

**Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)**

Appeal No. 143 of 2014

Dated: 20 August, 2015

**PRESENT: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER**

IN THE MATTER OF:

Rai Bahadur Narain Singh Sugar Mills Ltd.,
2, Kasturba Gandhi Marg
New Delhi – 110 001

...Appellant(s)

Versus

1. Uttarakhand Electricity Regulatory
Commission
1st floor, Institution of Engineers Building
Near ISBT, Majra
Dehradun 248 001
Uttarakhand
2. Uttarakhand Power Corporation Limited
Victoria Cross Vijeyta Gabar Singh Bhawan
Kanwali Road, Balliwala Chowk
Dehradun – 248001, Uttarakhand

... Respondent(S)

Counsel for the Appellant(s) : Mr. Avinash Menon
Mr. Kumar Mihir
Mr. Vishal Gupta
Mr. Mihir Kumar

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Mr. D.V. Raghu Vamsy
Mr. Manu Mridul with Mrs.
Ragini for Resp. No. 2, UPCL

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

1. The present Appeal has been filed under Section 111 of the Electricity Act, 2003 by the Appellant Petitioner challenging the impugned order dated 10.04.2014 passed by the Uttarakhand Electricity Regulatory Commission (hereinafter referred as the State Commission) whereby the State Commission has refused to relax the applicability of the provision of the UERC (Tariff and Other Terms of Supply of Electricity from Non-conventional Renewable Energy Sources and Non-Fossil Fuel Based Co-generating Stations) Regulations, 2013 against Normative Energy Charge for its Non-Fossil Fuel based Co-generation (Bagasse based) Plant.
2. The Appellant herein Rai Bahadur Narain Singh Sugar Mills Ltd (RBNSSML), is a company registered under the Companies Act having its registered office at 2, Kasturba Gandhi Marg, New Delhi and is *inter alia* engaged in the business of manufacture and sale of sugar. The Appellant has also installed a Co-Generation Power Plant based on Bagasse at Laksar; district Haridwar, Uttarakhand for its

captive consumption having a capacity of about 30 MW which was completed in two phases.

3. The Respondent No. 1 is the Uttarakhand State Electricity Regulatory Commission and the Respondent No. 2 herein is a distribution licensee as defined under Section 2(17) of the Electricity Act, 2003 in the State of Uttarakhand which is procuring surplus electricity being generated from the Co-generation Plant of the Appellant in terms of a Power Purchase Agreement dated 16.09.2003.
4. Gist of the facts giving rise to the instant Appeal are as under:
 - (a) The Appellant after completion of Phase- 1 of the Power Project (14.6 MW), filed a Petition being Petition No. 02 of 2007 dated 31.08.2006 before the State Commission under Section 62 and Section 86 of the Electricity Act 2003 read with the Regulations framed there under for determination of tariff for sale of surplus power to Respondent No. 2. The said Petition was duly considered by the State Commission which

finally decided the tariff for the sale of power vide its Tariff Order dated 22.10.2007.

- (b) The State Commission notified the Uttarakhand Electricity Regulatory commission (Tariff and Other Terms for Supply of electricity for Non-Conventional and Renewable energy Sources) Regulation 2008 on 30.04.2008 which came into effect from 01.04.2008 and was to be valid till 31.03.2013. It was further stipulated therein, that till the time, the Regulations 2008 will be replaced by new Regulation, they shall continue to apply.

The Appellant opted for levelized tariff specified in the RE Regulations 2008 since the relaxation was granted in the above Regulations by giving an option to the generating stations commissioned after 01.01.2002 to be covered under the Regulations.

- (c) The Phase-II of the Appellant Project i.e. 15 M.W started commercial operation from 18.12.2008 onwards.

