

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

Appeal No. 90 of 2013

Dated: 9th April, 2014

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

In the matter of:

**M/s. Puri Oil Mills Ltd.,
Having its registered office at
302, Jyoti Shikhar, 8 Distt. Centre,
Janakpuri, New Delhi-110 058**

... Appellant (s)

Versus

- 1. Haryana Power Purchase Centre,
Having its office at Shakti Bhawan,
Sector-6, Panchkula,
Haryana.**
- 2. Uttar Haryana Bijli Vitran Nigam Ltd.,
Vidyut Sadan, Plot No. C-16,
Sector-6, Panchkula
Through its Managing Director**
- 3. Haryana Electricity Regulatory Commission,
Bays No. 33-36, Sector-4,
Panchkula-134109, Haryana**

...Respondent(s)

Counsel for the Appellant(s): Mr. Sanjay Sen, Sr. Advocate
Mr. Abhay Anand,
Ms. Bina Gupta,
Mr. R.K. Mehta,
Mr. Antaryami Upadhyay

Counsel for the Respondent(s): Mr. M.G. Ramachandran,
Mr. Raghjeet Singh Madan,
Mr. Hemant Singh

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by M/s. Puri Oil Mills Ltd. against the impugned order dated 12.4.2012 passed by Haryana Electricity Regulatory Commission (“State Commission”) rejecting the Petition of the Appellant for re-determination of tariff of their two canal based Mini Hydro Power Plants and amendment of the concluded Power Purchase Agreement entered into with Haryana Power Purchase Centre for sale of power.

2. The Appellant is a generating company which has set up two small Canal based hydro power plants with installed capacity of 1.4 MW each. Haryana Power Purchase Centre which is responsible for procurement of power for the distribution licensees and Uttar Haryana Bijli Vitran Nigam Ltd., the distribution

licensee are the Respondent no. 1 and 2 respectively.
The State Commission is the Respondent no.3.

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

a) The Appellant entered into a Memorandum of Understanding with Haryana Renewable Energy Development Agency and Irrigation Department on 27.11.2006 for implementation of the canal based small hydro power projects.

b) The State Commission passed orders on 15.5.2007 and 6.11.2009 on Renewable Energy Tariff for the period 2007-08 to 2012-13.

c) The Appellant entered into a Power Purchase Agreement (“PPA”) on 13.8.2010 with Haryana Power Purchase Centre, the Respondent no. 1 for sale of energy from its two canal based Mini Hydro Power Projects of 1.4 MW each based on the above tariff orders of the State Commission.

d) The two projects were commissioned on 13.6.2011 and 30.9.2011 respectively.

e) The Appellant filed a Petition on 18.6.2011 before the State Commission for re-determination of tariff for its projects and accordingly sought amendment of the PPA dated 13.8.2010 executed by them with the Respondent no. 1.

f) The State Commission by the impugned order dated 12.4.2012 dismissed the above Petition on the ground that the State Commission's order dated 15.5.2007 which formed the basis of signing of the PPA between the parties could not be reviewed and in view of the commitment of sale of entire power generated by the Appellant to the Respondents, third party sale and REC benefits also could not be allowed.

g) The Appellant thereafter filed a review petition which was also dismissed by the State

Commission by its order dated 6.11.2012 as not maintainable.

h) Aggrieved by the order dated 12.4.2012 read with review order dated 6.11.2012, the Appellant has filed this Appeal.

4. The Appellant has made following submissions:

a) The State Commission had passed the generic order for tariff of renewable energy projects on 15.5.2007, based on the data available at that time when no similar canal based mini hydro project was under construction or in operation in the State. Therefore, the cause of action arose only when the projects of the Appellant were commissioned and facts came to surface.

b) During the construction of the projects by the Appellant, it was realized that the capital cost of these

projects was much higher than assumed by the State Commission in tariff order dated 15.5.2007 mainly due to various unforeseen additional costs for reason such as the conditions imposed by the State Irrigation Department for repair of canal lining and maintenance and upkeep of the canal 2 km. upstream and 2 km. down stream of the project site and other factors. In addition, cost of strengthening of the canal banks has also been passed on to the project developer by the State Irrigation Branch considering the last breach in canal which occurred on 15.12.2011, which resulted in complete closure of the hydro plants of the Appellant for some time. None of these factors were shared with the Appellant by the Irrigation Department before execution of the PPA. The actual average capital cost of the two projects was Rs. 12.60 Cr./MW as against the average cost of

