

# Judgment in Appeal No. 101 of 2012

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In the Appellate Tribunal for Electricity at New Delhi  
(Appellate Jurisdiction)

## Appeal No. 101 of 2012

Dated: 27<sup>th</sup> May, 2014

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

In the matter of:

M/s., Punjab Bio Mass Power Ltd.,  
Office at Gammon House,  
V.S. Marg, Prabha Devi,  
Mumbai-400025.  
Head Office at D-73/1, TTC  
Industrial Area, MIDC Turbhe,  
Navi Mumbai-400705 and Works Office  
At Village Bhagaura, Sub-Tehsil Ghanour,  
Tehsil Rajpura, District Patiala .....

Appellant

Vs.

1. Punjab State Electricity Regulatory Commission  
SCO No. 220-221, Sector 34-A,  
Chandigarh-160022.
2. State of Punjab Through  
Secretary to Govt. of Punjab,  
Department of Science, Technology, Environment  
and Non-Conventional Energy, Civil Secretariat,  
Chandigarh-160001.
3. Punjab State Power Corporation Ltd.  
(Formerly known as Punjab State Electricity  
Board) through its Chairman having its  
Head Office at the Mall,  
Patiala-147001. ....

Respondents

Counsel for the Appellant(s) : Mr. G. Umopathy  
Counsel for the Respondent : Mr. Buddy A. Ranganadhan for R-1  
Mr. Anand K. Ganesan for R-3

## JUDGMENT

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### PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This appeal arises out of an impugned order dated 28<sup>th</sup> March, 2012, passed by the Punjab State Electricity Regulatory Commission (in short referred to as 'State Commission') in Petition No. 45 of 2011, filed by the appellant under Section 111 of the Electricity Act, 2003, for fixing the tariff for FY 2010-11, in respect of its Bio Mass based Power Plant situated in the State of Punjab. The tariff of the appellant Company has been fixed under the CERC (Terms & Conditions for Tariff Determination from Renewable Energy Sources), Regulations, 2009 which had been adopted in the State of Punjab (with minor modifications which are not relevant to the present case).

2. That the appellant is the Biomass based Power Generating Company and the respondent no.1 is the State Regulator for the Electricity.

3. The relevant facts for deciding this Appeal are as under:-

3.1. that the appellant filed a petition under Section 86 of the Electricity Act, 2003 for Revision of Rates fixed by the State Commission vide order dated 13<sup>th</sup> December, 2007, whereby the tariff of Bio Mass based Power Plant was fixed as Rs. 3.49 per unit (with base year 2006-07) with five annual escalations @ 5% upto FY 2011-12, and for implementing the order dated 30.09.2010, passed by the State Commission in Petition No. 32 of 2010 (suo-motu), by which the State Commission had determined tariff rate as Rs. 5.05 per unit w.e.f. FY 2010-11.

3.2. that a Power Purchase Agreement (PPA) dated 29.04.2003, was executed between Punjab State Electricity Board (PSEB) and Bermaco for 9 no. 10 MW capacity Biomass based Power Projects to be set up in the State of Punjab. The Petition No. 14 of 2003 was filed by Bermaco for approval of tariff and other related commercial terms and conditions for Biomass based Power Projects. The State Commission passed order dated 04.10.2005, directing that a fresh PPA should be executed, as per New and Renewable Sources of Energy (NRSE) Policy 2001, in place of PPA dated 29.04.2003, already executed. In compliance of order dated 04.10.2005 of the State Commission, an Implementation cum Power Purchase Agreement dated 10.08.2006, was entered into between the appellant-Punjab

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Biomass Power Ltd. (a Company set up to implement the first project by Bermaco) and PSEB.

3.3. that the State of Punjab formulated NRSE Policy, 2006 and notified the same vide Notification dated 24.11.2006. The NRSE Policy was applicable for five years or till the State Government notify the new policy.