- (d) Subsequently, the State Commission notified the Regulation for the levelized tariff for its co-generation plant on 06.07.2010 which came into force w.e.f. 01.07.2010 and thereby the Regulations, 2008 were repealed.
- (e) The Regulations, 2010 gave an option to the generating stations commissioned after 01.01.2002 to be covered under said regulations. Accordingly, the Appellant availed the said option and opted for a levelized tariff for its co-generation plant. The Appellant further opted for variable charge at Normative Escalation Factor of 5% per annum on the fuel cost for the base year i.e. FY 2009-10 was to be taken as Rs. 1013/MT in terms of Regulation 31(2) of the Regulations 2010 a SHR Norm for the base cost was 1.60 by applying formula of SHR 3600 k cal/kwh and calorific value of 2250 kcal/kg and norm for auxiliary consumption was considered as 8.5%.
- (f) The State Commission further, on 15.04.2013 notified the Uttarakhand Electricity Regulatory Commission

(Tariff and Other Terms for Supply of electricity from Renewable Energy Sources and Non-fossil Fuel based Co-generating Stations) Regulations, 2013 (hereinafter referred as “Regulations, 2013”), the Regulations, 2010 stood repealed in a limited manner.

- (g) The Regulations, 2013 provided that in case of Generating Stations commissioned prior to coming into force of the said Regulations (except Solar), they will not get the benefit of Regulations in chapter 4 (Tariff-General principles) & 5 (Technology Specific Parameters of the Regulations, 2013 and their present tariffs shall continue to be applicable. Further that the Regulation 2013 do not prescribe any change in Gross Station Heat Rate (GSHR), Station Heat Rate (SHR), Gross Calorific Value (GCV), Capacity Utilization Factor (CUF), Auxiliary Consumptions and Normative escalation factor of 5% per annum under Regulation 30 in Chapter 5 of the Regulations 2013 for Non-fossil Fuel based Co-generation Projects.

- (h) The State Commission revised the cost of fuel for the base year (2013-14) and considered as Rs. 1531/MT for FY 2013-14.
- (i) As per the State commission erstwhile Regulations, 2010, the fuel cost for the FY 2013-14 works out to Rs. 1231/MT in terms of Normative escalation factor of 5% per annum on the base fuel cost of Rs. 1013/MT fixed for the base year i.e. FY 2009-10.
- (j) The fuel cost calculated for the FY 2013-14 of Rs. 1231/MT, the variable charge is worked out as Rs. 2.15 per Kwh in the FY 2013-14, whereas the generators who have started generation on or after 15.04.2013 are getting variables charge of Rs. 2.45 per Kwh in view of the escalated Fuel Cost of Rs. 1531/MT under the regulations, 2013.
- (k) In view of the above, the Appellant filed a Petition on 12.02.2014 before the State Commission with relevant data regarding value of the bagasse fuel being as 1379.73/MT in FY 2012-13 and Rs. 1342.61/Mt in FY 2011-12 and submitted the invoices for the same for

the period from December 2013 till January 2014 for the consideration of the State Commission.

- (l) The State Commission, after hearing the arguments, passed the impugned Order on dated 10.04.2014 which is under challenge before us in this Appeal.
- (m) Aggrieved by this Order, the Appellant filed this Appeal before this Tribunal and prayed to set aside the Impugned Order dated 10.04.2014 passed by the State Commission in the Petition dated 12.02.2014 filled by the Appellant and sought for following relief:
- a) **allow the Appeal and set aside the Impugned Order dated 10.04.2014 passed by the State Commission in the Petition dated 12.02.2014.**
 - b) **declare that the co-generation project of the Appellant is entitled to fuel cost of Rs. 1531/MT for the base year 2013-14, or**
 - c) **pass any other or further orders as this Tribunal may deem fit.**

5. We have heard Mr. Kumar Mihir, the learned Counsel for the Appellant and Mr. Buddy A. Ranganadhan, the learned Counsel for the Respondent and gone through the written submissions filed by the rival parties: we have gone through

the evidence and other materials available on record including the Impugned Order passed by the State Commission.

6. The following issue would arise for our consideration:

Issue: Whether the State Commission erred in rejecting the plea of the Appellant for relaxation of the base price of the fuel cost specified in Regulation 2010 for the Non-Fossil Fuel Based Co-generating Plant of the Appellant equal to the base price of the fuel specified in the Regulation 2013?