Rs.11.42 Cr. taken in the Detailed Project Report ('DPR') prepared by the Appellant and normative capital cost of Rs. 10.2 Cr./MW as per the tariff order dated 15.5.2007.

c) There was an inherent deficiency in the canal lining while raising its capacity from 3250 cusecs to 4500 cusecs as also admitted by the Irrigation Department. The condition of canal could be ascertained only after ponding of water in the canal which was created once the project was commissioned. Further, due to flat terrain in Haryana there are low water heads which require more civil works. As a result, the actual cost incurred on the project was much higher.

d) The O&M expenses are much higher than Rs. 17 lacs./MW (for FY 2010-11) with annual

escalation of 5.72% as allowed in the tariff order due to additional burden of maintenance of canal 2 km. upstream and 2 km. downstream. The actual O&M expenditure for the two hydro plants is Rs. 38.16 lacs/MW and Rs. 44.50 lacs./MW respectively.

e) The State Commission in its order dated 15.5.2007 provided for a levy of wheeling charges @ 2% of the energy fed in the grid. The PPA on the other hand provides for delivery point at the generation switchyard of the Appellant's plants and the distribution licensee is responsible for building the interlinking line only upto 10 km. from the generating station to the 33 kV sub-station of the distribution licensee. In the instant case the metering is being done at the generator premises and the distribution licensee is the direct beneficiary of the power and, therefore,

there is no justification of levying the transmission charges.

f) The evacuation system in Haryana is not fully strengthened, so there are frequent grid failures resulting in loss of generation. The PPA provides for compensation to the generator only when the total duration of the grid outages is above 480 hrs in a year. This is unfair.

g) The State Commission has failed to consider the third party sale and REC benefit in contravention to the PPA which provided that if at a later stage the State Commission formulated the policies of the third party sale of power generated by the Independent Power Projects, the Respondent no. 1 would consider permitting third party sale to the Appellant on a separate set of terms and conditions as mutually

acceptable to the parties subject to the approval of the State Commission.

5. In reply to the above contentions, the Respondent no. 1 has submitted as under:

a) The PPA specifically refers to the terms and conditions of the tariff orders passed by the State Commission dated 15.5.2007 and 6.11.2009 for small and mini hydro power plants. Further the State Commission has notified the Renewable Purchase Obligation and Renewable Energy Certificate Regulations of 2010 which provided that the PPAs signed by the distribution licensees on the basis of the tariff orders dated 15.5.2007 and 6.11.2009 on renewable energy before the notification of the 2010 Regulations would remain valid for the tariff period as per the PPA and such cases would not be reopened in view of the norms provided in the 2010 Regulations.

Therefore, it is not open to the Appellant to seek any increase in capital cost or otherwise any revision of any element of tariff over and above that specifically stipulated in the PPA and the order dated 15.5.2007.

b) The Appellant had voluntarily entered into the PPA dated 13.8.2010 with the Respondent in the background of the orders dated 15.5.2007 and 6.11.2009 passed by the State Commission. The Appellant is estopped from claiming any upward revision in tariff as even at the time of signing of the PPA, the Appellant never requested for any project specific tariff, despite knowing the existence of all factual aspects now being pleaded by the Appellant.

c) The Appellant had enough time to prepare and submit the DPR on 2.11.2007 after signing of MoU on 27.11.2006, i.e. nearly one full year. There was enough time for the Appellant to put its expertise to

use and understand the requirements of the project and then go ahead with it. Further the circumstantial changes which purportedly compelled the Appellant to seek intervention of the State Commission too were never disclosed by the Appellant at the relevant time.

6. We have heard Mr. Sanjay Sen, learned Sr. Advocate representing the Appellant and Shri M.G. Ramachandran, learned counsel for the Respondent no. 1.

7. On the basis of the rival contentions of the parties, the questions that arise for our consideration are:

i) Whether the State Commission should reopen the already concluded PPA and re-determine the tariff of the mini hydro projects of the Appellant in the circumstances of the case?

ii) Whether the Appellant is entitled to claim higher capital cost, O&M charges and compensation for loss of generation due to grid constraints over and above that considered in the tariff order dated 15.5.2007 and agreed to in the PPA?

iii) Whether the Appellant is entitled to claim open access and REC despite having a long term PPA for supply of power to the Respondent no. 1?

iv) Whether the Respondent no. 2 is entitled to claim wheeling charges @ 2% even though the entire energy from the Appellants projects is being supplied to the distribution licensees?