3.4. that the appellant/petitioner filed the Petition No. 14 of 2007 before the State Commission for applicability of tariff as per NRSE Policy 2006. The Petition No. 14 of 2007, was disposed of, vide order dated 19.12.2007 of the State Commission, whereby the tariff determined by it vide order dated 13.12.2007, as Rs. 3.66 per unit for Biomass Projects with annual escalation @ 5% and Rs. 3.59 per unit for Bagasse/Biomass based co-generation projects with annual escalation @ 3% for the year 2007-08 on the basis of tariff at the rate of Rs. 3.49 per unit for base year 2006-07, was made applicable. Accordingly, PPA was amended on 25.06.2008, in compliance to the order dated 19.12.2007 passed by the Commission. However, it was provided in the order dated 13.12.2007 that the individual developer is free to approach the State Commission for determination of such rates and the State Commission at that stage will decide whether the rates are to be approved individually in each case or generically for a category of cases.

3.5. that the State Commission passed order dated 30.09.2010, in Petition No. 32 of 2010 (suo motu) in the interest of justice, and fixed the tariff for Biomass based Power Projects as Rs. 5.05 per unit for FY 2010-11. According to the appellant, the State Commission allowed tariff of Rs. 5.12 per unit for the FY 2010-11 to Universal Biomass Energy Pvt. Ltd., vide order dated 26.11.2010 in Petition No. 11 of 2009.

3.6. that this Appellate Tribunal in Appeal No. 29 of 2010 in the matter of Rithwik Energy Systems Ltd., filed by Green Plant Energy Private Ltd., held that it was bounden duty of the State Commission to incentivise generation of electricity from renewable sources of energy and PPAs would be opened only for giving thrust to the non-conventional energy projects.

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3.7. that the appellant/petitioner requested before the State Commission that the tariff determined vide order dated 30.09.2010 fixing tariff for Biomass Projects for FY 2010-11 be allowed for the appellant's project as the appellant has not achieved the commercial operation date (COD) before 30.09.2010 for its project, as the project was synchronized in June, 2010 and the power export was commenced in October/November 2010.

3.8. that the impugned Petition No. 45 of 2011 was admitted, vide order dated 08.07.2011 of the State Commission and respondents were directed to file reply by 30.08.2011. State of Punjab, respondent no.1 before the State Commission, in its reply filed in Petition No. 45 of 2011 by way of affidavit of the Addl. Secretary submitted that as per clause 23.1.0 of the PPA dated 10.08.2006, the agreement shall remain in force for a period of 20 years from the date of commissioning of the project and the State Commission, vide order dated 16.08.2011, in Petition No. 27 of 2011 titled as Universal Biomass Energy Pvt. Ltd. Vs. Secretary to Government of Punjab and others had upheld the validity of PPA. According to the respondent, the State of Punjab, the appellant's petition deserves to be dismissed due to the existence of valid and binding PPA and also that the appellant/petitioner has delayed the Commissioning of the project as the project was to be commissioned by February, 2009, in terms of the agreement. As per clause 3.1.0 of the I.A. cum PPA, the scheduled date of synchronization is the date of commissioning of the project, which has been defined in clause 1.0.0 of the IA cum PPA as the date of synchronization is the date on which the project is synchronized with the grid for the first time. According to the appellant/petitioner in paragraph 17 of the petition itself, the plant was synchronized in June, 2010, therefore, COD is June, 2010, and hence the order dated 30.09.2010, is not applicable to the case of the appellant.

4. That the Punjab State Power Corporation Ltd. (PSPCL), who was respondent no.2, before the State Commission, by filing its reply dated 08.09.2011, made the following submissions:-

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- (i) that pursuant to the order dated 19.12.2007, passed by the State Commission in Petition No. 14 of 2007, amendment in IA cum PPA was signed between the appellant firm and the erstwhile PSEB, revising the tariff payable for the power to be purchased from two projects at village Baghaura and village Swai Singh Wala. Only Baghaura project, the subject-matter of the present petition, was commissioned in June, 2010.
  
- (ii) that the IA cum PPA had been re-opened twice before as per NRSE Policy, 2001 and NRSE Policy 2006 of Government of Punjab (GoP) and orders of the Commission in Petition Nos. 14 of 2003 & 14 of 2007 earlier, as such the IA cum PPA may not be re-opened time and again.
  