7. The following are the submissions made by the Appellant:

- (a) that the Appellant is seeking relaxation in the provisions of Regulations of 2010 and 2013 for its co-generation plant and the same could not have been rejected on the ground that relaxation in the Regulations cannot be undertaken by the Commission while discharging its judicial functions.
- (b) that the State Commission has rejected the Petition of the Appellant on an erroneous premise that the power of relaxation cannot be exercised while performing judicial functions and that the relaxation on the

regulations can only be done through Regulations and not by way of Orders.

- (c) that the Appellant is not challenging the provisions of the Regulations and is only seeking a prayer for the benefit of higher variable charge as provided to the generating stations covered under the Regulations of 2013.
- (d) that the Regulations, 2013 gave no reason for excluding the co-generation plants commissioned before 15.04.2013 and once the fuel cost was fixed at Rs. 1531/MT for FY 2013-14, the same should have been allowed for all the Co-generation projects as the cost of fuel is same for all the projects and the date of commissioning of the generating plant does not in any manner affect the cost of fuel. Further, the refusal of the state commission to exercise its power to relax has resulted in grave loss to the appellant as it is forced to supply at a completely unviable tariff which is based on an entirely unrealistic fuel price.

- (e) that the Actual Cost of bagasse Fuel was worked out to be Rs. 1596.51/ MT and the increase in the price of fuel was also recognized by the State Commission when it notified the Regulations, 2013 wherein it provided that the cost of fuel for FY 2013-14 was to be Rs. 1531/MT. Accordingly, there is no cogent reason for the State Commission to only allow a fuel cost of Rs. 1231/MT for the Plant of the Appellant after allowing 5% escalation factor on the base fuel cost of Rs. 1013/ MT for FY 2009-10.
- (f) that the Normative Escalation Factor of 5% had been provided in both the Regulations of 2010 and 2013, the simple average of yearly escalation in fuel cost during FY 2009-10 to FY 2013-14 works out to be 12.78% and there was no reason for the State Commission to deny the benefit of the same to the generating stations such as the Appellant which were commissioned before 15.04.2013. Further, the Appellant is getting a variable charge of only Rs. 2.15/Kwh, whereas the generating stations

commissioned after 15.04.2013 are getting a variable charge of Rs. 2.45/Kwh.

(g) that the Appellant was clearly not financially viable in view of increasing fuel costs and therefore, the rejection of the plea of the Appellant on the ground that grant of relaxation is not a judicial function and the Petition was an afterthought without assigning any other cogent reason for the same amount to a non-speaking order which is clearly violative of the principles of natural justice and therefore, the impugned order is liable to be set aside.

(h) in view of the above, the impugned Order dated 10.04.2014 passed by the State Commission in the Petition dated 12.02.2014 filed by the Appellant herein is liable to be set aside and the co-generation project of the Appellant is entitled to fuel cost of Rs. 1531/MT for the base year 2013-14.

8. Per Contra, the following are the submissions made by the Respondent No. 2 Uttarakhand Power Corporation Ltd.,

- a) that the Appeal is misconceived and is liable to be rejected. It is incorrect to say that the Commission erred in rejecting the Petition of the Appellant.
- (b) the power to remove difficulties cannot be invoked in the judicial proceedings. Determination of tariff is an administrative function which is performed on a representation being given by an affected party at the time of framing of the Tariff Regulations.

The proceedings for Determination of Tariff are held in accordance with UERC (Conduct of Business Regulations), 2004 which is essentially an administrative function.

- (c) the powers conferred by clause 49 can be exercised by the Commission only during the time of framing of the tariff regulations in the course of discharging its administrative functions. Thus, the Commission cannot exercise its power to remove difficulties and relax the provisions of the Regulations regarding determination of tariff of whatever nature while discharging its judicial functions.

