

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

**APPEAL NO. 215 OF 2014**

**Dated: 2<sup>nd</sup> March, 2016**

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of:-**

**Vaayu (India) Power Corporation Pvt. Ltd.  
Enercon Tower, A-9 Veera Industrial Estate,  
Veera Desai Road, Andheri (West)  
Mumbai-400053**

**...Appellant**

**Versus**

**Andhra Pradesh Electricity Regulatory Commission,  
4<sup>th</sup> and 5<sup>th</sup> Floors, Singareni Bhavan,  
Red Hills, Hyderabad-500004.**

**...Respondent No.1**

**Transmission Corporation of Andhra Pradesh Ltd.  
Vidyut Soudha,  
Hyderabad-500082.**

**...Respondent No.2**

**Central Power Distribution Company of Andhra Pradesh Ltd.  
11-5-423/1/A, First Floor,  
Singareni Collieries Bhawan,  
Lakdikapul, Hyderabad-500001.**

**...Respondent No.3**

**Southern Power Distribution Company of Andhra Pradesh Ltd.  
Upstairs, Hero Honda Showroom,  
Renigunta Road, Tirupati-517501.**

**...Respondent No.4**

**Northern Power Distribution Company of Andhra Pradesh Ltd.  
11-5-423/1/A, First Floor, 1-7-688,  
Postal Colony, Hanamkonda,  
Warangal-506001.**

**...Respondent No.5**

**Eastern Power Distribution Company of Andhra Pradesh Ltd.,  
Sai Shakti, Opp. Saraswati Park,  
Daba Gardens, Visakhapatnam-530020. ...Respondent No.6**

**Andhra Pradesh Power Coordination Committee,  
Vidyut Soudha, Khairtabad,  
Hyderabad-500082. ...Respondent No.7**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Mr. Kumar Mihir  
Mr. Vishal Gupta  
Mr. Shubham Arya  
Mr. Avinash Menon

Counsel for the Respondent(s) : Mr. S.B. Upadhyay, Sr. Adv.  
Ms. Mandakini Ghosh  
Mr. S. Shaw  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Meghana Aggarwal for R-2 to 7

Mr. K.V. Mohan  
Mr. K.V. Balakrishnan for R-1

## **JUDGMENT**

### **PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER**

The present Appeal is being filed under Section 111 of the Electricity Act, 2003 by M/s. Vayu (India) Power Corporation Pvt. Ltd. (hereinafter referred to as the “**Appellant**”) against the Impugned Order dated 10.06.2014 passed by the Andhra Pradesh Electricity Regulatory

Commission (hereinafter referred to as the “**State Commission**”) in O.P. No. 53 of 2013.

2. The Appellant is a generating company engaged primarily in the establishment, operation and maintenance of wind generating units and has set up a wind power generating station (Phase-1 to VII) having an aggregate capacity of 50.4 MW at Kondameedipalli in Kurnool district in the State of Andhra Pradesh.
3. The Respondent No. 1 is the State Commission which has passed the Impugned Order dated 10.06.2014 in O.P. No. 53 of 2013.
4. The Respondent No. 2 is the Transmission Corporation of Andhra Pradesh and is the State Transmission Utility (STU) notified under Section 39 of the Electricity Act, 2003.
5. The Respondent No. 3 is Central Power Distribution Company Ltd. and is a Distribution Licensee in the State of Andhra Pradesh.
6. The Appellant has entered into Power Purchase Agreements (PPAs) with the Respondent No.3 for the entire 50.4 MW power being generated by the Appellant in its wind generating station at Kondameedipalli in Kurnool district of the State of Andhra Pradesh.

7. Respondent Nos. 4, 5 and 6 are the other Distribution Licensees serving consumers in the State of Andhra Pradesh.

8. The Respondent No.7 is the Andhra Pradesh Power Coordination Committee.

9. **Fact of the Appeal:**

(a) The State Commission vide its order dated 01.05.2009 determined generic tariff of Rs.3.50 per kWh for sale of power by the wind energy generator having control period from 01.05.2009 to 31.03.2014.

