Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:22nd Apr, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 249 of 2013

M/s. British Super Alloys Pvt Ltd.,
F, 8th Floor,
Surhyarath, Panchvati,
Ahmedabad-380 006

... Appellant

Versus

1. **Gujarat Electricity Regulatory Commission,**
   Gift City,
   Gandhinagar,
   Gujarat

2. **Uttar Gujarat Vijli Company Ltd.,**
   Visnagar Road,
   Mehsana-384 001
   Gujarat

Respondent(s)

Counsel for the Appellant : Mr. K.T Dave
Mr. Amit Dave

Counsel for the Respondent (s): Mr. M G Ramachandran
Ms. Swapna Seshadri for R-2

J U D G M E N T

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

1. British Super Alloys Private Limited is the Appellant herein.

2. The Appellant filed a Petition before the Gujarat State Commission claiming a tariff of Rs.3.37 per unit as determined by the State Commission in the Order dated 11.8.2006 without deducting 15% from Rs.3.37 per unit. However, the said Petition was dismissed by the State Commission by the Order dated 8.8.2013 holding that the Distribution Licensee (R-2) is entitled to deduct 15% of Rs.3.37 per unit.

3. Aggrieved by this Order, the Appellant has filed this Appeal.

4. The short facts are as follows:

   (a) The Appellant is a Wind Turbine Generator.

   (b) The Gujarat State Commission is the First Respondent. Uttar Gujarat Vijli Company Limited, the Distribution Licensee, is the Second Respondent.

   (c) The Wind Generating Company originally belonged to M/s. Decolight Ceramics Ltd.

(d) The said Company commissioned a 2.1 MW Wind Turbine Generators (WTGs) on 15.1.2007. Earlier, the State Commission by the Order No.2 of 2006 dated 11.8.2006 determined the price at the rate of Rs.3.37 per Unit for procurement of power by the Distribution Licensee in Gujarat from the Wind Energy Projects.

(e) The Wind Turbine Generator Company in question was commissioned on 15.1.2007 and the same would be covered under the Tariff Order dated 11.8.2006.

(f) M/s. British Super Alloys Pvt Ltd, the Appellant in March, 2011 purchased the above Wind Turbine Project from M/s. Decolight Ceramics Company Ltd.

(g) Thereafter, the Appellant executed a Wheeling Agreement with the Distribution Licensee (R-2) on 31.3.2011.

(h) In the said Agreement, it was agreed that the Generating Company will sell surplus power after captive use to the Distribution Licensee at the rate of 85% of Rs.3.56 Per unit. Since the rate of Rs.3.56 was wrongly mentioned in the Wheeling Agreement dated 31.3.2011 as Rs.3.56 instead of Rs.3.37, the Distribution Licensee, the 2nd Respondent brought this

to the notice of the Appellant and requested for execution of the Amendment Agreement in order to make a correction with regard to the rate. Accordingly, the Amendment Agreement was entered into between the parties on 16.7.2011 retaining the very same clause but correcting the rate alone as notified by the State Commission.

(i) In this Amendment Agreement, it was specifically mentioned that the Generating Company has agreed to sell surplus power to the Distribution Licensee at 85% of Rs.3.37 per unit as fixed by the State Commission.

(j) After execution of this Amendment Agreement dated 16.7.2011, both the parties have acted upon the same. Accordingly, the Appellant sold the surplus power to the Distribution Licensee (R-2) at the rate of Rs.85% of Rs.3.37 per Unit.

(k) In the meantime, the Appellant filed Petition No.1118 of 2011 before the State Commission to resolve the dispute about the applicability of the tariff order in respect of Wheeling Charges. This Amendment Agreement with regard to the 85% of the Tariff Rate was entered into during the pendency of the said Petition. Ultimately, this Petition was allowed

by the State Commission by the Order dated 28.11.2011 in respect of the Wheeling Charges holding that the applicable State Commission Order is Order No.2 of 2006 dated 11.8.2006 as the Wind Turbine Generating Company was commissioned during the control period of that Order.