- (d) that the increase of fuel cost to Rs. 1231/MT for the plant of the Appellant was in accordance with the option exercised by the Appellant at the time of signing the PPA. The Regulation 15 of the RE Regulations, 2013 further lays down in very unambiguous terms that any shortfall or gain due to performance or other reasons is to be borne/retained by the RE Based Generating Stations and Co-generating Stations and no true up of any parameter, including additional capitalization for whatsoever reasons, shall be taken up during the validity of the tariff.
- (e) that the plea of the Appellant to raise his fuel cost by any measure cannot be entertained in the Petition post the operation of the Regulation.
- (f) that any difference in the variable charge between the Appellant plant and other plants cannot be brought to be same price unless the Appellant plant is suffering a loss. Therefore, the plea of the Appellant seeking realization in the provisions of the Regulation 2010 and 2013 is arbitrary and unjustified.

- (g) that even though there is a difference of 30 paise/Kwh between the variable charge of the Appellant and other co-generating plants, the Appellant has nowhere stated that he is suffering losses. The only plea of the Appellant is loss of profit, for which the provisions are clear and unambiguous in Regulation 15(9) of the RE Regulations 2010.
- (h) that the plants established prior to 15.04.2013 are governed by the Regulations made prior to RE Regulation 2013 and once plant is covered by a certain Regulations, the said plant is not entitled to change its options after the incorporation of the new Regulations.

9. Our Considerations on this Issue:

9.1 The Appellant Rai Bahadur Narain Singh Sugar Mills Ltd (RBNSSML), is having a Bagasse based co-generation renewable energy plant at Laskar, District Haridwar, Uttarakhand with an installed capacity of 30 MW (Phase-1 14.6 MW and Phase-II 15 MW).

9.2 The Appellant after completion of the Phase-I power project filed a Petition No. 02 of 2007 dated 31.8.2006 before State

Commission for fixation of tariff for the energy injected to the Respondent No. 2 and the Commission approved the tariff vide Order dated 22.10.2007 for the sale of power.

9.3 The State Commission in exercise of powers conferred under Section 181 of the Electricity Act 2003 duly following the procedure, came out with Regulations i.e. Uttarakhand Electricity Regulatory Commission (Tariff and other Terms for Supply of Electricity for Non- Conventional and Renewable Energy Sources) Regulations, 2008.

The salient features of the Regulation 2008 are as follows:

- a) the Regulations shall come into force from 01.04.2008 and shall remain in force up to 31.03.2013 provided that till they are revised by new Regulations, these shall continue to apply.
- b) these Regulations seek to achieve promotion of electricity generation from biomass/bagasse based co-generation, renewable sources of energy viz. wind, mini hydro, solar and other non-conventional sources of energy like biogas, municipal waste & industrial wastes and the same is gradually acquiring importance

in augmenting the generation capacity. Further these Regulations seek to achieve promotion of generation from these sources, facilitate connectivity of the generating plants with the grid and to ensure sale of electricity to any person.

- c) the generating plant shall enter into a Power Purchase Agreement (PPA) with the Distribution Licensee of the area, in which the plant is located for a period of at least 20 years (useful life of Bagasse based co-generation plant) from the date of its commissioning, in line with Model Power Purchase Agreement. Provided that the Distribution Licensee shall propose and get the Model PPA approved by the Commission within a period of three months from the date of notification of these Regulations.
- d) the Co-generation, Renewable Sources of Energy and other Non-Conventional energy Sources based plants shall be allowed to sell power, over and above the capacity required for their own use, to the Distribution Licensee at the rates specified in these Regulations or

to local rural grid or to any consumer within the State or to any other third party outside the State.

- e) as per the RE Regulations 2008, the levelized tariff for supply of electricity by the eligible source to a Distribution Licensee shall be as fixed by the State Commission i.e. Bagasse based co-generation projects Tariff is fixed as Rs. 1.90/kwh.

Accordingly, the Appellant opted for Levelized Tariff.

9.4 On 06.07.2010, in exercise of powers conferred under Section 61 read with Section 181 of the Electricity Act, 2003, and all other powers enabling it in this behalf, and after previous publication, the Uttarakhand Electricity Regulatory Commission notified the Regulation i.e. UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010 and the State Commission specified that these Regulations shall come into force with effect from the date of the publication in official gazette.

