Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 25th November, 2014.
Present:
HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 92 of 2012

In the Matter of:

1. Punjab State Power Corporation Ltd.
The Mall, Patiala - 147001
Punjab

……. Appellant

Versus

1. Punjab State Electricity Regulatory Commission
SCO No. 220-221, Sector 34-A
Chandigarh - 160 022

2. A2Z Maintenance & Engineering Services Limited
0-116, First Floor, Shopping Mall
Arjun Marg, DLF City Phase-1
Gurgaon - 122002

3. Government of Punjab
Department of Science, Technology, Environment and
Non-conventional Energy, Mini Secretariat,
Sector - 9 , Chandigarh - 160 009

4. Punjab Energy Development Agency
Solar Passive Complex
Plot No. 1-2, Sector-33D
Chandigarh - 160 034

...Respondent(s)

Counsel for the Appellant(s) :	Mr. M G Ramachandran Mr. Anand K. Ganesan Ms. Swapna Seshadri Mr. Ruth Elwin Ms. Swagatika Sahoo
Counsel for the Respondent(s):	Mr. Buddy A. Ranganadhan Mr. Raunak Jain Ms. Richa Bharadwaja for R-1 Mr. Sitesh Mukherjee Mr. Jafar Alam Ms. Payal Chandra Mr. Anand Kr. Srivastava Mr. Sakya Singha Chaudhury Mr. Shantanu Singh Ms. Anusha Nagarajan for R-2 Mr. R S Sharma Mr. Rajesh Kohli for R-3 & 4

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

Punjab State Power Corporation Limited (Punjab Power is the Appellant herein)

2. Aggrieved by the impugned Order dated 15.03.2012, passed by the Punjab State Electricity Regulatory Commission where by State Commission has disposed of the petition filed by the A2Z Maintenance and Engineering Services Limited for the determining the project specific tariff for its generating station for purchase of electricity by the Appellant, this Appeal has been presented by the Appellant.

3. The few facts leading to the filing of the present Appeal, in short are as follows:-

(i) The Appellant Punjab Power is the successor of Punjab State Electricity Board. After enactment of Electricity Act 2003, the Appellant has succeeded to the functions of generation and distribution of electricity of the State Electricity Board under the statutory Notification. As such, it became the distribution licensee to distribute the electricity procured from others to the State.

(ii) The A2Z Maintenance and Engineering Services Limited is 2nd Respondent here. It is engaged in the business of generating electricity, cogeneration of electricity from non-conventional sources in the State of Punjab. It is in the process of establishing and commissioning three co-generating stations of 15MW in three different places in the state of Punjab. These cogenerating stations are capable of producing two energies namely (i) steam for industrial use and (ii) electricity for consumption.

(iii) Under Section 86(1)(e) of the Electricity Act 2003, the generation of electricity from co-generation and non-conventional energy sources is to be promoted. Accordingly, the State Commission as well as Central Commission have framed Regulations and also passed the

Orders determining the preferential tariff for generation and supply of electricity by co-generating plants to distribution licensees including the Appellant.

(iv) In 2010, the State Commission has adopted the Renewable Energy Regulations of the Central Commission with only very limited modifications which were specific for the State. The above was done by the State Commission initiating *suo-moto* proceeding in Petition No. 32 of 2010. In these proceedings, the State Commission circulated the staff paper proposing to adopt the Central Commission's Renewable Energy Regulations. The A2Z Company, R-2 also participated in the proceedings. Various submissions, representations and suggestions were made by R-2 as a non-fossil fuel based cogeneration project developer. This was also on the tariff applicable for non-fossil fuel based cogeneration power projects.

(v) After hearing the stakeholders including the Respondent No. 2, the State Commission through its order dated 30.09.2010 determined the tariff applicable for renewable energy projects in the State of Punjab to be commissioned in the year 2010-11.

(vi) On the basis of this order, the Appellant and the A2Z Company entered into the PPAs dated 25.08.2011 for the

sale of electricity to the Appellant from the cogeneration plants of the A2Z Company. The said power project after the tariff determination by the State Commission was made applicable for the cogeneration projects.

(vii) Similar order was passed by the State Commission for the next year dated 31.10.2011 in the Petition No. 59 of 2011 applicable for the renewable energy projects to be commissioned in the FY 2011-12. At that stage, the A2Z Company, R-2 filed a Petition No. 43 of 2011 before State Commission seeking the same relief. However, at the later stage the Respondent No. 2 changed its stand and withdrew its petition with liberty to approach to file another petition. Accordingly, Respondent No. 2 in November 2011 filed a Petition No. 62 of 2011 seeking for project specific tariff for the three 15 MW projects being implemented by the Respondent No. 2 in the State of Punjab by taking the stand that the power projects did not amount to cogeneration power projects and there by seeking project specific tariff.

(viii) The State Commission after hearing the parties concerned disposed of the petition filed by the A2Z Company by the Impugned order dated 15.03.2012 and determined the project specific tariff for the generating stations of the

A2Z Company for supply to the Appellant. In this impugned order dated 15.03.2012, the State Commission has changed the very nature of generating station of the A2Z company namely from the accepted fact that the generating station was a non-fossil fuel based cogeneration plant to a biomass based generating station. Accordingly, the State Commission through the impugned order has proceeded to increase the applicable tariff for the A2Z Company. Aggrieved by this impugned order the Appellant has filed this Appeal challenging this order on the ground that this impugned Order is completely contrary to the Renewable Energy Regulations as well as previous tariff orders passed by the State Commission.

4. Let us now refer to the submissions made by the Appellant assailing this impugned order.

(i) The generating station of the A2Z Company is clearly a cogeneration station and not a non-cogeneration station. This is clear both in terms of the provisions of the Electricity Act, 2003 and the Regulations framed there-under as well as the various PPAs entered into by the parties.