(b) Subsequent to issuance of above generic order, the Appellant entered into Power Purchase Agreements (PPAs) with Respondent No.3 on 22.07.2010 for the entire capacity of 50.4 MW power.

(c) The wind generating units of the Appellant were commissioned in the years 2010 and 2011 i.e. within the control period of the State Commission's Order dated 01.05.2009.

- (d) M/s. Guttaseema Wind Energy Company Pvt. Limited challenged the above generic order issued by the State Commission on 01.05.2009 before this Tribunal in Appeal No. 194 of 2009.
- (e) This Tribunal vide its Order dated 03.05.2011 set aside the above order of the State Commission dated 01.05.2009 and directed the State Commission to re-determine the tariff for wind energy projects as per the principles laid down by this Tribunal in its said Order at the earliest (preferably within four months).
- (f) The Appellant contends that the State Commission's Order dated 01.05.2009 having been set aside became non est and as such, the tariff was required to be re-determined by the State Commission afresh for the control period commencing from 01.05.2009, in compliance of the directions of this Tribunal. Subsequently, Petitions were filed before the State Commission by some of the wind developers for curtailment of control period and re-determination of the tariff. In respect of the said Petitions, the State Commission passed an order dated 15.11.2012, wherein it determined tariff of Rs.4.7 per kWh for projects where the PPAs would be executed during the period from 15.11.2012 (the date of issuance of this Order by the State Commission)

upto 31.03.2015. In this Order dated 15.11.2012 the State Commission has held that the generic tariff order dated 01.05.2009 would continue to apply to the wind generating projects for which the PPAs had been executed between 01.05.2009 to 14.11.2012.

- (g) Aggrieved by this Order dated 15.11.2012 issued by the State Commission, the Appellant filed a Petition being O.P. No. 53 of 2013 seeking re-determination of tariff for the PPAs already executed between 01.05.2009 to 14.11.2012, in view of this Tribunal's Order dated 03.05.2011 setting aside the State Commission's earlier order dated 01.05.2009 and directing therein the State Commission to re-determine tariff for the wind energy projects. As per the Appellant, the applicability of the earlier generic tariff of Rs.3.50 for the wind energy power projects as per the State Commission's Order dated 01.05.2009 does not take effect since the said order of the State Commission dated 01.05.2009 became non est.
- (h) As per the Appellant, effect of setting aside of the order dated 01.05.2009 of the State Commission in law is that the said order does not exist. Thus the generic tariff of Rs.3.50 per kWh

determined under the said order dated 01.05.2009 is no longer applicable or can be enforced.

- (i) The Order dated 15.11.2012 of the State Commission determined the tariff for PPAs to be executed between 15.11.2012 to 31.03.2015. As per Appellant, no tariff exists for the projects for which the PPAs were already executed during the period of 01.05.2009 to 14.11.2012.
- (j) While disposing the Appellant's petition filed vide O.P. No. 53 of 2013 for re-determination of tariff for the PPAs already executed between 01.05.2009 to 14.11.2012, the State Commission vide its order dated 10.06.2014 has held that the Tariff Order dated 01.05.2009 would continue to apply to the projects for which the PPAs had been executed between 01.04.2009 to 14.11.2012 and for the projects for which the PPAs would be executed from 15.11.2012 to 31.03.2015, the re-determined tariff of Rs.4.70 per kWh would be applicable as against the earlier determined tariff of Rs.3.50 per kWh.

(k) Aggrieved by the above decision of the State Commission vide its Impugned Order dated 10.06.2014, the Appellant has filed the present Appeal.