As the first three issues are interconnected these are being dealt with together.

8. Let us examine the findings of the State Commission in the impugned order dated 12.4.2012.

The relevant findings of the State Commission are summarized as under:

i) The State Commission determined the generic tariff for renewable power projects vide order dated 15.5.2007 and the tariff was applicable with the annual escalation factor for the control period of five years. The order dated 15.5.2007 was not challenged by mini hydel power projects.

ii) The Tariff Regulations for renewable energy sources of 2010 were notified on 3.2.2011 and were applicable from the date of notification. The 2010 Regulations stipulate that the PPAs signed by the distribution licensees on the basis of tariff determined by the State Commission in its order dated 15.5.2007 and 6.11.2009 before the notification of the 2010 Regulations shall remain valid for the tariff period as

per the PPA and such cases shall not be reopened in view of the norms provided in these Regulations.

iii) In the PPA dated 13.8.2010, both the parties agreed to the tariff determined by the State Commission vide order dated 15.5.2007 including the escalation factor approved by the State Commission. The PPA also has the provision for determination of tariff beyond the control period. Thus, the Petitioner M/s. Puri Oil Mills Ltd. willingly entered into PPA as late as 13.8.2010 i.e. more than three years after the date of passing of the tariff order dated 15.5.2007 by the State Commission.

iv) There is nothing on record to establish that M/s. Puri Oil Mills Ltd. made any bonafide attempt to survey and reassess the additional work required for their power house or irrigation canal at site before going ahead with the project and signing the PPA.

v) In view of the concluded PPA with specific agreement on applicable tariff and the 2010 Regulations and Central Commission's Renewable Energy Regulations being subsequent development not applicable to the Petitioner, the claim of M/s. Puri Oil Mills Ltd. for adoption of the revised norms based on the 2010 Regulations of Haryana Commission and the Central Commission's Regulations is rejected.

vi) Regarding additional expenses on account of repair & maintenance of the irrigation canal, it was the pre-condition of approval and it was a planned work known in advance to the project developer before signing of PPA, hence the Petitioner ought to have taken all such expenses into consideration at the DPR stage. Therefore, these expenses cannot be considered unforeseen expenses.

vii) In view of firm commitment of sale of entire power generated by the Petitioner to the Respondents, third party sale and REC benefit cannot be allowed.

viii) The State Commission vide order dated 25.1.2012 has held that the State Commission would decide/review the tariff for small hydro projects in Haryana on case to case basis after obtaining data on water flow as well as capital cost for projects already commissioned in Haryana. Thus, the Petitioner has liberty to file a Petition for determination of tariff with case specific supporting data which would be applicable from a prospective date as the tariff determined by the State Commission vide order dated 15.5.2007 was valid only for the period ending March, 2012 and the Commission after reviewing the case specific data shall pass appropriate order.

9. Thus, the State Commission after rejecting the prayer of the Appellant for re-determination of tariff in view of the concluded PPA gave liberty to the Appellant to file a Petition with supporting data to determine project specific tariff prospectively as the tariff determined by order dated 15.5.2007 was valid only till the period ending March 2012.

10. Let us examine the PPA dated 13.8.2010. The relevant clauses are reproduced below:

“3.1. Sale of Energy by Company:

The HPPC shall purchase and accept all energy made available at the Delivery point from the Company’s facility, pursuant to the terms and conditions of this agreement as per the HERC tariff order dated 15.5.2007 and 6.11.2009 for small & mini HEP (falling under non conventional energy sources) issued by the Haryana Electricity Regulatory Commission. The IPP shall deliver the contracted energy barring unforeseen

circumstances of Canal Closures OR any planned maintenance schedules of Irrigation Deptt. planned & forced outage of the unit/plant or force Majeure conditions described separately under clause 15.1 & 15.2.

Annual Escalation @ 1.5% on the minimum rate of Rs. 3.67 per kWh (base year 2007-08) will be admissible upto the year (2011-2012) i.e. upto 31.03.2012 and for the remaining duration of the agreement, the purchase price shall be decided and notified by the Haryana Electricity Regulatory Commission subject to a minimum Rs. 3.67 per kWh. The escalated tariff will be applicable from 1st day of April of each year. This rate would be uniform throughout the day for the entire year”.

