

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 312 OF 2013

Dated 9th January, 2015

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

IN THE MATTER OF:

1. Gujarat Energy Transmission Corporation Limited,
Sardar Patel, Vidyut Bhavan Race Course,
Vadodara - 390 007 (Gujarat).
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2. Paschim Gujarat Vij Company Limited,
Off. Nana Mava Main Road,
Near Bhaktinagar Railway Station,
Laxminagar, Rajkot- 360 004 (Gujarat).
3. Madhya Gujarat Vij Company Limited,
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara- 390 007 (Gujarat).
4. Uttar Gujarat Vij Company Limited,
Registered Office: Visnagar Road,
Mehsana- 384 001 (Gujarat).
5. Dakshin Gujarat Vij Company Limited,
Nana Varachha Road,
Kapodara, Surat- 395 006 (Gujarat).
6. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan,
Race Course Circle,
Vadodara- 390 007 (Gujarat). Appellants

Versus

1. Gujarat Electricity Regulatory Commission,
6th Floor, GIFT ONE,
Road 5 C, Zone 5, GIFT City,
Gandhinagar - 382355 (Gujarat).
2. Abellon Clean Energy Limited,
Sangeeta Complex, Near Parimal Crossing,
Ellisbridge, Ahmedabad - 380 006.
3. Ankur Scientific Energy Technologies Private Limited,
Ankur, Near Navrachana School,
Sama, Vadodara - 390 024.

4. Cogeneration Association of India,
First Floor, Sahkar Sankul, Shivajinagar,
Pune - 411 005 (Maharashtra).
5. Fortune Vision International,
Regd. Office: N2/27, DLF Phase - II,
Gurgaon - 122 002 (Haryana).
6. Gujarat Biomass Energy Developers Association,
Snehal Park -I, Block No. A-46,
Behind Collector Office,
Near Meera Nagar, Junagadh - 362 001.
7. IL & FS Renewable Energy Limited,
The IL & FS Financial Centre, 8th Floor,
Plot C-22, G-Block, Bandra - Kurla Complex,
Bandra (East), Mumbai - 400 051.
8. Torrent Power Limited,
"Electricity House", Lal Darwaja,
Ahmedabad - 380 001.
9. Gujarat State Federation of Cooperative Sugar Factories,
Sardar Sahakari Khand Bhavan,
Plot No. 274, Sector - 16, GH Road,
Gandhinagar - 382 016.
10. Gujarat Energy Development Agency,
4th Floor, Block No. 11 & 12,
Udyogbhavan, Sector- 11,
Gandhinagar - 382 017.
11. Ministry of New and Renewable Energy,
Block - 14, CGO Complex,
Lodhi Road, New Delhi - 110 003.Respondents

Counsel for the Appellant (s) : Mr. M.G.Ramachandran
 Counsel for the Respondent(s) : Ms. Suparna Srivastava for Respondent No.1
 Mr. Anand K. Ganesan for Respondent No.8

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an Appeal under Section 111 of the Electricity Act, 2003 against the order dated 08.08.2013, passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to as 'State Commission') in Order No. 4 of 2013 in the matter of determination of tariff for procurement of power by the distribution licensees and others from biomass based power projects and bagasse based co-generation projects filed by the appellants

whereby the State Commission has determined the generic tariff applicable for the generation and supply of electricity by biomass based power projects and bagasse based co-generation projects to be commissioned in the State of Gujarat on or after 01.08.2013 for the control period commencing from 01.08.2013.

2. By the impugned order dated 08.08.2013, the State Commission has determined the generic tariff applicable for the biomass based generators and bagasse based co-generation projects applicable for the control period from 1.8.2013. In the impugned order, the State Commission has imposed the obligation of construction of the evacuation facilities on the licensees, namely, GETCO/DISCOM (transmission or distribution licensee). The State Commission has further held that the start up power/ stand by power required by the biomass based generators shall only be charged at the energy charges applicable to HT consumers without any payment of fixed/demand charges. According to the appellants, the State Commission has wrongly decided generic tariff without providing for the same as a capped tariff and subject to such capping there should be trueing up the prudent capital cost actually incurred or reasonably expected to be incurred and also on other financial and technical parameters to avoid such projects getting returns in excess of the reasonable return.

