

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

**Appeal no. 93 of 2013 & IA nos. 153 & 154 of 2013**

**Dated: 2<sup>nd</sup> April, 2014**

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

**In the matter of:**

**M/s Hi Tech Carbon  
Murdhawa Industrial Area  
P.O. Renukoot  
District Sonebhadra – 231 217  
Uttar Pradesh**

**...Appellant (s)**

**Versus**

- 1. Uttar Pradesh Electricity Regulatory Commission  
Kisan Mandi Bhawan, IInd Floor,  
Vibhuti Khand, Gomti Nagar  
Lucknow – 226 106**
- 2. U.P. Power Corporation Ltd.  
PPA Directorate, 14<sup>th</sup> Floor  
Shakti Bhawan Extension  
14, Ashok Marg  
Lucknow – 226 001 (U.P)**
- 3. Purvanchal Vidyut Vitran Nigam Limited  
DLW Bhikharipur, Varanasi (U.P.)**

- 4. Chief General Manager (PPA)  
Power Purchase Agreement Directorate  
U.P. Power Corporation Ltd.  
14<sup>th</sup> Floor, Shakti Bhawan Extension  
14, Ashok Marg, Lucknow – 226 001 (U.P.)**

**Counsel for the Appellant(s): Mr. Vinod K. Upadhaya, Sr. Adv  
Mr. Syed Shahid Hussain Rizvi**

**Counsel for the Respondent(s): Mr. Pradeep Misra  
Mr. Manoj Kr Sharma  
Mr. Daleep Kr. Dhayani  
Mr. Sanjay Singh  
Mr. Suraj Singh**

## **JUDGMENT**

### **RAKESH NATH, TECHNICAL MEMBER**

M/s. High Tech Carbon, a manufacturer of Carbon Black has filed this Appeal challenging the order of Uttar Pradesh Electricity Regulatory Commission dated 13.3.2013 determining the tariff in respect of power supplied to the distribution licensee from their co-generation plant.

2. The Appellant is a manufacturer of Carbon Black. During the manufacturing process waste heat is generated and the same is used for generation of steam and electricity and as such it is a cogeneration plant. The electricity generated at the cogeneration plant is partially consumed in captive use and the surplus is supplied to Purvanchal Vidyut Vitran Nigam Ltd., the distribution licensee and the third Respondent herein. The State Commission is the first Respondent. UPPCL is the second Respondent.
  
3. The brief facts of the case are as under:
  - A) The State Commission framed Regulations regarding terms and conditions for supply of power and fixation of tariff for sale of power from captive generation plants, cogeneration, renewable sources of energy and other non-conventional sources of energy in the year 2005 which came into effect from 28.7.2005.

- B) The Appellant entered into a Power Purchase Agreement ('PPA') on 2.11.2007 with the Respondent no.3 for supply of power from its proposed Power Plant of 10 MW capacity. The tariff agreed in the PPA was as per the 2005 Regulations. The PPA indicated date of commissioning of the power plant in July, 2008. However, due to certain reasons the Appellant's power plant was commissioned in January, 2011 and the power supply to the distribution licensee was commenced from February, 2011.
- C) In the meantime the State Commission notified the Tariff Regulations, 2009 for captive and non-conventional energy generating plants which came into effect from 1.10.2009.
- D) The Appellant filed a tariff Petition no. 756 of 2011 for determination of tariff of the Appellant's Waste Heat

based co-generation Plant on the basis of technical and financial data.

- E) The State Commission disposed of the Petition by the impugned order dated 13.3.2013 holding that the tariff as decided under the 2005 Tariff Regulations would be applicable to the Appellant.
- F) Aggrieved by the impugned order dated 13.3.2013, the Appellant has filed this Appeal.

4. The issue raised by the Appellant is as under:-

“Though the PPA mentions July, 2008 to be the date of commissioning of the project the same could not be adhered to due to reasons beyond the control of the Appellant. The Appellant had duly informed UPPCL, the Respondent no. 2 and requested them to carry out the amendments in PPA accordingly. UPPCL vide letter dated 10.1.2011 duly informed the Appellant that PPA

dated 2.11.2007 read with the 2009 Regulations would be followed for the purpose of tariff. The plant was commissioned in January 2011 and supplies were commenced from February 2011. Therefore, 2009 Regulations should be applicable to their tariff”.