- (iii) that the delay in commissioning the project should not be made the reason for allowing higher tariff as that would not be in the interest of justice. The rates given to the appellant/petitioner developer vide earlier orders are too high in comparison to consumer tariff at the time of NRSE Policy prevalent at the time of fixing tariff in 2007, and therefore, amended contract may not be re-opened for further revision of tariff as per revised regulations/orders of the State Commission since these were to be made applicable to the projects for which PPA (s) were yet to be signed and whose power purchase tariff was yet to be decided and petition be dismissed.
  
- (iv) that the Commissioning of the project of the appellant has been delayed from February, 2009 to June, 2010 and penalty as per provisions of the PPA is liable to be imposed upon the petitioner.
  
- (v) that due to the default of the appellant/petitioner itself, the appellant is not even eligible for seeking the revision of tariff and cannot claim a premium for default of its own.

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- (vi) that the tariffs fixed by the State Commission, vide its order dated 30.09.2010, are not applicable in cases where PPAs were already signed by the developers with the erstwhile PSEB or PSPCL. As per the PPA signed by the appellant, no escalation beyond FY 2011-12 is admissible and the tariff for sale of energy as applicable for FY 2011-12 shall remain in force for remaining term of the PPA. In case, the revision in tariff is allowed to the petitioner, PSPCL and in turn, the consumers of the State shall have to bear extra financial burden during the useful life of the project.
- (vii) that due to delay in commissioning of the appellant's project, it had to procure costly power on short term basis or against unscheduled interchange resulting in loss to PSPCL.
- (viii) that the appellant's project was commissioned in June, 2010 and the appellant's contention that regular generation was commenced in October, 2010 i.e. after the date of Commission's order dated 30.09.2010 is not correct.
- (ix) that with regard to the judgment of this Tribunal, the re-opening of the contract for encouraging and promoting renewable sources of energy projects cannot be at the cost of the State consumers. The State Commission had allowed revised tariff to Universal Biomass Energy Pvt. Ltd and Green Plant Energy Pvt. Ltd., on their merits and hence the same tariffs are not applicable to the appellant's projects.
- (x) that in its order dated 26.11.2010, in Petition No. 11 of 2009 filed by the Universal Biomass Energy Pvt. Ltd. and 13.01.2011, in Petition No. 29 of 2010 filed by Green Plant Energy Pvt. Ltd., the State

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Commission took note that the CERC notified the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2009 (CERC RE Regulations) followed by issuing two orders on 03.12.2009 and 26.04.2010, based on the suo motu petitions, wherein generic levelled tariff for RE Technology Power Projects to be commissioned in the years 2009-10 and 2010-11 respectively, were determined (subsequently CERC issued another order 09.11.2010 determining the generic levelled tariff for RE technology Power Projects to be commissioned in 2011-12).

5. After hearing the rival contentions and considering the different aspects of the matter, the State Commission, in the impugned order, has noted that pursuant to the State Commission's order dated 04.10.2005, in Petition No. 14 of 2013, the appellant/petitioner had signed the implementation cum Power Purchase Agreement with the erstwhile PSEB (now PSPCL) on 10.08.2006. In the order dated 04.10.2005, the State Commission had allowed the tariff rates as applicable to the new projects under NRSE Policy 2001 i.e. Rs. 3.01 per unit for the base year 2001-02 and five escalations @ 3% per annum upto the year 2006-07 with no further escalation and the tariff for sale of energy, as applicable for 2006-07 would remain in force for the remaining term of the PPA. The State Commission had also observed in the impugned order that, in order to protect the interests of PSEB and the consumers in general, Government of Punjab and PSEB must adopt suitable safeguards in the PPA to ensure that the developers continue to supply power at the prescribed rates during the term of the PPA. In the event of revision in the NRSE Policy of the Government in future regarding escalation in cost of fuel, the petitioner's right to approach the Commission for suitable orders does not get infringed in any manner. The State Commission has further noted in the impugned order that consequent to notification of NRSE Policy 2006, by Government of Punjab, the appellant/petitioner filed another Petition No. 14 of 2007, pleading for applicability of tariff as per the NRSE Policy 2006 which was disposed of by the State Commission vide order dated 19.12.2007, in terms

