

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

Appeal no. 132 of 2012 & IA nos. 247 & 248 of 2012
Appeal no. 133 of 2012 & IA nos. 249 & 250 of 2012

Dated: 2nd December, 2013

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

Appeal no. 132 of 2012 & IA nos. 247 & 248 of 2012

In the matter of:

M/s. Junagadh Power Projects Private Limited,
Plot No. 51, 1st Floor, Vithal Rao Nagar,
Madhapur,
Hyderabad- 510 081

... **Appellant**

Versus

1. **Gujarat Urja Vikas Nigam Limited,**
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodra-390 007,
Gujarat, India.
2. **Gujarat Energy Transmission Corpn. Limited,**
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodra-390 007,
Gujarat, India.
3. **Gujarat Energy Development Agency,**
4th Floor, Block No. 11 & 12,
Udyog Bhavan,
Sector-11,
Gandhinagar,
Gujarat, India.

4. **State Load Despatch Centre,**
132kV Gotri Sub-Station Compound,
Gotri Road, Vadodara-390 021
5. **Gujarat Electricity Regulatory Commission,**
1st Floor, Neptune Tower,
Opposite Nehru Bridge,
Ashram Road,
Ahmedabad-380 009
Gujarat, India.

...Respondent(s)

Appeal no. 133 of 2012 & IA nos. 249 & 250 of 2012

In the matter of:

M/s. Amreli Power Projects Limited,
4th Floor, My Home Plaze, 10-5-6/B,
Masab Tank,
Hyderabad- 500 028

... **Appellant**

Versus

1. **Gujarat Urja Vikas Nigam Limited,**
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodra-390 007,
Gujarat, India.
2. **Gujarat Energy Transmission Corpn. Limited,**
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodra-390 007,
Gujarat, India.
3. **Gujarat Energy Development Agency,**
4th Floor, Block No. 11 & 12,
Udyog Bhavan,
Sector-11,
Gandhinagar-382 010,
Gujarat, India.
4. **State Load Despatch Centre,**
132kV Gotri Sub-Station Compound,
Gotri Road, Vadodara-390 021

5. **Gujarat Electricity Regulatory Commission,**
1st Floor, Neptune Tower,
Opposite Nehru Bridge,
Ashram Road,
Ahmedabad-380 009
Gujarat, India.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Ms. Shikha Ohri,
Mr. Banerjee
Mr. Ruth Elwin
Mr. Anurag Sharma

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan,
Ms. Swapna Seshdri &
Ms. Swagatika Sahoo
Mr. V.F. Patel (Rep.)

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal nos. 132 of 2012 and 133 of 2012 have been filed by M/s. Junagadh Power Projects Pvt. Ltd. & M/s. Amreli Power Projects Ltd. against the order dated 10.5.2012 passed by the Gujarat Electricity Regulatory Commission (“State Commission”) in Petition nos. 1114 of 2011 & 1113 of 2011 rejecting the prayers of the Appellants for re-determination of

fuel cost in respect of their biomass based generating plants.

2. The Appellants are biomass based generating companies. Gujarat Urja Vikas Nigam Ltd. is the Respondent no. 1. The State Commission is the Respondent no. 5.

3. The facts of the case are briefly given as under:

3.1 The State Commission on 10.2.2010 floated a discussion paper on determination of tariff for procurement of power by Distribution licensees from biomass based generating plants. The Appellants submitted their objections and suggestions to the discussion paper.

3.2 On 17.5.2010, the State Commission passed an order determining tariff for procurement of power by Distribution licensees from Biomass based generating

plants. The State Commission fixed a generic fuel cost @ Rs. 1600/MT with an escalation of 5% per annum and accordingly, fixed the tariff for biomass projects for 20 years of operation. The State Commission fixed levelled tariffs for first 10 years of operation and for the subsequent 10 years of operation.

3.3 On 15.7.2010, Gujarat Biomass Energy Developers Association filed a Review Petition against the tariff order dated 17.5.2010 seeking *inter alia*, revision in the biomass fuel cost. However, the State Commission vide its order dated 16.11.2010 dismissed the Petition holding that the same was not maintainable.

3.4 On 20.9.2010 Amreli Power Projects Ltd., the Appellant entered into Power Purchase Agreement ('PPA') with GUVNL for sale of power from its biomass

project. Similar PPA was executed by M/s. Junagadh Power Projects Pvt. Ltd., the Appellant on 26.11.2010. Both the PPAs were entered in terms of the tariff determined by the State Commission in its order dated 17.05.2010.

3.5 The tariff fixed by the State Commission in its order dated 17.5.2010 was subsequently modified in respect of biomass power projects with air cooled condensers by the State Commission by its order dated 7.2.2011 in Petition no. 985 of 2009 filed by another biomass based generating company, namely M/s. Abellon Clean Energy Ltd. by allowing increase in tariff in biomass power projects using air cooled condensers.