(l) At that stage, the Distribution Company, the Second Respondent sent a letter to the Appellant on 17.4.2012 informing the Appellant that they would agree for refund of 15% amount deducted from 1.4.2011 as requested. Although such an assurance was made by the letter dated 17.4.2012, the Distribution Licensee did not act upon the said letter for a long time. Therefore, the Appellant filed a special Civil Application before the High Court of Gujarat for the implementation of the said decision taken by the Distribution Licensee as per the letter dated 17.4.2012. During the pendency of the said Application before the High Court, the Distribution Licensee took a decision to cancel the said letter and accordingly intimation was given to the Appellant through the letter dated 26.9.2012.

(m) Under those circumstances, the Appellant withdrew the Civil Application before the High Court as

the alternative remedy was available to the Appellant to approach the State Commission.

(n) Accordingly, on 25.3.2013, the Appellant filed a Petition in Petition No.1299 of 2013 seeking for a direction to the 2nd Respondent to refund the amount of 15% deducted for surplus sale of energy as the Appellant claimed that it is entitled for a tariff rate of Rs.3.37 per Unit without 15% deduction for surplus energy sale after captive use. In this Petition, the Appellant made one more prayer for setting off of enrgy for the month of March, 2011.

(o) The State Commission after hearing the parties, passed the Order dated 8.8.2013 rejecting the 1st prayer in respect of refund of the 15% amount deducted for surplus sale of energy.

(p) However, the State Commission allowed the Petition with regard to the 2nd prayer in respect of the issue of giving set-off of energy by the Appellant for the month of March, 2011.

(q) The Appellant has now filed this Appeal only with regard to the 1st prayer not granted to the Appellant by the State Commission in respect of the tariff rate of Rs.3.37 per Unit without deduction of 15% for the

surplus energy sale after captive use and for refund of the amount deducted.

5. The learned Counsel for the Appellant has made the following submissions assailing the Impugned Order dated 8.8.2013:

(a) The State Commission has wrongly relied upon the judgment rendered by this Tribunal in Indian Oil Corporation Limited Noida Vs Gujarat State Commission case reported in 2013 ELR (APTEL) 301, to reject the prayer of the Appellant. The said judgment has no application to the present facts of the case and as such it is distinguishable.

(b) The State Commission wrongly relied upon the Amendment Agreement dated 16.7.2011 in which it has been provided for payment of the deduction of 15% of 3.37 per unit. In fact, the State Commission did not properly consider the fact that it was not executed by the Appellant by free will.

(c) It is not disputed that the Distribution Licensee (R-2) itself sent a letter to the Appellant dated 17.4.2012 agreeing not to deduct 15% and to pay for the energy at 100% tariff i.e. Rs.3.37. But, the State Commission merely relied upon the subsequent letter of the Distribution Company dated 26.9.2012 cancelling

the letter dated 17.4.2012 without any reason whatsoever. The learned Counsel for the Appellant has cited authorities in support of his submission.

6. In justification of the Impugned Order, the learned Counsel for the Distribution Licensee has argued that the present case is squarely covered by the earlier Order of the State Commission as well as the judgment of this Tribunal in Indian Oil Corporation Limited case and the other authorities cited by the Respondent have no application to the present facts of the case.

7. In the light of the rival contentions, let us frame the question to be analysed in the present case:

1) "**Whether the Distribution Licensee, the 2nd Respondent is entitled to deduct 15% from the Tariff rate i.e. Rs.3.37 Per Unit determined by the State Commission for the energy which is considered as sale of surplus unit after captive use by the Appellant?"**

2) **Whether Amended Wheeling Agreement dated 16.7.2011 was willingly executed by the Appellant?**

3) **Whether the State Commission has ignored to consider the letter dated 17.4.2012 sent by the**

Distribution Licensee agreeing to refund 15% f the amount deducted?

8. Before dealing with these questions, it would be better to refer to judgments cited by the learned Counsel for the parties in support of their respective pleas.

9. According to the Respondent, this case is squarely covered by the judgment of this Tribunal in Indian Oil Corporation Limited case.

10. On the other hand, it is contended by the Appellant that the said judgment rendered in Indian Oil Corporation case would not apply to the present case. The Appellant cited the decision rendered by this Tribunal in Kutch Salt and Allied Industries case rendered by the judgment in Appeal No.190 of 2010 by the judgment dated 31.5.2011 in support of his case.

11. In the light of the above rival stand taken by the parties, it would be worthwhile to refer to the facts and findings given by the State Commission as well as this Tribunal in the case of Indian Oil Corporation as well as in Kutch Salt case in order to decide as to which of those decisions would apply to the present case.

