

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

**Appeal No. 338 of 2016 &
IA Nos. 732 of 2016, 733 of 2016, 734 of 2016 and 69 of 2017**

Dated : 20th March, 2017

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. T Munikrishnaiah, Technical Member
Hon'ble Mr. I. J. Kapoor, Technical Member**

In the Matter of:

1. M. P. Biomass Energy Developers Association

Regd. Address:

H.No. 6/4, Saket Nagar,
Bhopal – 24,
Madhya Pradesh.

Address for Correspondence:

7th Floor, Minerva Complex,
94, S.D. Road,
Secunderabad – 500 003.

2. M/s. Orient Green Power Co. Ltd.

Project Address:

Sookri (V), Gadarwara (T),
Narsinghpur (D),
Madhya Pradesh.

Address for Correspondence:

Sigappi Achi Building – 4th Floor,
No. 18/3,
Rukmani Lakshmi pathi Road (Marshalls Road)
Egmore,
Chennai – 600 008.

3. M/s. Arya Energy Ltd.

Project Address:

Arya Energy Ltd.

Reula Road, Goundhra (V),
Kotma (T), Annuppur (D),
Madhya Pradesh – 484 334.

Address for Correspondence:

Third Floor, E-14,
Shyam Plaza, Pandri,
Raipur – 492 001

4. M/s. Shalivahana Green Energy Ltd.

Project Address:

Nimidha (V),
Chhindwara (Tehsil and District)
Madhya Pradesh

Address for Correspondence:

7th Floor, Minerva Complex,
94, S.D. Road, Secunderabad – 500 003.

... Appellant(s)

Versus

1. Madhya Pradesh Electricity Regulatory Commission

5th Floor, Metro Plaza,
E-5, Bittan Market, Bhopal – 462 023.

2. Madhya Pradesh Power Management Co. Ltd.

Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur
Madhya Pradesh

... Respondent(s)

Counsel for the Appellant(s) : Mr. M. G. Ramachandran
Mr. Anand K. Ganesan
Mrs. Swapna Seshadri
Ms. Aditi Mohapatra

Counsel for the Respondent(s) : Mr. P. K. Kaurav
Mr. Venkatesh
Mr. Varun Singh
Mr. Pratyush Singh
Mr. Shashank Khurana
Ms. Natabrata Bhattacharya
for R.1

Mr. Ganesh Umapathy
Mr. Purushaindra Kaurav
Mr. Nitin Gaur
Mr. Aditya Singh for R.2

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER,

1. Facts leading to constitution of Full Bench.

The Appeal No. 211 of 2015, filed by Biomass Energy Developers Association and Others against the State Commission's Order dated 13.08.2015 by Madhya Pradesh State Commission, was heard at length by the Bench comprising Hon'ble Justice Mr. Surendra Kumar, the then Judicial Member and Hon'ble Mr. T. Munikrishnaiah, Technical Member and the Judgment was passed on 04.05.2016, determined the GCV of biomass fuels and station heat rate and directed the State Commission of Madhya Pradesh to re-determine the tariff passed on these values. The State Commission passed an Impugned Order dated 30.11.2016 considering the GCV of fuel and station heat rate as decided by this Tribunal in the Judgment dated 04.05.2016. The State Commission in the Impugned Order dated 30.11.2016 incorporated certain terms and conditions and stated that the tariff order shall be subject to terms and conditions mentioned in the Impugned Order dated 30.11.2016.

1.1 Aggrieved by the Order of the State Commission, the Appellants filed the Appeal against the Order dated 30.11.2016 under Section 111 of the Electricity Act, 2003 passed by Madhya Pradesh Electricity Regulatory Commission.

1.2 The Counsel of both the parties requested this Tribunal to constitute a Full Bench and hear the Appeal. Accordingly, the Hon'ble Chairperson of this

Tribunal felt that the matter in the Appeal involves complicated technical issues and hence felt it necessary to have the assistance of both the Technical Members. Hence, this full bench was constituted.

2. The appellant No.1, M.P. Biomass Energy Developers Association, has been formed by the developers setting up biomass based generating stations in the State of Madhya Pradesh and takes up the matters concerning the developers at various levels. The appellant No.2, M/s. Orient Green Power Ltd., is a company incorporated under the Companies Act, 1956 and has set up a 10 MW biomass based power plant in District Narsinghpur in the State of Madhya Pradesh. The plant was commissioned on 22.01.2014. The appellant No.3, M/s. Arya Energy Ltd. is another developer has set up a 12 MW biomass based plant in District Annuppur in Madhya Pradesh. The appellant No.4, M/s. Shalivahana Green Energy Limited is another developer has set up a 15 MW biomass based plant in District Chhindwara in Madhya Pradesh.

2.1. The respondent No.1 is the State Commission exercises regulatory and tariff determination functions under the Electricity Act, 2003 read with the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000. The respondent No.2, Madhya Pradesh Power Management Company is the holding company of all the distribution companies in the State of Madhya Pradesh.

3. **Brief facts of the case:**

3.1. The State Commission passed a Tariff Order dated 02.03.2012 determining the Tariff for procurement of power by the distribution licensees from the biomass based projects for the period 2012-14.

3.2. The Tariff Order dated 02.03.2012 was challenged before this Tribunal in Appeal No. 93 of 2012 by Biomass project developers. The State Commission passed the Impugned Order dated 03.05.2013 re-determining the tariff for biomass projects as per the directions of this Tribunal in the judgment dated 18.02.2013 in Appeal No. 93 of 2012.

- 3.3. Aggrieved by the order dated 03.05.2013 passed by MPERC the Appellants have filed Appeal No. 144 of 2013 before this Tribunal.
- 3.4. This Tribunal in the Judgment dated 29.05.2014, in Appeal No. 144 of 2013 remanded the matter to the State Commission to re-determine the Gross Calorific Value (**GCV**) of the fuel and the Station Heat Rate (**SHR**) as the State Commission has not given reasoned findings for considering the same values with regard to GCV of fuel and SHR.
- 3.5. The State Commission, as per the directions of this Tribunal in the judgment dated 29.05.2014, issued a public notice to the appellants, respondents and Department of New and Renewable Energy, Government of Madhya Pradesh and hearing was held on 03.07.2014. The Dept. of New and Renewable Energy of the Government of Madhya Pradesh was directed by the State Commission to furnish a report on the issue of GCV and SHR of the fuels available in the State of Madhya Pradesh. The Deputy Commissioner, NRED, Bhopal vide letter No.1174 dated 08.09.2014 submitted the GCV test results of two samples of rice husk, one sample of wheat husk and mulberry each. The State Commission did not consider the values given by NRED stating that the size of the samples taken by NRED was too small and did not represent the GCV on biomass fuel in the State as a whole and considered the earlier GCV for the biomass at 3600 Kcal/kg and station heat rate of 3800 Kcal/Kwh.
- 3.6. Aggrieved by the Order dated 13.08.2015, the Appellant, Biomass Energy Developers Association, filed Appeal No. 211 of 2015 for fixing of GCV of fuel and SHR.
- 3.7. This Tribunal in the judgment dated 04.05.2016, in Appeal No.211 of 2015, based on the test reports submitted by Deputy Commissioner, NRED, Bhopal and as per the CERC's (Terms and Conditions for tariff determination from Renewable Energy Resources) Regulations 2012 and as per the expert committee of Central Electricity Authority in its report of September, 2005 on operational norms for biomass based power plants and as per the study report

of the National Productive Council who has conducted the detailed assessment study for the biomass plants, this Tribunal concluded the GCV as 3100 kCal/Kg and SHR at 4200 kCal/kWh. This Tribunal directed the State commission to re-determine the tariff of biomass generating power plants in the State of Madhya Pradesh, considering GCV as 3100 kCal/Kg and SHR 4200 kCal/kWh.

3.8. The M.P. Biomass Developers Association had filed an Execution Petition no. EP-7 of 2016 before this Tribunal against the Commission towards non-execution of order of this Tribunal passed on 04.05.2016 in Appeal No. 211 of 2015. The case was heard on 03.10.2016 and the Execution Petition No. EP-7 of 2016 was disposed of with the direction that the order dated 04.05.2016 is to be implemented within a period of 8 weeks from 03.10.2016.