3.6 The biomass power plants of Amreli and Junagadh Power Projects, the Appellants achieved

commercial operation on 1.3.2011 and 22.5.2011 respectively.

3.7 Subsequently, the Appellants filed a Petition being no. 1114 of 2011 & 1113 of 2011 respectively before the State Commission requesting for re-determination of price of biomass fuel in view of the significant hike in the market price of biomass fuel and implementation of the order dated 7.2.2011 passed by the State Commission for increase in tariff for their projects which have air cooled condensers.

3.8 The State Commission passed the common impugned order dated 10.5.2012 rejecting the prayer of the Appellants with regard to re-determination of price of biomass fuel in view of hike in the price of biomass fuel. However, the State Commission directed to amend the PPA in view of increase in tariff on

account of use of air cooled condenser in the power plants of the Appellants in accordance with its order dated 7.2.2011 passed in the case of Abellon Clean Energy.

3.9 Aggrieved by the impugned order dated 10.5.2012 rejecting the prayer to re-determine the biomass fuel price, the Appellants have filed these Appeals.

4. As the issue as well as the impugned order in both the Appeals is same, a common judgment is being rendered.

5. The Appellants have made the following submissions:

- a) The Appellants were not seeking a review of Order dated 17.5.2010 but were seeking re-determination of tariff due to uncontrollable factor. The power and jurisdiction of the

State Commission to determine tariff is by virtue of the provisions of the Electricity Act, 2003 under Sections 61, 62, 64, and 86(1)(a), (b) and (e) of the Electricity Act, 2003. The power and jurisdiction of the State Commission is controlled by the provisions of the statute. The existence of a Power Purchase Agreement or a previous order cannot curtail or abrogate any provision of the statute. The State Commission is under a statutory obligation to determine tariff and the power to determine tariff cannot be made subject to any contract. On the contrary, the State Commission even after it has determined tariff has the power to re-determine the same as provided under Section 62(4) of the Electricity Act, 2003. The

State Commission also has the power to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for distribution and supply within the State. Therefore, the State Commission has the jurisdiction to re-determine tariff in an appropriate case.

- b) The tariff agreed in the PPA was not a tariff determined through competitive bidding process under Section 63 of the Electricity Act, 2003 wherein fuel is the sole responsibility of the generator. On the other hand, the tariff was fixed by the State

Commission under Section 62(1)(a) of the Act on cost plus basis.

- c) The State Commission had fixed the generic tariff for all biomass based plants in the State of Gujarat by its order dated 17.5.2010 when no biomass plants were existing in the State. The tariff order was based on estimates of the State Commission and recommendations of Gujarat Energy Development Agency. The fuel cost is an uncontrollable factor and variations in the cost of fuel are beyond the control of the Appellant. In fact, the State Commission in Multi Year Tariff Regulations, 2011 recognized variation in price of fuel as an uncontrollable factor. The substantial increase in the biomass fuel cost has affected the viability of the Appellant's project

necessitating positive intervention on the part of the State Commission under the provisions of Section 61(h) and 86(1)(e) of the Electricity Act, 2003 .

- d) The State Commission had considered the provisions of the CERC Tariff Regulations for Renewable Energy Sources, 2009 while fixing the generic tariff by its order dated 17.5.2010. However, the said 2009 Regulations have been superseded by the Central Electricity Regulatory Commission by 2012 Regulations, notified on 6.2.2012. In the 2012 Regulations, the price of biomass fuel has been increased significantly which has been ignored by the State Commission.

- e) The State Commission has power under Section 61, 62(2), (3) and (4) and 86(1)(a), (b) & (e) of the Electricity Act, 2003 to revisit tariff and reopen PPA to the extent of tariff numbers incorporated therein.
- f) The State Commission has also failed to consider the principles laid down by the Hon'ble Supreme Court and this Tribunal in the following:
- i) India Thermal Power Ltd. vs. State of M.P. & Ors. (AIR 2000 SC1005);
 - ii) Transmission Corporation of Andhra Pradesh Ltd. & Anr. vs. Sai Renewable Power Pvt. Ltd. & Ors. (2011) 11 SCC34;
 - iii) Rithwik Energy Systems vs. Transmission Corporation of Andhra Pradesh 2008 ELR (APTEL) 237;

- iv) Tribunal's judgment in HPSEB vs. UERC & Anr. in Appeal no. 183 of 2009;
- v) Tribunal's judgment in Konark Power Projects vs. Bangalore Electric Supply Ltd. in Appeal no. 35 of 2011;
- vi) Tribunal's judgment in the matter of Techman Infra Ltd. vs. HPERC & Ors. in Appeal no. 50 of 2008;
- vii) Tribunal's judgment dated 31.5.2012 in Appeal nos. 28 & 29 of 2011 in matter of Tarini Infrastructure Limited vs. GUVNL & Ors.