(ii) The impugned Order passed by the State Commission holding the power projects of the A2Z Company to be biomass projects is wrong. The nature of the projects of the

R-2 was never in dispute and continued to be the same since the time of framing of Renewable Energy Regulations and passing of the earlier orders dated 30.09.2010 and 31.10.2011. The nature of generation project cannot be changed merely because of the commercial arrangements of the project developer with third parties.

(iii) The Section 2(12) of the Electricity Act 2003 defines "Cogeneration". This means a process which simultaneously produces two or more forms of useful energy including the electricity. Thus, the only requirement is that the process produces at least two forms of useful energy, one of which is electricity. In the present case, generating station of the A2Z Company produces the electricity and also produces useful steam, which is being supplied by the A2Z Company to the Sugar Mills for useful heat applications. Thus, the generating station of the A2Z Company fulfils the criteria of a cogeneration station which squarely falls within the definition of "Cogeneration".

(iv) The State Commission has completely ignored the fact that even the A2Z Company had duly accepted the fact that its generating projects were non-fossil fuel based cogeneration plants and represented accordingly before the State Commission on the issue of tariff proceedings

leading to the passing of orders earlier on 30.09.2010 and 31.10.2011. The present claim of the R-2 before the State Commission would amount to blowing hot and cold and therefore, the State Commission ought to have dismissed the Petition filed by the A2Z Company on this ground alone.

(v) The nature of the project of A2Z Company squarely falls within the definition of a non-fossil fuel based co-generation project. The nature of the generating station cannot change merely based on the ownership of the station or the inter-se arrangement between the generating station and sugar mill. The State Commission in the impugned Order has come to erroneous conclusion that the generating stations of the A2Z Company are not cogeneration plants for the reason that (a) the legal entity which owns and operates a generating station is independent of the sugar mill (b) the bagasse fuel produced in the sugar mill and supplied to the Respondent No. 2 free of cost only constitutes about 17% of the total fuel requirement of the generating station for the year, and (c) the plant and machinery set up by the Respondent No. 2 is on a separate land provided by the sugar mill. These reasons are not correct or relevant for the purposes of determining the nature of the generation station of the A2Z

Company. There is no restriction on the legal entity which owns generating station. The fact that the generating station is owned by different legal entity is irrelevant. There is no such condition or restriction in the Electricity Act, 2003 or the Regulations framed there under.

(vi) As a matter of fact, the A2Z Company and the Appellant had executed PPAs, which was based on the tariff applicable for cogeneration project. The said PPAs were signed pursuant to the participation of the A2Z Company in the proceedings of the tariff determination before the State Commission and acknowledging its nature as developer of cogeneration power projects. In such circumstances, it is not now open to the A2Z Company to claim itself as not being a cogeneration power project.

(vii) The State Commission has failed to appreciate that there are number of other projects in the State, who were placed in a very similar situation to Respondent No. 2 and have been given the tariff as applicable to cogeneration power projects based on the orders passed by the State Commission. Hence, the A2Z Company cannot be entitled to any extra benefit over and above other cogeneration power projects in the State.

5. On these grounds the impugned order is sought to be set aside by the Appellant.

6. In reply to the above ground, in both the Learned Counsel for Respondent No. 2 A2Z Company as well as the Learned Counsel for the Commission made elaborate arguments justifying the impugned Order, contending that the reasons given in the impugned Order by the State Commission are perfectly valid and legal and as such impugned Order does not warrant interference.

7. In the light of the above rival contentions, the questions which may arise for consideration are as follows:-

(i) **Whether the State Commission is justified in applying the Tariff Order for bio-mass based generating station to the non-fossil fuel based cogeneration station?**

(ii) Whether the State Commission is justified in determining the projects specific tariff when the parties have already agreed to the generic tariff as determined by the State Commission and accepted without any challenge?

(iii) Whether the State Commission has ignored the provisions of the Renewable Energy Regulations which

provide for a clear distinction between biomass projects and cogeneration projects?

(iv) Whether the State Commission is justified in reopening the PPA between the parties when the said PPA has been signed based on the tariff as determined by the State Commission and agreed and accepted by both the parties?

(v) Whether the State Commission is justified in changing the very nature of project, merely because the A2Z Company has entered into a barter agreement with the Government of Punjab and sugar mills for supply of fuel, electricity etc ?

8. Since all the questions are interrelated, we shall discuss these issues by taking them up together.

9. The Appellant herein is challenging the impugned order principally on the ground that the generic tariff fixed by the State Commission by its earlier order dated 31.10.2011, for the “non-fossil fuel based co-generation project” category is applicable to the A2Z Company which comprise of 3 projects and that no projects specific tariff should have been allowed by the State Commission.

10. The main issue that arises for consideration in the present Appeal is whether the State Commission was justified in determining a project specific tariff for the A2Z Company's projects which is alleged to be contrary to the earlier orders and Regulations. While deciding this question, it would be worthwhile to refer to relevant Regulations as well as the provisions of the Electricity Act 2003. The Regulations are 65 and 66 of the Renewable Energy Regulations are relevant.

"65. Deviation from Norms

"Tariff for sale of electricity by the generating company may also be determined in deviation from the norms specified in these regulations subject to the conditions that the levellised tariff over the useful life of the project on the basis of the norms in deviation does not exceed the levellised tariff calculated on the basis of the norms specified in these regulations.

Provided that the reasons for the deviation from the norms specified under these Regulations shall be recorded in writing.

66. Power to Relax

"The Commission may by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."