5. According to the Respondents 2 to 4, as the plant of the Appellant was conceived before the enforcement of the 2009 Regulations and the PPA signed on 2.11.2007 had a provision that commissioning of the plant would be done in July, 2008, the Appellant was estopped from contending that their plant was a new plant as it was commissioned in 2011. Accordingly, the tariff of the Appellant’s plant should be as applicable to the existing power plant and not as applicable to a new power plant as per the 2009 Tariff Regulations.
6. We have heard Shri V.K. Upadhya, Learned Senior Counsel representing the Appellant, Shri Sanjay Singh,

Learned Counsel for the State Commission and Shri Pradeep Misra, Learned Counsel representing the Respondent no. 2 to 4. After considering the rival contentions of the parties, the only question that arises for our consideration is:

**Whether the State Commission has erred in determining the tariff for the Appellant's power plant as an existing power plant as per the scheduled date of commissioning indicated in the PPA and applying the 2005 Regulations instead of considering it as a new power plant as per the actual date of commission of the plant and applying the 2009 Regulations?**

7. Let us first examine the findings of the State Commission in the impugned order. The relevant extracts of the order are as under:-

*“7. As the PPA has been agreed between the parties as per the then existing Regulations, 2005 which specifies that “The Tariff for all non-conventional and renewable source of energy based plants other than*

*Bagasse/Bio-mass based co-generation plants and Mini/Micro Hydel Plants would be Rs. 2.50 per unit for 2005-06 with an escalation of 4% per annum for subsequent years without compounding.” and there was no provision for subsequent revision, the Petitioner’s contention for revision does not stand valid for the consideration of the Commission. The same is further supported by the provision in Regulation, 2009 which makes the condition for review limited to new projects. Therefore, the PPA agreed on 2.11.2007 having scheduled date of commissioning as July, 2008 does not qualify for revision of tariff under the existing Regulations.”*

8. *However, since the Commission shall go for revision of CNCE Regulations, 2009 in the FY 2013-14, the determination of tariff for Waste Heat based power may be taken up along with that.*

9. *Although, in present scenario, probably there are no benchmark norms available as provided by the competent bodies in India for Waste Heat based power, but hopefully by the time the Commission shall initiate proceedings for revision of CNCE Regulations, 2009, there would be benchmark norms available”.*

8. Thus the State Commission has held that:

i) PPA entered into between the parties has been as per the 2005 Regulations.

- ii) PPA had no provision for subsequent revision of tariff and, therefore, the tariff could not be revised.
- iii) The Appellant's plant having scheduled date of commissioning as July 2008 as per the PPA would not qualify for revision of tariff under the existing 2009 Regulations.
- iv) The determination of tariff for Waste Heat based power plant may be taken up when the State Commission would revise the 2009 Regulations in FY 2013-14 by which time the benchmark norms for Waste Heat based power would be available.

We find that the State Commission on one hand decided that the tariff could not be revised as per the terms of the PPA, on the other hand it held that the tariff for Waste Heat Recovery based Plant i.e. the Plant of Appellant's category may be taken up when the

2009 Regulations would be revised in FY 2013-14. Thus, the findings of the State Commission on this issue are contradictory.

9. **Let us now examine the UPERC (Terms and Conditions for Supply of Power and Fixation of Tariff for Sale of Power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and other Non-conventional Sources of Energy based Plants to a Distribution Licensee) Regulations, 2005, referred to herein after as 2005 Regulations.**
10. These Regulations came into force with effect from 28.7.2005 and would remain in force for a period of 5 years unless revised earlier or extended by the State Commission. According to clause 2(1), these Regulations were applicable to Captive Generating Plants, Bagasse/Biomass based co-generation plants,

Renewable Sources of Energy and other Non-conventional Sources of Energy based Generating Plants. Clause 4 which is relevant to the present case is as under:

*“For co-generation other than bagasse/bio-mass, the tariff shall be determined by the Commission on case to case basis on an application”.*

11. Admittedly, the plant of the Appellant is a co-generation plant based on fuels other than bagasse/biomass and therefore, according to the 2005 Regulations, the State Commission was required to determine its plant specific tariff on an application.