3. The appellants are aggrieved of certain aspects of the order dated 08.08.2013 namely:-

- a) with regard to extent of the obligations and responsibilities that can be imposed on the appellants-transmission licensee and the distribution licensee for development of the evacuation facilities from the project site to the existing sub station of the licensee;
- b) with regard to the retail tariff chargeable from the biomass generators for consumption of electricity drawn from the State grid for purposes such as start up/standby etc. without the obligation to maintain contract demand and pay minimum/demand charges.
- c) with regard to the terms and conditions of generic tariff set by the State Commission not being treated as capped tariff and within the capped tariff the actual capital cost and other financial parameters to be subjected to prudence check for reasonable cost and reasonable return; and

4. The relevant facts of the case are as under:-

4.1. that the appellant no.1 is the Transmission Company which undertakes intra state transmission of electricity in the State of Gujarat and also discharges the statutory functions of the State Transmission Utility for the State of Gujarat. Appellant nos. 2-5 are the distribution licensees in the State of Gujarat and have been vested with the functions

of distribution and retail supply of electricity in the State of Gujarat in their respective areas of supply. Appellant no.6 is the bulk purchaser of electricity for bulk supply to the distribution companies.

4.2. that the respondent no.1 is the State Commission which determines the tariff as applicable for the sale of electricity by generating companies to the distribution licensees in the State of Gujarat exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

4.3. that the respondent nos. 2-9 are the entities which are either developers or agencies or association interested in the development of generation and supply of electricity from biomass based power projects and bagasse based co-generation projects, who had participated in the proceedings before the State Commission. The respondent nos. 10 and 11 had also participated in the proceedings before the State Commission.

4.4. that prior to the impugned order dated 8.8.2013, the State Commission passed the orders dated 17.5.2010, 31.5.2010 and 7.2.2011 providing for the terms and conditions including tariff for the generation and supply of electricity by the biomass and bagasse based generators to be established in the State of Gujarat during the control period till 31.7.2013. In the earlier orders dated 17.5.2010 & 31.05.2010 (in respect of tariff for biomass based power project & bagasse based co-generation power project respectively) the State Commission had stipulated that the responsibility to provide the evacuation facilities from the generating station and up to the sub-station of the transmission or distribution licensee shall be that of the generators. The developers were also required to take a contract demand for start up and stand by power from the distribution licensees and pay the applicable charges as in the case of others. The State Commission had duly considered the cost of the evacuation facilities as a part of the capital cost of the generation project. In addition to the above, the State Commission had also specified a security deposit to be furnished by the power developers of Rs. 5 lacs perMW to secure the appellants to recover the loss caused on account of a non-serious developer causing the licensee to keep its system ready, in the event the generator does not establish the generating station in time.

4.5 . That in terms of the discussion paper circulated on or about 24.6.2013 for the determination of tariff for biomass based generators and bagasse based co-generation projects in the State of Gujarat for the new control period commencing from 1.8.2013, the State Commission proposed for the first time the obligation of construction of the evacuation facilities for the generating projects on the appellants. The evacuation facilities of a generator from the generating station up to the nearest sub-station of a licensee is to be generally a dedicated transmission line and duty of the generator to establish as per

sections 9 and 10 of the Electricity Act, 2003. The above obligations placed on the appellants would also result in the general consumers of the State burdened of servicing the cost of the evacuation facilities when in many cases, the project developers would be supplying electricity to third parties and also taking concessional benefits for wheeling and transmission, which would place additional burden on the licensees.

4.6. that while shifting the obligation of construction of the evacuation facilities on the licensee, the State Commission has, however, retained the same provision with regard to security deposit as per the earlier order. In the circumstances, the licensee having the obligation of establishing the evacuation facilities would not have adequate security from the generator in case the generator does not establish the generating station thereby causing loss to the licensees.

4.7. that the State Commission has wrongly held that the start-up power or standby power required by the biomass based generators shall only be at the energy charges applicable to HT consumers without any payment of fixed/demand charges and the same has been provided by the State Commission without any condition that the same would be applicable only during the period when the generating station is in operation and requires start-up power/stand-by power. By virtue of such stipulation, only energy charges would be leviable for the period even when the generating station is not in operation and the drawl of electricity is made by the generating company for the other purposes.

4.8. that the impugned order of the State Commission is erroneous because the obligation of laying down the evacuation line for evacuation of electricity from the generating station up to the existing sub-station of appellant licensees, as per the scheme, objective and provisions of Sections 9, 10, and 86 (1) (e) of the Electricity Act, 2003, is clearly on the generating station. The generating company has been given the duty to establish the dedicated transmission lines specially for the reason that a transmission or a distribution licensee cannot be expected to reach each and every individual generator, especially considering the fact that the licensees are required to plan the transmission and/or distribution system in the state as a whole and to cater to the maintenance of the system as a whole. The obligation of the appellant licensees to develop, operate and maintain such radial lines will result in a situation of various other systems being developed being affected and even the execution of the radial lines not being commensurate with the commissioning schedule of the generating station. Further, the placing of obligation on the appellant licensees would lead to unproductive investments at the cost of the general public. **Firstly, there is no restriction of the location of the generating station in the State of Gujarat.**

4.9. that the State Commission has, in the impugned order, merely observed that the evacuation line is not is not very long, without specifying the maximum distance of such lines, even assuming it to be established by the licensees. **Secondly while the appellants are required to develop the line, the generating station may not come or even if it comes may not operate. The quantum of exposure of the licensees is substantially higher.**

4.10. that similarly restricting the charges to be paid by the generators to the distribution licensee for supply of electricity for start-up/standby power drawl at the generating stations only to energy charges and also without any restriction on the quantum of such drawl, is without any rationale. The distribution licensees cannot be expected to tie up and keep electricity on stand by without any commitment on behalf of the generators to draw electricity. In such cases the generator would then be in a position to draw as much electricity and at any point of time, whereas the appellants distribution licensees would be required to keep electricity ready for supply to the generators.