Provided that provisions of Chapter 4 & 5 shall be applicable w.e.f. 01.07.2010.

9.5 With the coming into force of these Regulations, UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008, stood repealed.

9.6 According to these RE Regulation 2010, the Sub-Regulations in Chapter 4&5 shall not be applicable for generating stations commissioned before 01.01.2002 and the present tariffs shall continue to be applicable till they are decided by the Commission on case to case basis.

9.7 In the instant case, the generating station of the Appellant commissioned after 01.01.2002 and hence these RE Regulations 2010 are applicable for the Applicant.

9.8 According to these Regulations, all RE based Generating Stations and Co-generating Stations shall be allowed to sale power, over and above the capacity for their own use, to the Distribution licensee or to locals rural grids at the rates determined by the Commission or to any consumer

(provided that such consumer has been allowed Open Access under Open Access Regulations) or to any person within the State or outside the State at mutually agreed rates provided that such sale outside the State is not in contravention to any Policy notified by the State Government or to any provision of any legally enforceable existing agreement signed by generating company with any person.

9.9 Under Clause 31 of these Regulations, the State Commission fixed the tariff of Non-fossil Fuel based Co-Generation Projects. The relevant portion is quoted below:

“31 Non-fossil Fuel based Cogeneration Projects

(1) The technology specific parameters for determination of generic tariffs for Non-fossil Fuel based Cogeneration Projects shall be as below:

Projects Commissioned during FY 2001-02 to 2006-07

Capital Cost	O&M Expenses for year of commissioning	Station Heat Rate	Calorific value of fuel	Auxiliary Consumption	Capacity Utilization Factor
(Rs. Lakh/MW)	(Rs. Lakh/MW)	(Kcal/kWh)	(kCal/kg)		
350	10.11	3600	2250	8.5%	45%

Project Commissioned during FY 2007-08 to 2008-09

Capital Cost	O&M Expenses for year of commissioning	Station Heat Rate	Calorific value of fuel	Auxiliary Consumption	Capacity Utilization Factor
(Rs. Lakh/MW)	(Rs. Lakh/MW)	(Kcal/kWh)	(kCal/kg)		
375	11.94	3600	2250	8.5%	45%

Projects Commissioned or after 01.04.2009

Capital Cost	O&M Expenses for year of commissioning	Station Heat Rate	Calorific value of fuel	Auxiliary Consumption	Capacity Utilization Factor
(Rs. Lakh/MW)	(Rs. Lakh/MW)	(Kcal/kWh)	(kCal/kg)		
445	13.35	3600	2250	8.5%	45%

(2) Fuel Cost for the base year FY 2009-10 shall be taken as Rs. 1013/MT, which shall be indexed for different years of tariff period based on annual inflation rate for fuel handling (WPI), Indexed Energy Charge Component (IRC) and transportation cost (price for high speed diesel – Pd) with 20%, 60% and 20% respective weightages as per following formula:

$$P_{(n)} = P_{(n-1)} * \{0.2 * (WPI_{(n)} / WPI_{(n-1)}) + 0.6 * (1 + IRC)_{(n)} + 0.2 * (Pd_{(n)} / Pd_{(n-1)})\}$$

However, as the indices for nth year would be known only after close of nth year, the generator shall be allowed to raise fuel cost bills for nth year based on normative escalation factor of 5% on previous year's fuel cost, which shall be adjusted based on actual index for the nth year.

Alternatively, for each subsequent year of the Tariff Period, the normative escalation factor of 5% per annum shall be applicable at the option of the biomass project developer. The normative escalation factor shall be considered for determination of working capital fixed cost component of levelised generic tariff.