11. Thus, vide the above PPA the parties agreed to tariff of Rs. 3.67 per kWh with annual escalation of 1.5% as decided by the State Commission vide order

dated 15.5.2007 and 6.11.2009 for small and mini hydro electric projects.

12. Let us examine the grounds for re-determination of tariff pleaded by the Appellant in its Petition before the State Commission. These grounds are:

i) During the construction of the Project it was realized that the capital cost of the project would be much higher due to unforeseen additional cost for reasons such as conditions imposed by the State Irrigation Department for repair of canal lining and maintenance and upkeep of the canal 2 km. upstream and 2 km. downstream of the project site.

ii) The State Commission while determining the tariff for assumed auxiliary consumption, Return and Equity and interest rate lower than the Central Commission's Regulations of 2009 and Haryana Commission's Regulations of 2010. The PLF/CUF of

hydro projects in the State Commission tariff order was 70% whereas the Central Commission's Regulations provide for CUF of 56% and Haryana Commission's 2010 Regulations provide for CUF of 30%.

iii) The delivery point as per PPA is the power station bus bar and the distribution licensee has been given the responsibility of building the interlinking line upto 10 km. from the generating station to the designated 33 kV sub-station of the distribution licensee yet 2% wheeling charges have been specified in the tariff order dated 15.5.2007.

iv) Amendment in deemed generation based on the concurrence given to the Solar Projects by the State Commission needs to be considered.

v) Third party sale and REC needs to be allowed.

vi) The compensation for reduction in subsidy by the Ministry of New & Renewable Energy needs to be given.

13. During the hearing, the Appellant has pressed the claims for re-determination of tariff on grounds of increase in capital cost of the project, deemed generation, increased operation and maintenance expenses and waiver of wheeling charges and also sought third party sale and REC benefits. The Appellant wants that the State Commission should re-determine project specific tariff under Section 62 of the Electricity Act, 2003.

14. We find that the State Commission as per Section 86(1)(e) has to promote co-generation and generation of electricity from renewable sources of energy by

providing suitable measures for connectivity with the grid and sale of electricity to any person.

15. Clause 6.4 of the Tariff Policy specifies as under:

“ 6.4 Non-conventional sources of energy generation including Co-generation:

(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage for purchase of energy from such sources taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006.

It will take some time before non-conventional technologies can compete with conventional sources in terms of cost of electricity. Therefore, procurement by distribution companies shall be

*done at preferential tariffs determined by the
Appropriate Commission.”*

16. Thus, in terms of the Tariff Policy, the State Commission has to determine preferential tariff for non-conventional sources of energy for purchase of energy from such sources by the distribution licensees.

17. The State Commission vide order dated 15.5.2007 determined the preferential tariff for mini hydro power projects. Subsequently, the Appellant willingly entered into PPA for sale of power from its hydel project with the distribution licensing agreeing for the supply of energy at the tariff as determined by the State Commission by order dated 15.5.2007.

18. According to the Appellant, the State Commission while fixing the tariff by order dated 15.5.2007 was

aware that the hydro projects in Haryana are basically canal based having low head which require substantial civil work.

19. We notice from order dated 15.5.2007 of the State Commission that the stakeholders in their comments submitted to the State Commission during the public hearing had highlighted that the hydro project in Haryana basically being canal based with very low head required substantial civil works and consequently it would lead to escalation in the project cost. The State Commission after consideration of the submissions of the stakeholder decided capital cost of Rs. 10.25 Cr./MW for mini hydro projects. We find that the Central Commission in its 2009 Tariff Regulations for renewable energy sources has allowed capital cost of Rs. 5.5 Cr./MW for similar projects in the State of Haryana. Thus, the State Commission

has after taking into consideration the objections and suggestions of the stakeholder has allowed capital cost which is substantially higher than that allowed by the Central Commission.