12. Let us refer to the Indian Oil Corporation case as well as Kutch Salt Case.

13. The Indian Oil Corporation Limited filed a Petition in Petition No.1004 of 2010 and raised exactly the same claim as made by the Appellant in the present proceedings. The ground raised by the Indian Oil Corporation was that the price fixed for the purchase of power under Clause 3.4 of the Wheeling Agreement was in direct contravention of the tariff order No.2 of 2006 dated 11.8.2006.

14. On that ground, the Indian Oil Corporation prayed the State Commission for a direction to the Distribution Licensee to pay the entire applicable tariff as determined by the State Commission in the Order No.2 of 2006 without any deduction.

15. The State Commission dismissed the said Petition No.1004 of 2010 holding that since the Distribution Company had fulfilled the Renewable Purchase Obligation, the surplus energy for the Wind Energy Generators is being purchased by the Distribution Licensee at the rate of 85% of the applicable tariff as agreed by the parties in the Agreement and that therefore, the prayer of the Petitioner Indian Oil Corporation Limited cannot be granted.

16. Thereafter in other proceedings in the Petition No.1029 of 2010 filed by M/s. Kutch Salt and Allied Industries, it was prayed for the direction that the surplus energy available

after captive use shall be purchased by the Distribution Licensee at the rate determined by the Order No.2 of 2006.

17. In these proceedings, the State Commission by the Order dated 10.8.2010, allowed the Petition by interpreting the Wheeling Agreement entered into between the Kutch Salt and the Distribution Licensee which contained a clause that the surplus energy available after captive use, shall be purchased by the Distribution Licensee at the rate determined by Order No.2 of 2006 and held that Kutch Salt is entitled to the entire tariff as the Distribution Licensee did not carry out any competitive bidding process.

18. Admittedly, in the said case, there was no specific Clause in the Agreement to the effect that the tariff of 85% of the tariff determined by the State Commission is payable. This order dated 10.8.2010 was challenged before this Tribunal in Appeal No.190 of 2010. This Tribunal upheld the said order by the judgment dated 31.5.2011 and dismissed the Appeal.

19. Thereupon, the Indian Oil Corporation without filing the Appeal as against the Order dated 13.5.2011 in Petition No.1004 of 2010, approached the State Commission and filed Review Petition before the State Commission challenging the Order dated 13.5.2010 by relying upon the subsequent order of the State Commission dated 10.8.2010 in the Kutch Salt case which was confirmed by this Tribunal

in Appeal No.190 of 2010. However, the State Commission dismissed the said Review on 16.4.2012 as the Review Petition was not maintainable as the subsequent orders could not be relied upon as a ground for review in terms of Order No.47 Rule-1 of the CPC.

20. This dismissal Order dated 16.4.2012 was challenged by the Indian Oil Corporation before this Tribunal in Appeal No.124 of 2012 raising the ground that the ratio decided in the Kutch Salt case by this Tribunal would apply to that case also. But, this Tribunal elaborately dealt with the said issue and held that the ratio decided in the Kutch Salt case would not apply to the Indian Oil Corporation case and dismissed the said Appeal on 4.1.2013.

21. In this case, this Tribunal analysed the various provisions of the Wheeling Agreements entered into between the parties in Indian Oil Case as well as the Wheeling Agreements entered into between the parties in Kutch Salt case and pointed out the various differences between various Clauses mentioned in those Wheeling Agreements and ultimately held that the Indian Oil Corporation Limited cannot claim a high tariff relied upon the subsequent decision of the State Commission as the Clauses of the Wheeling Agreement in Indian Oil Corporation case was completely different from the Wheeling Agreement of the Kutch Salt case.

22. The relevant finding rendered by this Tribunal in the judgment dated 4.1.2013 in Appeal No.124 of 2012, is as follows:

> *"30. These findings would indicate that the State Commission had come to the conclusion that the decision of the State Commission in Petition filed by M/s. Kutch Salt And Allied Industries Limited would not apply to the present case since the facts of that case are entirely different from this case.*
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> *31. It is noticed that M/s. Kutch Salt and Allied Industries claimed tariff as per the order No.2 of 2006 passed by the State Commission on 11.8.2006 in Petition No.1029 of 2010. The State Commission allowed the said Petition by the order dated 10.8.2010 and the same was upheld by this Tribunal by the judgment dated 31.5.2011 by interpreting the various clauses in the Wheeling Agreement entered into between those parties.*
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> *32. The Wheeling Agreement entered into between the Appellant and the Distribution Company (R-2 and 3) contained different clauses for purchase of surplus energy by the Respondent in contrast to specific clauses in the Wheeling Agreement with M/s. Kutch Salt And Allied Industries Limited. The Wheeling Agreement between M/s. Kutch Salt And Allied Industries Limited and the Distribution Licensee provided through Clause 3.4 that the surplus energy available from the Wind Project after captive use, would be purchased by the Respondent No.2 at the rate determined through the competitive bidding process.*
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> *33. Let us now quote **Clause 3.4** of the Wheeling Agreement entered into between Kutch Salt And Allied*

Industries Limited and the Distribution Licensee which is as under:

"Clause 3.4: Purchase of Surplus Energy

In accordance with the Gujarat Electricity Regulatory Commission (GERC)'s order no. 2 of 2006 dated 11th August 2006, any excess energy (Net of Wheeling/Transmission loss/ Charges approved by GERC for wind farms and after subtracting the set off against monthly consumption) shall be treated as sale to the DISCOM. However, above deemed sale provision at the tariff rate determined by the Commission is applicable only for the purchase of energy from renewable sources up to the minimum requirement of power from such sources. The DISCOM has already tied up the purchase of power from renewable sources more than the minimum requirement of power purchase from such sources. Now, DISCOM may purchase power from Company's wind farms at the rate determined through competitive bidding process. Therefore, it is agreed to purchase the power from wind farm at the rate at which DISCOM will agree/sign an Agreement herein after with any other wind farm generator.

The payment of such energy agree to be purchased will be released within 30 days from the date of invoice from wind energy generator in this regard. Any excess consumption by the participant unit will be treated as sale by the DISCOM at retail tariff rates applicable to that consumer category (to which facility of wind energy owner belongs) as determined by GERC from time to time"

34. In that case, the Distribution Licensee did not carryout any competitive bidding process.

35. On the other hand, in that case, the Distribution Licensee claimed that only 85% of the Tariff determined by the State Commission would be paid for surplus energy. In the light of the facts of that case while interpreting the said Clause 3.4 of the said Agreement, the State Commission held that full tariff rate as determined by the State Commission would have to be paid. Accordingly, the State Commission decided that Kutch Salt And Allied Industries Limited would be entitled to tariff as determined by the State Commission in the order No.2 of 2006. Thus, neither, the State Commission nor the Tribunal while interpreting the relevant clause of the Agreement in that case interfered with the Wheeling Agreement between the Kutch Allied And Industries Limited and the Distribution Licensee.

36. But, in the present case, the Wheeling Agreement between the Appellant and the Distribution Licensee provides that the Appellant would sell the surplus power available after captive consumption wheeled

from Wind Turbine Generators (WTG) of the Appellant @ 85% of the applicable tariff i.e. 3.37 per unit as decided in the Order No.2 of 2006.

37. Let us now refer to Clause 3.4 of the Wheeling Agreement in the present case. The same is as follows:

> *"Clause 3.4 Purchase of Surplus Energy: .....Hence, the Company has agreed to sell such surplus power to Distribution Licensee at the rate 85% of Rs.3.37 per Unit or as notified by the Government or Regulatory Commission or any other Competent Statutory Authority from time to time...*

38. Thus, in the present case, the Appellant agreed to the above stipulation and signed the Wheeling Agreement. That apart, both the parties namely the Appellant and the Distribution Licensee acted upon the earlier order dated 13.5.2010 and the said Agreement accordingly as per the terms and conditions agreed between the parties under the Wheeling Agreement.

39. As rightly pointed out by the State Commission, the Appellant never objected to the tariff referred to in the Wheeling Agreement till they filed Petition before the State Commission belatedly.

40. Under these circumstances, the Appellant cannot claim a high tariff relying upon the subsequent decision of the State Commission on the basis of the clauses of the Wheeling Agreement which is

completely different from the Clause of the Agreement in question in the present case".

23. Thus, this Tribunal held that the Clauses in the Wheeling Agreement in Indian Oil Corporation case are totally different from the Clauses in the Wheeling Agreement in the Kutch Salt case. Thus, both the State Commission as well as this Tribunal came to the conclusion that the Clauses in the Wheeling Agreement in the Indian Oil Corporation case and the Kutch Salt case are different and have to be ascribed different meaning.