3.9. M.P. Power Management Company Ltd. filed a Civil Appeal No. 6547/4016 before Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed the Civil Appeal with the following directions:

"We find no substantial questions of law arising for an order of formal adjudication of the appeal. The Appeal is accordingly dismissed. Consequently I.A. No. 2 for stay is also dismissed"

3.10. The State Commission filed Review Petition No. 21 of 2016, before this Tribunal regarding GCV of fuel and SHR determined in the judgment dated 04.05.2016. The Review Petition was dismissed by this Tribunal in the order dated 03.10.2016. The operative part of the order is reproduced below:

"9.The Hon'ble APTEL has not taken into cognizance of this fact and passed the order dated 04.05.2016 wherein specific numbers have been provided for the GCV and SHR, which could only have been arrived at by the Commission scientifically based upon the data to be furnished by the Appellant.

"This Review Petition has been filed by Review Petitioner seeking review of order dated 04.05.2016 passed in Appeal No. 211 of 2015. Admittedly, from order dated 04.05.2016 an appeal was carried to the Supreme Court by MP Power

Management Company Ltd. and on 25.07.2016 the Supreme Court dismissed the said appeal by passing the following order:

“UPON hearing the counsel the Court made the following

ORDER

Exemption from filing certified copy of the impugned judgment is granted.

We find no substantial question of law arising for an order of formal adjudication of the appeal. The appeal is accordingly dismissed. Consequently, I.A. No. 2 for stay is also dismissed.”

In view of the above, this Review Petition cannot be entertained Review Petition is dismissed accordingly.”

3.11. In compliance to the directions of this Tribunal passed in its judgment dated 04.05.2016, the Gross Calorific Value (GCV) at 3100 kCal/Kg and State Heat Rate (SHR) at 4200 kCal/kWh are considered. Accordingly, by its order dated 30.11.2016 the State Commission set the year wise tariff for generation of electricity from new biomass energy projects commissioned on or after 02.03.2012 as under:

(a) *Commissioned on or after 02.03.2012 and during FY 2012-13*

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
6.20	5.94	6.11	6.28	6.47	6.68	6.89	7.12	7.37	7.62
Year 11	Year 12	Year 13	Year 14	Year 15	Year 16	Year 17	Year 18	Year 19	Year 20
7.57	7.92	8.29	8.68	9.09	9.53	9.98	10.45	10.95	11.48

(b) *Commissioned during FY 2013-14 and thereafter:*

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
6.58	6.31	6.49	6.68	6.89	7.10	7.34	7.58	7.85	8.13
Year 11	Year 12	Year 13	Year 14	Year 15	Year 16	Year 17	Year 18	Year 19	Year 20
8.08	8.46	8.85	9.27	9.71	10.17	10.65	11.16	11.69	12.25

The tariff mentioned above of this order shall be subject to the following terms and conditions:

- (a) *This tariff shall be applicable till 31.03.2017 or the new tariff order is issued, whichever is earlier.*
- (b) *The projects for more than 2 MW are subjected to the 'scheduling' and 'merit order dispatch principles' in terms of the para 8.10 of the tariff order dated 02.03.2012 since date of commissioning.*
- (c) *This tariff order is applicable to the projects using rice husk, wheat husk, mulbury and coal (limited to 15% of the total fuel on annual basis) only as a fuel based on which GCV has been decided by the Hon'ble APTEL in its Judgment dated 04.05.2016.*
- (d) *This tariff shall be applicable for the projects for which Power Purchase Agreement has already been executed at the time of commissioning of the project.*
- (e) *The M.P. Power Management Co. Ltd., Jabalpur shall submit, the draft of the Power Purchase Agreement to be executed, if any, with the developer of biomass based power projects to be commissioned after the date of this order, for approval of the Commission.*
- (f) *The developers shall have to submit monthly information, as required under para 8.25 of the tariff order dated 02.03.2012, to the M.P. Power Management Co. Ltd., Jabalpur by 10th day of each month following the month of information failing which action as per the provisions of para 8.26 of the tariff order dated 02.03.2012 must be ensured by the M.P. Power Management Company Limited."*

3.12. Aggrieved by the State Commission's Impugned Order dated 30.11.2016, passed by Madhya Pradesh Electricity Regulatory Commission, the appellants filed this appeal and prayed for following reliefs:

- "(a) Allow the appeal and set aside Para 15 of the Order dated 30.11.2016 passed by the State Commission to the extent challenged in the present Appeal.*
- (b) Award interest / carrying cost to the Appellants at the rate of 18% per annum for the delay in implementation.*
- (c) Impose costs on the State Commission for flouting the Judgments of this Hon'ble Tribunal.*
- (d) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper."*

4. We have heard Mr. M. G. Ramachandran, learned counsel for the appellants, Mr. S. Venkatesh for the respondents and after going through the submissions by both the parties and the Impugned Order, the following issue arises for our consideration:
- 4.1. Question of law: **(a) Whether the State Commission erred in incorporating the terms and conditions while determining the revised tariff of biomass power plants in the Impugned Order dated 30.11.2016 restricting the tariff applicability to the Biomass power generation producers who shall fulfill the terms and conditions specified in the said order?**
- (b)** Whether the State Commission is right in stating that the Tariff shall be applicable till 31.03.2017, or the new tariff order issued, whichever is earlier?
- (c)** Whether the State Commission is right in specifying the condition that the Biomass projects of more than 2 MW are subject to scheduling and merit order principles as per clause 8.10 of the Tariff Order dated 02.03.2012?
- (d)** Whether the State Commission is correct in stating that the Tariff order dated 30.11.2016 shall be applicable to those Biomass projects using Rice Husk, Wheat Husk, Mulberry and coal (limited to 15% of the total fuel on annual basis) contesting that this Tribunal arrived at the values based on the above Biomass fuels in the judgment dated 04.05.2016?
- (e)** Whether the State Commission is right in stating that the Tariff shall be applicable for the projects for which power purchase agreement has already been executed at the time of commissioning of the project?
5. The learned counsel for the appellants has made following arguments /submissions for consideration on the issue raised.

- 5.1. That the State Commission after giving an undertaking to this Tribunal to implement the Judgment dated 04.05.2016 in Execution Petition No. 7 of 2016 has erroneously imposed the additional conditions in order to take away the effect of the judgment dated 04.05.2016, and to punish the Members of the Appellant Association for getting the Tariff Orders of the State Commission set aside in Appellate Proceedings.
- 5.2. That despite the clear Orders passed by this Tribunal, from 17.01.2017 onwards, the Respondent No. 2 has taken away the must run status of the biomass generating companies /the Appellants and is not issuing any schedule of energy /dispatch instructions to the Appellants.
- 5.3. That the Appellant No. 3 vide letter dated 19.01.2017 brought the above anomaly to the notice of the SLDC but without any success.
- 5.4. That the Appellant No.2's plant got commissioned on 22.01.2014 and the Appellant No. 3's plant got commissioned on 31.03.2013. From the time of commissioning, the Respondent No. 2 continued to schedule power from the generating stations and gave the must run status as is given to all renewable energy projects. With regard to the Appellant No. 4, the generating station got commissioned on 03.10.2015 but is currently not functioning due to some technical difficulties.
- 5.5. That the State Commission in the Order dated 02.03.2012 had given 'must run status' to the extent of fulfillment of RPO to the biomass plants apart from holding that plants above 2 MW will be subject to merit order principles. However, curiously, in the Impugned Order, the State Commission has only insisted on merit order principles without giving must run status to the biomass plants. After the Impugned Order, the Respondent No.2 has stopped giving schedule to the biomass plants of the Appellant and the biomass plants have had to close down.

"22. In the subsequent Order dated 03.05.2013, the State Commission had given up the two part tariff and made it as a single part tariff, inter alia, providing as under:

"Based on the forgoing assessment, the Commission has decided to adopt the revised parameters for tariff determination in FY 2012-13 and FY 2013-14 as hereinafter stated. The terms and conditions stated in the Commission's Tariff Order dated 02.03.2012 shall continue to apply to the projects commissioned in these two financial years with the following amendments: -

(i) In para 5.1 of the tariff order dated 02.03.2012 the following shall be deleted:

"5.1 The tariff decided in this order are two part tariff viz. Fixed tariff and Variable tariff. The Fixed tariff shall apply to all projects which are commissioned during the above mentioned control period and shall remain valid for the project life of 20 years. The variable tariff is determined for the period from the date of issue of this tariff order to 31st March, 2013. The Commission shall declare the Variable tariff for each year beyond 31st March, 2013 in the month of March of its preceding financial year after considering the fuel cost afresh."