4.11. that further the State Commission ought to have directed the generic tariff determined by it on assumptions in regard to capital cost and other parameters to be a capped tariff and subjected such capped tariff to appropriate prudent check to be undertaken based on actual capital cost incurred and other actual financial parameters so as to limit the actual tariff to servicing reasonable actual cost and reasonable return. The project developer cannot be allowed to get higher tariff resulting in more than the reasonable return envisaged.

5. We have heard Mr. M.G. Ramachandran, learned counsel for the appellants, Ms. Suparna Srivastava, the learned counsel for respondent no.1 and Mr. Anand K. Ganesan, learned counsel for the respondent no.8. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission and reply filed by the rival parties.

6. The following issues arise for our consideration:

A. Whether the State Commission is justified in the facts and circumstances of the present case to place the obligation on the appellants/ licensees for establishing the evacuation facilities for generator from the place of generation to the existing sub- stations of the licensees and not placing the obligation on the generator for establishing the dedicated transmission line in terms of sections 9 and 10 of the Electricity Act, 2003?

- B. Whether the State Commission is justified in restricting the charges for the start-up/standby power for biomass and bagasse projects to only energy charges without any obligation for the payment of demand charges?
- C. Whether in the facts and circumstances of the case, the State Commission ought to have provided the generic tariff determined as capped tariff and subject to reduction based on actual reasonable capital cost and other parameters to restrict such tariff to reasonable prudent cost and reasonable return?

CONSIDERATION ON ISSUE NO. A- CONSTRUCTION OF EVACUATION FACILITIES

7. On this issue relating to power evacuation, the following contentions have been raised on behalf of the appellant/licensees.

7.1. that the obligation of laying down the evacuation line for evacuation of electricity from the generating station up to the existing sub-station of appellant licensees in terms of the scheme, objective and provisions of Sections 9 and 10 of the Electricity Act, 2003, is clearly on the generating station. It is for the generating station particularly small generating station to establish the dedicated transmission lines from the generating station to the existing sub-station of the licensees.

7.2. that section 10 of the Electricity Act, 2003 provides that the duties of the generating companies shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules and regulations made thereunder.

7.3. that the duty cast upon the generating company under this Section is not merely an option or entitlement or a right to the generating company. The last mile connectivity from the generating station to the sub station of transmission/distribution licensee, which is dedicated to the generating station needs to be the obligation of the generating company.

7.4. that section 86(1)(e) of the Electricity Act, 2003 dealing with the promotion of non conventional energy sources and obligations of the licensees in regard thereto has specified consciously only connectivity to the grid and not laying down of the radial dedicated line to the place of generation.

7.5 that the State Commission has failed to appreciate that the generating company has been given the duty to establish the dedicated transmission line because the transmission or a distribution licensee cannot be expected to reach each and every

individual generator, especially considering the fact that the licensees are required to plan the transmission and / or distribution system in the State as a whole and to cater to the maintenance of the system as a whole. Placing the obligation of the dedicated transmission lines on the licensees would lead to a situation wherein substantial resources of the licensees shall have to be dedicated for individual lines to reach the generators and the same would result in a situation where there will be a substantial burden on the existing resources and manpower of the licensees.

7.6. that the State Commission has failed to attract the provisions relating to dedicated transmission line and the need for obtaining a license being made inapplicable for laying down such dedicated transmission line have been incorporated in the Electricity Act, 2003 specifically envisaging that the generator, as a part of establishing the generating station, ought to have the obligation to lay down lines at his cost to reach the transmission system or distribution system of the licensee.

7.7. that the State Commission has failed to appreciate that the appellants are required to plan the development of the distribution system for the State and develop the said system to ensure that the capacity required for the entire State and the consumers at large is catered to. The resources available with the appellants are primarily deployed for the procurement of electricity, development and strengthening of the existing transmission/distribution system in the State and to ensure that the system is developed in a coordinated, economical and efficient manner to supply electricity to the consumers at large.

7.8. that because there is no duty provided for under the Electricity Act, 2003 for establishing the evacuation of electricity through radial lines which are in the nature of transmission or distribution lines dedicated to the generating companies.

