

# Judgment in Appeal No. 280 of 2013

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

Appeal No. 280 of 2013

Dated: 24<sup>rd</sup> July, 2014

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

In the matter of:

M/s. RDM Care (India) Pvt. Limited,  
2/12, West Patel Nagar,  
New Delhi-110 008.

.....

Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission  
5<sup>th</sup> Floor, Metro Plaza,  
E-5, Arera Colony, Bittan Market,  
Bhopal-462 016.

2. M.P. Power Management Company Ltd.,  
Shakti Bhawan, Vidyut Nagar,  
Jabalpur-482 008.

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Respondents

Counsel for the Appellant(s) : Shri Rajiv Yadav

Counsel for the Respondent : Shri C.K. Rai for R-1  
Mr. Manoj Dubey for R-2

## JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This appeal is directed against the order dated 31.08.2013, filed by M/s. RDM Care (India) Pvt. Ltd., appellant/petitioner under Section 111 of the Electricity Act, 2003, passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as the 'State Commission') in Petition No. 34 of 2013, titled as M/s. RDM Care (India) Pvt. Ltd. Vs. M.P. Power Management Co. Ltd., whereby the State Commission in the matter of clarification of the rates applicable for Biomass Energy Projects commissioned before 02.03.2012 in tariff order dated 3<sup>rd</sup> May, 2013 issued by it has passed the following order:

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"7. Having heard the parties, the Commission is of the view that there can be no doubt on the scope and applicability of the order dated 03.05.2013. The order dated 03.05.2013 overhauls the 'Commission's order dated 02.03.2012. In effect, therefore, the applicable orders in respect of biomass electricity generation are those dated 07.08.2007 (for projects commissioned upto 01.03.2012) and dated 03.05.2013 (applicable to projects commissioned on or after 2.03.2012)."

2. The relevant facts of the case for deciding the instant appeal are as under:-

2.1 that the appellant/petitioner M/s. RDM Care (India) Pvt. Limited filed the Petition No. 34 of 2013 before the State Commission for seeking clarification of the rates applicable for Biomass Energy Projects commissioned before 2<sup>nd</sup> March, 2012 in tariff order dated 3<sup>rd</sup> May, 2013 issued by the Commission.

2.2 that the appellant/petitioner is supplying power to respondent no.2 - M/s. M.P. Power Management Company Ltd. from its 1.2 MW Biogas based electricity generation plant at Village Pariyat, District Jabalpur. The Power Purchase Agreement (PPA) for sale of power was executed on 5<sup>th</sup> April, 2010 at the tariff terms and conditions as applicable to Biomass based Power Plant and indicated in tariff order 07.08.2007. The appellant is the Biomass Power Generating Company. Respondent No.1 is the State Electricity Regulator and respondent No.2 is the successor entity of M.P. Trading Company Ltd. (hereinafter referred to 'M.P. Tradeco'). The PPA dated 05.04.2010 was executed between the appellant and M.P. Tradeco for a period of 20 years from the date of commissioning of the Bio Gas Generation Plant.

2.3 that, subsequently, the State Commission issued a new tariff order, dated 02.03.2012, for procurement of power from Biomass Plants. The State Commission also determined the tariff for existing projects. A supplementary power purchase agreement for sale of power was executed on 06.06.2012 in line with para 9.1 of the tariff order dated 02.03.2012. The order dated 02.03.2012 was challenged before this Appellate Tribunal by way of filing Appeal No. 93 of 2012 and this Appellate Tribunal vide judgment dated 18.02.2013, remanded the matter back to the Commission directing the State Commission to re-determine the tariff and pass

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consequential orders at the earliest. For convenience, we are citing the relevant part of this Appellate Tribunal's judgment dated 18.02.2013 passed in Appeal No. 93 of 2012, which is as under:-

"i) On Capital Cost, Gross Calorific Value, Station Heat Rate and price of biomass fuel, we find that the State Commission has not passed a reasoned order in deciding the normative values. We, therefore, remand the matter to State Commission to decide these norms based on the directions given in this judgment. We want to make it clear that we are not giving any finding on values to be adopted for the above normative parameters.

ii) Regarding Return on Equity, we find that the State Commission has allowed a higher ROE to the conventional power plants in its Tariff Regulations. Allowing a lower ROE to biomass based projects, which are renewable source of energy, is not in consonance with the provisions under Section 61 (h) and 86 (1) (e) of the Act. We, therefore, direct the State Commission to allow ROE not less than that allowed under its Tariff Regulations as applicable to conventional generating stations."