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of its earlier order dated 13.12.2007, passed in the matter of implementation of Government of Punjab directive issued under Section 108 of the Electricity Act, 2003. In the order dated 19.12.2007, the State Commission held that PSEB will sign the revised PPA with the developer in case the same conforms to the order dated 13.12.2007 wherein the State Commission had approved the tariff rates as indicated in the NRSE Policy 2006 with the observations that these rates will be considered as the minimum rates that a NRSE Developer can claim and developers needing enhanced rates would be free to approach the Commission for determination of such rates and stated that the Commission will, at that stage, decide whether rates are to be approved individually in each case or generally for a category of cases. According to the State Commission's order dated 13.12.2007, these tariff rates would be applicable for a period of five years (upto 2011-12) after which the last escalated tariff shall continue and the Commission will determine the manner in which further enhancement in tariff, if any, by way of encouragement to the sector is to be effected. The State Commission had allowed these rates to those developers also who had signed the PPA under NRSE Policy 2001.

6. The State Commission, in the impugned order, has further noted that pursuant to its order dated 19.12.2007, the appellant/petitioner and erstwhile PSEB (Now PSPCL) on 25.06.2009, amended sub-clause 11.1.1 of the PPA dated 10.08.2006, as below:-

“The Board shall purchase and accept all the energy made available at the interconnection point from the Generating Company's facility, pursuant to the terms and conditions of this Agreement at the rate approved by the Commission in the order dated 13.12.2007, which is set out below:-

‘Rs. 3.49 per unit for the base year 2006-07. Five escalations shall be allowed @ 5% per annum upto the year 2011-12. Thereafter, no escalation will be allowed and the tariff for sale of energy as applicable for 2011-12 shall remain in force for the remaining term of the PPA.

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The escalated rate will be applicable from 1<sup>st</sup> day of April of each year. The rate would be uniform throughout the day for the entire year. No additional payment shall on any account, be payable by the Board.'

All other terms & conditions of the IA cum PPA dated 10.08.2006 shall remain the same."

7. The State Commission, in the impugned order, has concluded that the PPA signed between erstwhile PSEB/PSPCL and the appellant/petitioner would not stand in the way of considering appropriate tariff for a Renewable Energy (RE) project.

8. For our purpose, we quote paragraph 17 ( c ), (d) and (e) of the impugned order 28.03.2012 of the State Commission which is as under:

17) .....

( c ) The Commission notes that the Implementation-cum-Power Purchase Agreement signed between the petitioner and respondent, under Article 3.0.0 'Obligations of the Company' sub-article 3.1.0 'Project Implementation' specifically provides that the Company shall commission the project within 30 months from the date of signing the agreement (i.e. 10.08.2006), meaning thereby that the project was to be commissioned by 09.02.2009. In view of this specific provision in the PPA, the Commission is of the view that the PPA of the petitioner cannot be treated at par with that of Universal Biomass Energy Pvt. Ltd. wherein no specific timeframe for commissioning of the project with reference to the date of signing of the PPA was specified and the project was commissioned within four months of signing the PPA, the PPA having been signed on 02.06.2009 and the project commissioned on 30.10.2009. The provisions in the PPA of Green Plant Energy (P) Ltd., are also similar to that of Universal Biomass Energy Pvt. Ltd. The Commission feels that since the Distribution Licensee is obliged to comply with the Renewable Purchase Obligation and in the eventuality of non-availability of committed RE power, would have to purchase Renewable Energy Certificates, failing which it can be proceeded under Section 142 of

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the Act for levying penalty, the developer(s) of RE project(s) too, have a committed obligation to strive to commission their project (s) within the agreed timeframe barring force-majeure conditions, especially when preferential tariffs have been/are being allowed by the SERCs to encourage the RE developers, as mandated in the Act and National Electricity Policy/Tariff Policy. Besides, the respondent PSPCL has put forth arguments that due to the petitioner's project having not come up on schedule, it had to procure costly power on short term basis or against Unscheduled Interchange.