7.9. that the State Commission has failed to appreciate that the purpose of placing the obligation on the generating company for the establishment of the dedicated transmission line is that the evacuation facility need to be commensurate with the commissioning of the generating station and further any anomaly of the appellant - licensees incurring substantial cost in establishing the lines but the generating station not coming in time will lead to unproductive investments at the cost of the general public.

7.10. that the State Commission has failed to appreciate that there is no restriction on the location of the generating station in the State of Gujarat. The State Commission has merely observed that the evacuation line is not very long, without specifying the

maximum distance of such lines, even assuming it to be established by the licensees. The State Commission has failed to appreciate that the licensees cannot be expected to lay down the dedicated evacuation line for the generators over long distances with considerable cost and expense paid for by the consumers at large to provide the freedom to the generator to choose the project even at distant locations.

7.11. that the State Commission has failed to appreciate that the minimal security deposit of Rs. 5 lacs/MW to be paid by the generator was approved in the previous tariff orders to compensate for the upstream development of the transmission/distribution system in cases where the same is not utilized by the generator because the generating station is not established. However, as per the impugned order the dedicated transmission lines are also to be established by the licensees, the quantum of exposure of the licensees is substantially higher and the security deposit of Rs. 5 lacs/MW which is continued by the State Commission is grossly inadequate.

7.12. that the State Commission has failed to appreciate that the effect of the impugned order may be that the generator is not serious about the development of the generating station whereas the licensees establish the dedicated transmission line over large distances. The security deposit paid by the generator also does not cover the exposure of the appellants towards the establishment of the dedicated transmission lines.

7.13. that the State Commission has failed to appreciate that it should be an option to the licensees to establish transmission line or distribution line only in cases where the licensees find it conducive to establish the line to reach the generating station without affecting the licensees' other works and it should not have been imposed as a mandate.

7.14. that the State Commission has erred in proceeding on the premise that the length of the line for the biomass based developers is not much and would be comparatively shorter, without specifically limiting the length of the line. There being no restriction on the location for the project developer to establish the generating station, there could be substantial distances over with the evacuation lines need to be laid down, which will place a substantial burden in terms of resources as well as cost on the licensees and the consumers at large.

7.15. that in the alternative even if any obligation is to be cast on the appellants/ licensees for laying down the evacuation line, the same needs only to be limited to a particular distance which is short.

8. **Per contra**, the following submissions have been made by the respondent no.2, having taken us through its reply filed to the Memo of Appeal:-

8.1. that in the past for solar Power Projects (one of the renewable energy sources) the State Commission (GERC) had directed GETCO for laying down the transmission line at its own cost, as noted below:-

"1.1. As per the Solar Power Policy, 2009 by Government of Gujarat dated 6th January, 2009-

"14. Grid Connectivity and evacuation facility upto GETCO sub-station:- ... The transmission line from the switchyard of the solar substation to the GETCO substation shall be laid by the GETCO...."

1.2. As per the Tariff order no. 1 of 2012 of GERC for "Determination of tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects." Dated 27th January, 12, states that-

"4.4. Evacuation Facilities:- Commission's Ruling

...Further, the Solar Power Policy, 2009 of the Government of Gujarat provides that the transmission line from the switchyard of the substation of the megawatt- scale solar power plant to the GETCO sub-station shall be laid by GETCO.

...Hence, the Commission retains that the transmission lines from the switchyard of generator to the GETCO sub-station shall be laid by GETCO. The cost for the same shall also be borne by GETCO."

8.2. that it is important to note that the installed capacity of solar power in Gujarat is more than 900 MWs at various locations, ranging from 1 MW to 25 MW capacities. For the projects above 5 MW size, the connectivity was provided by GETCO & transmission line was laid by GETCO at its own cost and for projects below 5 MW the connectivity and transmission line was laid by discoms at their own costs. Therefore, the GETCO's argument stating "... unlike in the past in the case of the renewable power projects..." is contradictory and devoid of merits.

8.3. that it is evident that GETCO/discoms have laid the transmission lines at various locations across the state in compliance with State Commission's tariff order for these SPGs. Their promotions like providing transmission lines & connectivity to the grid are very much needed for promoting the generation from renewable energy sources as biomass is under very nascent stages of development. Hence, all the arguments of the appellants are liable to be rejected.