Provided that the generator has to give his option for normative or indexed fuel cost to the distribution licensee at least 3 months in advance of date of commissioning or one month after the date of issuance of these Regulations, whichever is later. **The option once exercised shall not be allowed to be changed during the validity period of the PPA.**

(3) The fuel cost component of the tariff for nth Year shall be calculated as follows:

$$\text{Rate of Variable Charge (Rs./kWh) } VC_n = \frac{\text{Gross Station Heat Rate(GSHR)}}{\text{Gross Calorific Value (GCV)}} \times \frac{P_n}{(100-AUX)} \times 10$$

9.10 Accordingly, the Appellant exercised his option as per the RE regulations 2010 as follows:

a) the Appellant agreed for the fuel cost for the base year 2009-10 as Rs. 1013/MT.

b) the Appellant opted for the Normative escalation factor of 5% p.a. and the Appellant has not opted for annual inflation rate for fuel handling (WPI), Indexed energy charge Component (IRC) and transportation cost (price for high speed diesel oil) as per the formula specified in the Cause 31 of the RE Regulation 2010.

9.11 The Appellant clearly specified his option for the base price of Rs. 1013/MT for the base year 2009-10 and Normative escalation factor of 5% p.a.

9.12 **Further the Regulation clearly specifies that the option once exercised shall not be allowed to be changed during the validity period of the PPA.**

9.13 Further the Appellant agreed for the Levelized Charges (RFC) and Variable Charges in Rs./kwh as shown in the following table:

Particulars	Rate of Fixed charges									Rate of Variable Charges for Year 1 as FY 2009-10 with 5% normative escalation subsequently
	Projects commissioned before 01.04.2007			Projects commissioned during FY 2007-08 & FY 2008-09			Projects commissioned on or after 01.04.2009			
	Gross Tariff	Less Accelerated Depreciation	Net Tariff	Gross Tariff	Less Accelerated Depreciation	Net Tariff	Gross Tariff	Less Accelerated Depreciation	Net Tariff	
1. Levelized (Entire Life)	2.15	0.15	2.00	2.35	0.15	2.20	2.75	0.15	2.60	

9.14 On 15.04.2013, the State Commission in exercise of the powers conferred under section 61(h), 86(I)(e) read with Section 181(zp) of the Electricity Act, 2003, **notified the Regulation called as Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013**, and specified that these Regulations shall come into force with effect from the date of notification, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of 5 years from the date of commencement. Further with the coming into force of these 2013 Regulations, UERC (Tariff and Other Terms for Supply

of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2010, shall stand repealed.

9.15 These Regulations (Uttarakhand Electricity Regulatory Commission RE Regulations 2013) shall apply in all cases where supply of electricity is being made from Renewable Energy Sources and Non-fossil Fuel Based Co-Generating stations, commissioned after coming into effect of these Regulations, to the Distribution licensees or local rural grids within the State of Uttarakhand.

9.16 Provided further that Sub-Regulations in Chapter 4 & 5, shall not be applicable for generating stations commissioned prior to coming into effect of these Regulations and their present tariffs shall continue to be applicable.

Provisions other than those in Chapter 4 and 5 shall apply to other generating stations located in the State of Uttarakhand, which are based on Renewable Sources of Energy including non-fossil fuel based Co-generation.

9.17 The existing projects, who are at present supplying power to their party shall have the option to switch over to supply to the distribution licensee or the local rural grid at generic

tariffs as was applicable at the time of commissioning of their project or seek determination of project specific tariff from the Commission.

The option shall be for the balance life of the project and shall not be allowed to be changed once it is exercised.

9.18 The tariff fixed under these Regulations 2013 is specified in Clause 30 i.e. for Non-fossil Fuel Based Co-generation Projects. The relevant part is quoted below:

“Non-fossil fuel based Cogeneration Projects

(1) the technology specific parameters for determination of generic tariffs for Non-fossil fuel based Cogeneration Projects shall be as below:

Projects Commissioned on or after 01.04.2013

Capital Cost	O&M Expenses for year of commissioning	Station Heat Rate	Calorific value of fuel	Auxiliary Consumption	Capacity Utilization Factor
(Rs. (Lakh/MW)	(Rs. Lakh/MW)	(Kcal/KWh)	(kCal/kg)		
420	16.92	3600	2250	8.5%	45%