12. The Date of Commercial Operation (COD) is defined as under:

*“Date of commercial operation or COD”-in relation to a unit means the date declared by the generator on achieving maximum continuous rating through a successful trial run and in relation to the generating station, the date of commercial operation means the*

*date of commercial operation of the last unit or block of generating station and expression 'commissioning' shall be construed accordingly."*

Thus, COD is the actual date of attaining Commercial Operation of the power plant.

13. Power Purchase Agreement is defined as an agreement between a generating company and a distribution licensee for supply of power on the terms and conditions as specified therein and with the provisions that tariff for sale of power shall be as determined by the State Commission from time to time.

Thus, the tariff for sale of power from the Appellant's Plant had to be determined by the State Commission.

14. Clause 17 of the Regulations provides that the captive generating plants may enter into an agreement with the distribution licensee for sale of their surplus capacity based on the Model PPA available as Annexure.

However, the parties to the agreement may make plant/site specific changes in the Model PPA not inconsistent with the Act, 2005 Regulations and other relevant Regulations but such changes shall be subject to approval of the State Commission.

15. Schedule II of the Regulations specifies the tariff for generation, co-generation, renewable sources of energy and other Non-conventional Energy sources. It specifies that tariff for all non-conventional and renewable sources of energy based plants other than bagasse/biomass based cogeneration plants and Mini Micro Hydel Plants would be Rs. 2.50 per unit for 2005-06 with an escalation of 4% per annum for subsequent years without compounding. However, we find that this tariff would not be applicable to the Appellant's plant as it was not based on non-conventional and renewable sources of energy.

16. The Appellant's plant is a Waste Heat Recovery based power plant which is a cogeneration plant and is based on fuels other than biomass and bagasse. We find that the tariff of Waste Heat Recovery based plant not based on bagasse/biomass was not determined in the 2005 Regulations. According to clause 4 of the 2005 Regulation, the tariff for cogeneration plants such as the Appellant's plant was to be determined by the State Commission on case to case basis on application. The tariff for such plants was not determined in the 2005 Regulations.
17. **Let us now examine the PPA dated 2.11.2007 entered into between the Appellant and the distribution licensee, the Respondent no.2.**
18. The Date of Commissioning is defined in the PPA as the date on which the supply of energy is commercially

commenced by the generating plant to the distribution licensee. Thus, according to the PPA, the date of commissioning for the Appellant's plant should be February, 2011 when the plant commenced supply of power to the Respondent no.2.

19. The relevant clauses of PPA regarding terms of supply of power are as under:

*“2. POWER PURCHASE, SALE AND BANKING.*

*2.1 UPPCL on behalf of DISCOM shall accept and purchase upto 10 MW power made available to Discom/STU's system from the Generating Plant non-Conventional based generation in accordance with the terms and conditions of this Agreement, at the rate specified for such plant in Schedule II of Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Supply of Power and Fixation of Tariff for Sale of Power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and Other Non-Conventional Sources of Energy based Plants to a Distribution Licensee) Regulations, 2005 as amended from time to time. and mentioned*

*“The Tariff for non-conventional plants would be Rs. 2.50 per unit for 2005-06 with an escalation of 4% per annum for subsequent years without compounding”.*

*The other provisions mentioned in Scheduled-II of Regulation in respect of the rate shall also be applicable. Except for Income Tax, all other taxes, duties and other levies imposed by the Central and/or State Government or other local authorities directly relating to generation shall be payable by Discom on production of necessary supporting documents by the Generating Plant, while those relating to sale of electricity, shall be borne and payable by Discom.*

*2.2 The provisions set out in Annexure-II shall govern the Sale and accounting for power purchased by Discom.*

*2.3 The generating plant and Discom shall comply with all the regulations issued by UPERC from time to time including but not limited to UP Electricity Grid Code, Open Access Regulations, SLDC Regulations to the extent they are applicable to them.”*

20. Thus, the Appellant and the Respondent no.3 in the PPA agreed to the terms and conditions and rate for supply of power as per Schedule II of the 2005 Regulations, as amended from time to time, as applicable to Non-conventional plants i.e. Rs. 2.50 per unit for 2005-06 with escalation of 4% per annum without compounding.