9. We have considered the rival submissions made by the parties and have also gone through the reply filed on behalf of respondent, the relevant part of which we have quoted above. We find that the appellants contention in this regard that the State Commission proposed for the first time (unlike in the past in the case of the renewable power projects like wind, small hydel, biomass, bagasse) the obligation of construction of the evacuation facilities for the generating projects on the appellants is quite wrong. The learned State Commission in its earlier tariff order being Tariff Order No. 1 of 2012 vide order dated 27.1.2012 had already laid down that since the Solar Power Policy of 2009 of the Government of Gujarat provides that the transmission line from switchyard of the sub-station of the megawatt-scale solar power plant to the GETCO sub station shall be laid by the GETCO. Hence, the State Commission retains that the transmission line from the switchyard of the generator to the GETCO sub station shall be laid by GETCO and the cost for the same shall also be borne by the GETCO. For the projects above 5 MW, the connectivity was provided by GETCO and transmission line was laid by GETCO on its own cost and for projects below 5 MW the connectivity and transmission line was laid down by the discoms at their own costs. Thus, it is clearly evident that the GETCO/discoms have been laying the transmission lines on various locations across the State of Gujarat in compliance with the State Commission's aforesaid tariff order for the Solar Power generators. The contention of the appellant that the State Commission has for the first time proposed for the obligation of construction of evacuation facilities upon the transmission or distribution licensees is wrong and the same does not find support from the material on record.

10. We are conscious of the fact that as per Section 61 of the Electricity Act, 2003, the appropriate Commission shall be guided by the following:-

- (h) The promotion of co-generation and generation of electricity from renewable sources of energy.
- (i) The National Electricity Policy and tariff policy.

10.1 that the National Electricity Policy, 2005 further states as under:-

"5.12.1. Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy..."

"5.12.2. The Electricity Act, 2003 provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of electricity from such sources.

...Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost with conventional sources, the Commission may determine an appropriate differential in prices to promote these technologies.”

“5.2.20. Feasible potential of non-conventional energy resources, mainly small hydro, wind and biomass would also need to be exploited fully to create additional power generation capacity. With a view to increase the overall share of non-conventional energy sources in the electricity mix, efforts will be made to encourage private sector participation through suitable promotional measures.”

10.2. that further Section 86 (1) of the Electricity Act, 2003 provides as under:-

“86. (1) The State Commission shall discharge the following functions, namely:-

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person...”

11. We find that in line with the above provisions of the Electricity Act, 2003 and National Electricity Policy, 2005, the State Commission after following Solar Power Policy, 2009 dated 6.1.2009, issued by the Government of Gujarat and following State Commission’s Tariff Order No. 1 of 2012 dated 27.01.2012 has passed the impugned order directing the transmission/distribution licensee to bear the expenses or the cost for laying down the construction of evacuation facilities from the biomass based power project’s and bagasse based co-generation power project’s place to the sub station of the licensee.

12. We may quote here that in the discussion paper, the State Commission had proposed not to include the cost associated with laying of power evacuation line beyond interconnection point as a part of capital cost. The cost associated with erection of transformer, associated equipment and creation of evacuation system up to interconnection point is already included in the capital cost. GETCO was made responsible for laying the power evacuation line from the interconnection point to the nearest GETCO substation.

13. The learned State Commission, in the impugned order, has held that the biomass based power projects and bagasse based co-generation projects have to lay comparatively shorter transmission lines than that of the wind power projects and the size of these projects is in the range of 1 MW to 1`5 MW and the State Commission has, by the impugned order, directed that GETCO/discom shall erect the transmission line from the interconnection point to the nearest GETCO/discom sub station at its own cost. The State Commission has further clarified in the impugned order that the evacuation line related provisions specified under the present tariff order shall be made applicable prospectively for the projects to be commissioned during the control period w.e.f.

1.08.2013. The biomass based power projects commissioned in the previous control period will be governed by the prevalent tariff orders of the Commission.

14. From the above discussions, we come to the conclusion that the State Commission has rightly and justifiably directed the appellants/licensees to construct evacuation facilities for the imposed obligation of the construction of the evacuation facilities on the licensees and we do not find any infirmity or illegality in the findings recorded by the State Commission in the impugned order on this issue. The impugned order so far as it regards the present issue is in conformity with the provisions of Electricity Act, 2003 and National Electricity Policy, 2005 for promoting the co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity. The State Commission while deciding this issue in the impugned order has proceeded on the analogy of the Solar Power Policy, 2009 dated 06.01.2009 issued by the Government of Gujarat for Solar Power Projects which is also one of the renewable energy sources. We agree to the views of the State Commission on this issue. Consequently, issue No. A is decided against the appellants.

ISSUE NO. B - NON -LEVY OF DEMAND CHARGES:

15. On this issue, the following contentions have been made on behalf of the appellants:

15.1. that the State Commission has erred in restricting the charges to be paid by the generators to the distribution licensee for supply of electricity for start-up/standby power drawl by the generating stations only to energy charges and also without any restriction on the quantum of such drawl.

15.2. that the State Commission has failed to appreciate that the appellants distribution licensees cannot be expected to tie up and keep electricity on standby without any commitment on behalf of the generators to draw electricity.