11. We shall now refer to the relevant provisions of the Electricity Act 2003. Those provisions are 62 and 86.

> "**62** provides as follows: ***"Determination of tariff-*** *(1) the Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -*
>
> *a) Supply of electricity by a generating company to a distribution licensee:..."*
>
> **86** provides as follows : ***"Functions of State Commission -*** *(1) The State Commission shall discharge the following functions, namely:-*
>
> *a) Determine the tariff for generation, supply transmission and wheeling of electricity, wholesale bulk or retail, as the case may be within the State:"*

12. The reading of these provisions and Regulations would disclose that it is the State Commission's prerogative to determine the tariff of the generating stations. This prerogative power is vested with State Commission to decide as to whether the generating station shall have generic tariff or of project specific tariff. In a similar case, when the party objected to the fixing up specific project tariff contrary to the generic tariff, this Tribunal has held that it is within the jurisdiction of the State Commission to determine project specific tariff of any generator, even if it is a determined a generic tariff for the category in which that generator falls after considering the circumstances of the case. This has been decided in Konark Power Projects Limited

v. Bangalore Electric Supply Company Limited in Appeal No. 35 of 2011 dated 10.02.2012 by referring to the Section 62 of the Electricity Act, 2003. The relevant paragraphs of Konark Power are reproduced here under:-

> *"**9**. The main objection raised by the learned Senior Counsel for the 1st Respondent before us is that under the 2004 Regulations framed by the State Commission, the State Commission would fix the normative tariff for energy generated from different types of Renewable Sources of energy and sold to distribution Company. Accordingly, the State Commission, vide its Order dated 18.1.2005, fixed generic tariff for Biomass based plants. The tariff so fixed can be modified generally and not in individual cases...*
>
> ***10**. This above argument of the 1st Respondent Distribution Licensee is not tenable for the following reasons:*
>
> *I. ...*
>
> *III. In this context it would be appropriate to refer to a case came before this Tribunal in Appeal No. 50 of 2008. In this case the Himachal Pradesh Electricity Regulatory Commission had determined generic tariff based on normative parameters for all small hydro power stations in its Order dated 12.08.2007. This Order of Himachal Pradesh Electricity Regulatory Commission was challenged before this Tribunal in Appeal No. 50 of 2008 in the matter of Techman Vs. Himachal Pradesh Electricity Regulatory Commission. The relevant portion of the judgment of this Tribunal in this Appeal is reproduced below:*

The promoters of hydro-power generation in the State of Himachal Pradesh as well as the Himachal Pradesh State Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost is not suitable to either of them. Similarly, if Capacity Utilisation Factor (CUF) of 45% for a specific project is contested by either party, it may approach the Commission with the site specific CUF.

***11**. Thus from the above judgment of this Tribunal in Appeal No. 50 of 2011 and Section 62 of the 2003 act, it would be clear that the State Commission has powers to determine the tariff for any generator supplying electricity to distribution licensee even if the concerned the State Commission had determined the generic tariff for certain class of generator."*

13. The finding which have been rendered by the Tribunal, recognised the plenary jurisdiction to determine the project specific tariff and under Section 62 of 86(1)(a) and (b) of the Electricity Act 2003 read with 65 and 66 of the Renewable Energy Regulations. In the light of the ratio laid down by this Tribunal, we shall now look into the present facts of the case as well as the relevant clauses of the PPA to find out whether the State Commission was right in determining the Project Specific Tariff in the circumstances of the case.

14. In the instant case, under clause 2.1.1(i) of the PPA dated 25.08.2011 executed with A2Z Company, both the parties have agreed that A2Z Company shall receive the tariff specified by the

State Commission on the petition for project specific tariff filed by the A2Z company before the State Commission. We shall now refer to the class 2.1.1(i) of the PPA.

> ***"2.0.0 ENERGY PURCHASE AND SALE***
>
> *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 condition of this agreement at the following rates approved by the Commission in the generic levellised generation tariff order dated 30.09.2010, which is set below:-*
>
> *(i) The applicable tariff for Non-fossil based co-Generating project is Rs. 4.57/- (Rs. 1.73/Unit for fixed tariff + Rs. 2.84/Unit for variable tariff) as applicable to projects to be commissioned in FY 2010-11. <u>However, the companies shall be eligible for getting the applicable tariff for the project commissioning as per further tariff orders notified by PSERC</u>. The variable tariff for subsequent year 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 sum of the Agreement, till the useful life of 20 years of the project, shall be as determined by the Commission. In case there is a delay determining the tariff by the Commission, the tariff payable shall be the last tariff for the 13th*

year till the commission determines the new tariff.

The tariff for the remaining ten years of the agreement term, beyond the useful life of the project of 20 years, shall also be as decided and approved by the Commission.

The orders passed by the Hon'ble PSERC on the Petition filed by the developer and clarification on the amendment of IA signed by PEDA shall be applicable."

15. According to the A2Z company, the power projects of the A2Z Company are not eligible to receive the generic tariff determined by the State Commission for "non-fossil fuel based cogeneration project" category under Regulation 4(4) read with Regulation 2(1)(o) of the RE Regulations. A2Z Company pointed out the following reasons for the same.

(i) The Regulation 4(4) does not cover the 3 projects;

(ii) The generic tariff fixed for the "non-fossil fuel based cogeneration project" category applies to a typical cogeneration project;

(iii) Further, the operational requirements and parameters of A2Z company's projects are materially different from those on which the Renewable Regulations are based. Therefore, a project specified tariff had necessarily to be

determined for the 3 projects. It is now refer to both Regulations namely Regulation 2(i)(o) and Regulation 4(4) :-

"2. Definitions and interpretation

(1) In these regulations, unless the context otherwise requires:-

(o) 'Non fossil fuel based co-generation' means the process in which more than one form of energy (such as steam and electricity) are produced in a sequential manner by use of biomass provided the project may qualify to be co-generation project if it fulfils the eligibility criteria as specified in clause (4) of Regulation 4."

