

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

O.P. No. 3 of 2012

Dated : 23rd March, 2015

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

**Indian Biomass Power Association
Sigapi Achi Building, 4th Floor,
18/3, Rukmani Lakshmipathi Road,
Egmore, Chennai-600008.**

.....Appellant(s)

Versus

- 1. Ministry of Power, Govt. of India & Anr.
Sharam Shakti Bhawan,
New Delhi.**
- 2. Ministry of New & Renewal Energy,
Government of India,
New Delhi.**

3 to 9

**Andhra Pradesh Electricity Regulatory Commission,
4th & 5th Floors, 11-4-660, Singareni Bhavan,
Hyderabad-500004.**

**Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower, Opp. Nehru Bridge,
Ashram Road, Ahmedabad-380009.**

**Orissa Electricity Regulatory Commission,
Bidyut Niyamak Bhavan, Unit-VIII,
Bhubaneswar-751012.**

**Chhattisgarh State Electricity Regulatory Commission,
Irrigation Colony, Shanti Nagar,
Raipur-492001.**

**Madhya Pradesh Electricity Regulatory Commission,
Metro Plaza, 4th & 5th Floor, E-5, Arera Colony,
Bittan Market, Bhopal-462016.**

**Rajasthan Electricity Regulatory Commission,
Vidhyut Viniyamak Bhawan,
Near State Motor Carage, Sahkar Marg,
Jaipur-302001.**

**Tamil Nadu Electricity Regulatory Commission,
No.19A, Rukmini Lakshmipathy Road,
(Marshals Raod, TIDCO Complex, Egmore,
Chennai-600008.**

.....Respondent(s)

Counsel for the Appellant(s): Mr. G. Umapathy
Ms. R. Mekhala

Counsel for the Respondent(s): Mr. C.K. Rai for MPERC
Ms. Swapna Seshadri and
Mr. Anand K. Ganesan for CSERC
Ms. Suparna Srivastava for GERC
Ms. Nishitha Sikrora for R.5 & 8
Mr. K.V. Mohan and
Mr. K.V. Balakrishna for APERC
Mr. B.K. Nayak &
Mr. Rutwik Panda for OERC
Mr. Anshu Malik for OERC
Mr. S. Vallinayagam for TNERC
Mr. Samir Malik for PTC
Mr. Aditya Dewan for PFS
Mr. Rajesh Kumar
Mr. M.G. Ramachandran
Mr. Anish Garg for JERC

ORDER

This Original Petition has been filed by Indian Biomass Power Association seeking appropriate direction under section 121 of the Electricity Act, 2003 to the State Electricity Regulatory Commissions regarding revision of annual tariff of biomass based power projects, effective implementation of renewable purchase obligation and renewable energy certificate mechanism and to provide open access to biomass based power projects.

2. The Appellant is an association of biomass power producers in India representing their interest throughout the country. The Petitioner had made Ministry of Power and Ministry of New & Renewable Energy, Government of India as the Respondents. However, since the directions were sought for to certain State Commissions, this Tribunal vide order dated 5.12.2012 issued notice to Andhra Pradesh, Chhattisgarh, Gujarat, Madhya Pradesh, Orissa, Rajasthan and Tamil Nadu State Commissions.
3. The Petitioner has made the following submissions:-
 - a) Biomass power is a renewable energy source which apart from generating renewable energy provides benefit for economic development and employment creation in rural areas. There is

also considerable saving in transmission and distribution loss of the utility as the biomass projects are located in rural area. Biomass is purchased from the farmers and the price of the fuel varies with time.

- b) The current availability of biomass in India is about 120 to 150 Million Tonnes per annum covering agriculture and forestry residues which corresponds to a potential of about 18000 MW of generation capacity. However, the present installed capacity of biomass based power plants is of the order of 1142 MW. Thus, only 6.3% of the total potential of biomass energy has been exploited. One of the reasons for slow development of this sector is on account of non-revision of tariff on a regular basis and non-revision of biomass fuel cost on annual basis. While some of the State Commissions are reviewing the tariff every year taking into consideration the prevailing biomass fuel price to encourage the development and sustainable operation of biomass based power projects, there are some Commissions, namely Madhya Pradesh, Orissa, Gujarat, Tamil Nadu and Rajasthan which are not revising the tariff on annual basis on the basis of actual cost of biomass fuel.