(ii) In para 6.26 of the tariff order dated 02.03.2012 the following shall be deleted:

In the light of the above, the very basis for providing for Scheduling and Merit Order principles and not giving the must-run status contained in the Order dated 02.03.2012 ceased to apply. Consequently, Para 8.10 of the said order also ceased to apply. As mentioned above, the issue of single part tariff with Merit Order principle and also on the face of the Regulations notified by the State Commission, the Scheduling, Dispatch and Merit Order principle cannot go together.

5.6 The Order dated 03.05.2013 cannot be interpreted in a manner to say that though there will be a single part tariff and not a two part tariff as envisaged earlier in the Order dated 02.03.2012, the Merit Order principle would still continue to apply.

5.7 The said claim made by the State Commission as well as Respondent No. 2 is contrary to the fact that from the stage of the commissioning of the power plant of the Appellants 2 to 4 (which are all after the Order dated 03.05.2013, namely, 22.01.2014, 31.05.2013 and 03.10.2015 respectively), Respondent No. 2 and the State Load Dispatch Centre have been taking the delivery of the power without

applying the Merit Order principles till the impugned order dated 31.11.2016. In other words, neither Respondent No. 2 implemented the Merit Order principle for the period from the date of the commissioning of the respective generating plant till the date of the impugned Order nor the State Commission took any steps to enforce the Merit Order principle during all these period.

- 5.8 *However, immediately on the passing of the impugned Order on 30.11.2016, Respondent No. 2 has stopped taking electricity from the Appellants 2 to 4 leading to the shut-down of the power plants purporting to implement the Merit Order principle by comparing the price of electricity with the conventional energy sources. This lead to the plant being shut down.*
- 5.9 *Thus, there has been a change of stand on the part of Respondent No. 2 and by incorporation of the Conditions in 15(b) of the impugned Order, an attempt has been made to avoid purchase of power from the Projects of the Appellants 2 to 4.*
- 5.10 *It is submitted that there is no reason whatsoever for the State Commission to have incorporated Condition 15(b) in the impugned Order. There was no occasion for dealing with the same in the impugned Order. The impugned Order had been passed in pursuance to the Judgment passed by the Hon'ble Tribunal dated 04.05.2016, Order dated 25.07.2016 passed by the Hon'ble Supreme Court dismissing the Civil Appeal challenging the Judgment dated 04.05.2016, the Order dated 03.10.2016 passed by the Hon'ble Tribunal dismissing the Review Petition filed by the State Commission and the Order dated 03.10.2016 passed by the Hon'ble Tribunal in the Execution Petition, recording the undertaking given by the Senior Counsel appearing for the State Commission. In none of these proceedings or at any stage prior to the impugned Order, there was a whisper of the State Commission applying the Merit Order principle. Respondent No. 2 who was also a party in the proceeding which had filed the Civil Appeal before the Hon'ble Supreme Court did not also raise the Merit Order issue. Thus, the Respondents have sought to raise the Merit Order issue as an afterthought only to defeat the Appellants having the benefit of the implementation of the Judgment passed by the Hon'ble Tribunal.*
- 5.11 *The above submissions of the Appellants is further fortified by the perusal of the other conditions contained in Para 15 of the impugned Order. In all the Tariff Orders passed including in the Renewable Energy Regulations notified by the State Commission, the reference was only to 'Biomass'. There was no bifurcation of various types of Biomass or restricting the benefit of the projects to those based on the*

Rice Husk, Wheat Husk, Mulberry etc. This has been introduced for the first time in the impugned Order. There is also no rationale whatsoever for restricting the same when the policies of the Government, the Regulations of the Central and State Commission envisaged Biomass a total category to be promoted. This again has been done purporting to affect the projects of the Appellants 2 to 4.

5.12 Further, in Para 15(c), (d) etc. other conditions have been imposed for first time. This clearly shows that there is an intention in imposing the conditions to affect the Biomass based Projects and to make the Order passed by the Hon'ble Tribunal a non-est after the Respondent No. 2 had been unsuccessful before the Hon'ble Supreme Court, the State Commission has been unsuccessful in the Review Petition and the State Commission had given an undertaking in the Execution Petition to implement the Order.

5.13 The State Commission in its submissions and interpretation given to the Regulations is also mixing of the issue of scheduling with merit order. There can always be Scheduling (which is to inform the quantum of Electricity that will be available) but the power plant has a must run status. The wind and solar power plant scheduling referred to in the Regulations is on the above basis. This does not mean that such projects will lose the must-run status. In fact, even the wind generators (above 10 MW) and the solar generators (above 5 MW) are only being subjected to scheduling and not merit order dispatch principles. This is obviously because in the case of wind and solar plants also, there is a single part tariff. When the State Commission passed the first remand order dated 03.05.2015 making a single part tariff applicable even to biomass generators, obviously there could have been no question of applying merit order dispatch principles.

5.14 As decided by this Hon'ble Tribunal in the two cases quoted above it is incorrect on the part of the State Commission rely on the clauses in the PPA / LOI, when the Respondent No. 2 does not consider any changes whatsoever to the PPA. It is not that the Appellants have any option but have to execute the PPA by signing on the dotted line. The clause in the PPA is against the provisions of the Regulations, obviously the said clause needs to be read down and cannot be illegally imposed on the parties."

5.6 That this Tribunal had clearly directed in the Orders dated 20.12.2016 & 02.01.2017 that no coercive steps were to be taken against the Appellants in terms of the Impugned Order. Despite the above, the Respondent No.2 has

taken coercive steps and closed down the operational biomass generating plants.

5.7. That the Appellants are constrained to file the present appeal seeking compliance of the Interim Orders passed by this Hon'ble Tribunal.

6. **Per contra**, following are the submissions made by the counsel on behalf of respondent No.1, Madhya Pradesh State Electricity Regulatory Commission:

6.1. That the issue of 'Must Run' status of Biomass Generators is devoid of merits and shows complete lack of understanding on the part of Appellants. It is submitted that Para 5.6 of the Order dated 02.03.2012 which gave the 'must run' status to the biomass generators upto a capacity of 2MW emanated from the MPERC (Cogeneration and generation of electricity from renewable sources of energy) (Revision-I) Regulations, 2010 (herein referred to as "**MPERC Renewable Regulations**"). The relevant extracts of the MPERC Renewable Regulations are being reproduced as follows:

"9. Scheduling of Co-generation and Renewable Sources of Energy: The generation from Co-generation and renewable Sources of Energy are excluded from the ambit of "merit order dispatch principles".

6.2. That the MPERC Renewable Regulations as on today at Regulation 9 clearly provides that generation from Renewable Source of Energy are excluded from the ambit of "merit order dispatch principles". Thereby meaning that the said Projects would not be backed down by MOD i.e. are Must run. Hence, the must run Status of the Biomass Generators in fact flows from the MPERC Renewable Regulations. Therefore, it is incorrect for the Appellants to state that the said provision of the Order dated 02.03.2012 has been amended. In fact, as stated above, the said position even remains till date on the language in the Order has been modulated which in no manner is detrimental to the Appellants.

6.3. That in so far as Projects above 2 MW are concerned, the verbatim provision of Clause 8.10 of the Order dated 02.03.2012 has been retained in the Impugned Order. Admittedly in the present facts of the case the Appellants are above the threshold level of 2 MW which is evident from the following:-

- i) Appellant No.2 is a 10 MW generating station
- ii) Appellant No.3 is a 12 MW generating station
- iii) Appellant No.4 is a 10 MW generating station

6.4. That admittedly the Appellant Nos. 2 to 4 are Biomass Generators who are above the threshold of 2 MW and are subject to Merit Order principles. Moreover, even if the prayer sought by the Appellants is granted in Terms of IA No. 69 of 2017 still the Appellants would be subject to MOD principles as the said obligation in fact flows from Para 8.10 of the 2012 Tariff Order which has not been challenged by the Appellants in any of the proceedings before this Tribunal.

