Rana Sugars Ltd. and M/s A.B. Sugars Ltd. (the two similarly placed co-generation plants), which have been set up 3 years after the co-generation plant of the Appellant. Both these contentions are without merits because the State Commission had, by order, dated 30.9.2010, in Petition No. 32 of 2010 (suo-motu) for Renewable Energy technologies including that of the Appellant namely; non-fossil fuel based co-generation project commissioned in the FY 2010-11, determined generic levellised generation tariff for renewable energy projects in the State of Punjab, by adopting the norms and parameters as stipulated by the Central Commission, with such modification, as made by the State Commission for the State of Punjab.

13. We note that the State Commission, in the aforesaid order, dated 30.9.2010, determined the tariff for non-fossil fuel based co-generation projects @ Rs. 4.57 per kWh with the fixed tariff of Rs.1.73 per kWh and variable tariff of Rs.2.84 per kWh for FY 2010-11 with escalation in variable charges. Since, the Appellant's co-generation plant was commissioned in FY 2010-11, the tariff determined by the State Commission, vide its order, dated 30.9.2010, was adopted and incorporated in the aforesaid PPA entered into between the Appellant and the Respondent No.2.

14. We also observe that after agreeing to the supply of electricity to the Respondent No.2 at the generation tariff as determined by the State Commission and execution of the PPA, the Appellant, just 6 months later i.e. in April, 2013, filed the instant petition being Petition No. 23 of 2013, before the State Commission seeking revision and redetermination of tariff and claiming the tariff of Rs.8.50 per unit (Rs.3.50/unit as fixed charges and Rs.5.00/unit as variable charges). We also observe that the Appellant did not provide any details whatsoever in the impugned petition regarding the increase in the cost of biomass fuel as existing before the execution of the PPA and existing at the time of filing the impugned petition and merely sought for the increase by filing the instant petition by citing the decision

of this Appellate Tribunal in M/s Rithwik Energy Systems & Ors vs. Transmission Corporation of Andhra Pradesh & Ors., which we have referred in detail above. It was incumbent upon the Appellant-petitioner to give data/details of the fuel like bagasse/rice husk prevalent at the time the PPA was signed and the monthly and quarterly increase in the price of biomass fuels within the next 6 months till the filing of the instant petition. We are unable to accept the contentions of the Appellant that there was steep increase in price of biomass fuel like bagasse or rice-husk within the next 6 months of the date of entering into the PPA between the Appellant and the Respondent No.2. If there was really any increase, the same should have been given data-wise, so as to enable the learned State Commission to consider or compare the same and then give conspicuous and well-reasoned finding. The Appellant has simply contended that its tariff should be worked out @ Rs.8.50 per unit without giving details of fuel purchase, equipment purchase, the mix of fuel being used, the bills of fuel purchase etc. The Appellant-petitioner, in our opinion, has miserably failed to discharge the onus placed upon the Appellant for proving the details of higher cost being incurred and without any proof thereof, the Appellant cannot succeed in the Appeal.

15. We do not find any substantial or concrete ground to reverse the findings recorded in the impugned order or to reverse the impugned order, dated 16.8.2013, passed by the State Commission. The judgment, dated 28.9.2006, passed by this Appellate Tribunal in M/s Rithwik Energy Systems case, is not applicable to the facts and circumstances of the case of the Appellant petitioner because just on the mere request of any Appellant/Co-generation project, PPA cannot be allowed to be reopened just after 6 months of the execution of the PPA and just on the ground of increase in price of biomass fuel like bagasse or rice-husk without there being any data or documentary proof showing purchase of such fuel at the higher price. No co-generation project can be held to be automatically entitled to the benefit of the provisions provided under Sections 61(h) and 86(1)(e) of the Electricity Act, 2003 because the provisions are required to

be satisfied in all contents. The Appellant is claiming tariff equal to those aforesaid co-generation plants, which were set up 3 years after the Appellant's co-generation project and they have been given tariff as per the terms and conditions of the individual PPA and other Tariff Regulations of the State. No one is automatically entitled to higher tariff fixed or variable just on the ground that other co-generation plants commissioned after three years are being allowed higher tariff namely; higher fixed tariff and higher variable tariff.