He also referred to a number of judgments of the Hon'ble Supreme Court and this Tribunal regarding regulatory powers of the Regulatory bodies and power to revise the tariff.

(g) With regard to the benefit of higher tariff to be passed on to the Appellants for use of air-cooled condenser, the contention of the Appellants is that the State Commission has not fully addressed the issue in terms of order dated 7.2.2011. If the benefit of 21 paise for use of air-cooled condenser is allowed on year to year basis, it would result in reduction of tariff.

6. Respondent no. 1 in its reply has made the following submissions:

a) By seeking review and re-fixation of biomass price, the Appellants in the petitions before the State Commission as well as in the Appeals, are indirectly seeking the review of the State Commission's order dated 17.5.2010 deciding the biomass price and

generic tariff. The prayer for increase in biomass price has been duly considered and rejected by the State Commission vide order dated 16.11.2010 in Review Petition filed by Gujarat Biomass Energy Developers Association. The Appellants are seeking to raise the very same issues which have been considered and rejected and there are no new circumstances pleaded by the Appellants.

- b) The Appellants were fully aware of the claim made by their Association for increase in Biomass price when they dealt with GUVNL for signing of the PPA and in fact M/s. Junagadh had signed the PPA after rejection of the Review Petition filed by the Association seeking for increase in biomass price.

- c) The Appellants had consciously agreed to the terms and conditions contained in the PPA and the order dated 17.5.2010 with the full knowledge that the State Commission had rejected the claim of the Association for increase in biomass price.
- d) The Appellants did not challenge either the order dated 17.5.2010 or the order dated 16.11.2010 of the State Commission at the relevant time. On the contrary, the Appellants decided to opt for tariff as decided by the State Commission in the order dated 17.5.2010. The Appellants' stand in regard to the adjustment of tariff for use of air cooled condensers is inconsistent and without any basis. On one hand, the Appellants are

relying on the order dated 7.2.2011 seeking to get the benefit of the additional 21 paise per kWh in tariff despite signing the PPAs and agreeing to the tariff as per the State Commission's order dated 17.5.2010. On the other hand, the Appellants are stating that the option given by the State Commission in the order dated 7.2.2011 to GUVNL to shift to year on year tariff ought not to be given. The Appellants herein have to accept the order in toto and cannot seek partial application of M/s. Abellon order without the attached covenant relating to year on year tariff.

- e) Respondent no. 1 has also tried to differentiate the judgments referred to by the Appellants in support of their contentions.

7. On the above issues, we have heard Shri Sanjay Sen, learned Senior Advocate representing the Appellants and Shri M.G. Ramachandran, learned counsel for Respondent no. 1.

8. Based on the rival contentions of the parties, the following questions would arise for our consideration:

- i) Whether the State Commission has erred in not re-determining the fuel price of biomass fuel in view of the difficulties expressed by the Appellants in operating their plants in view of steep rise of fuel since the determination of the generic tariff by order dated 17.5.2010?
- ii) Whether the State Commission is empowered to revise the biomass fuel price and consequently the tariff in the circumstances of the case even though the biomass

generators had voluntarily signed PPAs accepting the generic tariff decided by the State Commission by order dated 17.5.2010?

- iii) Whether the State Commission has erred in not correctly allowing the enhancement in tariff on account of use of air cooled condenser?

9. All the issues are interconnected with each other and therefore, being dealt with together.

10. Let us now examine the findings of the State Commission in the impugned order dated 10.5.2012 rejecting the claim of the Appellants. The gist of the findings is as under:

- i) The Power Purchase Agreements signed between the parties are based on the Order

No. 5 of 2010 dated 17.5.2010 in which the price of biomass fuel was decided by the State Commission after consideration of the objections raised by the stakeholders including the Appellants.

- ii) The Appellants have submitted that the price of biomass is uncertain and it is uncontrollable due to unorganized market of the biomass fuel. In such a situation, it is the duty of the project developer first to ascertain the availability of fuel, prior to setting up the power projects in the planning stage. The availability of fuel and other parameters is the responsibility of the project developers. Any uncertainty arising later on cannot be allowed to be passed on in the tariff, as it will affect the consumers' tariff.

- iii) The request of the Appellants to reconsider the price of biomass fuel would lead to review of the price decided by the State Commission in order dated 17.5.2010 which is not permissible without deciding the maintainability of review of the order dated 17.5.2010. Even though the biomass generators have not prayed for review of Order dated 17.5.2010 but without a review it is not possible to revise the biomass price as prayed by the generators.
- iv) The State Commission by order dated 16.11.2010 had dismissed the Review Petition No. 1045 of 2010 filed by the Biomass Manufacturers Association praying for increase in price of biomass. Based on

the above decision of the State Commission, the increase in the price of biomass prayed by the biomass generators is not acceptable.