2.4 The learned State Commission, in compliance with this Tribunal's judgment dated 18.02.2013, invited comments and after holding a public hearing passed the order dated 03.05.2013 which revised the tariff order dated 02.03.2012. The revised tariff order dated 03.05.2013, does not stipulate separate tariff for existing Biomass based Power Projects. It was, therefore, presumed by the appellant/petitioner that the revised order dated 03.05.2013 may also be applicable for the existing projects.

2.5 The appellant/petitioner raised the bills for power sold to the respondent no.2 at revised tariff indicated in the order dated 03.05.2013. The respondent no.2 admitted the bills as per earlier order dated 02.03.2012 and paid accordingly. It was at that stage that the appellant/petitioner filed the impugned petition being No. 34 of 2013 praying therein to the State Commission to issue necessary clarification regarding applicability of tariff order dated 3<sup>rd</sup> May, 2013 for existing Biomass based power projects commissioned prior to 2<sup>nd</sup> March, 2012.

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2.6 Thus, the appellant/petitioner by filing the impugned petition sought clarification from the State Commission whether revised tariff order dated 3<sup>rd</sup> May, 2013 would apply to existing Biomass based Power Projects commissioned prior to tariff order dated 2<sup>nd</sup> March, 2012. Thus, the question before the State Commission was to clarify the tariff which would be applicable to existing Biomass based Power Projects which were commissioned prior to tariff order dated 2<sup>nd</sup> March, 2012. The purpose for filing the aforesaid clarification petition before the State Commission was whether the revised tariff order dated 3<sup>rd</sup> May, 2013 would apply to the existing Biomass based Power Projects which were commissioned prior to the tariff order dated 2<sup>nd</sup> March, 2012.

2.7 The appellant/petitioner by filing the impugned petition requested the State Commission to clarify the rates applicable for Biomass based Energy Projects commissioned before 2<sup>nd</sup> March, 2012. During hearing before the State Commission, the learned counsel for the respondent by filing written submissions mentioned that the plant of the appellant was commissioned on 20<sup>th</sup> August, 2011 and at that time the tariff order dated 7<sup>th</sup> August, 2007 was applicable. After the tariff order dated 7<sup>th</sup> August, 2007, a supplementary agreement was executed as per the tariff order dated 2<sup>nd</sup> March, 2012, which tariff order was set aside by this Appellate Tribunal vide its judgment dated 18<sup>th</sup> February, 2013 and remanded back the matter to the State Commission. Thereafter in compliance of the this Appellate Tribunal's judgment dated 18<sup>th</sup> February, 2013, the State Commission re-heard the matter and thereafter issued revised tariff order dated 3<sup>rd</sup> May, 2013 which is applicable to projects commissioned on or after 02.03.2012 (in FY 2012-13 & 2013-14). The appellant's/petitioner's contention, that the revised tariff order dated 03.05.2013 may also be applicable to the Biomass Projects commissioned prior to the tariff order dated 2<sup>nd</sup> March, 2012, was opposed on behalf of the respondent no.2 saying that the contention is not tenable.

2.8 After hearing, the State Commission, as stated above, passed the impugned order dated 31.08.2013 observing that the revised tariff order dated 03.05.2013 is quite clear leaving no scope of doubt about its applicability and the revised tariff order dated 03.05.2013, overhauls the State Commission's order dated 02.03.2012. In effect, it has been observed by the State Commission in the

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impugned order that the appellant/petitioner is entitled to the tariff under the tariff order dated 07.08.2007 (for projects commissioned upto 01.03.2012) and the revised tariff dated 03.05.2013 is applicable to projects commissioned on or after 02.03.2012. The reasoning of the State Commission as mentioned for passing the impugned order is that since the appellant's Biomass based Power Plant was commissioned on 20.08.2011 and at that time the tariff order dated 07.08.2007 was applicable, hence the appellant's Biomass based Power Project would be entitled to tariff which was applicable as per tariff order dated 07.08.2007. The clarificatory order/impugned order dated 31.08.2013 is under challenge in this Appeal on the following grounds:-

A. that the appellant, a Biomass Power Generator, shall continue to get a tariff as per the previous tariff order dated 07.08.2007, even though such tariff order had a control period upto 31.03.2012 only.

B. that the appellant has been relegated to a lower tariff of Rs. 3.33, even though it had been held entitled to a tariff of Rs. 3.86 vide State Commission's tariff order of 02.03.2012 for FY 2012-13, which tariff was indeed paid by respondent no.2 to the appellant, for power supplied between April, 2012 and July, 2013.

C. that in view of the State Commission's directive to revive the since expired tariff order of 07.08.2007, the respondent no.2 has proceeded to recover the alleged excess payments made to the appellant @Rs. 3.86 per unit by deducting payments from the appellant's current bills. Consequently, the appellant did not receive any payment in respect of power supplied by it to MP Tradeco in the month of August, 2013.