6.5. That IA No. 69 of 2017 in fact seeks to assail the findings of the 2012 Tariff Order which has attained finality. The above is classic case where the Appellants seek to assail findings of already passed Tariff orders indirectly as they are barred by law of limitation to assail them directly. The Hon'ble Supreme Court in the case of **State of TN vs. Shyam Sunder (2011) 8 SCC 737** has held as follows:-

"VI. What cannot be done directly – cannot be done indirectly

43. "21. It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited under law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud ...*"

- 6.6. That at best if the MOD is being prepared to prejudice the Appellants in any manner by the Respondents the remedy available to Appellants lies elsewhere and not before this Tribunal through the present IA. Moreover, the Appellants in their IA before this Tribunal have not been able to demonstrate a single Biomass based generator being subjected to MOD principles. Further, even if it is assumed that such generators are being subjected to MOD then the relief would lie elsewhere and not before this Tribunal.
- 6.7. That the Respondent Commission by imposing the requirement of signing of the PPA has taken away the applicability of the revised tariff from the Appellants as none of them have a valid signed PPA with Respondent No.2.

That the submission of the Appellant is not sustainable and is based on incorrect interpretation of the Impugned Order passed by the Answering Respondent. The condition of having a valid PPA for supply of power to Distribution Licensee has formed part of Tariff Orders passed by the Answering Respondent including the Regulations notified by the Respondent Commission. **The Answering Respondents had clearly specified the need of a PPA in its first order dated 02.03.2012 and was not challenged by the Appellants in the previous rounds of litigation.**

7. **Following are the submissions on behalf of respondent No.2, Madhya Pradesh Power Management Co. Ltd. :**

- 7.1. That the issues relating to scheduling and Merit Order Dispatch (MOD) were never agitated by the parties and owing to such fact it had attained finality.
- 7.2. That there is no infirmity in the directions contained in the impugned order and the Answering Respondent being a regulated entity has strictly complied with directions issued by the 1st respondent.
- 7.3. That the Appellant never challenged the switching of tariff from two part to single part while filing the Appeal against order dated 03.05.2013. Further, the Appellants are challenging the implementation of Merit Order Dispatch (MOD)

which has become final against which no appeal was preferred by the Appellants at any point of time since 2012 and therefore it is not open for the Appellants to challenge the same now. The issue attained finality and it is no longer open to the Appellants to agitate the issue of MOD in the present appeal which is clearly barred by the principles of *res judicata* and constructive *res judicata*.

- 7.4. That the Appellant had raised issues while challenging the impugned order which are to the limited extent of imposing following new terms and conditions:
- (i) The tariff order shall be applicable to the projects using rice husk, wheat husk, mulberry and coal (limited to 15% of the total fuel on annual basis) only as a fuel.
 - (ii) The tariff shall be applicable for the projects for which PPAs has already been executed at the time of commissioning of the project.
 - (iii) The project for more than 2 MW are subjected to the 'scheduling' and 'merit order dispatch principles' in term of Para 8.10 of the tariff order dated 02.03.2012 since date of commissioning.
- 7.5. That the members of the appellant association do not have a PPA with the Answering Respondent. The submission of the appellant that new conditions have been imposed in the impugned order and the same is beyond the order of APTEL is totally devoid of merits.
- 7.6. That in accordance with the provisions of section 61 of Act 2003, the 1st respondent is fully empowered to determine the tariff for supply of electricity by a generating company to distribution licensee. Further, in terms of Section 62 of Act, 2003, the 1st respondent is fully empowered to specify the terms and conditions for determination of tariff. Therefore, in the light of the same it cannot be contended that there is error or illegality in the impugned order dated 30.11.2016 passed by the Hon'ble Commission.

- 7.7. **That the contention of the appellant that 1st respondent has imposed additional conditions of applicability of tariff and that it is denuded of its power is wholly untenable and incorrect. The 1st respondent, under section 62 of Act, 2003, is fully empowered to specify terms and conditions for determination of tariff and to impose any conditions at any time.**
- 7.8. That the submission of the appellant that in the impugned order, the 1st respondent has only insisted on the merit order principles without giving must run status to bio mass plants is wholly untenable and denied.
- 7.9. In view of the above it is submitted that there is no merit in the appeal and the same deserves to be dismissed.
- 8.0 **After having done a careful examination of all the aspects brought before us on the issues raised in the appeal and submissions made by the respondents as well as appellants for our consideration, our observations are as follows:**

The State Commission, as per the directions of this Tribunal in the judgment dated 04.05.2016 in Appeal No. 211 of 2015 re-determined the tariff considering the GCV of fuels as 3100 Kcal/Kg and SHR at 4200 Kcal/Kwh in the tariff order dated 30.11.2016. The State Commission in the tariff order dated 30.11.2016, specifically mentioned that the tariff order shall be subject to the following terms and conditions:

- (a) *This tariff shall be applicable till 31.03.2017 or the new tariff order is issued, whichever is earlier.*
- (b) *The projects for more than 2 MW are subjected to the 'scheduling' and 'merit order dispatch principles' in terms of the para 8.10 of the tariff order dated 02.03.2012 since date of commissioning.*
- (c) *This tariff order is applicable to the projects using rice husk, wheat husk, mulberry and coal (limited to 15% of the total fuel on annual basis) only as a fuel based on which GCV has been decided by the Hon'ble APTEL in its Judgment dated 04.05.2016.*

- (d) *This tariff shall be applicable for the projects for which Power Purchase Agreement has already been executed at the time of commissioning of the project.*
- (e) *The M.P. Power Management Co. Ltd., Jabalpur shall submit, the draft of the Power Purchase Agreement to be executed, if any, with the developer of biomass based power projects to be commissioned after the date of this order, for approval of the Commission.*
- (f) *The developers shall have to submit monthly information, as required under para 8.25 of the tariff order dated 02.03.2012, to the M.P. Power Management Co. Ltd., Jabalpur by 10th day of each month following the month of information failing which action as per the provisions of para 8.26 of the tariff order dated 02.03.2012 must be ensured by the M.P. Power Management Company Limited.”*
9. The counsel of the respondent No.2 also argued that the conditions specified in the tariff order are applicable terms and conditions of the tariff order dated 02.03.2012 and they are continuing from the tariff order dated 02.03.2012 onwards and there is nothing new.
10. Let us examine the conditions specified in the tariff order dated 02.03.2012 and then we will discuss the conditions specified in the Impugned Order dated 30.11.2016 one by one.
- 10.1 The State Commission provided the tariff order for procurement of power from biomass based power projects in the order dated 02.03.2012. The State Commission submitted that the tariff order has been issued duly exercising powers vested in it under Section 86(1)(c) and (e) and Section 62(1) of the Indian Electricity Act as per the MPERC (Co-generation and Generation of Electricity from Renewable Sources of Energy) (Revision-I), Regulations, 2010 and all other powers enabling the Madhya Pradesh Electricity Regulatory Commission while issuing Tariff Order dated 02.03.2012.
11. The important terms and conditions as noted in the Tariff Order dated 02.03.2012, are as under:

- a) **Clause 4.1:** In the clause 4.1 of the tariff order, the State Commission has stated that the tariff determined in this order will be applicable to all new biomass based power generation projects in the State of Madhya Pradesh, commissioned on or after the date of issue of this order for sale of electricity to the distribution licensees within the State of Madhya Pradesh. This order also specifies the terms and conditions (other than tariff for captive users or for sale to third party)

In such cases, where the power purchase agreement has already been executed by the developer but the plant is not commissioned prior to the date of issue of this order, the tariff and terms and conditions as per this order shall be applicable to those projects also and the developer and procurer are required to execute the supplementary agreement accordingly.