24. It is pointed out by the learned Counsel for the Respondent that the Clauses contained in the Wheeling Agreements in the present case are pari-materia of the clauses contained in the Wheeling Agreement of the Indian Oil Corporation case.

25. Let us now see the relevant clause in both the Original Agreement as well as the Amendment Agreement entered into in the present case.

26. The relevant portion of Clause 3.4 of the Wheeling Agreement dated 31.3.2011 is reproduced below:

"*…….Hence the Company has agreed to sell such surplus power to Distribution Licensee at the rate 85% of Rs.3.56 per Unit or as notified by the Government or Regulatory Commission or any other Competent Statutory Authority from time to time".*

27. The above Clause clearly shows that it was a pari-materia Clause to that of the Wheeling Agreement in the Indian Oil Corporation Case.

28. However, in the above Agreement dated 31.3.2011, the rate of Rs.3.56 was inadvertently mentioned instead of Rs.3.37. Therefore, as agreed by the parties, the Amendment Agreement was entered into on 16.7.2011 providing the very same clause but correcting the rate as mentioned below:

> *".....Hence the Company has agreed to sell such surplus power to Distribution Licensee at the rate 85% of Rs.3.37 per Unit or as notified by the Government or Regulatory Commission or any other Competent Statutory Authority from time to time."*

29. The perusal of both the Agreements would indicate that in the Amendment Agreement dated 16.7.2011, the rate alone was changed from Rs. 3.56 to Rs. 3.37 per unit. But, both the Original Wheeling Agreement dated 31.3.2011 and the amended Wheeling Agreement dated 16.7.2011 entered into between the Appellant and the Distribution Licensee in the present case clearly provide that the Appellant would sell surplus power available after captive consumption wheeled from wind turbine generating Company of the Appellant at the rate of 85% of the tariff applicable to the Wind Turbine Generator i.e. Rs.3.37 per Unit. This is most important similarity found in the present case as well as the Indian Oil Corporation case.

30. In view of the above, we conclude that the first issue has been correctly decided by the State Commission on the basis of the Indian Oil Corporation case which is squarely covered by the judgment of this Tribunal. Accordingly, the first issue is decided.

31. The **2nd Issue** raised by the Appellant with reference to lack of free will on the part of the Appellant in executing the amended Wheeling Agreement dated 16.7.2011.

32. According to the Appellant, the amended Wheeling Agreement dated 16.7.2011 was not executed by the Appellant out of its free will but it was executed under the coercion.

33. Admittedly, the Appellant has not furnished any material either before the State Commission or before this Tribunal to demonstrate this.

34. On the other hand, the Appellant merely stated that no prudent man would agree for reducing the applicable tariff from Rs.3.56 per unit to Rs.3.37 per unit.

35. This argument is strange.

36. It is a well settled law that when the party alleges that there was coercion or a lack of free will for execution of Agreement, the same has to be specifically pleaded and proved by the party who raised the said plea. The plea of

the coercion raised at this stage, by the Appellant that too after almost two years of signing the Wheeling Agreement cannot but, be an afterthought.

37. It is for the Appellant to show to the satisfaction of the State Commission by giving evidence that the Distribution Licensee, the Respondent coerced the Appellant to sign the Wheeling Agreement dated 31.3.2011 and the Amendment Agreement dated 16.7.2011 and that the Agreements were signed out of lack of free will. Admittedly, this has not been established.

38. The learned Counsel for the Respondent relied upon the following judgments:

(a) S K Jain Vs State of Haryana & Anr (2009) 4 SCC 357

8. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly [(1986) 3 SCC 156: 1986 SCC (L&S) 429: (1986) 1 ATC 103]. The said decision does not in any way assist the Appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts.

(b) Bishundeo Narain and Anr V Seogeni Rai and Jagernath AIR 1951 SC 280

"27. We turn next to the questions of undue influence and coercion. Not it is to be observed that these have

not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

28. It is also to be observed that no proper particulars have been furnished. Now, if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set-forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion".