4. Eligibility Criteria

(1)...

(4) Non-fossil fuel based co-generation project: The project shall qualify to be termed as a non-fossil fuel based co-generation project, if it is using new plant and machinery and is in accordance with the definition and also meets the qualifying requirement outlined below:-

Topping cycle mode of co-generation - Any facility that uses non-fossil fuel input for the power generation and also utilizes the thermal energy generated for useful heat applications in other industrial activities simultaneously.

Provided that for the co-generation facility to qualify under topping cycle mode, the sum of

useful power output and one half the useful thermal output be greater than 45% of the facility's energy consumption, during season.

Explanation - For the purposes of this clause.

a) *'Useful power output' is the gross electrical output from the generator. There will be an auxiliary consumption in the cogeneration plant itself (e.g. the boiler feed pump and the FD/ID fans). In order the computed the net power output it would be necessary to subtract the auxiliary consumption from the gross output. For simplicity of calculation, the useful power output is defined as the gross electricity (kWh) output from the generator.*

b) *'Useful Thermal Output' is the useful heat (steam) that is provided to the process by the cogeneration facility.*

c) *'Energy Consumption' of the facility is the useful energy input that is supplied by the fuel (normally bagasse or other such biomass fuel)"*

16. The Respondent further contended the 3 projects fall under Regulation 7 of the Renewable Energy Regulations within the category of "biomass project other than based on Rankine Cycle Technology application with water cooled condenser" or at least bear a closer resemblance to the said category of biomass projects than to the category of "non-fossil fuel based cogeneration project". Let us refer to the Regulation 7 :-

"7. Project Specific Tariff

(1) Project specific tariff, on case to case basis, shall be determined by the Commission for the following types of projects:

a)

f) Biomass project other than that based on Rankine Cycle technology application with water cooled condenser.

(2) Determination of Project specific Tariff for generation of electricity from such renewable energy sources shall be in accordance with such terms and condition as stipulated under relevant Orders of the commission.

(3) Provided that the financial norms as specified under Chapter-2 of these Regulations, except for capital cost, shall be ceiling norms while determining the project special tariff."

17. According to the Respondent, 3 projects established by it are unique in nature and there are no other power plants in the state that are similar to the power projects of the 2nd Respondent. The Renewable Energy Regulations which were adopted based on typical cogeneration projects, do not cover the projects of the Respondent. Therefore, the Respondent was constrained to apply for the project specific tariff for its projects. On going through the records and also the pleadings, it is clear that the 3 projects set up by the A2Z Company are materially different from typical cogenerating stations established in the

State of Punjab and contemplated by the Renewable Energy Regulations, in terms of ownership, control, operations and finances. Therefore, the generic tariff determined by the State Commission for the “non-fossil fuel based cogeneration project” does not apply to the 3 projects of the Respondent and as such A2Z Company is entitled to determination of a project specific tariff. The Respondent has filed a table setting out the material differences that distinguish the 3 projects established by the A2Z Company from typical co-generation projects. Admittedly, none of these material differences have been disputed by the Appellant in any of the admitted proceedings.

18. From these things, it is clear that the various projects specific features of the 3 projects distinguishes it from the category of the power plants for which levellised generic tariff was determined by the State Commission through the earlier orders dated 30.09.2010 and 31.10.2011. In the light of the material differences and deviation between the 3 power projects of the A2Z Company and the typical cogeneration projects and typical biomass projects, the 3 projects of the A2Z Company cannot be grouped with the power plants for which generic levellised tariff had been determined.

19. Let us now deal with the aspect as to whether 3 projects of the Respondent would qualify as “non-fossil fuel based

cogeneration station". It cannot be disputed that the definition of "non-fossil fuel based co-generation" under the Renewable Energy Regulations applies only to the typical cogeneration project. The Regulation 2(1)(o) of the RE Regulations reiterates the definition of co-generation as given under Section 2(12) of the Electricity Act 2003. However, the second part of the definition is qualified by a proviso that requires a project to fulfil the eligibility criteria specified in Regulation 4(4) to qualify as a "non-fossil fuel based co-generation project". Let us see the relevant Regulations. First is 2(i)(o) is as follows

"2. Definitions and interpretation

(1) In these regulations, unless the context otherwise requires:-

(o) 'Non fossil fuel based co-generation' means the process in which more than one form of energy (such as steam and electricity) are produced in a sequential manner by use of biomass provided the project may qualify to be co-generation project if it fulfils the eligibility criteria as specified in clause (4) of Regulation 4."

4. Eligibility Criteria

(1)...

(4) Non-fossil fuel based co-generation project: The project shall qualify to be termed as a non-fossil fuel based co-generation project, if it is using new plant and machinery and is in accordance with the

definition and also meets the qualifying requirement outlined below:-

Topping cycle mode of co-generation - Any facility that uses non-fossil fuel input for the power generation and also utilizes the thermal energy generated for useful heat applications in other industrial activities simultaneously.

Provided that for the co-generation facility to qualify under topping cycle mode, the sum of useful power output and one half the useful thermal output be greater than 45% of the facility's energy consumption, during season.