15.3. that the State Commission has failed to appreciate that the tariff design applicable for the consumption of electricity is two parts, namely, fixed charges and energy charges. Both the above components together compensate the appellants distribution licensees for the power purchase cost incurred. The very concept of demand charges is to compensate the distribution licensees for the unavoidable costs incurred. In the circumstances, requiring the generators to only pay the energy charges for drawl of electricity would cast the burden for the demand charges on the appellants distribution licensees and consequently on the consumers at large in the State of Gujarat.

15.4. that the State Commission has failed to appreciate that there being no restriction on the quantum of drawl of electricity by the generators, the generators would be in a position to draw as much electricity by only paying the energy charges. There is also no restriction on the time period when the electricity could be drawn, which could be both when the generating station is in operation and not in operation. The State Commission has failed to appreciate that in any event, during the period when the generating station is not in operation, the generator ought not to be allowed to draw electricity without any restriction and upon payment of only the energy charges.

15.5 that the State Commission has failed to appreciate that the biomass based generators do not operate their generating station throughout the year and are in operation only during the period when biomass fuel is available. In the circumstances, there are substantial periods of time when the generating station is not in operation, there is no availability or schedule provided and in such cases there ought not to be any obligation on the part of the appellants distribution licensees to supply electricity at energy charges. The generator ought to have a contract demand with the distribution licensee or otherwise make alternative arrangement for electricity consumption.

15.6. that the State Commission ought to have provided for the consumption of all and every nature from the supply by the distribution licensees ought to be set off in quantum against the supply of electricity from the generating company on monthly basis instead of directing the distribution licensees to supply electricity to the generating company at energy charges only.

16. **Per contra** the following points have been raised on behalf of respondent no.2 on this issue relating to contract demand.

16.1. that the appellant has willfully erred in stating that the biomass based generators do not operate their generating station throughout the year and are in operation only during the period when biomass fuel is available.

16.2. that as per the impugned tariff order, the Commission's decision is as under:-
"Commission's Decision:- For analyzing the PLF of biomass based power projects, the Commission has considered the approach followed by CERC/SERCs in this regard. The Commission has also referred to the submission under the report titled 'Operating norms of biomass project report prepared by CEA. Considering all the facts, the commission decides to retain the PLF for biomass based power projects as 70% in the first year of operation and 80% from the second year onwards."

16.3. that for promoting renewable energy sources like wind and solar in the State of Gujarat, few promotional measures were provided which are as under:-

16.3.1. As per the Tariff order no.1 of 2012 for "Determination of Tariff for Procurement of Power by the Distribution Licensees and Others from Wind Power Projects: dated 08.08.2012:-

"4.6. Banking of Surplus Wind Energy: Commission's Decision

... as a promotional measure the Commission decides to continue the present practice of settlement of excess generation after set off in case of captive wind power projects in the state....

...In other words, WEGs opting for captive use of the energy generated shall be eligible to get set off against the energy generated during peak and normal hours as specified by the Commission in the tariff orders. The WEGs are eligible for one month banking for the electricity generated during the same calendar month..."

16.3.2. As per the Solar Power Policy, 2009 by Government of Gujarat dated 6th January, 2009-

"17. Forecasting and Scheduling: The SPG based generation shall not be covered under scheduling procedure for Intra State ABT. However, the actual energy injected in the grid during particular time block of 15 minutes shall be post-facto considered in drawl schedule for sale of power to licensee/Third party or for giving set-off against the consumption of recipient unit in case of wheeling.".

16.4. that presently, the Wind Power Generators (WPGs) & Solar Power Generators (SPGs) in the state of Gujarat are availing net metering i.e. they are able to set-off the auxiliary power consumption required for cold/black start with their power generation at the end of the month. Which means that WPGs & SPGs are not paying any demand charges to the distribution licensees/discom's for getting their initial power required for star-up of the plants, which is required on daily basis.

16.5. that the impugned order dated 08.08.2013, mentions as follows:-

"1.1. Potential for Biomass Power and Bagasse Co-generation Projects:- The potential assessment study carried out by the Ministry of New and Renewable Energy (MNRE) indicates grid connected biomass power potential and bagasse co-generation potential in the order of 1014 MW and 350 MW respectively. The installed capacity of grid connected biomass based power projects in the state is 31.2 MW; all of which were

commissioned during the control period of previous tariff order dated 17th May, 2010 and 7th February, 2011. The State does not have operational grid connected bagasse based co-generation project as on date”.

16.6. that these promotions like waiver of demand charges, are very much needed for promoting the generation from renewable energy sources like biomass, as biomass is under very nascent stages of development in Gujarat. Hence, the appellants arguments on this issue are liable to be rejected.