(d) Keeping in view the discussion in the foregoing sub-paras, the Commission is inclined to allow the revision in tariff to the petitioner with future escalations in the variable component of the tariff during the tariff period as per RE Regulations, despite a contradictory provision in the PPA that no escalation in tariff to be allowed after 2011-12, on the basis of the date of commissioning provided in the PPA. Accordingly, the Commission proceeds to determine the tariff for the petitioner's project as hereinafter:-

The Commission in its Order dated 30.09.2010, adopted the CERC RE Regulations with modifications and revised RE tariffs made applicable to RE Projects to be established in the State. The Commission adopted normative capital cost of Rs. 450 lac per MW for Biomass based Power Projects for FY 2009-10 in accordance with the aforementioned RE Regulations. For re-determining tariff payable to the petitioner during FY 2011-12 for its project scheduled to be commissioned in FY 2008-09 as per the PPA, the Commission intends to determine capital cost for 2008-09 applying indexation mechanism as specified in the RE Regulations on the normative capital cost of Rs. 450 lac per MW adopted by the Commission. Accordingly, normative capital cost for 2008-09 comes to Rs. 378.66 lac per MW which is required to be depreciated at the standard book depreciation rate of 5.28% per annum thus resulting in its working out to Rs. 321.79 lac per MW in the year 2011-12. In the order of the Commission dated 31.10.2011 for determination of generic levellised generation tariff for Renewable Energy Power Projects for FY 2011-12, fuel cost for Biomass

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based Power Projects has already been determined as Rs. 2625/- per MT whereas other parameters are in accordance with RE Regulations. On that basis, tariff payable to the petitioner, is depicted in the following table:

Tariff for the year 2011-12				
Levelling Fixed Tariff (Rs./kWh)	Variable Tariff (Rs./kWh)	Applicable Tariff Rate Rs/kWh	Benefit of Accelerated Depreciation (if availed) (Rs./kWh)	Net Applicable Tariff (upon adjusting for Accelerated Depreciation benefit, if availed) (Rs/kWh)
1.73	3.29	5.02	(0.15)	4.87

(e) The Commission is of the view that the aforementioned tariff is just and reasonable and will be payable to the petitioner prospectively for a period of 13 years as prescribed in RE Regulations with effect from the date of this Order. The levellised fixed component will remain the same during the tariff period. However, the variable component will change each year based on whether the petitioner opts for fuel price indexation or normative escalation factor of 5%. In accordance with Regulation 22 of the RE Regulations, any incentive or subsidy offered by the Central or State Government, if availed by a renewable energy developer is to be deducted while determining tariff. Although the per unit reduction on account of accelerated depreciation benefit has been quantified, reduction in tariff on account of other incentives and subsidies has not been specified. In the circumstances, the Commission directs that PSPCL will work out subsidy/incentive, if any, availed by the petitioner as per the scheme(s) of Ministry of New and Renewable Energy/Government of Punjab etc. and reduce the tariff to that extent for a period of 10 years.

The petition is disposed of accordingly.”

9. We have heard Shri Ganesh Umapathy, learned counsel for the appellant, Shri Buddy A. Ranganadhan, learned counsel for the respondent

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no.1/State Commission and Shri Anand K. Ganesan, learned counsel for the respondent no.3/PSPCL. We have also gone through the written submissions filed by the rival parties and after going through the rival contentions of the parties, the following issues arise for our consideration:-

- (i) Whether the learned State Commission has incorrectly applied the principles of tariff computation?
- (ii) Whether the State Commission has failed to follow well settled accounting practices in calculating the Tariff?
- (iii) Whether the State Commission has incorrectly taken the commissioning period of the appellant's project as 2008-09, whereas the actual Commercial Operation Date ('COD') or commissioning of the appellant's project was October, 2010 i.e. in FY 2010-11?

10. Before proceeding further, it is pertinent to note that an application, on behalf of the appellant seeking permission to file photostate copies of some letters of correspondence between the appellant and the respondents has been filed. These documents were not filed before the State Commission during the hearing before it. These documents consist of copies of letters dated 21.06.06, 04.04.2008, 23.05.2008, 02.07.2008, 29.07.08, Minutes of the Meeting regarding feasibility clearance of Punjab Biomass held on 11.09.2008 and other letters of correspondence dated 15.05.2009, 26.06.09, 16.11.2011, 01.12.2011, 02.12.2011, 22.12.2011, 01.02.2012, 11.02.2012, 23.02.2012 & 02.03.2012. An attempt has been made by the appellant by filing these letters to justify the delay in the commissioning of the project. As per the Implementation Agreement Cum PPA dated 10.08.2006, the appellant's Biomass Plant was to be completed within 30 months from the date of PPA and thus the project was to be commissioned upto 9<sup>th</sup> February, 2009. The plant was synchronized to the grid, according to the appellant itself in June, 2010 and power export from the plant started in October/November, 2010. We have considered all these aspects of the matters before us.