- b) **Clause 5.1:** The control period will start from the date of issue of this order and will end on 31.03.2014 (i.e. end of FY 2013-14). The determination of tariff for next control period shall be done separately and in case tariff for the next control period is not determined before commencement of next control period, the tariff as per this Order shall continue to be in force until revised tariff is determined. The tariff decided in this order are two part tariff viz. Fixed tariff and Variable tariff. **The Fixed tariff shall apply to all projects which are commissioned during the above mentioned control period and shall remain valid for the project life of 20 years. The variable tariff is determined for the period from the date of issue of this tariff order to 31st March, 2013.** The Commission shall declare the Variable tariff for each year beyond 31st March, 2013 in the month of March of its preceding financial year after considering the fuel cost afresh.
- c) **Clause 5.5:** Normally, two part tariff is applied in order to recover fixed and variable costs through the fixed and variable components of tariff separately. **This is especially useful in a scenario of merit order dispatch.**
- d) **Clause 5.6:** The minimum purchase obligation for procurement of power from renewable sources of energy is specified through MPERC (Cogeneration and generation of electricity from renewable sources of energy) (Revision-I) Regulations, 2010. Thus, such projects will normally be “must run” projects. The Commission after considering various aspects decided that **fixed and variable tariff components of tariff i.e. two part tariff appears best suited** for energy generated from Biomass based Power Plants. Thus the Commission has adopted two part tariff approach.”
- e) In the tariff order dated 02.03.2012 the Commission considered GCV as 3612 Kcal/Kg and SHR as 3800 Kcal/Kwh stated these values are considered taking the views of the stake holders.
- f) **Clause 8.1:** The tariff indicated above is the maximum tariff and M.P. Power Trading Co. on behalf of the Distribution Licensee or the licensees themselves, as the case may be, shall be free to invite bids from developers. The developer

bidding the lowest tariff will be allowed to sell the generated power to state utilities.

h) Clause 8.4: *The Tariff rates and structure shall be firm and will not vary with fluctuation in exchange rate or on account of changes in law or in taxes.*

i) Clause 8.6: *Power Purchase Agreement: The State Government has transferred and vested the functions, properties, interest, rights and obligations of the MPSEB relating to Bulk Purchase and Bulk Supply of Electricity along with the related agreements and arrangements in the State Government and re-transferred and re-vested these in the M.P. Power Trading Company Ltd. Therefore, the Commission directs that the energy generated by the biomass based power generating units will be procured centrally by the M.P. Power Trading Co. Ltd. on behalf of the distribution licensees at the rates specified in this order. The energy so procured will be allocated by M.P. Power Trading Co. Ltd. to the three distribution licensees in the ratio of their actual energy input in each financial year. **Accordingly, the Power Purchase Agreements will be signed between the developer and the M.P. Power Trading Co. Ltd., Jabalpur.** The M.P. Power Trading Company Limited, Jabalpur in turn will have back to back power supply agreement with the Discoms. The agreements will be for exclusive sale/purchase of electricity for a period of 20 years from the date of commissioning of plant.*

It shall be the responsibility of the developers to get all the required statutory consents before executing Power purchase agreement with M.P. Power Trading Company Limited, Jabalpur.”

j) Clause 8.10 Scheduling: *Biomass based power generation plants for more than 2 MW shall be subject to the ‘scheduling’ and ‘merit order dispatch principles’.”*

12. Broadly the above terms and conditions are specified in the tariff order dated 02.03.2012. It is pertinent to mention here that the State Commission in its order has stated that the minimum purchase obligation for procurement of power from renewable sources of energy is specified through MPERC (Co-generation and generation of electricity from renewable sources of energy) (Revision-I) Regulations 2010. According to clause 5.6 of the tariff order such projects will normally be ‘Must Run’ projects and also the Commission stated that after considering various aspects decided a fixed variable component of tariff i.e. 2 part tariff appears best suited for biomass plants.

13. Before proceeding further let us examine provisions of MPERC (Co-generation and generation of electricity from renewable sources of energy) (Revision-I) Regulations 2010.

“9. **Scheduling of Co-generation and Renewable Sources of Energy**

The generation from Co-generation and Renewable Sources of Energy are excluded from the ambit of “merit order dispatch principles”.

- 13.1 Further, clause 13 of the Regulations deals with Renewable Purchase Obligation (**RPO**) and clause 14 deals with certificate under Regulation of the Central Commission and clause 5 deals with effect of default in fulfilling RPO.

14. The State Commission determined the Tariff Order as per the directions of this Tribunal’s judgment dated 04.05.2016 in Appeal No. 211 of 2015. The Commission passed the Impugned Order dated 30.11.2016 subject to Terms and Conditions specified in the para 15 of the Impugned Order. **Let us discuss the conditions one by one as specified in the Tariff Order dated 30.11.2016:**

- 14.1 **[Condition] (a)** Whether the State Commission is right in stating that the Tariff issued in the Impugned Order shall be applicable till 31.03.2017 or the new Tariff Order issued, whichever is earlier.

- 14.2 One of the functions of the State Commission as per the Electricity Act, 2003 is that the State Commission shall discharge the following functions, namely;

“86(1)(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;"

14.3 Thus the State Commission is having right to determine and regulate the Tariff for generation, supply, transmission and wheeling of electricity within the State.

15. Let us examine the relevant clauses of the Tariff Order dated 02.03.2012 regarding applicability:

Clause 4.1: *Tariff Determined through this order will be applicable to all new biomass based power generation projects in the State of Madhya Pradesh commissioned on or after the date of issue of this order for sale of electricity to the distribution licensees within the State of Madhya Pradesh. This order also specifies the terms & conditions (other than tariff) for captive user or for sale to third party.*

Clause 5.1: *The control period will start from the date of issue of this order and will end on 31.03.2014 (i.e. end of FY 2013-14). The determination of tariff for next control period shall be done separately and in case tariff for the next control*

period is not determined before commencement of next control period, the tariff as per this Order shall continue to be in force until revised tariff is determined. The tariff decided in this order are two part tariff viz. Fixed tariff and Variable tariff. The Fixed tariff shall apply to all projects which are commissioned during the above mentioned control period and shall remain valid for the project life of 20 years. The variable tariff is determined for the period from the date of issue of this tariff order to 31st March, 2013 in the month of March of its preceding financial year after considering the fuel cost afresh.

ii) Applicability as per MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision – 1), Regulations 2010.

- 15.1 According to clause 5.1 of the Tariff Order dated 02.03.2012, the control period will start from the date of issue of this order and will end on 31.03.2014. The Tariff for the next control period i.e. from 01.04.2014 to 31.03.2017 (FY 2014-15, FY 2015-16 and FY 2016-17) shall be done separately. Further, if the Tariff Order is not revised before the next control period, the existing Tariff shall continue until revised tariff is determined.
- 15.2 The contention of the State Commission is that the new Tariff order determined in the Tariff order 02.03.2012 shall have the effect up to the control period 31.03.2014 and is under continuous revision as per the direction of this Tribunal upto 30.11.2016 (Impugned Order). Hence, as per clause 5.1, this Tariff order is applicable up to the end of the control period i.e. 31.03.2017.
- 15.3 Accordingly, the applicability of the Tariff order determined by the State Commission in the Impugned order dated 30.11.2016 is applicable up to 31.03.2017 and shall be applicable until the new tariff is determined.
- 15.4 Further, according to clause 4.1 of the Tariff order, the Tariff determined in the tariff order dated 02.03.2012 will be applicable to all new Biomass based power generation projects in the State of Madhya Pradesh commissioned on or after the date of issue of this order for sale of electricity to the distribution licensees in the State of Madhya Pradesh.

15.5 According to the submissions of the appellants, the Biomass plants of appellants 2, 3 and 4 are commissioned after the issue of the order i.e. 02.03.2012 and subsequently the tariff was finally revised in the Impugned order dated 30.11.2016. Hence, the Impugned tariff is applicable to the Biomass plants of the appellants for sale of electricity to distribution companies of Madhya Pradesh.

15.6 Let us discuss condition (b) of the Tariff Order dated 30.11.2016.

[Condition] (b) Whether the State Commission is right that the projects for more than 2 MW are subject to scheduling and merit order dispatch principles in terms of para 8.10 of the Tariff Order dated 02.03.2012 since date of commissioning (or) whether the clause 9 of the MPERC Regulations is applicable to the Biomass plants and also 'must run' status as per clause 5.6 of the Tariff order dated 02.03.2012 is applicable or not?

15.7 Let us first examine Clause 9 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 reads as under:

"9. The generation from Co-generation and Renewable Source of Energy are excluded from the ambit of "Merit Order Dispatch Principles". This clause was amended on 09.04.2012 as below:

9. Scheduling of Co-generation and Renewable Sources of Energy-
Appropriate directives shall be issued on scheduling of Wind Electric Generators with collective capacity of 10 MW and above and Solar Generating Plants with capacity of 5 MW and above after the issue is decided by the CERC and necessary provisions in the Grid Code are incorporated."