17. We have considered the rival submissions of the parties on this issue. The learned State Commission has, in the impugned order, clearly held that the startup/standby power required by the biomass based generator shall only be charged as per the energy charges applicable to HT consumers without any payment of fixed/demand charges. The grievance of the appellants on this issue is that the biomass based power generator should be under obligation to maintain contract demand and pay minimum/demand charges.

18. The contention of the appellants that the State Commission has erred in restricting the energy charges to be paid by the generators to the distribution licensees for supply of electricity for start up/stand by control by the generating stations only to the energy charges and that too without any restriction on the quantum of such power. According to the appellants, in the circumstances of the matter, requiring the biomass generators to pay only the energy charges for use of electricity would cast the burden for the demand/fixed charges on the appellants distribution licensees and consequently on the consumers at large in the State of Gujarat. One more contention of the appellants is that the State Commission has not duly considered the tariff design applicable for the consumption of electricity in two parts, namely, fixed charges and energy charges. The very concept of demand charges is to compensate the distribution licensees for the unavoidable costs incurred. We are unable to accept all the contentions made on behalf of the appellants on this issue. The learned State Commission after considering all the points involved has rightly recorded in the impugned order dated 08.08.2013 that the start up/stand by power required by the biomass based generator shall only be charged at the energy charges applicable to the HT consumers without any payment of fixed/demand charges. The startup power/standby power is expected to be used for short durations and in small quantum for running station auxiliaries and control systems. It is not required to be drawn when the power plant is in operation. The benchmark PLF for recovery of fixed charges of the biomass generators is 70% during the first year of operation and 80% thereafter. The State Commission, for promoting the renewable energy sources like-wind and solar in the State of Gujarat, has passed the impugned order and rightly followed its earlier tariff order no.1 of 2012 dated 27.1.2012 which provided few promotional measures. The State Commission has further acted in pursuance of the Solar

Power Policy, 2009 issued by the Government of Gujarat on 06.01.2009. We are of the view that the measures to promote renewable energy sources like wind and solar in the State of Gujarat including the waiver of demand charges are very much needed because biomass is under very nascent stages of development in the State of Gujarat and the same has rightly been observed by the State Commission in its impugned order dated 08.08.2013.

19. We approve the view and the findings recorded by the State Commission on this issue in its impugned order dated 08.08.2013. We further hold that the State Commission is fully and legally justified in restricting the charges for the start up/stand by power for biomass and bagasse projects to only energy charges without any obligation for the demand charges/fixed charges on the biomass and bagasse based generation projects. We do not find any infirmity or illegality in the findings recorded by the State Commission on this issue in the impugned order. However, we feel that the State Commission should have considered fixing a ceiling on quantum of drawal for startup/standby so that such power is not misused. Therefore, the State Commission is directed to consider ceiling on quantum of power up to which the power can be drawn by biomass/bagasse generator by paying only energy charges. This issue no. B is also decided against the appellants.

ISSUE NO. C- GENERIC TARIFF TO BE MADE CAPPED TARIFF AND SUBJECT TO ADJUSTMENT:

20. The following submissions have been made by the appellants on this issue.

20.1. that the State Commission ought to have directed the generic tariff to be determined by it on assumptions in regard to capital cost and other parameters to be a capped tariff and subjected such capped tariff to appropriate prudent check to be undertaken based on actual capital cost incurred and other actual financial parameters so as to limit the actual tariff to servicing reasonable actual cost and reasonable return.

20.2. that the State Commission ought not to allow more than the reasonable cost and reasonable return to the project developers as such costs are to be a pass through in the tariff payable by the consumers in general. The project developers cannot be allowed to make windfall gain at the cost of the consumers.

21. Per contra, learned counsel for the respondent no.2 M/s. Abellon Clean Energy Ltd., taking us through the reply filed by it, has made the following submissions on this issue relating to capped tariff:-

21.1. that the appellants have erred to contend that the State Commission ought to have directed the generic tariff determined by it on assumptions in regard to capital cost and other parameters to be a capped tariff and subjected such capped tariff to appropriate prudent check to be undertaken based on actual capital cost incurred and other actual financial parameters so as to limit the actual tariff to servicing reasonable actual cost and reasonable return.

21.2. that the appellants' submission that the project developers cannot be allowed to make windfall gain at the cost of the consumers is totally wrong because as per Regulation 10 relating to tariff design of the generic tariff of the Central Commission's (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012, 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.

Levelling 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".

21.3. that this Appellate Tribunal vide judgment dated 02.12.2013 in Appeal No. 132 & 133 of 2012 has observed as under:-

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

(A) We find that in the tariff order dated 17.05.2010 itself, the State Commission was conscious that there was no enough data available regarding price of biomass fuel and the market for biomass is unorganized. However, the State Commission fixed the fuel price for base year i.e. FY 201-11 and determined the fuel price for the 20 years period with an escalation of 5% per annum. When the fuel price is uncontrollable and it is known that the biomass fuel market is unorganized, it is not prudent to decide the price of biomass fuel for a long period covering the entire PPA of 20 years in the generic tariff. The fixed costs can be decided for the entire span of PPA for 20 years and variable cost for a shorter control period to be reviewed after the end of the control period."