### 11. Issue Nos. (i), (ii) & (iii)

Since all these issues are inter-related with one another, they are being taken up together and are being decided simultaneously.

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12. The following submissions have been made on behalf of the appellant on these issues.

12.1. that the appellant wrote to the relevant respondents and informed on 26.06.2009 that the project was near completion and testing was expected in July, 2009 (within the time contemplated by the PPA) but the respondents' evacuation facility was not ready, which became ready only in April, 2010. The appellant had to complete the project upto 9<sup>th</sup> February, 2009, but the project could not be commissioned as the respondents' evacuation facilities were not ready on time, otherwise the appellant could have well achieved the commissioning before 9<sup>th</sup> February, 2009. There was no possibility of synchronizing of the project to the grid before the Commercial Operation Date (COD). Thus, the respondents prevented the appellant from achieving COD in FY 2009-10.

12.2. that Biomass Power Plant of the appellant was synchronized in June, 2010 due to the time taken for inter-connection of the evacuation facility after the respondent no.3 had completed the evacuation facility and power export could be commenced only in October, 2010. The Biomass Power Plant was commenced in FY 2010-11 and the delay in synchronizing itself was not attributable to the appellant.

12.3. that the State Commission has wrongly distinguished the appellant's Biomass Plant from the tariff fixation of other Biomass Plants of M/s. Universal Biomass Energy Pvt. Ltd., whereby the State Commission held in its order dated 26.11.2010 that the normative capital cost for the FY 2010-11 for Biomass Power Project based on Rankine Cycle Technology Application using water cooled condenser (i.e. the same as appellant's project shall be Rs. 426.24 lacs/MW).

12.4. that the appellant on 24.06.2011, filed Petition No. 45 of 2011, before the State Commission praying that the tariff rate for the appellant's project be revised and fixed in terms of the order dated 26.11.2010 in the matter of tariff fixation for Biomass Plant -M/s. Universal Biomass Energy Pvt. Ltd. in the interest of justice.

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12.5. that since the appellant's Biomass based Power Project was commissioned in FY 2010-11 and, therefore, the tariff calculation ought to have been done taking the base year as 2010-11.

12.6. that the learned State Commission has wrongly taken the base year as 2008-09 on the basis that the project was originally to be commissioned by 9<sup>th</sup> February, 2009 and the project could be commissioned in October, 2010, only after a delay.

12.7. that the State Commission failed to appreciate that there is no concept of "scheduled date of commissioning" under the CERC Renewable Energy (RE) Regulations, 2012, hence the tariff must be calculated based on the year in which the project is actually commissioned.

12.8. that Regulation 10 of CERC Renewable Energy (RE) Regulations, 2012 defines the tariff design as under:-

"10. Tariff Design

- (1) The generic tariff shall be determined on levellised basis for the tariff period. Provided that for renewable energy technologies having single part tariff with two components, tariff shall be determined on levellised basis considering the year of commissioning of the project for fixed cost component while the fuel cost component shall be specified on year of operation basis.
- (2) For the purpose of levellised tariff computation, the discount factor equivalent to Post Tax weighted average cost of capital shall be considered.
- (3) Levellisation shall be carried out for the 'useful life' of the Renewable Energy project while Tariff shall be specified for the period equivalent to 'Tariff Period'.

12.9. that the tariff for the appellant's project ought to have been fixed taking the base year as 2010-11 and not 2008-09.

12.10. that the normative capital cost ought to have been taken by the State Commission as Rs. 426.24 lacs per MW, which is the cost for the year 2010-11, when the appellant's project was commissioned. Assuming without admitting that there is any concept of deemed commissioning as sought to

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be adopted by the State Commission, in that event also, the normative capital cost ought to have been taken as Rs. 378.66 lacs MW ( and in no event could the normative capital cost have been taken as Rs. 321.79 lacs per MW). The said figure of Rs. 321.79 lacs per MW is neither the cost for the year 2010-11 (actual commissioning) nor for the year 2008-09 (deemed commissioning).