(2) Fuel Cost (P) for the first year of the Control Period, i.e. FY 2013-14 shall be taken as Rs. 1531/MT, which shall be indexed for different years of tariff period based on annual inflation rate for fuel handling (WPI), Indexed Energy Charge Component (IRC) and transportation cost (price for high speed diesel: Pd) with 20%, 60% and 20% respective weightages as per following formula:

$$P_{(n)} = P_{(n-1)} * \{0.2 * (WPI_{(n)} / WPI_{(n-1)}) + 0.6 * (1 + IRC)_{(n-1)} + 0.2 * (Pd_{(n)} / Pd_{(n-1)})\}$$

However, as the indices for nth year would be known only after close of nth year, the generating company shall be allowed to raise fuel cost bills for nth year based on normative escalation factor of 5% on previous year's fuel cost, which shall be adjusted based on actual index for the nth year.

Alternatively, for each subsequent year of the Tariff Period, the normative escalation factor of 5% per annum shall be applicable at the option of the biomass project developer. Provided that the generating company has to give his option for normative or indexed fuel cost to the distribution licensee at least 3 months in advance of date of commissioning or one month after the date of issuance of these Regulations, whichever is later. The option once exercised shall not be allowed to be changed during the validity period of the PPA.

(3) The fuel component of the tariff for nth Year shall be calculated as follows:

$$\text{Rate of Variable Charge (Rs./kWh) } VC_n = \frac{\text{Gross Station Heat Rate (GSHR)}}{\text{Gross Calorific Value (GCV)}} \times \frac{P_n}{(100 - \text{AUX})} \times 10$$

9.19 The RE Regulations 2013 revised the rate of base fuel cost for the first year of the control period i.e. FY 2013-14 shall be taken as Rs. 1531/MT and the other conditions specified in the earlier RE Regulations 2010 will hold good and the levelized rate of charges fixed shown below:

Levelized Rate of Fixed Charges (RFC) & Variable Charges in Rs./kWh for Non-fossil fuel based Co-generation Projects.

Particulars	Rate of Fixed Charges
Gross Tariff	2.85
Less: Accelerated Depreciation	0.15
Net Tariff	2.70

Year	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Rate of variable charges for Year I as FY 2013-14 with 5% normative escalation subsequently	2.45	2.5	2.70	2.84	2.98	3.13	3.28	3.45	3.62	3.80	3.99	4.19	4.40	4.62	4.85	5.09	5.35	5.61	5.90	6.19

9.20 The Appellant filed a Petition on 12.02.2014 before the State Commission for consideration of the revised fuel cost rate of Rs. 1561/MT and for the variable cost of Rs. 2.45/kwh.

9.21 After hearing the arguments, the State Commission passed the impugned Order on dated 10.04.2014 duly disposing of the Petition filed by the Appellant. The relevant portion of the Impugned Order is extracted below:

“The Commission observes that there exists valid long term PPA executed between the Applicant and the Respondent for sale of power at Rs. 2.50 per unit in respect of the aforesaid project. The above referred Regulations 11(2) & 31(2) of the RE Regulations, 2010 prevents the generator to change its option once exercised by it. Further, Regulation 15(9) clearly states that any shortfall or gain due to performance or other reasons is to be borne/retained by the generator. In addition, relevant Regulation 30(1) of the existing RE Regulations, 2013 specifies applicable fuel cost only for the projects commissioned on or after 01.04.2013.

Thus, the readings of the above referred Regulations clearly provide that the option once exercised cannot be allowed to be changed. Therefore, the Commission holds that prayer of

the Petitioner for review/relax of the provisions of the Regulations is not maintainable as relaxation/amendment of Regulations cannot be undertaken by the Commission while discharging its judicial function.

(e) In this regard, reference made by the Applicant to Regulation 50 of RE Regulations, 2013 is not valid. Regulation 50 is reproduced here:

“50. Power to Relax: the Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person.”

The Commission has powers to relax the provisions of the Regulations; however, such powers cannot be exercised by the Commission while discharging its judicial function. Any relaxation or amendment to any provisions of the Regulations can only be done through Regulations & not by way of Orders.