10. The main issue as emerged from the above Appeal which needs to be addressed by this Tribunal is:

**Whether the generic wind tariff order dated 01.05.2009 of the State Commission would hold good for the Appellant even when the same order dated 01.05.2009 is non est in view of this Tribunal's Judgment dated 03.05.2011 as alleged by the Appellant?**

11. We have heard at length the Learned Counsel for the Appellant Mr. M.G. Ramachandran and the Learned Counsel for the State Commission Mr. K.V. Mohan and Learned Sr. Counsel for the Respondent Nos. 2 to 7 Mr. S.B. Upadhyay and considered their written submissions and the arguments put forth during the pleadings and our observations are brought out as hereunder.
12. The Appellant stated that it entered into the PPAs for the entire 50.4 MW capacity of power being generated from its generating station at Kondameedipalli in Kurnool district of the State of Andhra Pradesh based on the generic tariff order dated 01.05.2009 passed by the State

Commission indicating therein the preferential tariff as Rs. 3.50 per kWh. The PPAs entered into were duly approved by the State Commission. Having done so, it should not be construed that tariff of Rs.3.50 per kWh would remain as it is even after the decision of this Tribunal dated 03.05.2011 setting aside the State Commission's Order dated 01.05.2009 and directing the State Commission to re-determine the tariff for the wind energy projects as per the principles laid down by the Tribunal. Learned Counsel for the Appellant stated that this Tribunal had set aside the Order of the State Commission dated 01.05.2009 in its entirety and the Tribunal had noted that the Order dated 01.05.2009 was not in accordance with the provisions of the Electricity Act, 2003, National Electricity Policy and Tariff Policy as well as Regulations framed by the State Commission and the Central Commission for the wind power generating units. The Appellant further submitted that this Tribunal has also held that the Order dated 01.05.2009 of the State Commission was not a reasoned order and in such circumstances, it can not be said that the State Commission's Order dated 01.05.2009 would still survive with respect to the existing wind projects.

13. The Appellant made it clear that it is not seeking to re-open its PPAs but was only seeking for re-determination of tariff as has been directed by this Tribunal since the PPAs executed provided for the generic tariff as decided in the State Commission's Order dated 01.05.2009 which has now no sanctity in law and therefore the said tariff can no longer be effective for such PPAs. The Appellant made submission that the State Commission's subsequent Order dated 15.11.2012 would be made applicable even to the PPAs signed earlier since the earlier Order of the State Commission dated 01.05.2009 is non est.
  
14. As per the Appellant, the State Commission can not, by mere observation in the Order dated 15.11.2012 that the generic tariff as per the State Commission's Order dated 01.05.2009 would continue to govern for the projects having PPAs executed earlier i.e. upto 14.11.2012 that would tantamount to keeping alive its Order dated 01.05.2009 violating thereby the binding directions of the Tribunal as given in its Order dated 03.05.2011. The said observation can not preclude the Appellant from seeking implementation of the directions of this Tribunal and as such the Appellant's Petition before the State Commission was not to be contemplated as review of the State Commission's Order dated 15.11.2012.

15. The Learned Counsel for the Appellant stated that in light of the Judgment of this Tribunal dated 03.05.2011 setting aside the earlier State Commission's Order dated 01.05.2009 directing thereby re-determination of tariff should be complied with and as such it is seeking re-determination of tariff for its entire capacity of 50.4 MW.
16. The Learned Sr. Counsel for the Respondent Nos. 2 to 7 stated that the Appellant entered into the PPAs as per its will and without demur, considering the tariff of Rs.3.50 per kWh and agreed to be bound by the terms of the PPA being well aware of the tariff applicable to the wind energy generating projects in the State. Clause 2.2 of this PPA, provides as follows:-

***“The Wind Power producer shall be paid tariff for energy delivered at the Inter connection point for sale to DISCOM, which shall be firm at Rs.3.50 per unit for a period of 10 years from the Commercial Operation Date (COD). The tariff payable beyond 10<sup>th</sup> year of operation shall be as determined by the APERC.”***

The Learned Sr. Counsel further stated that for the first 10 years from the respective Commercial Operation Date of the Appellant's projects, firm tariff of Rs. 3.50 per kWh would be applicable and beyond the tenth year, the tariff will be re-determined by the State Commission as decided by the State Commission in the generic tariff order dated

01.05.2009 and the same was unconditionally adopted by the Appellant while executing the PPAs for its wind power projects. Besides this tariff, the State Government also provided many benefits to the wind energy generators as detailed out in its generic tariff order dated 01.05.2009 and as a result, the Appellant was eligible for accelerated depreciation benefits, indirect tax benefits, capital subsidy and generation based incentive for the wind energy projects commissioned by the Appellant.