15.8 In this amendment it was clearly specified that the scheduling of power is applicable with respect to wind electric generators, with a collective capacity of 10 MW and above and solar generating plants under capacity of 5 MW, and stated that this amendment will be applicable after the issue is decided by the CERC and necessary principles in the Grid Code are incorporated.

Subsequently, the State Commission amended Regulation 9 on 25.11.2014. The amendment is extracted below:

“9. Scheduling- *The scheduling of Wind Electric Generators with collective capacity of 10 MW and above and Solar Generating Plants with collective capacity of 5 MW and above shall be made as per the decision of the Central Electricity Regulatory Commission.”*

- 15.9 It is stated that in clause 9 of the Regulation, scheduling is applicable to only wind and solar generation. Subsequently, in the amendment, it is stated that the above amendment shall be made as per the decision of Central Regulatory Commission and as specified in the Grid Code. We have gone through the CERC’s (Indian Electricity Grid Code) (3rd Amendment) Regulations 2015. The relevant part of CERC order is quoted below:

“No. 1/14/2015-Reg. Aff.(FSDS)(i)/CERC – In exercise of powers conferred under clause (h) of sub-section (1) of Section 79 read with clause (g) of sub-section (2) of Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, the Central Electricity Regulatory Commission hereby makes the following regulations to amend the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 including the first and second amendments thereof (hereinafter referred to as “the Principal Regulations”).

“Part 6: Scheduling and Despatch Code: *this section deals with the procedure to be adopted for scheduling and despatch of generation of the Inter-State Generating Stations (ISGS) and scheduling for other transactions through long-term access, medium-term and short-term open access including complementary commercial mechanisms, on a day-ahead and intra-day basis with the process of the flow of information between the ISGS, National Load Despatch Centre (NLDC), Regional Load Despatch Centre (RLDC), Power Exchanges and the State Load Despatch Centres (SLDCs), and other concerned persons.*

Most of the wind and solar energy generators are presently connected to intra-State network and in future are likely to be connected to the inter-state transmission system (ISTS) as well. Keeping in view the variable nature of generation from such sources and the effect such variability has on the inter-state grid, and in view of the large-scale integration of such sources into the grid envisaged in view of the Government of India’s thrust on renewable sources of

energy, scheduling of wind and solar generators which are regional entities, has been incorporated in this code.”

15.10 According to CERC’s Amendment, the wind generation and solar generation are mostly dependent on climatic conditions and geographical conditions. The power from the wind and solar renewable energies is not firm and are not predictable and energy injected to the system is variable in nature. In view of this there is a possibility of grid disturbance due to sudden injection of power from these renewable sources. Hence the Central Commission suggested scheduling of power injection to the grid from these energy renewable sources. The energy from the biomass power plants are not related to climatic conditions and the power from the biomass power plants is constant in nature depends upon the availability of raw material.

According to clause 3(xv) : Renewable energy sources means renewable sources such as small hydro, mini hydro, wind, solar, biomass, biomass fuel cogeneration, urban/municipal waste and such other sources as approved by MNRE.

The Central Commission out of all the above sources of renewable energy, chooses only wind and solar energy sources to be kept under scheduling and merit order principles because of their unpredictable nature of electricity generation.

Thus, according to clause 9 of the MPERC (Cogeneration and generation of electricity from renewable sources of energy) (Revision-I) Regulations 2010, the generation from cogeneration and renewable source of energy (in this case energy from Biomass power plants) are excluded from the ambit of merit order dispatch principles.

15.11 Let us examine the relevant clauses regarding scheduling in the Tariff Order dated 02.03.2012, which is reproduced below:

“Clause 8.10: *Biomass based power generation plants for more than 2 MW shall be subject to the ‘scheduling’ and ‘merit order dispatch principles’.*

Clause 5.6: *The maximum purchase obligation for procurement of power from renewable sources of energy is specified through MPERC (Cogeneration and generation of electricity from renewable sources of energy) (Revision-I) Regulations, 2010. Thus, such projects will normally be “Must Run” projects.”*

15.12 In the Tariff Order dated 03.05.2015, it was specifically mentioned that the terms and conditions stated in the Commissions Tariff Order dated 02.03.2012 shall continue to apply to the projects commissioned in the financial years 2012-13 and 2013-14 with the following amendments:

“5.1: *The tariff decided in this order is two part tariff viz. Fixed tariff and Variable tariff. The Fixed tariff shall apply to all projects which are commissioned during the above mentioned control period and shall remain valid for the project life of 20 years. The variable tariff is determined for the period from the date of issue of this tariff order to 31st March, 2013. The Commission shall declare the Variable tariff for each year beyond 31st March, 2013 in the month of March of its preceding financial year after considering the fuel cost afresh”.*

“6.26: *The Commission has also decided that the fuel cost for the subsequent period on year to year basis shall be determined in each year in the month of March preceding that financial year”.*

15.13 In this order, as per Clause 5.1, two part tariff is applicable. All the other conditions applicable means Clause 5.6 is applicable. Thus, such projects will normally be must run projects.

15.14 On 13.08.2015, the Commission again re-determined the Tariff Order dated 03.05.2015 in compliance of the Judgment dated 29.05.2014 passed by this Tribunal in Appeal No. 144 of 2013. The relevant part of the Tariff Order is extracted below:

“The Commission is also of the view that majority of biomass power plants may not run on single fuel and a mix of fuels shall be used. The biomass power

projects were already allowed to use fossil fuel @ 15%. Thus, the Commission does not find any reason to enhance the Station Heat Rate of 3800 Kcal/Kwh considered in the impugned order for the purpose of tariff determination till a detailed study is carried out by some independent agency or the Department of New and Renewable Energy, Madhya Pradesh.

By Order dated 03.05.2015, the Commission had determined the year wise tariff for the projects commissioned up to the FY 2013-14. Due to review of the norms in terms of the Judgment dated 29.05.2014 issued by the APTEL, the tariff for the control period beyond FY 2013-14 could not be determined. As per clause 5.1 of the impugned tariff order, in case tariff for the next control period is not determined before commencement of next control period, the tariff as per tariff order dated 02.03.2012 shall continue to be in force until revised tariff is determined. Also, it would not now be appropriate to determine the tariff for the projects commissioned during the FY 2014-15 and 2015-16. Therefore, based on the order dated 03.05.2015, the Commission decides to continue the same tariff for the projects commissioned during FY 2014-15 & 2015-16 as determined for the projects commissioned during the FY 2013-14”.

15.15 According to Clause 8.10 of Tariff Order, the Biomass Plants for more than 2 MW are subject to the scheduling and merit order principles. At the same time, the Clause 5.6 of the Tariff Order specifies that the biomass plants will normally be “Must Run” as per MPERC Regulations, 2010. According to the counsel of the Respondent No.1, MPERC, all the conditions prevailing in the Tariff order dated 02.03.2012 are continued in the subsequent Tariff orders. Accordingly, the ‘must run’ status specified in clause 5.6 of the Tariff order has to continue.

15.16 Further, it is to mention here that Clause 9 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 clearly specifies that the co-generation and renewable source of energy are to be excluded from the ambit of “Merit Order Dispatch Principles”.

15.17 In the subsequent amendments to Clause 9, it has been mentioned in the 2nd and 3rd Amendments that scheduling of wind generation with collective capacity of 10 MW and above solar generating plants with collective capacity of 5 MW and above, shall be made as per the decision of Central Electricity Regulatory Commission (CERC).

15.18 According to Article 5.1 Biomass based power plants for more than 2MW shall be subject to scheduling and merit order principles. Both the clause 5.6 of the Tariff Order and Article 5.1 of the PPA/Clause 8.10 of the Tariff order are contradictory. The State Commission, as per Section 86(1)(e) of the Electricity Act, 2003, has to promote renewable sources of energy. The relevant sections are quoted below:

“86.(1)(e) promote cogeneration 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, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;”

61(h) the promotion of co-generation and generation of electricity from renewable sources of energy”

15.19 According to above sections of the Act, the State Commission has to promote cogeneration and generation of electricity from the renewable sources of energy.