21. We find that in the PPA, the parties agreed to a tariff for non-conventional and renewable sources of energy as specified in the 2005 Regulations even though the Appellant's plant was not covered in the tariff specified in Schedule II of the 2005 Regulations and the tariff for the Appellant's plant being co-generation plant not based on biomass or bagasse was not determined in the Regulations and for such plants the tariff was to be determined on case to case basis.

22. Clause 16 of the PPA states as under:

*“The Generating Plant shall commission the generation facility and synchronize it with STY/UP JVNL system grid by July, 08’. In case, the plant is commissioned beyond the said date of commissioning, the tariff applicable for sale of electricity from the plant to DISCOM shall be the rate corresponding to the year in which the Commissioning of the plant was agreed to as above irrespective of delay occurred, if any due reason attributable to any party hereof.”*

23. According to clause 16, the Appellant had to commission the plant by July, 2008 and if any, delay due to reason attributable to any party occurred in commissioning of the plant, the tariff as applicable on the scheduled date of commissioning would be applicable.
24. Let us now examine the UPERC (Captive and Non-conventional Energy Generating Plants) Regulations, 2009 referred to herein as 2009 Regulations.
25. These Regulations came into force from 1.10.2009 and would remain in force upto 31.3.2014 unless reviewed earlier or extended by the State Commission and would apply to Captive and Non-conventional Energy Generating Plants.

26. The provision regarding Tariff determination in the 2009 Regulations is as under:

*“The tariff in respect of a Generating Plant under these Regulations shall be applicable to the capacities or the units in respect to which an agreement has been reached between the parties for supply of electricity:*

*Provided also that any commercial arrangement, other than tariff, made or agreed between the parties in a Power Purchase Agreement for supply of electricity, prior to UPERC CNCE Regulations, 2005, may be continued with the approval of the Commission for such time as considered appropriate by the Commission. However the tariff under such agreement shall be determined as per provisions of these Regulations.”*

27. Thus, the tariff under these Regulations is applicable to those plants for which an agreement has been reached between the parties. Further, commercial agreement made between the parties in the PPA prior to 2005 Regulations would continue with the approval of the State Commission but the tariff under such agreements would be determined according to the 2009 Regulations.

28. The 2009 Regulations provide that for Non-conventional Energy Generating Plants other than that covered under these Regulations would be determined by the State Commission on case to case basis on application filed for this purpose.
29. The Date of Commercial Operation (COD) is defined as the date declared by the generator on achieving maximum continuous rating through a successful trial run of a unit or the generating plant.
30. The PPA is defined in the 2009 Regulations as an agreement between a generating company and a distribution licensee for supply of power on the terms and conditions as specified therein and with the provisions that the tariff for sale of power shall be determined by the State Commission from time to time. Regulation 3 of 2009 Regulations stipulates that that

even where the PPA is existing the applicable tariff has to be determined under the Regulations.

31. The general conditions for Non-conventional source based generation in the PPA under Chapter 3 clearly indicates that these would apply to all existing generating stations generating electricity from Non-conventional Energy Sources based generation and cogeneration and all generating stations generating electricity from Non-conventional Energy Sources Commissioned after the notification of these Regulations. However, the Appellant's plant is not based on Non-conventional Energy Sources and therefore the tariff determined for such plants would not be applicable to the Appellant's cogeneration power plant.