- v) According to the order dated 7.2.2011 in Petition no. 985 of 2009, the State Commission had decided that the biomass based power plants with air-cooled condensers commissioned after the Order dated 7.2.2011 are eligible for the revised tariff decided in the order dated 7.2.2011. Accordingly, the order dated 7.2.2011 is also applicable to the Appellants' plants. The tariff decided by the State Commission vide its order dated 17.5.2010 and the tariff decided by the State Commission for air-cooled condensers based power projects vide its order dated 7.2.2011 are under exercise of its

power under section 61(h), 62(1)(a) read with section 86(1)(e) of the Electricity Act, 2003 and are statutory orders. Article 5.2 of the PPAs pertains to tariff for the projects and is of statutory nature. Article 5.2 of the PPAs consist of the tariff decided by the State Commission by order dated 17.5.2010 which is inconsistent with the order dated 7.2.2011. Therefore, the parties to the PPA shall have to amend the PPA to that extent as the tariff agreed in Article 5.2 of the PPAs is based on statutory order.

11. Thus, the State Commission has declined to re-determine the price of biomass fuel mainly due to the following reasons:

(i) it would result in review of the tariff order dated 17.5.2010 which is not permissible.

(ii) Such review has been rejected earlier in a Review Petition filed by the Biomass Developers Association;

(iii) As biomass price is uncontrollable due to unorganized market, it was the duty of the Project Developers to ascertain the availability of fuel.

12. Let us first consider whether the State Commission has powers to re-determine the price of fuel which was decided in its generic tariff order dated 17.5.2010 for a period of 20 years and agreed in the PPAs entered into by the Appellants with the Respondent no1.

13. Section 62 (1) of the Electricity Act, 2003 vests jurisdiction on the Appropriate Commission to determine tariff. Section 62(1)(a) empowers the Appropriate Commission to determine the tariff for

supply of electricity by a generating company to a distribution licensee. Section 62(4) of the Act provides that the tariff may not be ordinarily amended more frequently than once in any financial year except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified by the Commission. Section 64(6) provides that the tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

14. Section 61 provides for the terms and conditions for the determination of tariff which guide the Appropriate Commission. Sub-section (a) (b) (d) (g) (h) & (i) of Section 61 stipulates that the State Commission shall be guided by:

“(a) the principles and methodologies specified by the Central Commission for determination of

the tariff applicable to generating companies and transmission licensees.

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles.

(c) the factors which would encourage competition, efficiency, economical use of resources, good performance and optimum investments.

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner.

(g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission.

(h) the promotion of co-generation and generation of electricity from renewable sources of energy.

(i) the National Electricity Policy and tariff policy”.

Thus, the State Commission has to promote generation of electricity from renewable sources of energy. The State Commission has to also safeguard the consumers' interest and at the same time has to ensure recovery of cost of electricity in a reasonable manner.

15. Under Section 86(1)(a), the State Commission has to discharge *inter alia*, the function of determination of generation tariff, regulate the electricity purchase and procurement process including the price at which the distribution licensee procures power from the generating companies. Under Section 86(1)(e) of the Electricity Act, 2003, the State Commission has to promote generation of electricity from renewable sources of energy.

16. National Electricity Policy envisages exploitation of feasible potential of non-conventional energy resources fully to create additional power generation capacity and with a view to increase the overall shares of non-conventional energy sources in the mix, efforts to be made to encourage private sector participation through suitable promotional measures for sustained growth of these sources. The Tariff Policy states that it will take some time before non-conventional technologies can compete with conventional sources in terms of cost of electricity and, therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission.

17. Before we interpret the provisions of the Act based on the citations quoted by the learned counsel for the parties, we would like to go into the various factual aspects of the present case.

18. We have noticed the following:

- (i) In the discussion paper on determination of tariff of biomass based power plants circulated on 10.2.2010 it was stated that fuel procurement and transportation were handled by unorganized sector and thus, the prices were influenced by local factor.
- (ii) In the tariff order dated 17.5.2010, it was noted that there was no reliable data regarding fuel cost and the market of biomass was unorganized.
- (iii) In the tariff order dated 17.5.2010, the Central Commission's Regulations of 2009 for renewable energy sources were considered. The Central Commission's Regulations of 2009 for renewable sources of

energy for biomass power plants indicated the biomass price for various States. Price for Gujarat is not specifically mentioned but for 'other States' which would also cover Gujarat, the price of biomass was specified as Rs. 1685 per MT for the FY 2009-10 with choice to project developer to either opt for escalation of 5% per annum or escalation to be given as per the formula specified in the Regulations. The State Commission after considering the objections and suggestions of the stakeholders decided price of Rs. 1600/MT for the FY 2010-11 for bio-mass fuel with 5% escalation per annum for a period of 20 years in the generic tariff order dated 17.5.2010, even though it was noted in

the tariff order that there was no reliable data available regarding biomass price and the market of biomass fuel was unorganized. Subsequently, the Central Commission in its tariff regulations of 2012 revised the fuel price to Rs.2476 per MT for FY 2012-13 with fuel cost escalation as per the specified formula.