20. The bare perusal of the Regulation 4(4) of the RE Regulations indicate following aspects:

a) A power project is "non-fossil fuel based co-generation" if it is part of a facility that uses a non-fossil fuel to generate electricity, and the steam that is generated by the power project, is simultaneously utilized by the facility for useful applications in other industrial activities.

b) In other words, for a power plant to qualify as "non-fossil fuel based cogeneration", any "facility", that is, the same facility (the provision does not read 'any one or more facilities') must use non-fossil fuel to generate power and must utilize, that is, itself utilize (not transfer to sell to another facility), the thermal energy generated for useful

heat applications in other industrial activities simultaneously.

c) Therefore, the tariff fixed for “non-fossil fuel based co-generation projects” under the RE Regulations is applicable to a facility that apart from generating electricity, utilizes the thermal energy in an integrated manner in the industrial processes undertaken by the facility. It cannot be applied to the 2nd Respondent’s 3 IPPs which do not utilize either the power or the steam they generate for any industrial activity whatsoever.

d) Indeed, in the 2nd Respondent case, under clause 4.1 iii) of the Implementation Agreement dated 27.06.2011 (@ p.102 of the answering Respondent’s Reply), Respondent No. 2 is not permitted to use the site of the 3 IPPs to carry out any activity, business or transaction other than the production of steam and energy.

e) Furthermore, the proviso to Regulation 4(4) read with Explanation (c), stipulates that the useful power output and one half of the useful thermal output should be greater than 45% of the facility’s energy consumption during season. It is stated and submitted that such a stipulation can have not application to a standalone IPP. It can be applied only to facilities that carry out industrial

processes and also operates a cogeneration project which generates power and steam which can then be used in said industrial process. A cogeneration or biomass IPP would be hopeless unviable if it was consuming 45% of its power and steam output.

21. These aspects would indicate that the 3 projects of the A2Z Company cannot be said to be covered by the Regulation 4(4) as none of these 3 projects can carry out any industrial activity other than generating power for which they can utilise the power and steam they generate.

22. In the impugned Order, the State Commission has taken a view that A2Z Company is operating a “biomass power project” and not a “co-generation project”. The relevant findings of the Commission are quoted below:-

> *“9. The Commission has carefully gone through the contents of the petition and the replies filed by the respondents and heard the arguments put forth by the parties. In this regard,* ***a few important aspects of the Assignment order by Sugarfed and individual MoUs with the three sugar mills are brought out here under:***
>
> *(i) Five acres of land to be provided to A2Z by each sugar mill for the Concession period (defined as 15 years w.e.f. 01.09.2010 or first day of start f plant which ever is earlier free of cost/on lease.*

(ii) A2Z to set up 25 MW (Morinda) and 20 MW each (Nakodar and Fazilka) bagasse/biomass based co-generation plant(s) by end of August 2010, subject for force-majeure.

(iii) A2Z shall also invest in up-gradation and modernization of sugar mill(s).

(iv) A2Z shall provide interconnecting linkages for supply of power and stream from the plant(s) to the sugar mill(s), wherever required, at its cost. ***Free power and steam shall be supplied by A2Z to the mill(s) for in-house use and in-turn whatever bagasse would be produced in the mill(s), after in-house consumption, will belong to A2Z for consumption in the plant(s).***

(v) A2Z shall deposit Rs. Two Crore with each sugar mill as advance payment without any interest to be kept by the sugar mill(s) in separate account(s) and utilized for modernization of sugar mill(s) only. The accrued interest will also be treated as advance payment. Additional amount required for modernization/capacity enhancement to be provided by A2Z free of interest from time to time as per requirement assessed by the co-ordination committee.

vi) Water and condensate, as available with the mill(s) will be supplied for use in the plant(s) free of cost.

(vii) The project(s) shall be developed and operated on the BOOT basis and upon expire of

concession period, the same shall be handed over to the respective sugar mill(s), free of cost.

Upon completion of the Concession period, A2Z will have the first refusal right on the terms and condition settled at that time in case the sugar mill(s) decides to do so and the sugar mill(s) shall offer no better terms and conditions to any third party.

(viii) ***Operation and control over the sugar mill(s) and the plant(s) will be that of the respective parties.***

(ix) ***All revenues generated from the sale of power by A2Z including carbon credits etc. shall accrue to them, out of which A2Z will pay percentage of revenue*** *equal to 9% during the first five years and 9.5% during the remaining Concession period in case of Morinda sugar mill subject to a minimum of rs. 50 lac per annum. For Nakodar and Fazilka Sugar mills, these percentages re 7% for first five years and 7.5% thereafter till the end of the Concession period subject to a minimum of Rs. 25 lac per annum. The advance payments made by A2Z shall be adjusted first in A2Z's account.*

(x) An amount of Rs. 50 lac (Moridna) and Rs. 25 lac (Nakodar & Fazilka) already deposited by A2Z in respect of the projects shall be treated as earnest money liable to forfeiture in case of non-partial completion or failure to commission to project(s). The earnest money shall be release/adjusted after the successful commissioning of the project(s).

(xi) ***A2Z shall be entitled to use biomass fuel in addition to bagasse for operating the plant(s).***

(xii) *Any subsidy/benefit from the MNRE or any other Government agency shall solely accrue to A2Z. Further any benefits/incentives under the Sugar Development Fund Act 1982 for modernization/expansion within the mill(s) premises are also to be passé don to A2Z to the extent of their investment.*

10. i) ***The Commission notes that the ownership, management, operation & control etc. of the generating plant(s) lies with the petitioner and is independent of the sugar mill(s)*** *except that* ***these generating plant(s) are to supply steam and electricity to the sugar mill(s) in lieu of bagasse, on barter basis.*** *Moreover, the* ***bagasse produced in the sugar mills would constitute a small percentage (17% approx.) of the total fuel requirement of the power plant(s),*** *which would be made available* ***in lieu of electricity and steam to be supplied*** *by the generating plant(s) to the sugar mill(s). The Commission also notes that the* ***generating plant(s) have been set up in separate land provided by the sugar mill(s) with their own plant & equipment.*** *In the light of the above, the Commission is of the opinion that* ***the three generating plants set up by the petitioner are indeed biomass based independent power projects, except that these generating plant(s) would be using bagasse to the extent of 17% approx.*** *of the total fuel requirement on annual basis and as*

such, it may not be justifiable to bracket these generating plant(s) purely under the co-generation category."