20. According to the Appellant additional cost was incurred due to damage of the canal after raising the water head in the canal at the time of commissioning of the power project, poor condition of the canal and the condition subsequently imposed by the Irrigation Department for operation and maintenance of the canal two km. upstream and two km. downstream of the hydro project. We notice that the responsibility of strengthening works of the canal banks to facilitate ponding of water in the canal was that of the Appellant and the Appellant had adequate time to study and carry out due diligence of the condition of the canal from the date of entering into a MoU with the State

Government on 27.11.2006 and signing of the PPA on 13.8.2010. The Appellant itself had admitted that while approving the drawings the Irrigation Department had indicated that O&M of the canal two kilometers upstream and two kilometers downstream would be the responsibility of the Appellant. We are, therefore, not convinced about the claim of the Appellant for additional capital cost as we feel that the capital cost decided by the State Commission while determining the tariff by order dated 15.5.2007 is reasonably high taking into consideration the high cost for canal based hydro projects in Haryana.

21. For the operational norms such as O&M expenses the Appellant has referred to the provisions of Central Commission's Regulations of 2009. The capital cost specified in the Central Commission's Renewable Energy Regulations, 2009 for hydro projects is

Rs. 5.5 Cr./MW as against Rs. 10.25 Cr./MW decided by the State Commission in its order dated 15.5.2007. The Appellant is not claiming capital cost as per Central Commission's Regulations but claims other operational norms as per the Central Commission's Regulation. We feel that the Appellant cannot selectively seek favourable parameters from the Central Commission's Regulations to claim higher tariff. The generic tariff determined by the State Commission by order dated 15.5.2007 based on the parameters specified therein was accepted by the Appellant and they willingly entered into the PPA with the Respondent no. 1 at the tariff determined by the State Commission by order dated 15.5.2007. The capital cost allowed by the State Commission in the norms decided in the tariff order dated 15.5.2007 is substantially higher than the Central Commission's

norm for capital cost. It is now not open to the Appellant to claim higher tariff just because more favourable operational norms have been decided in the Central Commission's Regulations and in the State Commission's Regulations notified subsequently.

22. The Appellant also relies on the 2008 Regulations which provides for norms for WYC Projects and Micro Hydel projects claiming that the 2010 Regulations do not in any manner repeal the 2008 Regulations. Alternative submission made by the Appellant is that the 2010 Regulations cannot in any manner take away a statutory right vested on the generator to seek determination of tariff under Section 62 and 64 of the Electricity Act, 2003.

23. We find that the 2008 Tariff Regulations notified on 19.12.2008 are the Regulations for determination of

Generation Tariff for Thermal and hydro projects for supply to distribution licensees. The 2008 Regulations provide that where the tariff has been determined bilaterally between the distribution licensee and the generating company and the PPA has been approved by the State Commission based upon such tariff, the State Commission shall adopt such tariff together with terms and conditions of such approved PPA. The 2008 Regulation provides certain tariff norms for WYC Projects & Micro Hydel. Regulation 25 provides that subject to prudence check by the Commission, the actual expenditure incurred on the completion of the project shall form the basis for fixation of final tariff.

24. We find that the Appellant entered into PPA for sale of power with the Respondent no. 1 on 13.8.2010. At the time of execution of the PPA, the State

Commission's 2008 Tariff Regulations had been notified and also the State Commission had also determined the generic tariff for mini hydro projects based on some norms by order dated 15.5.2007 in terms of the Tariff Policy under which the Commission had to decide preferential tariff to promote renewable sources of energy. The Appellant had a choice of determination of tariff as per 2008 Tariff Regulations at the time of execution of the PPA. However, it chose to accept the generic tariff as determined by the State Commission vide order dated 15.5.2007. Subsequent to the 2008 Regulations, the 2010 Regulations for renewable energy sources were notified which had specific provision for continuation of earlier tariff for those projects which had already entered into the PPA. At this stage it is not open for the Appellant to claim

determination of project specific tariff as per the 2008 Regulations.

25. The Appellant has cited the following judgments in support of its claim for re-determination of the tariff:

i) Rithwik Energy System Ltd. vs. Transmission Corporation of A.P. Ltd. 2008 ELR (APTEL) 237.

ii) 2009 ELR (APTEL) 1025 in the matter of Techman Infra Ltd. vs. Himachal Pradesh Electricity Regulatory Commission & Ors.

iii) Tarini Infrastructure Ltd. vs. Gujarat Urja Vikas Nigam Ltd. reported in MANU/ET/0106/2012

iv) Tarini Infrastructure Ltd. vs. Gujarat Electricity Transmission Corporation Ltd. & Ors. reported in MANU/ET/0107/2012.