17. The Respondent also clarified that M/s. Guttaseema Wind Energy Company Pvt. Ltd. challenged the generic tariff order dated 01.05.2009 of the State Commission before this Tribunal without executing any PPAs with the Distribution Licensees but having merely Memorandum of Understanding (MoU) for supply of power. This Tribunal in its Judgment dated 03.05.2011 decided as under:-

***“In view of the above, we allow the appeal partly and set aside the order to the extent as indicated above and direct the State Commission to re-determine the tariff for wind energy projects taking note of our findings referred to above and to give a reasoned order at the earliest, preferably within a period of four months from the date of this order.”***

18. The Respondents further contended that at no point of time did this Tribunal indicate that tariff should be re-determined for all existing wind

power generators, who have already entered into PPAs. This Tribunal had adjudicated the matter on the basis of claims made by a wind power generator who was yet to enter into a binding PPA with the State Distribution Licensees and it is clear that this Tribunal had directed the State Commission to re-determine the tariff for the wind energy generators keeping in view the fact that the Appellant before this Tribunal was yet to execute binding PPA implying thereby the applicability of this Tribunal's Order dated 03.05.2011 is for the wind power generators, who intend to enter into a PPA for supply of power to Discoms. The Respondents stated that in light of the Judgment dated 03.05.2011 of this Tribunal, the State Commission re-determined the levelised preferential generic tariff for 25 years period at Rs.4.70 per kWh for all the wind power generating units that will enter into the PPAs commencing from the date of its order i.e. 15.11.2012 till 31.03.2015 and this re-determination vide State Commission's order dated 15.11.2012 was done on the suggestions received from the stakeholders during the public hearings and it was only for the PPAs yet to be executed on the date of the State Commission's order. The State Commission categorically decided that for the PPAs already executed, the tariff of Rs.3.50 per kWh would remain as it is as the

wind energy generators were bound by the terms & conditions of a fixed binding contract i.e. PPA which was entered into without any demur and accordingly there was no vacuum in the tariff for wind energy generators for the period from 01.05.2009 to 14.11.2012. They further mentioned that tariff order of the State Commission dated 15.11.2012 was accepted by all the wind energy generators and remains uncontested till date and it is settled law that this order has attained finality and can not be set aside in collateral proceedings.

19. The Respondents further stated that the State Commission's Tariff Order dated 15.11.2012 for curtailment of tariff period was accepted by the parties.
20. The Respondents further mentioned that the State Commission vide its order dated 15.11.2012 considered the guidelines/directions of this Tribunal vide its Judgment dated 03.05.2011 as it relates to Return on Equity, Capital Cost, Capacity Utilization Factor and interest on the Working Capital and the State Commission's said order stand uncontested and has attained finality. Thus, the order of this Tribunal dated 03.05.2011 indicating therein the principles to be adopted for re-determination of wind tariff have been complied with and there has been no violation done by the State Commission of the directions given

vide this Tribunal's Judgment dated 03.05.2011. After noticing the enhanced tariff for the projects for which the PPAs are yet to be executed, the Appellant filed petition before the State Commission seeking re-opening of the PPAs already executed by it and sought its re-determination of tariff even in respect of the projects established during the period 01.05.2009 to 14.11.2012.

21. The State Commission vide its Order dated 10.06.2014 dismissed the Petition filed by the Appellant by holding that it had absolutely complied with the Judgment of this Tribunal dated 03.05.2011 and there was no ground for amending the tariff in respect of the projects which had concluded PPAs with the free will of the wind power generators during the period 01.05.2009 to 14.11.2012.
22. The Respondents further submitted that the State Commission vide its Impugned Order dated 10.06.2014 had correctly appreciated the sanctity of the binding PPA & in support of the same, the Respondents made reference to the findings of the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Ltd. & Anr. V/s. Sai Renewable Power Private Ltd. & Anr. (2011) 11 SCC 34, to the extent that both Appellant and Respondents agreed to the tariff under a binding PPA and the parties to the PPA can not seek to avoid

obligations provided under the PPA and the relevant extract of above referred judgment of Hon'ble Supreme Court at para 86 is reproduced below:

***“86. In the present case the order dated 20.06.2001 was fully accepted by the parties without any reservation. After the lapse of more than reasonable time of their own accord they voluntarily signed the PPA which contained a specific stipulation prohibiting sale of generated power by them to third parties. The agreement also had a renewal clause empowering TRANSC/APTRANSCO/ Board to revise the tariff. Thus, the documents execute by these parties and their conduct of acting upon such agreements over a long period, in our view, bind them to the rights and obligations stated in the contract. The parties can hardly deny the facts as they existed at the relevant time, just because it may not be convenient now to adhere to those terms. Conditions of a contract cannot be altered/avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. Such conduct, would be hit by allegans contraria non est audiendus.”***

23. The Respondents further stated that the capital investment incurred by the Appellant is front loaded with all capital expenditure incurred before COD and in this case, the Appellant has achieved commercial operation before the date of entering into the PPAs having voluntarily accepted the tariff @ Rs. of 3.50 per kWh for the first ten years. As such in the given circumstances, it is not admissible to seek re-determination of tariff as agreed to by the concerned parties.

Hence, the Appellant does not have any merit in the present Appeal and it should be dismissed.

24. While deciding on the various issues as brought out by the rival parties, let us first consider the relevant portion of this Tribunal's

Judgment dated 03.05.2011, which is reproduced as under:-

***“3.1. The Appellant has entered into Memorandum of Understanding with Non-Conventional Energy Development Corporation of Andhra Pradesh (NEDCAP), for developing 365 MW wind power projects.***

***3.2. The State Commission initiated suo-motu proceedings in O.P. no. 6 of 2009 for fixation of tariff in respect of wind power projects.***

***5. The learned counsel for the State Commission has submitted that the State Commission had arrived at a levelised tariff of Rs. 3.43 per kWh. However, to encourage wind projects, the State Commission has fixed a single part tariff for the first 10 years at Rs. 3.50 per kWh with a provision to review tariff.***

***.....  
.....Besides a tariff of Rs. 3.50 per kWh the other benefits and concessions available to the wind power developers are higher share in CDM benefits, lower supervision charges for interconnection, lower cross subsidy surcharge for open access, etc. Besides the above benefits granted by the State Commission, other benefits available to Renewable energy projects are accelerated depreciation or Generation Based Incentive, Income Tax holiday and concessional excise duty.***

**12. Summary of our findings:**

- i) Return on Equity (ROE) allowed by the State Commission to the Wind Energy Projects is inferior to that provided to Page 22 of 27 Appeal No. 194 of 2009 thermal and other Conventional Power Projects by the State Commission. This is not in consonance with the provisions of the 2003 Act, National Electricity Policy and Tariff Policy. Accordingly, we direct the State Commission to re-determine ROE for wind energy projects after considering its own Regulations for conventional energy sources and Central Commission's Regulations for Wind Energy Projects. However, in no case ROE to Wind Energy Projects shall be less than that admissible to conventional energy projects according to its own Regulations.**
- ii) The second issue is regarding the Capital Cost. In our opinion, the State Commission has not adopted a correct Page 23 of 27 Appeal No. 194 of 2009 approach in relying on the capital cost determined by some State Commissions where capital cost was determined in years 2006/2007. The State Commission has not given a reasoned order in this regard. The State Commission has also not provided any price indexation mechanism for capital cost for projects to be commissioned subsequently during the period for which the tariff is applicable i.e. May, 2009 to March, 2014. Accordingly, the State Commission is directed to redetermine the capital cost with appropriate Capital Cost Indexation Mechanism, after considering the Central Commission's Regulations and give a reasoned order. Page 24 of 27 Appeal No. 194 of 2009**
- iii) The State Commission has not considered the Wind Power density map of the State and has not given a reasoned order regarding Capacity Utilisation Factor. Accordingly, the State Commission is directed to determine the Capacity Utilisation Factor (CUF) after considering the Wind Power density map provided by C-WET/ Ministry of New & Renewable Energy and give a reasoned order.**