39. On the basis of the this ratio decided by the Hon'ble Supreme Court, if we look at the facts of the present case, there is nothing to indicate that only due to coercive action of the Respondent Licensee, the Appellant had to sign the Wheeling Agreement dated 31.3.2011 and the Amendment Agreement dated 16.7.2011. Therefore, the plea of the so called coercion cannot be said to be valid and the same is accordingly rejected.

40. The **3rd Issue** is relating to the letter issued by the Distribution Licensee on 17.4.2012 which is relied upon by the Appellant to show that the R-2, the Distribution Licensee has earlier agreed to refund 15% of the amount deducted.

41. Let us refer to the letter dated 17.4.2012 which reads as under:

> *"As per letter of GUVNL, Vadodara under reference and as per the Order issued by Hon'ble GERC in case of Kutch Salt and Allied Industries Ltd., your request for payment of 15% amount deducted from your invoices of WTGs w.e.f. 01.04.2011 is hereby accepted.*
>
> *You may submit your month wise claim through Division Office, KADI for differential amount of 15% with effect from 01.04.2011".*

42. According to the Respondent, this letter was wrongly issued on 17.4.2012 and on realising the said mistake, the Appellant issued another letter dated 26.9.2012 cancelling the earlier letter and clarified the position to the Appellant through the letter dated 26.9.2012.

43. Let us refer to the letter dated 26.9.2012 which is as under:

> *"Letter No.UGVCL/AC/R&C/1034 dated 17.04.2012, issued by GM (F) may be treated as cancelled in line with the letter No.UGVCL/REGD/COM/WF-12/2052 dated 04.07.2012 issued by Chief Engineer (OP) UGVCL, Mehsana."*

44. It is stated that the R-2 in the Affidavit in reply before the State Commission to the effect that the letter dated 17.4.2012 was issued as a mistake and the same was rectified by the letter dated 26.9.2012.

45. In view of the above, the Appellant cannot rely upon the letter dated 17.4.2012 which has been cancelled.

46. In this context it is to be pointed out one more aspect.

47. The Appellant filed a special civil application before the High Court of Gujarat seeking for a direction to implement the letter dated 17.4.2012 sent by the Distribution Licensee. But, during the pendency of the civil application before the High Court, the Distribution Licensee sent a letter dated 26.9.2012 clarifying to the Appellant that the said letter was cancelled. On receipt of this letter, the Appellant decided to withdraw the civil application to approach the State Commission in order to resolve the dispute. Accordingly, the same was withdrawn. At this stage, the Appellant did not complain to the High Court that the withdrawal of the letter dated 17.4.2012 was not bona fide.

48. That apart, even before the State Commission it was not demonstrated that the cancellation of the letter dated 17.4.2012 by the letter dated 29.9.2012 by the Respondent was not a valid one. Hence, the reliance on the letter dated 17.4.2012 is misconceived.

49. At any rate, the Appellant has to establish its claim only on the basis of the Wheeling Agreement dated 31.3.2011 and the Amendment Agreement dated 16.7.2011 and not on the basis of the letter dated 17.4.2012.

50. Therefore, the letter sent by the Distribution Licensee dated 17.4.2012 which has been cancelled through the letter dated 26.9.2012 will not be of any help to the Appellant.

51. Therefore, this issue is also decided as against the Appellant.

52. **Summary of Our Findings**

(i) The rate applicable to the sale of surplus power after captive use by the Appellant for supply to the distribution licensee from its Wind Energy Generator would be 85% of Rs.3.37 as agreed to in the Wheeling Agreement dated 31.3.2011 as amended by the Amendment Agreement dated 16.7.2011.

(ii) The finding of the Tribunal in Indian Oil Case as reported in 2013 ELR (APTEL) 301 will be applicable to the present case and not the finding in Kutch Salt case in Appeal No.190 of 2010.

(iii) The plea of the Appellant regarding coercion in entering into Amendment Wheeling Agreement

dated 16.7.2011 is rejected as the Appellant has not furnished any material to demonstrate coercion by the Respondent No.2.

(iv) The Appellant cannot rely on the letter dated 17.4.2012 issued by the Distribution Licensee for refund of 15% of amount as the same letter was cancelled on 26.9.2012.

53. In view of our above findings, there is no merit in this Appeal.

54. Consequently, the Appeal is dismissed.

55. However, there is no order as to costs.

(Rakesh Nath) **Technical Member**

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

Dated:22nd Apr, 2014

√REPORTABLE/~~NON-REPORTABLE~~