- iv) The Appellants entered into the PPAs and agreed to supply electricity at the tariff determined by the State Commission in its order dated 17.5.2010. One of the Appellants entered into PPA after the State Commission's order dated 16.11.2010 rejecting the review petition filed by Gujarat Biomass Energy Developers Association *inter alia*, for review of biomass fuel price.

- (v) The Appellants in their petition before the State Commission for re-determination of biomass fuel price have submitted that the price of groundnut shell, cotton stalk and Juli flora have increased by 100%, 50% and 65% respectively over the price determined for 2010-11 in the tariff order dated 17.5.2010.
- vi) Gujarat Energy Development Agency, the nodal agency of the State Government in their letter dated 17.2.2012 referred to in the impugned order has stated that “the cost of biomass works out to Rs. 2360/MT.” This is against the price of Rs. 1680/MT for the FY 2011-12 worked out with base price of Rs. 1600/MT with 5% escalation as per the tariff order dated 17.5.2010.

(vii) The Appellants have stated that the biomass plants in Gujarat have been partially shut down and are operating at extremely low plant load factor due to unviable tariff on account of substantial rise in biomass fuel cost. They have submitted the following generation data of biomass projects in Gujarat:

Name of Power Station	Plant Load Factor %age		
	2011-12	2012-13	2013-14
Amreli	31%	7%	3%
Bhavnagar	19%	15%	5%
Junagadh	35%	30%	21%

Thus, the Plant Load Factor of Biomass Power Plants has been going down every year since FY 2011-12 and the plants are operating at sub-optimal capacity and they are not able to recover their fixed cost on the investment made in the generating

station assets, which is recovered fully at 80% Plant Load Factor.

19. Let us now examine the citations relied upon by the parties.

20. In *Coop. Central Bank Ltd. vs. Additional Industrial Tribunal*, (1969) 2 SCC 43, the Hon'ble Supreme Court has held as under:

“The jurisdiction which is granted to Industrial Tribunals by the Industrial Disputes Act is not the jurisdiction of merely administering the existing laws and enforcing existing contracts and the Industrial Tribunal have the right even to vary contracts of service between the employer and the employees which jurisdiction can never be exercised by a civil court or a Registrar acting under the Cooperative Societies Act.....”

21. In *Rohtas Industries Ltd. v. Brijnandan Pandey*, 1956 SCR 800, it has been held as under:

“11. The discretion which an Industrial Tribunal has must be exercised in accordance with well recognized principles. There is undoubtedly a distinction between commercial and industrial arbitration. As has been pointed out by Ludwig Teller (Labour Disputes and Collective Bargaining) Vol. 1, p. 536:

“Industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.”

A court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power

when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimisation. We cannot, however, accept the extreme position canvassed before us that an Industrial Tribunal can ignore altogether an existing agreement or existing obligations for no rhyme or reason whatsoever”.

22. In *New Maneck Chowk Spg. and Wvg. Co. Ltd. v. Textile Labour Association*, (1961) 3 SCR 1, it has been held that:

*“6. So far as the first question is concerned (namely, the general power of an Industrial Court to impose new obligations upon the parties), the matter is now well settled by the decisions of the Federal Court and also of this Court. It was held by the Federal Court in *Western India Automobile Association v. Industrial Tribunal, Bombay*³ that—*

“adjudication does not in our opinion mean adjudication according to the strict law of master and servant. The award of the Tribunal may contain provisions for settlement of a dispute which no court could order if it was bound by ordinary law, but the Tribunal is not fettered in any way by these limitations”.

The Federal Court also approved the view of Ludwig Teller that—

“industrial arbitration may involve the extension of an agreement or the making of a new one, or in general the creation of new obligations or modification of old ones while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements (see p. 345)”.

This Court also in Rohtas Industries Ltd. v. Brijnandan Pandey⁴ held that—

“a court of law proceeds on the footing that no power exists in the courts to make contracts for the people; and the parties must make their own

contracts. The Courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice and/or victimisation (see p. 810)”.

In Patna Electric Supply Co. v. Patna Electric Supply Workers' Union⁵ this Court held that—

“there is no doubt that in appropriate cases industrial adjudication may impose new obligations on the employer in the interest of social justice and with the object of securing peace and harmony between the employer and his workmen and full cooperation between them (see p. 1038)”.