D. that the entire amount billed by the appellant for power supplied in August, 2012 has remained unpaid as the same has been unlawfully adjusted against past payments made by MP Tradeco in terms of tariff order dated 02.03.2012.

E. that the State Commission, vide order dated 03.05.2013, in compliance of this Appellate Tribunal's judgment, revised the tariff for the new projects commissioned in FY 2012-13 or FY 2013-14. The revised order did not contain any

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specific express stipulation for existing projects, it was legitimately expected that the variable cost elements in the revised tariff shall also apply to existing projects, as they, too have to bear the same variable (fuel) cost as new projects in the State.

F. that the bills raised by the appellant, as per the revised tariff order dated 03.05.2013, were not honoured by MP Tradeco on the ground that such revised tariff was applicable only to new projects.

G. that the appellant/petitioner filed the instant petition before the State Commission, seeking clarification that the revised tariff order dated 03.05.2013 would also be applicable to existing projects, the State Commission, without any justification, held that the existing projects shall get tariff under the erstwhile tariff order dated 07.08.2007. Consequently, not only the appellant/petitioner was held not entitled to the revised tariff, but it was also deprived of tariff @ Rs. 3.86 per unit under the original tariff order dated 02.03.2012.

H. that the State Commission, vide tariff order dated 02.03.2012, fixed a two part tariff for procurement of power from Biomass based Power Projects and vide the said tariff order the appellant became entitled to the tariff of Rs. 3.86 per unit w.e.f. 01.04.2012.

I. that the State Commission on 01.06.2012, increased the variable tariff applicable to existing and new projects to Rs. 2.45 per unit.

3. We have heard at length Shri Rajiv Yadav, learned counsel for the appellant and Shri C.K. Rai, learned counsel for the respondent no.1 and Shri Manoj Dubey, learned counsel for the respondent no.2 and have meticulously perused the respective written submissions filed by the rival parties.

4. The impugned order, dated 31.08.2013, has admittedly been passed on the clarificatory petition being Petition No. 34 of 2013 filed by the appellant/petitioner before the State Commission requiring State Commission to clarify the rates applicable for Biomass based Energy Projects commissioned before the tariff order dated 02.03.2012. The learned State Commission, by the impugned order dated 31.08.2013, as mentioned above, held that there is no

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doubt on the scope and applicability of the revised tariff order dated 03.05.2013 which overhauled the earlier tariff order dated 02.03.2012 of the State Commission. This fact is also admitted by the rival parties that the tariff order dated 02.03.2012 of the State Commission was challenged in appeal before this Appellate Tribunal being Appeal No. 93 of 2012 and this Appellate Tribunal, vide judgment, dated 18.02.2013 remanded the matter back to the State Commission directing it to re-determine the tariff and pass consequential orders. It was thereafter that the learned State Commission, in compliance of this Appellate Tribunal's judgment dated 18.02.2013, undertook the exercise and after adopting the procedure, passed the revised tariff order dated 03.05.2013. Thus, this Appellate Tribunal while remanding the appeal to the State Commission, quashed the earlier tariff order dated 02.03.2012, passed by the State Commission. The legal position, as emerged after the remand of the matter by this Appellate Tribunal, would be that the tariff order dated 02.03.2012, after being set aside by this Appellate Tribunal, has been overhauled and revised vide subsequent tariff order dated 03.05.2013 of the State Commission. This fact is also not disputed that tariff @ Rs.3.86 per unit was determined for Biomass based Power Projects in the order dated 02.03.2012 which has been substituted by the tariff @ Rs. 3.33 per unit vide revised order dated 03.05.2013. The appellant in the instant petition sought clarification of the revised tariff order dated 03.05.2013 passed by the State Commission. We further clarify that the impugned order dated 31.08.2013 has been pronounced on the clarificatory petition filed by the appellant/petitioner which is under challenge in the instant appeal before us.

5. This fact is also not disputed that the appellant has not filed any appeal against the revised tariff order dated 03.05.2013 but preferred to seek its clarification by filing the clarificatory petition being Petition No. 34 of 2013.

6. We may note that the appellant, in the garb of present proceedings is trying to re-open the tariff order dated 07.08.2007, remand judgment dated 18.02.2013 of this Appellate Tribunal and the revised tariff order dated 03.05.2013, passed by the State Commission in compliance of the Appellate Tribunal's judgment dated 18.02.2013.