23. The above discussion made by the State Commission in the impugned Order would make it clear that the generating plant(s) being independent of the Sugar Mills. The Learned Counsel for the Commission would also point out following aspects in order to support the findings, rendered on the basis of reasonings given in impugned order.

(i) The generating plant(s) of the Respondent No. 2 (hereinafter referred to as "Generator") are separate entities from that of the neighbouring Sugar Mill(s) next to which the generating unit(s) are located and owned by the Generator.

(ii) These generating plant(s) have been set up on land leased to the Generator by the Sugar Mills.

(iii) The Management, Operation and Control of these generating plant(s) are completely different and distinct from that of the neighbouring Sugar Mill(s).

(iv) The generating plant(s) of the Generator are designed and operated with the intention of generating electricity and not for the intended purpose of utilizing two different forms of energy.

(v) The production of steam as a part of the generating cycle is also used for the limited and specific purpose of selling steam to the neighbouring sugar mill in barter for the supply of bagasse only for the limited period when the Sugar Mill operates and produced bagasse.

(vi) The steam so produced by the Generator is, for the contractual sale by the Generator to the Sugar Mill(s) in exchange for some bagasse for a very limited period in a year from the neighbouring sugar mill(s). Hence the generating plant(s) of the Generator are designed to produce electricity and incidentally utilises the steam energy so produced as a commodity which is sold by the Generator to barter for a small proportion (i.e. for 17%) of its total requirement of fuel.

(vii) The steam so produced, is not used for any industrial activity of the Generator.

24. As pointed out by the Learned Counsel for the State Commission, under the Central Commission Regulations (as adopted by the Commission) to qualify as a “co-generator”, the steam being produced by the Generator must be used for an industrial activity. This obviously means an industrial activity of

the Generator and not the industrial activity of some other entity. The perusal of the relevant Regulations would reveal that as per the eligibility criteria as refer to in Regulation, in order to qualify as co-generation plant, the facility must use non fossil fuel for power generation but also utilize the thermal energy generated for useful heat applications in other industrial activities simultaneously. From this, it is clear that for such plant to qualify as a co-generation plant for the purposes of Tariff, the steam produced by the co-generation plant has to be used ex-necessitus by the other industrial activity of such co-generator alone.

25. Hence, if the steam generated by the plant is not utilised for any other industrial activity of the co-generator, but it is supplied to a neighbouring sugar mill in lieu of a small quantity of bagasse for a small proportion of the time, such plant could never be qualified to be a co-generator for the purposes of the Tariff Regulations. Hence, the generating facility of the Generator is not a “co-generation facility”. It is an independent power production facility fuelled by bio-mass which constitutes 83% of annual fuel requirement and purchased by the Generator from outside. It is true as contended by the Appellant that the Power Purchase Agreement executed between the Appellant and the A2Z Company describes Generators as a “Co-Generators”.

However, the following aspects have to be considered while deciding the issue:-

(i) The description which two contracting parties may decide to give in any contract to themselves could not and will not, in law, bind the State Commission in the discharge of their statutory duties.

(ii) The State Commission is, in law, entitled to enquired into the nature of the generating facility and appropriately either classify the same for the purpose of generic tariff or determine the tariff under Section 61, 62 & 86(1)(e) having regard to all relevant considerations including the nature of the project, nature of operations and the ground realities of the situation.

(iii) The Commission has in the impugned Order taken into consideration all the submissions made before it, as also the materials placed and raised before it, in arriving at its findings.

(iv) In this connection it is interesting to note that on the basis of the submissions made, bagasse to the extent of only 17%(approximately) of the fuel for the generating plant(s) would be available from the

neighbouring Sugar Mill(s) and the Generators will have to independently arrange the balance requirement of biomass for its generating plant(s). Also, there is no commitment or guarantee for the quantity of bagasse to be provided by the sugar mill(s) to the generating plant(s).

(v) In a typical “co-generation project” normally large quantity of the fuel required for the generating unit of the facility would be made by the Sugar Mill.

(vi) The Power Purchase Agreement itself contains a specific provision to the effect that the orders passed by the Hon’ble PSERC on the petition filed by the developer shall be applicable. Hence the contracting parties i.e. the Appellant and the Respondent No. 2 had voluntarily subject the tariff payable under the Power Purchase Agreement to the tariff determination process initiated by the Respondent No.2

(vii) In any event, as per the law laid down by this Hon’ble Tribunal in several judgments, the Commission, in law, is entitled to even re-open the terms of a Power Purchase Agreement.

(viii) Under the Electricity Act, 2003, it is settled law that the Commission has to balance the equities between the Generator, Distribution licensees and Consumer and neither one of the parties should be made to unduly benefit to suffer because of the other.

26. The Appellant has also contended that A2Z has got an extra benefit over and above the other co-generation power projects in the State. This is not factually correct. In fact, A2Z Company has got a tariff less than other biomass generation project in the State. The State Commission in the impugned Order has not allowed generic tariff for bio-mass generator to the A2Z Company. On the other hand, it has evaluated the generation project on independent terms and has disallowed various costs and expenses etc. in the tariff determination of the A2Z Company. The various factors as considered by the State Commission in this regard have been enumerated in detail in Para 10(vi) of the impugned Order. The net result of such disallowances has been that while the available tariff rate for bio-mass project generators would be Rs. 5.31 per unit, the tariff fixed for the A2Z Company is only Rs. 5.20 per unit. Hence, the specific tariff for project of this Generator is 11 paise per unit less than the generic tariff for the other biomass projects.