- v) Konark Power Projects Ltd. vs. Bangalore Electric Supply Co. Ltd. 2012 ELR (APTEL) 429.
- vi) Harvest Energy Pvt. Ltd. vs. Madhya Pradesh Electricity Regulatory Commission & Anr. in Appeal no. 93 of 2012
- vii) India Thermal Power Ltd. reported as (2000) 3 SCC 379.
- viii) Sai Renewable Power Pvt. Ltd. reported in (2011) 11 SCC 34.

26. Rithwik Energy case referred to above at i) is not applicable to the present case. In Rithwik Energy case the State Commission had introduced certain conditions which did not find place in the original PPA and thus re-opened the PPA to the detriment of the renewable energy project by curtailing the incentive.

27. In Techman Infra case referred to above at S.No. ii), the Tribunal felt that the capital cost allowed by the State Commission was required to be enhanced and decided so and also allowed the Electricity Board and the generator to apply for a site specific fixation of capital cost in the circumstances of the case. This finding will not be applicable to the present case. In this case we find that the project is a canal based project where the conditions are well known and no geological surprises are expected as in case of any other river based project. The State Commission in special circumstances of development of canal based hydro projects in the State determined the tariff on 15.5.2007 considering a high capital cost of Rs. 10.5 Cr./MW after considering the objections/suggestions of the stakeholders.

28. The findings in Tarini case referred to above at iii) & iv) will also not be applicable to the present case as in Tarini case the tariff was not determined under the provisions of the Act and the tariff as per the guidelines of Ministry of New & Renewable Energy which had no force of law was adopted. In the present case, the State Commission has determined the tariff under the provisions of the Act as per the norms decided in the tariff order dated 15.5.2007.

29. In case of Konark Power referred to above at v) in the circumstances of the case where the biomass project had to be closed down as the biomass fuel cost had increased much above the fuel cost allowed in the tariff resulting in unviable operation of the plant, the Tribunal had remanded the matter to the State Commission to re-fix the tariff. Findings in Konark Power will also not be applicable to the present case

where the Appellant is claiming a higher capital cost and we have held that the State Commission has already allowed a reasonably high capital cost. The Appellant's Power Plant is a Hydro Project which has a very low operating cost as no fuel is used.

30. In Harvest Energy case referred to above at S. No. vi), the State Commission's order determining the tariff of renewable energy sources of energy was challenged and the Tribunal felt that the State Commission had not determined the capital cost and other normative parameters with a reasoned order and accordingly the matter was remanded to the State Commission for reconsideration. The finding in this case will also not be applicable to the present case where the Appellant had not challenged the tariff order dated 15.5.2007 and executed the PPA on the basis of the tariff order dated 15.5.2007.

31. The India Thermal Power case referred to above at S. No. vii) dealing with PPA under Section 43 of the Electricity (Supply) Act 1948 is also not applicable to the present case. In the present case the PPA was executed based on the tariff determined by the State Commission and in the circumstances of the case we have held that the claims of the Appellant for re-opening of the PPA are not valid.

32. Similarly, the findings of the Hon'ble Supreme Court in Sai Renewable Power case are also not applicable to the present case. In Sai Renewable Power case the Hon'ble Supreme Court set aside the judgment of the Tribunal who had held that the State Commission had no jurisdiction to re-fix the tariff. In the present case we have held that the re-fixation of tariff in the circumstances of case is not warranted.

33. In view of above, we do not find that there is any valid reason for reopening the PPA and re-determining the tariff of the Appellant's hydro projects in the circumstances of the case. Accordingly, the Appellant is also not entitled to claim higher capital cost, O&M charges and compensation for loss of generation over and above that considered in the tariff order of the State Commission dated 15.5.2007 and agreed to in the PPA. First two issues are answered against the Appellant accordingly.

34. We find that the State Commission by the impugned order has already given the liberty to approach the State Commission for determination of tariff prospectively after the completion of the earlier control period in March, 2012. Accordingly, the Appellant may approach the State Commission with

the supporting documents for determination of the tariff with prospective effect.

35. The Appellant has also sought permission for third party sale and REC. We do not understand how the Appellant could claim permission for third party sale when it has entered into a long term PPA for 25 years for sale of power with the Respondent no. 1.