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7. The question before the State Commission was to clarify the tariff which would be applicable to existing Biomass based Power Projects which were commissioned prior to the tariff order dated 02.03.2012, which order dated 02.03.2012 had already been set aside by this Appellate Tribunal vide judgment dated 18.02.2013 in Appeal No. 93 of 2012 against the tariff order dated 02.03.2012. The main point for our consideration is as to whether the learned State Commission while passing the impugned order dated 31.08.2013 on a clarificatory petition of the appellant/petitioner was bound to see the following aspects:-

- i) that the impugned order has served to defeat a vested right by virtue of order dated 02.03.2012 that had accrued to the appellant under original tariff order dated 02.03.2012.
- ii) that the State Commission is not justified in depriving the appellant of the tariff fixed by it for the existing projects by the revised tariff order dated 03.05.2013.
- iii) that the State Commission is also not justified in extending the application of the tariff order dated 07.08.2007 beyond its control period.
- iv) that the impugned order is discriminatory against the appellant, in so far as, it has not extended the benefit of benchmarking of variable cost to the appellant even though appellant's existing project has to bear the same variable cost as the new projects.
- v) that the State Commission is not justified in abandoning the cost plus approach of tariff determination in respect of the existing projects.
- vi) that the State Commission while passing the impugned order has failed to adhere to the provisions of Section 61 of the Electricity Act, 2003 which mandate that the tariff should progressively reflect the cost of supply of electricity.

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- vii) that the State Commission has exceeded the scope of the remand judgment of this Appellate Tribunal in Appeal No. 93 of 2012.
- viii) that the State Commission has applied the revised tariff order dated 03.05.2013 in violation of the principles of natural justice.

8. In contrast to the above points raised by the appellant/petitioner, the learned counsel for the respondents have tried to defend the impugned order saying that reasonings recorded in the impugned order are just, sound and legal one requiring no interference with the impugned order, as the impugned order has been passed on the clarificatory petition of the appellant/petitioner and the State Commission could not be expected to go into the aforementioned submissions/points raised on behalf of the appellant/petitioner. It has further been argued on behalf of the respondents that the tariff order dated 02.03.2012 was challenged before this Appellate Tribunal in Appeal No. 93 of 2012 and this Appellate Tribunal while partly allowing the Appeal, vide judgment dated 18.02.2013, remanded the matter back to the State Commission for re-determination of tariff having set aside the tariff order dated 02.03.2012 which was under challenge in that appeal. Thus, the tariff order dated 02.03.2012 had already been set aside by this Appellate Tribunal in the aforesaid Appeal No. 93 of 2012 and after remand, the State Commission has passed the revised tariff order dated 03.05.2013 determining tariff @ Rs. 3.33 per unit whereas the earlier tariff order dated 02.03.2012 had fixed the rate of tariff as Rs. 3.86 per unit. In the aforesaid development of the instant matter, the bills have been raised and properly adjusted and the State Commission has not committed any illegality in passing the impugned order on the clarificatory petition of the appellant/petitioner.

9. After hearing the rival submissions and perusing the written submissions filed on behalf of the respondents, we find that, the impugned order dated 31.08.2013, passed by the State Commission on the clarificatory petition being Petition No. 234 of 2013 of the appellant/petitioner does not suffer from any kind of illegality or perversity and the findings recorded in the impugned order are cogent, sound and passed on the proper appreciation of the material including documentary evidence, namely, Power Purchase Agreement dated 05.04.2010,

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executed between the appellant and M.P. Tradeco. We agree to all the findings and reasonings recorded by the State Commission in the impugned order and we approve the said findings. Consequently, the instant appeal is liable to be dismissed, being without merits.

### SUMMARY OF FINDINGS

10. While passing the order on a clarificatory petition, the State Commission or Central Commission is required to confine itself to the point regarding which the clarification of the said order is sought. It would be beyond the competence of the respective Commission to travel beyond the points on which clarification of any tariff order or any other kind of order passed by the respective Commission is sought by any party to the litigation. Any party to the matter if feels aggrieved, can file an Appeal as provided under Section 111 of the Electricity Act, 2003 before this Appellate Tribunal. If any Regulations of any Commission or provisions of the Electricity Act, 2003 are to be challenged on the point of ultra vires or intra vires, Writ Petition before the higher forum like concerned High Court can be filed. If any party, feeling aggrieved against any order, does not file appeal before the appellate forum like this Appellate Tribunal or any other higher forum if provided under law, it would be presumed that the said party is satisfied with the said judgment or order of the respective Commission because the scope of any petition seeking clarification of any order is legally confined to the points on which clarification of the order is sought and not beyond that.

11. In view of above discussions, the instant appeal is dismissed as it does not bear any merits. We note that since the State Commission's order dated 03.05.2013 is not under challenge before us in the instant appeal, hence the appellant/petitioner may seek proper remedy if so advised and provided under law. No order as to costs.

**Pronounced in open Court on this 24<sup>th</sup> day of July, 2014.**

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

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

√ **REPORTABLE/NON-REPORTABLE**

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