Therefore, the contention by the Appellant in this regard is baseless.

27. The Appellant has contended that the State Commission has not provided any reason as to why it is determining a project specific tariff for 3 projects of the A2Z Company, when they fall within the category of non-fossil fuel based cogeneration projects under Regulation 4(4) of the Renewable Energy Regulations. The above contention is contrary to the records. As a matter of fact, the impugned Order sets out various reasons for determining a project specific tariff for the 3 projects of the 2nd Respondent. This reasoning is quoted below:

> *"10. i) The Commission notes that the ownership, management, operation & control etc. of the generating plant(s) lies with the petitioner and is independent of the sugar mill(s) except that these generating plant(s) are to supply steam and electricity to the sugar mill(s) in lieu of bagasse, on barter basis. Moreover, the bagasse produced in the sugar mills would constitute a small percentage (17% approx.) of the total fuel requirement of the power plant(s), which would be made available in lieu of electricity and steam to be supplied by the generating plant(s) to the sugar mill(s). The Commission also notes that the generating plant(s) have been set up in separate land provided by the sugar mill(s) with their own plant & equipment. In the light of the above, the Commission is of the opinion that the three generating plants set up by the petitioner are indeed biomass based*

independent power projects, except that these generating plant(s) would be using bagasse to the extent of 17% approx. of the total fuel requirement on annual basis and as such, it may not be justifiable to bracket these generating plant(s) purely under the co-generation category."

(ii) The Commission is of the opinion that the renewable energy projects set up by the petitioner would be beneficial to the State, since besides generating electricity by utilizing renewable energy sources, it is providing interest free funds for the modernization/expansion of the cooperative sugar mills and will also reduce emission of green house gases.

(iii) The Commission is also mindful of several provisions both in the Electricity Act 2003 (Act) and the Tariff Policy/National Electricity Policy framed under Section 3 of the Act which enjoins the Central Govt. to prepare the National Electricity Policy and the Tariff Policy with a view to developing the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances, hydro and renewable sources of energy. Section 61 and 86(1)(e) of the Act further mandate that the Commission while determining tariffs would be guided by the need to promote co-generation and generation of electricity from renewable sources of energy. Furthermore, para 6.4 of the Tariff Policy provides for preferential tariffs to be determined by the Commission for NRSE projects while para 5.2.20 of the National Electricity Policy requires adoption of suitable promotional measures for encouraging higher generation from NRSE sources.

(iv)With regard to the submission made by PSPCL that the petitioner has already entered in PPAs for supply of electricity from these plant(s) at tariff determined by the Commission, the Commission takes note that the PPAs already provide that the Orders passed by the Commission on the petition filed by the developer would be applicable. The Commission also takes not of the observations of the Hon'ble Appellate Tribunal for Electricity in the case of Rithwik Energy Systems Ltd. and others versus Transmission Corporation of Andhra Pradesh Ltd. and others. In its judgement, the Hon'ble Tribunal was pleased to observe that

"A distinction, however, must be drawn in respect of a case, where the contract is re-opened for the purposes of encouraging the promoting renewable sources of energy projects pursuant to the mandate of section 86(1)(e) of the Act, which requires the State Commission to promote cogeneration and generation of electricity from renewable sources of energy."

In para 35 of the order, the Hon'ble Tribunal further observed that it is bounden duty of the Commission to incentivize generation of electricity from renewable sources of energy and that PPAs can be reopened only for the purposes of giving thrust to non-conventional energy projects. In the light of the discussion above, the Commission concludes that PPAs signed between PSPCL and the petitioner would not stand in the way of considering appropriate tariff for the project(s).

(v) Further, with regard to the observation of PEDA and PSPCL that the tariff period as per RE Regulations is 13 years whereas the returns from

the project(s) shall be available to the petitioner for 15 years as per MoU(s) with the cooperative sugar mill(s), the Commission finds that the Concession period as per MoU(s) starts w.e.f. 1.9.2010 or from the date of commissioning of the plant(s), whichever is earlier. Since the plant(s) are under commissioning/ commissioned recently, a period of almost 18 months has already elapsed, the tariff period effectively comes to little more than 13 years."

28. The crux of the reasonings given by the Commission as referred above has been given hereunder.

(i) There are several material differences between the 2nd Respondent's 3 IPPs and other non-fossil fuel based co-generation projects and material similarities between the 3 IPPs and biomass power projects.

(ii) Renewable energy projects are beneficial for the state of Punjab as in addition to generating power, they provide interest free funds for the modernization/expansion of cooperative sugar mills and reduce emission of greenhouse gases.

(iii) Section 61 and 86(1)(e) of the Electricity Act, 2003, along with paragraph 6.4 of the Tariff Policy and paragraph 5.2.20 of the national Electricity Policy mandate the State Commission to take promotional

measures for encouraging higher generation from renewable sources including the adoption of preferential tariffs.

(iv) The PPA between the Appellant and Respondent No. 2 explicitly provides that the orders passed by the State Commission on the Petition filed by Respondent No. 2 for tariff determination would bind the parties.

(v) The Hon'ble Tribunal has held in Ritwik Energy Systems v. Transmission Corporation of Andhra Pradesh Ltd., Appeal No. 90/2006 that PPA can be re-opened in order to encourage non-conventional energy projects.