32. In the 2009, Regulations the State Commission has determined the tariff for existing plants

- based on non-conventional resources except Bagasse/Biomass/Solar/Small Hydro) as Rs. 2.89/kWh with an escalation of 5.72% per annum and for such new plants as Rs. 3.21 per kWh with an escalation of 5.72% per annum.
33. According to Shri Upadhaya, Learned Senior Counsel for the Appellant the tariff as determined under 2009 Regulations for Non-conventional source based new plants should be applicable to them as these plant attained COD in February 2011 i.e. after the date of notification of the 2009 Regulations. On the other hand according to Shri Pradeep Misra, Learned Counsel for Respondents 2 to 4, since the COD mentioned in the PPA was July, 2008, the tariff for such plants would be as per the 2005 Regulations.
34. We find that the PPA, the 2005 Regulations and 2009 Regulations define the COD of the unit as the date on

which the generator attains commercial operation of the plant and commenced commercial supply of power to the distribution licensee. As the plant of the Appellant commenced commercial supply from its 10 MW cogeneration plant in February, 2011, the same has to be considered as the COD of the plant.

35. Under the 2005 Regulations, the tariff for Appellant's captive power plant has to be determined on 'case to case basis' on filing of application. We find that the Appellant had filed a Petition on 22.7.2011 before the State Commission seeking determination of tariff under the 2009 Regulations. The Appellant also furnished the necessary financial and operating parameters for determination of tariff. We feel that the State Commission should have determined the tariff considering the principles laid down under Section 61 and the Regulations and also considering that the

co-generation would result in achieving high efficiency levels the benefit of which has to be passed on to the consumers.

36. However, the tariff as determined for other Non-conventional energy resources based plants under the 2009 Regulations would not be applicable to the Appellant's plant. The State Commission has also not determined the tariff for the category of Appellant's plant in the 2009 Regulations.
  
37. We find that the provision in clause 2.1 of the PPA regarding tariff of Rs. 2.50 per unit for 2005-06 with an escalation of 4% is in contravention to the 2005 Regulations. When the clause in PPA is in contravention to the Regulations then the provision of the Regulations will prevail. According to the Regulations, the State Commission had to determine the project specific tariff for co-generation plants of

Appellant's category on application. The State Commission should have determined the project specific tariff for the Appellant's cogeneration plant on the Petition of the Appellant. However, the State Commission wrongly decided that the tariff as agreed in the PPA would be applicable and since the PPA had no provision for revision of tariff, the tariff could not be revised. The State Commission also held that the determination of tariff of Waste Heat Recovery based Power Plant i.e. the category of the Appellant's power plant, would be taken up in 2013-14 at the time of revising the 2009 Regulations. This was contrary to the first finding of the State Commission.

38. We find that the State Commission's findings are contradictory and are also in contravention to the 2005 & 2009 Regulations. Accordingly, we set aside the impugned order of the State Commission and direct the State Commission to determine the project specific tariff

for the Appellant's plant considering the date of commencement of supply as the date of commissioning of the project, after prudence check of the financial and operational parameters claimed by the Appellant and keeping in view the high efficiency of co-generation which will help in reducing the cost.

**39. Summary of our findings:**

**Under the Regulations the tariff for Appellant's plant category has to be determined by the State Commission on case to case basis on application. Thus, the State Commission has to determine the project specific tariff on the Petition of the Appellant. We find that the State Commission's findings on determination of the tariff of Appellant's captive cogeneration power plant are contradictory in nature and are also in contravention to the 2005 and 2009 Regulations. Accordingly, the State**

**Commission is directed to determine the project specific tariff for the Appellant's co-generation based captive power plant (other than biomass/bagasse) as per its Regulations considering the date of commencement of supply as the date of commissioning of the project after prudence check of the financial and operational parameters claimed by the Appellant and keeping in view the high efficiency of co-generation within 3 months of the date of communication of this judgment. The Appellant is also directed to provide any data required by the State Commission to determine the tariff. Till the determination of tariff, the Appellant will be paid at the rate stipulated in the PPA subject to adjustment on final determination of tariff by the State Commission.**

40. In view of above, the Appeal is allowed to the extent indicated above and the impugned order is set aside. The State Commission is directed to pass the consequential order within 3 months of the date of communication of this judgment. No order as to costs.

41. Pronounced in the open court on this 2<sup>nd</sup> day of April, 2014.

**(Justice Surendra Kumar)**  
**Judicial Member**

**(Rakesh Nath)**  
**Technical Member**

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**REPORTABLE/~~NON-REPORTABLE~~**  
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