- iv) The State Commission has not included Interest on Working Capital which is an important element of the Tariff. We notice that the Interest on Working Capital is permissible according to the State Commission's Tariff Regulations Page 25 of 27 Appeal No. 194 of 2009 applicable to conventional energy sources. The Central Commission has also provided Interest on Working Capital for Wind Energy Projects in its Tariff Regulations. Accordingly, the State Commission is directed to include Interest on Working Capital in the tariff applicable to Wind Energy Projects.**
- v) Regarding open access and third party sale, the State Commission in the impugned order has recorded that the relevant provisions in existing orders/regulations/codes shall also apply to open access in case of wind energy projects. These orders are not part of the Appeal. Thus, the submission on this Page 26 of 27 Appeal No. 194 of 2009 issue is without any substance and the same is rejected.**
- 13. In view of above, we allow the Appeal partly and set aside the order to the extent as indicated above and direct the State Commission to re-determine the tariff for wind energy projects taking note of our findings referred to above and to give a reasoned order at the earliest, preferably within a period of four months from the date of this order."**

We could clearly make a distinction that the Petitioner in the above case was having only MoU and has not entered into a binding PPA. Nowhere in the above Judgment, it has been decided that it would be applicable to the projects where the PPAs have already been executed and the plants have been commissioned.

- 25. Based on the above Judgment of this Tribunal, the State Commission vide its order dated 15.11.2012 re-determined the levelised preferential

generic tariff for the wind power projects for which PPAs were not yet executed but for the PPAs executed prior to this order, the State Commission retained the earlier preferential generic tariff at Rs.3.50 per kWh as per their earlier order dated 01.05.2009. The relevant part of the order dated 15.11.2012 passed by the State Commission is as under:-

“20.....

***Since the tariff pattern being prescribed in the present order is proposed to be applicable only to units which are going to enter into PPA after the commencement of this order i.e. the date of issue of the present order, and will not be applicable for projects already entered into PPA by the date of issue of this order, and the tariff pattern prescribed in the 01.05.2009 order will continue to govern the tariff structure of units which have already entered into PPA before the date of issue of this order, the curtailment of the control period prescribed in the 01.05.2009 order upto the date of issue of the present order will not be tantamount to a review of the previous wind power tariff order dated 01.05.2009. The curtailment of the control period prescribed in the 01.05.2009 order is only to enable the units that are likely to enter PPA after the date of issue of this order to become eligible for the tariff pattern being prescribed in the present order and will have no effect on the tariff rate pattern applicable to the units who have entered PPA in terms of the order dated 01.05.2009, prior to the date of issue of the present order. Since such units will continue to be governed by the earlier tariff pattern, the curtailment of the control period will not amount to a revision of the 01.05.2009 order.***

.....  
.....

**22. Based on the above parameters and considering the useful life of a wind power plant as 25 years, the levelised preferential generic tariff for a 25 year period, works out to Rs.4.6995 per unit or say Rs.4.70 per unit. The Commission accordingly, considers it reasonable to fix the preferential levelised generic tariff 49 in this order at Rs.4.70 per unit for all the units that will enter PPA between the date of this order and 31-03-2015.**

**The Commission, accordingly, in exercise of the powers conferred on the Commission under Section 61(h), 62, 86(1) (a), 86 (1) (b) and 86 (1) (e) of the Electricity Act, 2003, hereby determines the preferential generic levelised tariff over 25 years for wind power generation projects in the State of Andhra Pradesh which enter into PPAs between the date of issue of this order and 31-03-2015 as Rs.4.70 per unit.”**

It is noted that as per the State Commission’s Order dated 15.11.2012 for the Appellant’s projects having commissioned and entered into PPAs prior to the date of issuance of this order i.e. 15.11.2012, the earlier tariff at Rs.3.50 per kWh has not been revised/re-determined.