- c) Another major concern is that some States have not been providing open access to the biomass based power projects for selling power to 3rd party within or outside the state. This is not in consonance with the provision of Section 42 of the Electricity Act, 2003.
4. The following reliefs have been sought by Petitioner:-
- (a) Exercise the power under Section 121 of the Electricity Act, 2003 and issue appropriate instructions/directions to all the State Commissions to revise the tariff within stipulated defined time period on an annual basis without altering the control period in any manner with regard to the non-conventional energy sources and in particular biomass energy sector.
- (b) Direct all the State Electricity Regulatory Commissions to consider grant of Open Access facility to all powers producers irrespective of nature of sources.
- (c) Direct all the State Electricity Regulatory Commissions to ensure that the purpose of REC mechanism is achieved without diluting the scheme in any manner.

5. However, during the proceedings before this Tribunal, the Learned Counsel for the Appellant did not press the 3rd issue relating to effective implementation of REC mechanism.
6. On the issue of annual determination of fuel cost and the variable charges of biomass based power projects and providing open access, we have heard Shri G. Umapathy, Learned Counsel for the Petitioner as also Learned Counsel for the State Commissions.
7. Based on the submissions made by the Learned Counsel for the State Commission, the following position emerges:
 - a) **Gujarat:** Gujarat Commission has determined generic tariff for biomass based power stations for the Control Period 1.6.2010 to 31.3.2013. The levellised tariff has been determined for 20 years considering base year fuel cost with escalation of 5% per annum. There is no provision to compensate the generator in case the actual fuel cost is in excess of the cost fixed by the State Commission. The Open Access Regulation provide non-discriminatory open access to be granted to renewable power projects.
 - b) **Orissa:** The Orissa Commission has determined generic tariff for biomass power plants for a period of 13 years from 2010-11 to

2022-23 by its order dated 14.9.2010. The State Commission has fixed the variable tariff for different years and levelled fixed tariff for the above period. The above tariff was reviewed by the State Commission by the order dated 23.9.2011 and the variable charges were increased. The first Control Period has ended in the FY 2012-13. The Commission shall re-determine the tariff for the next control period by taking into account changes in various technical and financial parameters. Open Access is permitted to consumers exceeding 1 MW to take power from a generating company w.e.f. 1.10.2009. As per OERC (Renewable & Co-generation Purchase Obligation & its Compliance) Regulations, 2010, third party sale from renewable energy sources shall be exempted from cross subsidy surcharge determined by the Commission from time to time.

- c) Chhattisgarh:** The Commission's Order dated 28.12.2011 in Petition No. 22 of 2011(T) specifies for determination of energy charges every year. Energy charge is revised every year considering the increase in fuel cost as per the RE Tariff Regulations, 2012. Provision has also been made in RE Tariff Regulations, 2012 for review of tariff. Open Access Regulation

specified facilitation of open access to all power developers irrespective of nature of source. Renewable energy power developers have been given preferential treatment in Open Access Regulations. As per spirit of the Act, there is non-discriminatory provision for grant of open access in Open Access Regulations.

- d) Madhya Pradesh:** The State Commission has already passed a Tariff Order dated 2.3.2012 determining the generic tariff for biomass based power plants for the Control Period of 2012-14. The Commission has decided two part tariff viz. fixed and variable charges. The fixed tariff shall remain valid for the project life of 20 years. The variable tariff is determined for one year and thereafter there will be annual revision of fuel cost. Under the Policy of 2006 dated 17.10.2006, the Government of MP provided incentives such as exemption on Electricity Duty and Cess for 10 years, subsidy on wheeling charges, reduction of contract demand any time and 50% exemption on stamp duty on purchase of land to the project developers. These incentives are still enjoyed by the generators who have registered their projects under the above policy. The biomass based generators who have

taken advantage of the policy and registered under the policy are subject to obligation that energy generated from such plants is used within the State. The State Commission in exercise of power under Section 181 read with Section 86 (1) (e) has notified Cogeneration and Generation of Electricity from RE Sources Regulations, 2010 in which Regulation 8 provides that cogeneration and renewable generators shall have open access within the States as per Open Access Regulation under Section 42 of the Electricity Act subject to the provision of State Government Incentive Policy notified on 17.10.2006. Thus, open access restrictions are only applicable to the generators who are registered under the policy and have availed benefits under the Policy.

- e) Rajasthan:** The State Commission has determined the tariff of biomass plants in terms of its Tariff Regulations, 2009. The State Commission has determined/fuel price for the base year 2009-10 and linked the fuel price to the Indexation Formula as outlined in the Regulations. Alternatively the generators have option for fuel cost escalation of 5% per annum.