“There is no doubt therefore that it is open to an Industrial Court in an appropriate case to impose new obligations on the parties before it or modify contracts in the interest of industrial peace or give awards which may have the effect of extending existing agreement or making a new one. This,

however, does not mean that an Industrial Court can do anything and every thing when dealing with an industrial dispute. This power is conditioned by the subject-matter with which it is dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to that matter as laid down by the legislature or by this Court.”

23. In Cellular Operators Association of India and Ors. V. Union of India (UOI) and Ors., reported in (2003) 3 SCC 186, it has been held that:

“33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.

34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise the Parliament thought of creating an independent expert tribunal which, if an occasion arises therefore, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the Authority. Succinctly stated the jurisdiction of the tribunal is not circumscribed in any manner whatsoever.

... ..

37. There cannot be any doubt whatsoever that when jurisdiction upon a court or a Tribunal is conferred by a statute, the same has to be construed in terms thereof and not otherwise. The power of judicial review of this Court as also the High Court, however, stand on a different footing. The power of this Court as also the High Court although is of wide amplitude, certain restrictions by way of self-discipline are imposed. Ordinarily

the power of judicial review can be exercised only when illegality, irrationality or impropriety is found in decision making process of the authority.”

38. Similarly, the civil court's jurisdiction in service matters is circumscribed by the provisions of the Special Relief Act, 1963.

39. However, the jurisdiction of the Industrial Tribunal or the Labour Court in a similar situation having regard to the provision of Section 11-A of the Industrial Disputes Act, 1947 is much wider and akin to the appellate power. Similarly, exercise of jurisdiction by the same court in an appeal vis-à-vis a revision would be different. Its approach as an Appellate Authority or a revisional authority even if arising out of the same order would be different”.

24. In *Transmission Corporation of Andhra Pradesh Ltd. and Anr. vs. Sai Renewable Power Pvt. Ltd. and Ors. etc.*, reported in (2011) 11 SCC 34, the Hon'ble

Supreme Court held as under:

33. In addition to the statutory provisions and the judgments afore referred, we must notice that all the PPAs entered into by the generating companies with the appropriate body, as well as the orders issued by the State in GO Ms. Nos. 93 and 112, in turn, had provided for review of tariff and the conditions. The Tribunal appears to have fallen in error of law in coming to the conclusion that the Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so called incentives. Every document on record refers to the power of the authority/Commission to take a review on all aspects including that of the tariff. One of the relevant consideration for determining the question in controversy is to examine whether the matter falls within the statutory or contractual domain. From various provisions and the documents on record it is clear that Regulatory Commission is vested with the power to revise tariff and conditions in relation to procurement of

power from generating companies. It is also clear from the record that in terms of the contract between the parties, the APTRANSCO had reserved the right to revise tariff etc. with the approval of the Regulatory Commission.”

“51. The basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the regulatory responsibilities of the Regulatory Commission from the Government and of harmonizing and rationalizing the provisions of the existing laws relating to electricity in India, on the other hand. The object and reasons of Electricity Act, 2003 as well as the Reform Act, 1998 are definite indicators of such legislative intent. The basic objects of these enactments were that the said Regulatory Commission may permit open access in distribution of energy as well as to decentralize management of power distribution through different bodies. The Reform Act, 1998 stated in its objects and reasons

that the set-up of power sector in force, at that time, was virtually integrated and functional priorities were getting distorted due to resource-crunch. This has resulted in inadequate investment in transmission and distribution which has adversely affected the quality and reliability of supply. The two corporations proposed thereunder were to be constituted to perform various functions and to ensure efficiency and social object of ensuring a fair deal to the customer. These objects and reasons clearly postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency in performance and economic utilization of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as the Regulatory Commission. The policy decisions of these constituents are to be in conformity with the object of the Act. Thus, it is necessary that the Regulatory Commission, in view of this object, take practical decisions which would help in ensuring existence of these units rather than their extinguishment as alleged.”

25. In Sri Venkata Seetaramanjaneya Rice and Oil Mills and Ors. v. State of Andhra Pradesh etc., reported in AIR 1964 SC 1781, it has been held as under:

“21. Then, it was faintly argued by Mr. Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price,

and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase the price so as to make it fair. That is why we do not think Mr. Setalvad is right in contending that even though the respondent may have the power to regulate the prices at which electrical energy should be supplied by it to the appellants, it had to power to enhance the said price. We must, therefore, hold that the challenge to the validity of the impugned notified orders on the ground that they are outside the purview of Section 3(1) cannot be sustained.”

26. In *D.K. Trivedi & Sons and Ors. vs. State of Gujarat and Ors.*, reported in AIR 1986 SC 1323, it

has been held as under:

“30. Bearing this in mind, we now turn to examine the nature of the rule-making power conferred upon the State Governments by Section 15(1). Although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in pari materia with the language of Section 15(1). Each-of these provisions confers the power to make rules for "regulating". The Shorter Oxford English Dictionary, Third Edition, defines the word "regulate" as meaning "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings".