29. In view of the reasonings given in the impugned Order, the contention of the Appellant that there is no reason given for determining the specific project tariff for the Respondent is not tenable.

30. The Appellant further contended, since A2Z participated in the bidding process, entered into a PPA, received benefits and subsidies from the Government, participated in the *suo moto* proceedings by which the State Commission adopted the Renewable Energy Regulations and determined generic tariffs for all categories of Renewable Energy Projects and

filed the petition No. 43 of 2011 on the basis that this project is setting up a cogeneration project, A2Z company is estopped from taking the different stand that its 3 projects are biomass based generating stations. This contention is misconceived for the following reasons:-

(i) Having agreed under the Article 2.1.1(i) of the PPA that the party would be bound by the tariff determined by the State Commission on the basis of the A2Z Company petition, the Appellant cannot be permitted to contend that the Respondent is not entitled to the determination of a project specific tariff.

(ii) The Renewable Energy Regulations were adopted by the State Commission through its order dated 30.09.2010 i.e. after the bids and after the issuance of the Assignment Order dated 12.12.2008. So, the bid invitations on Assignment Orders could not have contemplated the definition or eligibility criteria laid down for non-fossil fuel based cogeneration projects in the RE Regulations. There was no occasion for A2Z Company to represent that it was a non-fossil fuel based cogeneration projects as per the RE Regulations during the bid. Similarly, the A2Z Company did not ever represent that it was a non-

fossil fuel based cogeneration projects as per RE Regulations during the bid process or otherwise.

(iii) A2Z Company, at no point of time, has represented that its 3 projects are not covered by the definition of "cogeneration". It was only contended that its 3 projects are entitled to be considered for project specific tariff since they are not "non-fossil fuel based cogeneration" projects as there are materially different from typical cogeneration power. Therefore, there cannot be estoppel against the A2Z Company as claimed by the Appellant.

(iv) The fact that A2Z Company participated in the tariff determination proceedings for a Renewable Energy projects has no bearing whatsoever on the instant case. The participation of the A2Z Company was pursuant a public notice for a proceeding in which all members of the public were entitled of participate.

(v) The A2Z Company has not derived any unjust benefit from the determination of a project specific tariff for its 3 projects, because the State Commission in the impugned order directed the Appellant to reduce the tariff for the 3 projects of the Respondents based on

the subsidy, if any, availed by the A2Z Company in respect of its 3 projects.

(vi) The pleadings in Petition No. 43 of 2011 filed by the A2Z Company before the State Commission are of no significance whatsoever, since the said petition filed by the A2Z Company was allowed to be withdrawn pursuant to the State Commission's Orders dated 14.09.2011. In that order the liberty was given to the Respondent to file a fresh petition. This liberty was exercised by the Respondent by filing the Petition No. 62 of 2011 in which the impugned Order has been passed and from which the instant appeal arises. The grant of liberty has not been questioned by the Appellant either before the State Commission or before the Tribunal. In the absence of any challenge to the State Commission's Order dated 14.09.2011, which has since attained finality, it is not open to the Appellant to challenge the validity of the impugned Order or its applicability to the PPA. The relevant order dated 14.09.2011 is reproduced below:

> *"The petitioner prays to withdraw the present petition with liberty to file a new petition as per law. The Commission allows the withdrawal of the petition with liberty to file a new petition.*

The petition stands disposed of accordingly."

31. The Appellant has also contended that impugned Order amounts to State Commission reopening the PPA between the parties, and a PPA cannot be reopened to increase the tariff payable to A2Z Company. This contention also has no merits. The State Commission has recorded in the impugned Order that the Article 2.1.1(i) expressly states that the parties shall be bound by the orders passed by the State Commission in the petition filed by the A2Z Company for project specific tariff determination. Further, the State Commission has relied upon the Tribunal's judgment in Appeal No. 90 of 2006 in Ritwik Energy System. In this judgment Tribunal has held that the PPA can be re-opened in order to encourage non-typical energy projects.

32. The Appellant has also relied upon this Tribunal's Judgment dated 2.9.2014 in Appeal No. 31 of 2014 in the case of Star Wire (India) Pvt. Ltd. Vs. Haryana Electricity Regulatory Commission. On the basis of this judgment, Appellant contended that once generic tariff for a category of power plants has been determined; there is no scope for project tariff specific determination. On perusal of the judgment, it is noticed that Star Wire case does not support the Appellant's contention in any manner. In that case the Tribunal had held that the project in

question was not eligible for project specific tariff as the relevant Regulations had no provision for project specific tariff determination. In the instant case, the RE Regulations specifically provide for determination of project specific tariff in Regulation 7, 65 and 66.

31. In view of the above, it is to be held that impugned Order is correct and based on sound reasoning.

32. **SUMMARY OF THE FINDINGS:**

(a) **The State Commission has given detailed reasons as to how the projects set-up by A2Z Company are materially different from typical co-generation plant in terms of ownership, control, operations and finances. We agree with the same.**

(b) The generic tariff determined by the State Commission for non fossil fuel based co-generation project does not apply to the projects of A2Z Company due to material difference that distinguish the projects of A2Z Company.

(c) PPA entered into between the parties contains a specific provision that determination of the tariff by the State Commission on the Petition filed by the Developer shall be applicable.

(d) The State Commission has correctly determined the project specific tariff for the power projects of A2Z Company by evaluating the projects on independent terms and has disallowed various costs and expenses with respect to the generic tariff for bio-mass projects.

33. In view of the above findings, we do not find any merits in this Appeal. Hence, the Appeal is dismissed. There is no order as to costs.

34. Pronounced in the Open Court on this **25th day of November, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated : 25th November, 2014

✔ **REPORTABLE / ~~NON-REPORTABLE~~**