26. The details of the wind based power project of the Appellant which were divided into seven phases and their respective date of commissioning (“CoD”) are as under:

<b>S.No.</b>	<b>Name of the developer</b>	<b>Capacity (MW)</b>	<b>COD dated</b>
1.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-I)	4.8	02.08.2010
2.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-II)	4.8	25.09.2010
3.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-III)	4.8	30.03.2011

4.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-IV)	11.2	28.09.2010
5.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-V)	4.8	30.09.2010
6.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-VI)	9.6	02.12.2010
7.	M/s. Vaayu (India) Power Corporation Pvt. Ltd. (Phase-VII)	10.4	31.12.2010
	<b>Total</b>	<b>50.4</b>	

27. After having carefully examined the State Commission's Order dated 15.11.2012, we are of the considered opinion that directions given by this Tribunal vide its Judgment dated 03.05.2011 have been fully complied with and the fact that all the seven wind power projects of the Appellant were commissioned much in advance and the Appellant was aware of the total cost incurred by it upto the commercialization and was in a better position to ascertain where it is getting remunerative tariff by accepting the generic tariff order of 01.05.2009 issued by the State Commission and thereafter it had executed the PPAs with the Respondent No.3 without any demur and it was only after issuance of the State Commission's order dated 15.11.2012 in pursuance of the Judgment of this Tribunal dated 03.05.2011, the Appellant made its case for re-determination of earlier agreed tariff and filed the Petition before the State Commission.

28. However, this Tribunal's Judgment dated 03.05.2011 was specific to a wind power generator M/s. Guttaseema Wind Energy Company Pvt. Limited which had only MoU and not a valid PPA and hence it should not be construed that it was open for the PPAs which were already entered into since at no place in the said Judgment of this Tribunal, it has been mentioned that the executed PPAs could be re-opened for re-determination of tariff based on the guidelines/directions indicated therein.
29. While dismissing the Petition of the Appellant, the State Commission in its Impugned Order dated 10.06.2014 has concluded as follows:-

***“43. Even if it is to be accepted that PPAs can be reopened by the Commission for the benefit of those NCE generators, who have suffered unanticipated losses due to circumstances beyond their control, the question is whether the PPAs signed by the petitioner are eligible for such favorable consideration. The petitioner is a wind power generator who set up seven different windmill projects with capacity varying between 4.8 MW and 11.2 MW, which were commissioned between 02.08.2010 and 30.03.2011. All the seven related PPAs were executed by the petitioner and respondent No.2 on a single day, i.e., 22nd July 2010. All the projects were commissioned after the respective PPAs were executed, some well after this date. One project was commissioned five months after the PPA was executed and another as much as eight months after the PPA was executed. The Commission finds it difficult to believe that the petitioner though allegedly suffering from disadvantageous PPAs with tariff fixed to its detriment, went ahead and executed all the seven projects it had undertaken to implement. It must also be remembered that these are wind projects where there is no***

**variable cost and all the capital cost is incurred upfront prior to the COD. Thus, after the PPAs were signed on 22.07.2010 for “a firm tariff of Rs.3.50 per unit” the petitioner went ahead invested in not one, not two but seven independent wind projects and incurred all its costs upfront, these being windmill projects. The petitioner clearly found this tariff as remunerative at that time. Thus the Commission finds it difficult to believe that three years subsequent to making this purely front loaded capital investment, the petitioner developer has been overtaken by cost increases which drastically undermine its economics and profitability and therefore there is a need to reopen the PPAs executed between it and respondent No. 2. On the above grounds, the Commission feels that the petitioner has not made out an effective case for reopening the PPA which allows for payment at Rs.3.50 per unit for the first ten years after the COD.**

**44. The petitioner has not effectively countered the argument of the respondents, who have stated that the petitioner agreed for firm tariff of Rs.3.50 per unit and entered into PPAs and also supplying energy to the respondent No.2 on its free volition; that the petitioner had agreed for all the conditions of PPA and executed the same in a mutually agreed format with price as approved by Commission, that too after being fully aware of the fact that above tariff was a subject matter of Appeal before Hon’ble ATE; that the said PPAs are consented by the Commission; that the petitioner is not eligible for any revision any terms & conditions of the PPAs and that the request of the petitioner for higher tariff is an attempt to reopen PPAs, which have attained finality, and therefore, the request of the petitioner is untenable.**