15.20 Let us examine the relevant part of the regulation which deals with R.P.O is extracted here as under:

“Section 3(xi) ‘Obligated Entity’ means the entity such as the Distribution Licensees, Captive Consumers and Open Access Consumer who are mandated to fulfill Renewable Purchase Obligation under these Regulations;

Section 4.2 If the Distribution Licensees fulfill the minimum purchase requirements and still have offers from energy generators including Co-generators from Renewable Sources, then either the Distribution Licensee or the Investor/Developer can approach the Commission for approval of such additional procurement offers.

Section 4.3 If an Obligated Entity is not able to fulfill the minimum purchase requirements as per Regulation 4.1 above, such Obligated Entity shall be required to purchase Energy Certificates issued by the Central Agency as specified in PART-B of these Regulations.

Section 4.4 The condition of minimum purchase requirement for the Obligated Entities can be relaxed by the Commission to the extent it is affected by the Force Majeure Conditions such as war, strike, lockout, riots, act of god or natural calamity etc.

Section 4.5 The energy from all the Renewable Sources of Energy and Co-generation units may be procured centrally by the M.P. Power Trading Co. Ltd. on behalf of the Distribution Licensees, at the tariff determined by the Commission from time to time in its Tariff orders. The energy so procured centrally will be allocated by M.P. Power Trading Co. Ltd. to all Distribution Licensees in the ratio of total actual energy input to each one of them in previous Financial Year. This arrangement of central procurement shall be applicable till the related provisions of 'Transfer Scheme Rules, 2006' notified by the Government of Madhya Pradesh remain in force.

Section 13.1 The RPO specified in Regulation 4.2 hereinabove shall always be kept reserved by the Obligated Entities for procurement of Specific type of Renewable Energy, if any, and shall be diverted, if necessary, to other Renewable Energy Sources, only on a temporary basis, and also that all energy available from this source shall be purchased until it reaches the aforementioned percentage even if consequently the total Renewable Energy purchase exceeds the total RPO considering the Renewable Energy Power Purchase Commitments made under the Power Purchase Agreement (hereinafter, "the PPAs") already entered into and consented to by the Commission.

Section 13.2 Further, such obligation to purchase Renewable Energy shall be inclusive of the purchases, if any, from Renewable Energy Sources already being made by Obligated Entities.

15.21 Further, the State Commission in the 5th amendment to the Regulations specified the RPO by various sources of energy by the obligated entities in the following table :

"S.No.	Financial Year	Cogeneration and other Renewable Sources of Energy		
		Solar (%)	Non Solar (%)	Total (%)
(1)	(2)	(3)	(4)	(5)
1.	2010-11	-	0.80	0.80
2.	2011-12	0.40	2.10	2.50
3.	2012-13	0.60	3.40	4.00
4.	2013-14	0.80	4.70	5.50
5.	2014-15	1.00	6.00	7.00
6.	2015-16	1.00	6.00	7.00

7.	2016-17	1.25	6.50	7.75
8.	2017-18	1.50	7.00	8.50
9.	2018-19	1.75	7.50	9.25"

and Section 15 of the Regulations specifies the effect of default. The relevant Section is quoted below:

“15.1 In the event the Obligated Entities do not fulfill the mandate of the obligation to purchase energy from Renewable Energy Sources as provided in these Regulations during any Financial year and also do not purchase the certificates from the Power Exchange, the Commission may :

(i) direct the Obligated Entity to deposit into a separate Fund, to be maintained by such Obligated Entity, such amount as the Commission may determine as required for purchase of Certificates to the extent of the estimated obligation on the basis of the shortfall in units of RPO and the Forbearance Price of the Certificates which shall be utilized, as may be directed by the Commission, partly for purchase of the certificates and partly for development of Transmission infrastructure for evacuation of power from Generating Stations based on Renewable Energy Sources:

Provided that the Obligated Entities shall not be authorized to use the fund created in pursuance of Clause (i) above, without prior approval of the Commission;

(ii) to the extent of the shortfall in the fulfillment of the Obligations, the Commission may empower an Officer of the State Nodal Agency to procure from the Power Exchange the required number of Certificates out of amount in the Fund.

15.2 The Distribution Licensee shall be in breach of its License condition if it fails to deposit the amount directed by the Commission within 15 days of the communication of the directions.

15.3 Further, where any person though required to comply with these Regulations fails to purchase the required percentage of power from Renewable Energy Sources or the Renewable Energy Certificates, he shall also be liable for penalty as may be decided by the Commission under Section 142 of the Act.”

15.22 Accordingly, all the obligated entities are bound to fulfill the renewable purchase obligation at the specified percentage of renewable energy out of the annual drawal of power by the obligated entities.

15.23 We have gone through the tariff orders issued by the Commission for the FY 2014-15, 2015-16 & 2016-17, we find that the obligated entities i.e. Distribution Companies in the State of M.P. are falling short in fulfilling the RPO. The details of RPO to be required, fulfilled and short fall extracted from the tariff orders is as under:

"Table 37: Renewable energy requirement computed by the Commission (MU)

Particulars	East	West	Central	State
<i>RPO Solar</i>	1%	1%	1%	1%
<i>RPO Non Solar</i>	6%	6%	6%	6%
Total	7%	7%	7%	7%
Ex-bus Renewable energy requirement to fulfill RPO (MU)				
<i>RPO Solar</i>	181	217	192	590
<i>RPO Non Solar</i>	1087	1301	1156	3544
Total (MU)	1268	1518	1348	4134
Energy available from existing Renewable Sources (MU)				
<i>Solar</i>	150	179	160	489
<i>Other than Solar</i>	410	491	436	1337
Total	560	670	596	1826
Shortfall				
<i>Solar</i>	31	37	33	101
<i>Other than Solar</i>	677	810	720	2207
Total	708	847	753	2308

"Table 17: RPO Obligation for FY 2015-16:

Renewable Purchase Obligation		FY 2015-16
<i>Solar</i>	%	1.00%
<i>Other than Solar</i>	%	6.00%
Total	%	7.00%
Ex-bus renewable energy requirement to fulfill RPO (MU)		
<i>Solar</i>	MU	648
<i>Other than Solar</i>	MU	3,888
Total	MU	5,536
Energy Available from existing Renewable Sources		
<i>Solar</i>	MU	541
<i>Other than Solar</i>	MU	1,670
Total	MU	2,211
Shortfall		
<i>Solar</i>	MU	106
<i>Other than Solar</i>	MU	2,218

<i>Total</i>	MU	2,324
<i>Extra Surplus available after meeting RPO obligations</i>	MU	2,324
<i>IEX rate</i>	Rs/unit	2.94
<i>Additional revenue from sale of surplus due to RPO obligation</i>	Rs. Crore	683.27
<i>Renewable Energy purchase Rates</i>		
<i>Solar</i>	Rs./unit	7.64
<i>Other than Solar</i>	Rs./unit	4.94
<i>Additional Cost due to RPO Obligation</i>		
<i>Solar</i>	Rs. Crore	81.34
<i>Other than Solar</i>	Rs. Crore	1,095.49
<i>RE Power Purchase from new/other sources to fulfill RPO</i>	Rs. Crore	1,176.83
<i>Revenue from sale of surplus units</i>	Rs Crore	(683.27)
<i>Net RE Power Purchase from new/other sources to fulfill RPO</i>	Rs. Crore	493.56

"Table 19: RPO for FY 2016-17:

Renewable Computation	Purchase Obligation	FY 2016-17
Solar	%	1.25%
Other than Solar	%	6.50%
Total	%	7.75%
Ex-bus renewable energy requirement to fulfill RPO (MU)		
Solar	MU	781
Other than Solar	MU	4,059
Total	MU	4,839
Energy Available from existing Renewable Sources		
Solar	MU	912
Other than Solar	MU	2,382
Total	MU	3,294
Shortfall		
Solar	MU	-
Other than Solar	MU	1,677
Total	MU	
Extra Surplus available after meeting RPO obligations	MU	1,677
IEX rate	Rs/unit	2.50
Additional revenue from sale of surplus due to RPO obligation	Rs Crore	419.21
Renewable Energy purchase Rates		
Solar	Rs./unit	5.05*
Other than Solar	Rs./unit	5.58
Additional Cost due to RPO Obligation		

Solar	Rs. Crore	-
Other than Solar	Rs. Crore	935.68
RE Power Purchase from new/other sources to fulfill RPO	Rs. Crore	935.68

15.24 On perusal of the above data, we find that the State utilities/distribution companies (obligated entities) are falling short of non-solar power towards fulfillment of RPO obligation. To fulfill the obligation, the said distribution companies have to purchase renewable energy certificates or they are bound to purchase renewable power from other States. Further, as per clause 15.1, in case the obligated entity does not fulfill the mandate of the obligation by purchasing Renewable energy, obligated entity has to deposit the shortfall cost of R.E. obligation in a separate fund to be maintained by such obligated entity.