27. In *Rithwik Energy Systems Limited vs. Transmission Corporation of Andhra Pradesh Ltd. and others*, reported in 2008 ELR (APTEL) 237, it has been

held by this Tribunal as under:

“35. The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that non-conventional sources of energy are environmentally benign and do not cause environmental degradation. Even the tariff regulations Under Section 61 are to be framed in such a manner that generation of electricity from renewable sources of energy receives a boost. Para 5.12 of the National Electricity Policy pertaining to non-conventional sources of energy provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the sources. Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non- conventional energy projects and not for curtailing the incentives.”

28. In Patikari Power Ltd. v. Himachal Pradesh Electricity Regulatory Commission, Appeal No. 179 of 2010, this tribunal has held as under:

“36. The tariff of a hydro project is dependant mainly on capital cost and water inflows in the river. In the present case the completed cost of the project was within the cost approved by the respondent no.2 However, the inflows are reported to be much lower than the anticipated at the DPR stage. Admittedly, the hydrology/DPR of the project was provided by the respondent no. 2 for revalidation to the appellant. The appellant was allowed only one year as per the terms and conditions of the MOU dated 21.06.2000 entered into with the State Government to revalidate the Detailed Project Report including the hydrology. The period of one year is grossly inadequate to validate the hydrology as discharge series for several years is required for establishing the expected inflows for the design of the project. According to the learned counsel for the appellant, they had completely relied upon the hydrological

data as provided by the respondent no.2 at the time of submissions of the tender for development of the project and in preparation of the DPR. Thus if the river discharge is much lower than that envisaged at the planning/tendering stage it would tantamount to change in the circumstances and the basic parameters on the basis of which the appellant developed the project and which is dependant on nature and are beyond the control of the appellant.

37. Ld. Counsel for the appellant has submitted that due to lower generation at Patikani hydro electric project due to less inflows, the appellant had to infuse additional finances to pay the debts and the project could become a non-performing asset. There is point in the submissions made by the appellant that it will not serve the object of the Act regarding promotion of renewable sources of energy if the existence of such a project is endangered due to change in the fact situation on the basis of which the appellant developed the project and which is dependent on nature and

beyond its control. This aspect requires reconsideration by the State Commission. We also notice that the validity of PPA is for 40 years and the project has to sustain operations for such a long period. We, therefore, feel that the State Commission should consider the aspect of low discharge.”

“45. Summary of findings:

ii) The State Commission can review the already concluded PPA entered into between the appellant, a renewable energy generator, and the respondent no. 2 according to its own regulations. The appellant has sought the review on two grounds viz., a) lower Return On Equity expected under the fixed tariff of Rs. 2.25/kWh; and b) lower water discharge in the river than expected as per the hydrology provided by the respondent no. 2. In view of the settled position of law, lower return on equity could not be a reason for review of the PPA. However, there is point in the contention of the appellant that it had relied upon the hydrological data provided by the respondent no.2 at the time of

submission of tender for development of the project. One year period given to the appellant to validate the hydrological data was grossly inadequate. Thus if the actual river discharge is much lower than that envisaged at the planning/tendering stage it tantamounts to change in the basic parameters on the basis of which the appellant developed the project. In view of this we give liberty to the appellant to approach the State Commission with material and data in support of their case regarding the low discharge in the river and the State Commission would consider the same after giving opportunity of hearing to all concerned.”

29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective

of the Electricity Act. The State Commission has the duty to incentivise the generation of electricity from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company. In fact the State Commission has itself in the case of Abellon Clean Energy by order dated 7.2.2011 modified the tariff determined earlier in the generic tariff order dated 17.5.2010. In the order dated 17.5.2010, there was no separate tariff for biomass projects with air-

cooled condensers and a common tariff was decided irrespective of the type of cooling used. However, the State Commission re-determined the tariff decided in order dated 17.5.2010 and allowed increase in tariff for biomass plants with air cooled condenser.

30. Let us examine whether there are adequate reasons to consider re-determination of the price of biomass and consequently the tariff in the present case.

(A) We find that in the tariff order dated 17.5.2010 itself, the State Commission was conscious that there was not enough data available regarding price of biomass fuel and the market for biomass is unorganized. However, the State Commission fixed the fuel price for base year i.e. FY 2010-11 and determined the fuel price for the 20 years period with an escalation of

5% per annum. When the fuel price is uncontrollable and it is known that the biomass fuel market is unorganized, it is not prudent to decide the price of biomass fuel for a long period covering the entire PPA of 20 years in the generic tariff. The fixed costs can be decided for the entire span of PPA for 20 years and variable cost for a shorter control period to be reviewed after the end of the control period.