12.11. that as per the applicable regulations, the salvage value of the asset shall be considered as 10% and depreciation shall be allowed upto a maximum of 90% of the capital cost of the asset. In the present case, the State Commission has allowed recovery of 90% of Rs. 321.79 lacs per MW.

12.12. that the State Commission has erred in applying tariff prospectively for 13 years. In terms of the Regulation 6(e) of the RE Regulations, the tariff (as applicable from year to year) is to apply from the date of commercial operation for 13 years and, therefore, the State Commission ought to have directed that the tariff is applicable w.e.f. October, 2010, and not prospectively from the date of the impugned order.

12.13. that the State Commission could not have deducted depreciation from the year 2008-09, when the appellant's project had not even been commissioned. Regulation 15(3) of the RE Regulations clearly stipulates that the depreciation is to be deducted only from the first year of commercial operation, and, therefore, the State Commission has erred in charging depreciation from 2008-09.

12.14. that the standard accounting practice prescribed by the Institute of Chartered Accountants stipulates that depreciation is to be deducted only from the time the asset is put to use. In the present case, the appellant's plant was commissioned only in October, 2010 and therefore, depreciation could have only been deducted for the period thereafter and not from 2008-09.

12.15. that even assuming delays by the appellant, upon payment for penalty, the contractually agreed date of commissioning of the appellant's project automatically stood extended to 2010-11, and on this basis the tariff

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for the appellant's project ought to have been determined taking the base year as 2010-11 when the appellant's project was commissioned and not 2008-09 when the project was scheduled to be commissioned. According to the PPA, in case of delay in commissioning/achieving of commercial operation, there is a provision of imposition of penalty upto Rs. One crore as the State Commission had charged and recovered penalty from the appellant, though delay was not attributable to it but to PSPCL. The contractual period automatically stands extended from 2008-09 to 2010-11.

12.16. that once the penalty has been paid by the appellant, the State Commission ought to have taken the base year 2010-11 and the contractual period, as stipulated in Implementation Agreement Cum PPA should have automatically been extended to FY 2010-11. By adopting the double penalty measures, the State Commission has caused irreparable financial loss to the appellant, in contravention of Section 74 of the Contract Act, 1872.

12.17. that since the appellant had paid the penalty of Rs. One crore, the COD of the plant must have been extended to the period of actual commissioning of the plant as double penalty is not permissible in law because by payment of penalty, it is presumed that time is not the essence of the contract as held in *M/s. Hindustan Construction Contractors V. State of Maharashtra*, (1979) 2 SCC 70; *Burn and Company, Limited V. His Highness Thakur Sahib Sree Lukhdhirji of Morvi State*, AIR 1925 Privy Council 188.

12.18. that the appellant has further been distinguished without any basis from the State Commission's order dated 13.01.2011 in Petition No. 29 of 2010 in *M/s. Green Plant Energy Pvt. Ltd. V. State of Punjab*, wherein the Commission held that it is the bounden duty of the Commission to incentivise generation of electricity from renewable sources of energy and PPAs would be re-opened only for the purposes of giving thrust to non-conventional energy projects.

12.19. that the tariff for the year 2010-11, which works out to be Rs. 5.12 per unit, be made applicable to the appellant's project.

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13. Per contra the learned counsel for the respondents have reiterated the same contentions as raised by them before the learned State Commission. We have already given in detail the counter submissions raised on behalf of the respondents before the learned State Commission and there is no need to reproduce the same here again.

14. After going through the impugned order and deeply considering the submissions raised by the rival parties, we find that the State Commission has correctly applied the principles of tariff computation to the appellant's Biomass based Power Plant. As per the Implementation Agreement cum PPA dated 10.08.2006 entered into between the appellant and the erstwhile PSEB, the Biomass based Power Plant of the appellant was to be commissioned within 30 months thereof and thus the plant was to be commissioned by 9<sup>th</sup> February, 2009. According to the appellant itself, the said project was synchronized to the grid in June, 2010 and power export from the said plant commenced in October, 2010.