16. The State Commission has fully discharged its statutory functions as provided under Sections 61(h) and 86(1)(e) of the Electricity Act, 2003. The State Commission has passed the impugned order in a legal, just and proper way without any discrimination between the co-generation projects including that of the Appellant. The State Commission has rightly dismissed the instant petition of the Appellant praying for revision of tariff rate and the Appellant cannot be given the same higher tariff fixed or variable as given to M/s Rana Sugars Ltd. and M/s A.B. Sugars Ltd., vide order, dated 30.11.2012. The Commission has rightly and properly determined the tariff for all the co-generation plants for the relevant period. We do not find any perversity or illegality in the impugned order and we approve the same. The contentions of the Appellant are without merits and the instant Appeal is liable to be dismissed. **All the issues are, therefore, decided against the Appellant.**

17. **Summary of our findings:**

17.1 The State Commission has legally and properly discharged its statutory functions under Sections 61(h) and 86(1)(e) of the Electricity Act, 2003 while passing the impugned order and has rightly rejected the Appellants' instant petition being Petition No. 23 of 2013 filed by the Appellant seeking revision of tariff in respect of sale of surplus power to the Distribution Licensee/PSPCL/Respondent No. 2 under Section 86(1)(e) and Section 61 of the Electricity Act, 2003. The State Commission had, by

order, dated 30.9.2010, determined generic levellised generation tariff for renewable energy projects in the State of Punjab, which order was applicable to the projects to be commissioned in the FY 2010-11, adopting the norms and parameters as stipulated by the Central Commission, with necessary State modifications at the relevant time. In the earlier tariff order, dated 30.9.2010, the State Commission, determined the tariff for non-fossil fuel based co-generation projects at Rs.4.57 per kWh [Rs.1.73 per kWh as fixed cost + Rs.2.84 per kWh as variable cost] with annual escalation clause in variable charges for the year 2010-11. Since, the aforesaid bagasse/ bio-fuel based co-generation plant of the Appellant was set up in the FY 2010-11, the same tariff was allowed to the Appellant's co-generation plant for FY 2010-11. Accordingly, the PPA between the Appellant and the Distribution Licensee/PSPCL was signed on 10.9.2012 as per the generic tariff determined as stated above.

17.2 The grounds seeking revision of tariff rate in the instant petition being Petition No. 23 of 2013, are that due to increase in the price of biomass fuel like rice-husk in off season, the running of the aforesaid plant of the Appellant has become unviable and generation of electricity therefrom has become unworkable and the Appellant be allowed Rs. 8.50 per unit (Rs.3.50 as fixed charges + Rs.5.00 as variable charge) considering the increase in biomass fuel price in the off season, increase in the cost of short term working capital loan and also increase in O&M charges due to inflation and cost of labour. The instant petition was filed just after 6 or 7 months of signing of the PPA without furnishing or providing any details of fuel purchase, equipment purchase, the mix of fuel being used, the bills of fuel purchase etc., basing its claim on the judgment, dated 28.9.2006, passed by this Appellate Tribunal in the case of M/s Rithwik Energy Systems and others vs. Transmission Corporation Ltd., Andhra Pradesh and others also on the ground that two other similarly placed bagasse or biomass fuel based co-generation plants, which were set up three years after the co-generation plant of the Appellant, have been provided higher tariff, the instant petition has rightly been rejected by the State Commission.

17.3 The Appellant cannot be held entitled to seek revision or redetermination of tariff due to alleged increase in the price of biomass fuel like bagasse or rice-husk, just after 6 months of the execution of the PPA, particularly, when no data or details regarding increase in fuel price, purchase of fuel and equipment, etc for his bagasse/biomass based co-generation plant have been furnished. Our judgment, dated 28.9.2006, in M/s Rithwik Energy Systems case does not automatically entitle any bagasse or biomass fuel based co-generation plant to the benefit of Section 61(h) and 86(1)(e) of the Electricity Act, 2003 unless the conditions prescribed therein are fully satisfied. No co-generation plant, like that of the Appellant, is entitled to higher tariff just on the ground that other similarly placed co-generation plants set up three years after that plant of the Appellant, are being given higher tariff because every plant whether co-generation plant or otherwise, is entitled to the tariff as per the terms and conditions of the individual PPA and other tariff Regulations of the concerned Commission as per provision of the Electricity Act, 2003.

18. Consequently, the instant Appeal has no merits and is accordingly dismissed and the impugned order, dated 16.8.2013, passed by the Punjab State Electricity Regulatory Commission is hereby affirmed. No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 1ST DAY OF OCTOBER, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE / ~~NON-REPORTABLE~~

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