(B) The State Commission in the impugned order has held that availability of fuel and other parameters is the responsibility of the Project Developers. While we agree that arranging the supply of fuel is the responsibility of the project developers, the price of fuel is uncontrollable factor and will vary depending on the demand and supply situation in the market which is beyond the control of the Appellants. In fact the variable cost of fossil fuel fixed power stations is

determined at the prevailing price of fuel with a provision of adjustment in terms of Fuel Cost Adjustment formula specified by the State Commission. Such adjustment in tariff on account of variation in fuel price is also admissible under Section 62(4) of the Electricity Tariff. Accordingly the fossil fuel based power stations are being compensated according to change in actual landed price of fuel at the power station. In the present case the State Commission provided for fuel cost adjustment by providing for an annual escalation of 5% per annum which has subsequently been found to be inadequate. It is submitted by the Appellants that the price of biomass since the order dated 17.5.2010 has increased by 50% to 100% for different types of biomass fuels available in the State. GEDA, the Nodal Agency of the State Government had also submitted that the data which

also indicated the substantial increase in the price of biomass fuel. The Central Commission in its Regulations of 2009 decided the price of biomass fuel for various States and the price for 'other States' category in which Gujarat would fall was determined as Rs.1685/MT for the base year 2009-10. The Central Commission in the 2012 Regulations applicable to the subsequent control period has since revised the price of biomass fuel to Rs. 2476/MT for the FY 2012-13 which has to be escalated every year according to the formula specified in the Regulations.

(C) It has also been reported that the biomass projects in the State are partially closed down and operating at an extremely Low Plant factor due to high price of biomass fuel which has affected their commercial viability.

(D) The State Commission determined the base price of biomass fuel and escalation factor in order dated 17.5.2010 considering the various submissions made by the stakeholder and fixed the price at Rs. 1600/MT with escalation of 5% per annum which in its wisdom would compensate for increase in price of biomass fuel for next 20 years. However, the price of biomass fuel in the market has gone up excessively as the actual price of biomass fuel will depend on the demand and supply in the market. Admittedly, the Appellants accepted the generic tariff determined by the State Commission and entered into long term PPAs with the Respondent no. 1 for 20 years. However, in the changed circumstances if the price of biomass fuel in the market has increased to the extent that it has resulted in partial closure of the biomass plants and threat for total closure, it is the duty of the State

Commission to interfere with the tariff agreed in the PPA according to its generic tariff order dated 17.5.2010 and re-determine the fuel price and tariff.

(E) It is not a case where the Appellants are requesting for revision in return on equity, capital cost of project, operation & maintenance cost, depreciation or any other controllable parameter which has affected the expected return on capital to the project developers.

(F) The present case where PPA has been entered into for a long period of 20 years has to be differentiated from a contract where goods are supplied against a contract. One time supply of goods against a contract at less than a reasonable profit or on loss cannot be compared with a long term PPA for supply of power by a generating company where power has to be supplied for a 20 years period as the latter

would involve sustaining operation of the generating plant for the entire period of the PPA.

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

32. In view of above, we remand the matter to the State Commission for consideration of re-determination of biomass fuel price and consequently the tariff. However, we want to make it clear that we

are not rendering any specific finding about what should be the price of biomass fuel. But the revised price of biomass fuel shall be applicable prospectively.

33. As regards benefit of the order dated 7.2.2011 for air cooled condenser, we find that the State Commission has decided in the impugned order that the order dated 7.2.2011 will be applicable to the Appellants. In the order dated 7.2.2011, the State Commission has given year on year tariff as well as levelised tariff for biomass projects with air cooled condensers. The State Commission has allowed the revised tariff to the Appellants as per its order dated 7.2.2011 and has directed the parties to amend the PPA. Thus, we do not find any reason to interfere with the impugned order in this regard. However, according to the Appellants their tariff with air cooled

condenser when given on year to year basis will reduce substantially from the current tariff creating adverse financial impact on them making their projects unviable. We feel that this issue may be raised by the Appellants before the State Commission at the time of reconsideration of the biomass fuel price and the State Commission shall consider and decide the issue in accordance with law.

34. Summary of our findings:

The State Commission has the powers to reconsider the price of biomass fuel and consequently revise the tariff of the biomass based power plants in the State in view of the circumstances of the case as the biomass plants in the State are partially closed and operating at suboptimal Plant Load Factor due to substantial increase in the price of biomass fuel and in order

to avert their closure. In our opinion in the circumstances of the case, this is a fit case for the State Commission to reconsider and re-determine the biomass fuel price.

35. In view of above, the Appeals are allowed and the matter is remanded to the State Commission for re-consideration of the biomass fuel price and consequently re-fixing of the tariff of Biomass Based Power Projects. The State Commission is directed to pass the consequential order within four months from the date of communication of this judgment. No order as to costs.

36. Pronounced in the open court on this **day of 2nd December, 2013.**

(V.J. Talwar) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Technical Member Chairperson

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REPORTABLE/NON-REPORTABLE
Vs