21.4. that as the biomass prices are uncontrollable and the biomass market is unorganized, the State Commission, in impugned order dated 08.08.2013, has declared a two part tariff for the next control period. The fixed costs can be decided for the entire span of PPA for 20 years and variable cost for a shorter control period is to be reviewed after the end of the control period, so that market prices of biomass can be appropriately factored. The control period for the impugned order dated 08.08.2013 is of three years.

21.5. that it is worthy to note that even for conventional power, the STUs/discoms and other licensees, pass on the increase in fuel prices to the consumers, by charging fuel surcharge which are regulated by State Commissions and revised from time to time on quarterly basis. This is done to safeguard the interest of the generator against market risks of fuel price escalation.

21.6. that the process of determination of tariff is in accordance with the Central Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012, and therefore, all the arguments of the appellants are liable to be rejected. Further, the instant appeal is liable to be rejected as the impugned order passed by the State Commission is to promote the biomass based power plants in Gujarat in pursuant to the provisions of Electricity Act, 2003 National Electricity Policy and Central Commission's (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012.

22. We have cautiously considered the rival submissions made by the parties on this issue relating to capped tariff. The learned State Commission, in its impugned order dated 08.08.2013, has decided generic tariff without providing for the same as a capped tariff. According to the appellants, the State Commission has wrongly decided generic tariff without providing for the same as a capped tariff and subject to such capping there should be trueing up, the prudent capital cost actually incurred or reasonably expected to be incurred and also on other financial and technical parameters to avoid such projects getting returns in excess of the reasonable returns.

23. We are unable to agree to the main contention of the appellants on this issue that the State Commission ought to have directed the generic tariff determined by

it on assumptions in regard to capital cost and other parameters to be a capped tariff and subjected such capped tariff to appropriate prudent check to be undertaken based on actual capital cost incurred and other actual financial parameters so as to limit the actual tariff to servicing reasonable actual cost and reasonable return. According to the appellants the State Commission ought not to allow more than the reasonable return cost and reasonable return to the project developers as such costs are to be a pass through in the tariff payable by the consumers in general. The learned State Commission, in our view, has rightly decided this issue in accordance with the provisions of the Electricity Act, 2003, National Electricity Policy, 2005 and Central Commission's (Terms and Conditions for Tariff Determination from Renewable energy Sources) Regulations, 2012 just to promote the biomass based power plants in the State of Gujarat.

24. We do not find any force in any of the contentions made on behalf of the appellants on this issue. The State Commission has rightly and legally decided this Issue No. 'C' against the appellants. We affirm the findings recorded on this issue by the State Commission and this Issue No. 'C' is also decided against the appellants as the same does not suffer from any illegality or perversity.

Since all the issues have been decided against the appellants, this Appeal merits dismissal.

SUMMARY OF FINDINGS

25. We do not find any infirmity in the State Commission imposing the obligation of construction of the evacuation facilities on the licensees, namely, GETCO/discoms (transmission/distribution licensee) for the bagasse/biomass based generation projects to be commissioned in the State of Gujarat on or after 01.08.2013 for the control period commencing from 01.08.2013.

26. The learned State Commission has, by the impugned order dated 08.08.2013, rightly and correctly determined the generic tariff applicable for the biomass based generators and bagasse based co-generators applicable for the control period from 01.08.2013.

27. The State Commission has, in the impugned order, legally and correctly held that the start up/stand up power required by the biomass generators shall only be charged at the energy charges applicable to HT consumers without requiring any payment of fixed or demand charges. However, we have given some directions to

the State Commission to consider the fixing of a ceiling on quantum of power to be drawn by biomass/bagasse based generators for startup/standby control by paying only the energy charges (Refer paragraph 19).

28. We are unable to agree to the contention of the appellants that the State Commission ought to have directed the generic tariff to be determined by it on assumptions in regard to capital cost and other parameters to be a capped tariff and subjected such capped tariff to appropriate prudent check to be undertaken based on actual capital cost incurred and other actual financial parameters so as to limit the actual tariff to servicing reasonable actual cost and reasonable return.

29. Consequently, the instant Appeal is dismissed as the same is devoid of merits. The impugned order dated 08.08.2013 passed by the State Commission is hereby affirmed as we do not find any illegality or perversity therein. No order as to costs.

Pronounced in Open Court on this 9th day of January, 2015.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ **REPORTABLE/NON-REPORTABLE**

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