- f) **Tamil Nadu:** The State Commission has decided to determine tariff by order dated 27.04.2009 for biomass plants valid for a period of two years which was further extended upto 31.7.2012. The State Commission has determined fuel price for the base year and has provided for escalation @ 5% per annum following the Central Commission's Regulations. The Commission has provided unrestricted open access to all non-conventional energy generators without any discrimination.
8. We find that the biomass fuel market in the country is an unregulated market. The price of biomass fuel varies with the demand and supply position. Besides power generation, biomass fuel is also used in various industrial applications as a substitute of fossil fuel. Industry uses biomass fuel as a substitute for the fossil fuels. The price of biomass varies with demand of biomass fuel by power projects and other industries vis-à-vis the availability of biomass fuel.
9. We find that some of the State Commissions have determined the tariff of biomass based projects for 20 years taking into consideration the cost of fuel prevailing in the base year at the time of tariff determination and providing annual escalation of fuel based on WPI and CPI indices or a fixed percentage escalation. However, in some States, the price of

fuel has increased substantially, much more than the escalation based on indices fixed by the State Commissions. In such case, the biomass based power plants have experienced difficulties in sustaining their operation at normative plant load factor.

10. We find that in case of conventional thermal power projects the actual fuel cost is a pass through in tariff determined under Section 62 of the Electricity Act, 2003. However, cost of fossil fuel is notified by the supply companies which are mostly Public Sector Undertakings or by the Government of India. For imported fuel also international indices/benchmarks are available. However, the biomass fuel market is unregulated and the fixation of price of biomass would require state-wise study to be conducted from time to time to determine the price realistically.
11. Shri Umapathy has brought to our notice that the Central Commission by Order dated 18.3.2014 has made amendment to Regulation 44 of the Principal Tariff Regulations for Renewable Energy Sources, 2012 as under:

“Attentively, biomass fuel price shall be decided annually by the appropriate Regulatory Commission through an independent survey which could be carried out by constituting a State Level Committee consisting of representatives of State Nodal Agency, State Government, Distribution Licensees, biomass power producers association and any other organizations.”

He suggested that similar directive may be given to the State Commissions.

12. We have been informed that in some states, restrictions have been imposed on biomass based power plants for selling power to 3rd party outside the State.
13. Section 61 of the Electricity Act, 2003 provides that the Appropriate Commission in specifying terms & conditions for determination of tariff shall be guided by the following:
 - (a) *the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
 - (b) *the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
 - (c) *the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
 - (d) *safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
 - (e)
 - (f)
 - (g)
 - (h) *the promotion of co-generation and generation of electricity from renewable sources of energy;*
 - (i) *the National Electricity Policy and tariff policy.*
14. Section 86 (e) mandates that the State Commission shall promote cogeneration and generation of electricity from renewable sources of energy.

15. Section 42 (2) of the Electricity Act, 2003 mandates the State Commission to introduce open access on payment of surcharge in addition to the wheeling charges as may be determined by the State Commission.
16. After hearing the Petitioner and the Learned Counsel for the State Commissions, we feel that this Tribunal should give some directions under section 121 of the Electricity Act to the State Commissions for tariff determination in future with a view to encourage development of biomass based power projects and ensure sustainable operation of the plant capacity as per the mandate given under the Electricity Act, 2003.
17. Accordingly, this Tribunal deems it appropriate to give following directions to the State Commission for future for determination of tariff for biomass based power projects :-
 - i) The State Commission shall determine two part tariff i.e. fixed and variable charges in respect of biomass based power projects instead of a single flat energy tariff. The fixed charges may be determined for the life cycle of biomass power projects. However the variable charges may be determined periodically on the basis of prevailing biomass fuel price which may be fixed after carrying out a State specific study. The fuel price may be

determined annually through an independent study. Attentively fuel price may be determined for the first year of the Control Period of say 2 to 3 years with percentage annual escalation linked to appropriate indices for the subsequent years of the Control Period. At the end of the Control Period, the fuel price may be re-determined for the first year of the next Control Period.

- ii) Under the Electricity Act, 2003, the generating companies have freedom to supply electricity to the customers of their own choice. The State Commissions have to provide non-discriminatory open access on payment of the requisite charges. Therefore, the biomass based generators who have not entered into a Power Purchase Agreement with the distribution licensees of the host State should be given non-discriminatory open access for the transmission & distribution system to enable supply of power to third parties within or outside the State subject to the provision of the Act and the Regulations. It has been pointed out by the Learned Counsel for MP State Commission that the State Government had given some incentives under the State Govt. Policy to renewable energy generators provided such generators supply energy within the State. Therefore such biomass projects

who are claiming the incentive under the State Govt. policy could not claim inter-State open access.

18. With the above directions, the Petition is disposed off. The Registry is directed to send a copy of this order to all the State Commissions and the Central Commission.
18. Pronounced in the open court on this 23rd day of March, 2015.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

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