15. According to the appellant itself, the penalty amount of Rs. One crore has been charged and recovered from the appellant for delayed commissioning of the project. It is a fact that the distribution company due to the delay in commissioning of the appellant's plant, had to purchase short term power or unscheduled power at higher rates to fulfill its demands and the appellant is to blame itself for delayed commissioning of the project. The contention of the appellant that since its plant was synchronized in June, 2010 and power export commenced in October 2010, the tariff should have been as per the rate applicable for FY 2010-11. This contention is meritless and the State Commission has discussed this issue in detail giving a correct and legal finding thereon to which we agree and approve the same. We note that the Commission, in para 17 (c) of the impugned order dated 28.03.2012, has allowed the revision in tariff to the appellant/petitioner with future escalations in the variable component of tariff during tariff period as per Renewable Energy Regulations, despite a contradictory provision in the PPA that no escalation in tariff to be allowed after FY 2011-12, on the basis of the date of commissioning provided in the

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PPA. Thus, the State Commission has, by impugned order, granted reasonable relief to the appellant and allowed revision in tariff inspite of there being contradictory provision in the PPA.

16. There is no force in the appellant's contention that on the payment of penalty, the contractual period of commissioning of the project is automatically extended to the actual date of commissioning. In the cited case of M/s. Hindustan Construction Contractors Vs. State of Maharashtra, the Hon'ble Supreme Court was dealing with a case in which there was a contract between the appellant - Contractor and the State for construction of an aqueduct across the canal and in the agreement there was a clause providing for extension of time within the discretion of the Executive Engineer on an application by the Contractor within 30 days before the expiry of the period. The facts of the reported case are distinguishable from the facts of the matter before us.

17. Likewise the facts of the case of Burn and Company, Limited V. His Highness Thakur Sahib Sree Lukhdhirji of Morvi State, AIR 1925 Privy Council 188 are not identical with the facts of the matter before us.

18. The State Commission has distinguished its orders in the two other Biomass Energy Projects by giving details and providing distinguishing features. We also find that the facts and circumstances of the appellant's project are quite different from the cases of the two other Biomass Energy Developers, namely, Universal Biomass Energy Pvt. Ltd. and M/s. Green Plant Energy Pvt. Ltd. decided by the State Commission vide orders dated 26.11.2010 in Petition No. 11 of 2009 and 13.01.2011 in Petition No. 29 of 2010. We also observe that the calculation of tariff as well as the base year for calculation thereof have been correctly made by the State Commission in the impugned order after providing detailed analysis of different aspects. The accounting practice has legally been followed by the State Commission. All the submissions raised on behalf of the appellant have no substance and are unmerited. All these issues are consequently decided against the appellant and we agree to the findings/conclusions made by the State Commission in the impugned order and there appears no

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cogent or satisfactory reason to deviate from any such findings recorded in the impugned order. The appeal is consequently meritless and is liable to be dismissed.

### 19. Summary of Findings

(i) The State Commission has correctly applied the principles of tariff computation for the appellant's Biomass based Power Plant, which was, as per the Implementation Agreement cum PPA dated 10.08.2006, to be commissioned within 30 months thereof, namely, by 9<sup>th</sup> February, 2009 but synchronized to grid in June, 2010 and power export commenced in October, 2010, during the base year as 2008-09 and applying tariff applicable for sale of energy for FY 2008-09. The State Commission has not committed any illegality in calculating the tariff for the appellant's plant.

(ii) The State Commission has correctly and rightly taken the commissioning period of the appellant's Biomass based Power Project as 2008-09 and has rightly ignored the appellant's contention that commissioning of the appellant's project was in October, 2010 i.e. in FY 2010-11.

(iii) The State Commission has correctly and rightly determined the base year 2008-09 for the capital cost for tariff determination of the appellant's Biomass based Power Project.

(iv) that on the payment of penalty charged and recovered from the appellant Biomass based Power Project, the same cannot be a ground to automatically extend the period of commissioning of the project till the

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date of actual commissioning of the project. The appellant's contention in its support is not legally tenable.

20. In view of the above discussions, the instant appeal is without any merits and is, therefore, dismissed. No order as to costs.

**Pronounced in open Court on this 27<sup>th</sup> day of May, 2014.**

**(Justice Surendra Kumar)  
Judicial Member**

**(Rakesh Nath)  
Technical Member**

**√ REPORTABLE/NON-REPORTABLE**

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