36. The Appellant is relying on Article 11.1 of the PPA for claiming third party sale. Article 11.1 of the PPA is reproduced below:

“11.1 If at a later stage, during the tenure of this agreement, HERC lays down or formulate the policies of third party sale of power generated by IPPs, in that eventuality, the HPPC will consider the proposal of the third party sale of power by the generating company on a separate set of terms and conditions as mutually acceptable to both, the

HPPC and the generating company and subject to prior approval of HERC”.

37. According to the above provision the Respondent no. 1 could consider to allow third party sale on terms and conditions mutually acceptable to both the parties and subject to prior approval of the State Commission. If the Respondent no. 1 is not willing to allow third party sale, the same could not be claimed by the Appellant as a matter of right. We find that the State Commission has also given correct reasons for disallowing third party sale.

38. Similarly there is no case for the Appellant to claim REC benefit when the Appellant is supplying power to the Respondent no. 1 on the preferential tariff determined by the State Commission against a long term PPA. Thus, the Appellant does not qualify to

claim REC benefit. Accordingly, the third issue is also decided as against the Appellant.

39. However, we find merit in the case of the Appellant in the fourth issue regarding levy of wheeling charges on the energy supplied to the Respondent no. 1 for use by the distribution licensee. The Appellant is supplying the entire energy generated at its power plants for use by the distribution licensee and is not wheeling any power for captive use or for sale to third party.

40. 'Wheeling' is defined under Section 2 (76) of the Electricity Act, 2003 as under:

(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;

Here the distribution system facilities are being utilized by the distribution licensee for taking power from the Appellant's Power Plant for supply to its consumers and, therefore, there is no reason for the Respondents to levy wheeling charges on the Appellant, the generator.

41. We find that the State Commission has determined the tariff based on the operational and financial norms decided the tariff order dated 15.5.2007. According to the tariff order the State Transmission utility/distribution licensee has to provide connectivity to the renewable energy generator and the generator has to bear the cost of transmission line beyond 10 km. if the distance of transmission line from the power plant to the licensee's sub-station is more than 10 km. In the tariff order the State

Commission also decided the wheeling charges and banking which are applicable for wheeling of power for captive use or third party sale. The banking and wheeling charges are not applicable where the generator is supplying the entire power at its bus bars to the distribution licensee for which the State Commission has determined the ex-bus tariff.

42. We also find that according to the PPA dated 13.8.2010, the delivery point of the power is the switchyard of the power plant of the Appellant. The tariff is also defined as the rate approved by the State Commission for every kWh of net delivered energy at the delivery point. The metering point is also the Inter Connection Point which is the point where the switchyard of the Power Plant joins with the power evacuation line of the distribution licensee. The PPA has a provision (Article 11) for Wheeling and Banking,

if at a later stage there is mutual agreement the parties agree for third party sale by the Appellant subject to the approval of the State Commission and in such case the Appellant and the third party shall enter into a Wheeling & Banking agreement. We feel that the Wheeling charges will be payable by the Appellant only when in supplies power to a third party which is not the case at present.

43. Thus, we hold that wheeling charges are not leviable on the Appellant for the energy supplied to the Respondent no. 1 for utilization by the distribution licensee. Accordingly, the distribution licensee will refund amount wrongly deducted as wheeling charges to the Appellant within 45 days of communication of this order. In case of delay in making payment beyond 45 days simple interest @ 12% per annum will be payable to the Appellant.

44. Summary of our findings:

i) In the circumstances of the case we do not find any merit for re-determination of the tariff of the Appellant's mini hydro power plants and claim of the Appellant for third party sale/REC.

ii) The Respondent no. 1 has wrongly levied wheeling charges @ 2% from the Appellant whereas no wheeling charges were leviable for supply of energy by the Appellant to the distribution licensees. Accordingly, the Respondent no. 1 has been directed to refund the amount deducted from the bills of the Appellant towards wheeling charges to the Appellant within 45 days of communication of this order. In case of delay in refunding the amount due to the Appellant beyond 45 days simple interest at the rate of 12% per annum will

be payable by the Respondent no. 1 to the Appellant.

45. The Appeal is allowed only with respect to levy of wheeling charges. No order as to costs.

46. Pronounced in the open court on this **9th day of April, 2014.**

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√
REPORTABLE / ~~NON-REPORTABLE~~
Vs