(f) Moreover, the commission has also taken note of the fact that the RE Regulations, 2013 and its subsequent amendment have been notified following the due procedure after seeking comments/suggestions from stakeholders. The generator had not made any representation in the matter though it had submitted its comments on other issues of the draft RE Regulations, 2013. Instant application of the generator appears to be an afterthought to seek coverage under provisions of the existing RE Regulations, 2013 which is clearly prohibited under the same.

(g) With the above observations, the petition stands disposed off as not maintainable.”

9.22 Thus the Commission follows certain procedures for framing the Regulation as per Section 181(1) of Electricity Act 2003. In the first instance, the State Commission prepares a draft Regulation and publishes the draft Regulation for the public comments/remarks. After receipt of comments/remarks, conducts public hearing inviting the stakeholders/consumers to offer their remarks/suggestions, etc. After going through suggestions/remarks and with available materials, the Commission finalizes the Regulation and publishes in the Government Gazette of the respective States. Further, the Appellant was also given an opportunity to express his opinion/any objection to the said proviso, but the Appellant did not raise any objection at that time. After notification of the Regulations, the Appellant prayed for the revision of fuel price cost and levelized variable cost specified in the 2013 Regulations. Further, at the time of notification of RE Regulations 2010, **it was clearly mentioned in the Regulation that the options once exercised is final and cannot be changed.** At that time, the Appellant had chosen the base price of the fuel for the FY 2009-10 as Rs. 1013/MT and levelized tariff of Rs. 2.15.

Hence, the Appellant is not having any right to claim for relaxation of Regulation 2010.

9.23 Further, it also to mention here that the distribution companies who are purchasing power from these RE generators has incorporated the power purchase cost from RE sources in their ARR's before the State Commission for fixing of Annual Tariff etc. If the prayer of the Appellant is allowed, then the Power Purchase Cost will increase and thereby the consumers are burdened with increase of tariff.

9.24 Under the above circumstances, the State Commission has clearly spelt out in the RE Regulations 2010, subsequently in 2013 in the respective Regulations, the options once exercised cannot be revised or altered.

9.25 We do not agree to the submission that any Electricity Regulatory Commission while determining tariff exercises Administrative functions. The correct legal position is that it is done under the quasi-judicial function of the Regulatory Commission.

9.26 This Appellate Tribunal, in the case of Ratnagiri Gas Power Private Limited vs. Central Electricity Regulatory Commission (2011) ELR (APTEL) 532, has in Para Nos. 10.3 and 10.07 of the judgment held as under:

10.3. In our opinion, power to remove difficulties is to be exercised when there is difficulty in effecting the Regulations and not when difficulty is caused due to application of the Regulations. Thus, the exercising power to remove difficulties does not arise in the present case.

10.7. The above regulations and the decision to give the judicial discretion to the Central commission to relax norms based on the circumstances of the case. However, such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation. It has to be exercised only in exceptional case and where non-exercise of the discretion would cause hardship and injustice to a party or would lead to unjust result. In the case of relaxation of the regulations the reasons have to be recorded in writing. Further, it has to be established by the party that the circumstances are not created due to act of omission or Commission attributable to the party claiming the relaxation.

9.27 The same view has been reiterated by this Appellate Tribunal in BSES Yamuna Power Limited in Appeal Nos. 259 of 2012, 55, 63, 77, 143, 158 and 194 of 2013 and 43 of 2014, Judgment dated 24.03.2015.

9.28 Since the instant matter was not a fit one, the power to relax was not legally and correctly exercised by the State Commission. The State Commission is perfectly justified in

not exercising the power to relax. For exercising the power to relax, the reasons are required to be recorded. We also on perusal of the whole matter on the record find that the present case is not a fit one in which the power to relax can be exercised.

9.29 We fully agree and approve the findings recorded by the State Commission in the impugned Order. This issue is consequently decided against the Appellant and the present Appeal merits dismissal.

There shall be no order to costs.

Pronounced in the Open Court on **this 20 day of August, 2015.**

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

Dated, the 20 August, 2015.

REPORTABLE / ~~NON-REPORTABLE~~