**46. The Commission notes that there are 46 PPAs executed between 01.05.2009 to 14.11.2012 aggregating to 145.55 MW. All the PPAs belong to the same tariff class as that of the petitioner. Allowing this petition will result in demands from all the other 45 promoters for a similar benefit which may unnecessary burden the consumers. The Commission notes that it is duty bound as per the Electricity Act, 2003 to “safeguard consumers interest and at the same time recover the cost of electricity in a reasonable manner”. The Commission notes that no convincing case has been made out by the petitioner to justify its claim. In this regard,**

***it must be recognized that in a generic tariff determination through a cost plus approach, the tariffs are determined periodically consistent with the changing economic environment. As such the developers who have signed PPAs during a particular policy regime should not automatically assume that they can migrate to another policy regime merely on the ground that the tariff determined later is higher without substantial reasons for the same as such a transition will undoubtedly impose an additional burden on the consumers.***

***47. Keeping in mind the above analysis, the Commission is not inclined to accept the petitioner's proposal to reopen the PPA executed between it and respondent No.2 and re-determine the tariff stipulated therein.***

***48. As mentioned supra, the petitioner's argument for advancing its case rests upon two limbs. First that there is a vacuum in the tariff order and that the Hon'ble ATE orders have not been fully complied with. Second, adequate ground exists for amending PPAs given the Commission's special obligation to encourage projects based upon non conventional energy. Both of these arguments have not been accepted by the Commission for the reasons outlined above. Accordingly, the petition is dismissed. This order is corrected and signed on this 10th day of June, 2014."***

30. We are of the considered opinion that there has been no violation of this Tribunal's Judgment dated 03.05.2011 while deciding the re-determination of generic tariff for the wind power projects for which PPAs were to be signed between 15.11.2012 till 31.03.2015 by the State Commission vide its Order dated 15.11.2012.
31. After examining the commissioning details of wind power projects and its PPAs of the Appellant, we do not find any merit in the present

Appeal since it is relating to the projects already commissioned with valid PPAs of the Appellant prior to the Judgment dated 03.05.2011 of this Tribunal and the State Commission's Order dated 15.11.2012, indicating therein re-determined tariff of Rs.4.7 per kWh for the PPAs to be executed between 15.11.2012 till 31.03.2015 after considering the principles laid down in the Tribunal's Judgment dated 03.05.2011 was appropriate and tenable. And if at all the Appellant was aggrieved by the generic tariff indicated in the State Commission's Order dated 01.05.2009 i.e. Rs.3.5 per kWh, it was quite open to the Appellant whether to accept it and to execute PPAs accordingly or to have taken up its issue of that generic tariff of Rs.3.5 per kWh if not acceptable with State Commission for review of its order dated 01.05.2009 or any other action deemed fit at an appropriate time consequent upon the issuance of the State Commission's Generic Order dated 01.05.2009.

32. It is observed that only after issuance of State Commission's Order dated 15.11.2012, the Appellant with an aim to take advantage of re-determined tariff since higher than that agreed earlier made out its case vide its Petition before the State Commission and sought re-determination of the tariff which was earlier accepted by the Appellant which in our opinion would have amounted to the re-opening

of executed PPAs which are binding contracts upon the concerned parties and as such, the State Commission has rightly not allowed.

33. We are in agreement with the findings of the State Commission in its Order dated 10.06.2014.

**ORDER**

In light of the above, we find no merit in the present Appeal filed by the Appellant and as such, this Appeal is hereby dismissed. The Impugned Order dated 10.06.2014 passed by the State Commission does not suffer from any defect and is hereby upheld. No order as to cost.

Pronounced in the open court on this **2<sup>nd</sup> day of March, 2016.**

**(I.J. Kapoor)**  
**Technical Member**

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

✓  
**REPORTABLE/NON-REPORTABLE**  
dk