16. The National Tariff Policy and Indian Electricity Act clearly specify that the State Commission has to promote co-generation and renewable energy generation in the States. We feel that closing down of biomass plants/scheduling of the biomass plants, there will be a shortfall of renewable power to fulfill the said targets towards fulfillment of RPO by the State Commission. By purchasing renewable energy certificates to fulfill the renewable power purchase obligation leads to extra expenditure to be done by the distribution companies (obligated entities) and thereby to meet the energy balance, the distribution companies have to incur extra expenditure for purchase of power to meet the demand and the expenditure has to include ARR of the distribution companies, which lead to increase in tariff and burden to end consumers. We feel that these biomass power plants should be categorized under 'Must Run' as per clause 5.6 of the MPERC Regulations, 2010 so that the renewable purchase obligation can be met by the obligated entities and also to safe guard the Biomass power generation sector.

16.1 It is true that in the tariff order dated 02.03.2012, under clause 8.10, biomass based power plants of more than 2 MW shall be subject to the scheduling and

merit order dispatch principles. The Central Commission decided that the wind energy and solar energy are dependent on the climatic conditions and hence they should be put under scheduling and merit order dispatch principle to save the grid from sudden injection of power from these sources. Further, in the MPERC Regulation (Co-generation and generation of electricity from renewable sources of energy) 2010, in clause 9 it is clearly mentioned that the generation from co-generation under renewable sources of energy are excluded from the merit order dispatch principle. Subsequently, in the amendment to the clause 9 of the Regulation, it was incorporated that the appropriate directive shall be issued on scheduling of wind electric generators of capacity 10 MW and above and solar generation plants with capacity of 5 MW and above are to be kept under scheduling but not the biomass plants.

16.2 Thus, we do not agree with the State Commission to keep the Biomass power plants in scheduling as mentioned in the Clause 8.10 of the tariff order dated 02.03.2012 but at the same time, the clause 9 of the Regulation supports the Biomass plants under non-scheduling category and as per clause 5.6 of the tariff order dated 02.03.2012, the Biomass plants should be given 'Must Run Status'. Further, this Tribunal in various judgments upheld that the State Commissions should follow their own condition of the Regulations while determining the Tariff order.

16.3 It is also to state that in the tariff order dated 02.03.2012, a two part tariff was introduced and thereby the biomass power plants can survive with fixed charges to meet their capital cost, O&M expenses etc. even if the plants are in scheduling so that the generators can pay back their commitments towards loan re-payment to the nationalized banks and to financial institutions. In the subsequent tariff orders, the two part tariff was replaced by single part tariff. In the single part tariff if the biomass generators are kept under scheduling and dispatch principles it is difficult for the generators to meet their expenditures like payment of loan, O&M expenses etc. and thereby the biomass plants are

forced to close down and thereby the principle of promotion of renewable energy sources will be defeated.

- 16.4 In view of the above, we feel that the biomass generating plants are to be kept under must run status so that the obligated entities can fulfill their RPO obligation and thereby the object of National Tariff Policy and promotion of co-generation and renewable energy generation can be fulfilled. Further, the biomass generation can survive in the State of M.P. It is pertinent to mention that the Appellant plants are supplying power from the date of commissioning without any scheduling by the State Load Dispatch Centres. In the light of the above, the very basis for providing for scheduling and merit order principles and not giving must run status contained in the Tariff Order dated 02.03.2012 ceased to apply. Further, in general we feel that merit order principle would apply when there is a two part tariff but in the case of single part tariff, there is no question of applying merit order dispatch principle.
- 16.5 Accordingly, we are not agreeing with the decision of the State Commission that the project for more than 2 M.W. are subject to scheduling and merit order principles in terms of the para 8.10 of the Tariff Order dated 02.03.2012 since date of commissioning.
17. Conditions (c) & (d) are not carried forward as contested by the counsel of the Respondent No. 1 from the original Tariff Order dated 02.03.2012 or in the subsequent revision of Tariff Orders dated 03.05.2015 and 13.08.2015 and hence, the State Commission cannot impose the Impugned Order on these conditions. However, we will discuss these issues also.
- 17.1 **Whether the State Commission is correct in stating that the tariff is applicable to the projects using rice husk, wheat husk, mulberry and coal (limited to 15% of the total fuel on annual basis)?**

17.1 (i) We are distressed to read the following comments made by the State Commission in the Impugned order, which apart from incorrect, are also derogatory:

"9. The Hon'ble APTEL has not taken into cognizance of this fact and passed the order dated 04.05.2016 wherein specific numbers have been provided for the GCV and SHR, which could only have been arrived by the Commission scientifically upon the data to be furnished by the Appellant."

It was improper and opposed to judicial discipline for the State Commission to pass such comments on this Tribunal's judgment. Appeal from the order of this Tribunal lies to the Supreme Court and it is the Supreme Court alone which can comment on legality or otherwise of this Tribunal's Order. We deprecate this approach of the State Commission and record our strong disapproval. The State Commission should refrain from passing such comments in future.

17.2 (ii) This Tribunal in judgment dated 29.05.2014 in Appeal No. 144 of 2013 expressed displeasure regarding the attitude of the State Commission and expressed the view as under:

"We find that the State Commission has again not given reasoned findings for Gross Calorific Value (GCV) of the fuel and the Station Heat Rate (SHR). Therefore, we again remand the matter to the State Commission to re-determine the norms. The State Commission after remanding the matter from this Tribunal's Judgment dated 18.02.2013 in Appeal No. 93 of 2012 considered the GCV of fuel as 3600 Kcal/kg and Station Heat Rate (SHR)" of 3800 kCal/kWh.

17.3 Hence, this Tribunal in its Judgment dated 29.05.2014 remanded the matter to the State Commission to determine the Gross Calorific Value (GCV) of the fuel and Station Heat Rate (SHR) of the plant. The relevant portion of the Judgment dated 29.05.2014 is reproduced below:

- “28. We find that the State Commission has again not given a reasoned order to the GCV of biomass fuel. The State Commission has also not considered the Central Commission’s Regulations as directed by this Tribunal and has decided to retain GCV at 3600 Kcal/kg.
29. We find that the Central Commission in its tariff Regulations of 2012 has adopted GCV at 3300 Kcal/kg based on the suggestions recovered from Ministry of New and Renewable Energy, study carried out by National Productivity Council and CEA study. The Central Commission has considered GCV of biomass at 3250 Kcal/kg and after taking into account, use of 15% of coal (average coal GCV at 3600 Kcal/kg), the weighted average GCV has been considered at 3300 Kcal/kg.
30. We agree that the normative value of GCV has to be decided based on the types of biomass fuels used in the State. However, the State Commission has indicated that there is no established ground to determine the weighted average GCV. We find that neither the Appellants have furnished proper data giving the proportion of different biomass fuels used by them nor the State Commission took assistance of the concerned State agencies to obtain the data on availability of different types of biomass fuels in the State. The State Commission could take assistance from State Renewable Energy Agency, Agriculture Department to ascertain the availability of types of biomass fuels prominently in the State and assess the proportion of different biomass fuels. Data of GCV of different biomass fuels being available, it may be possible to determine the weighted average GCV of biomass fuel. Considering 15% use of coal and GCV of coal available in the State, the normative GCV may be determined. The Appellants are also directed to furnish data regarding actual use of different types of biomass fuel with the supporting documents to the State Commission for consideration”.

17.4 The State Commission again re-determined the Tariff in the Order dated 13.08.2015 by considering their earlier values of GCV of fuel as 3600 kCal/kWh and SHR of 3800 kCal/kWh without following the instructions of this Tribunal in the judgment dated 29.05.2014.

17.5 Finally, this Tribunal was forced to finalize the parameters in the Judgment dated 04.05.2016 in Appeal No. 211 of 2015, the GCV of fuel as 3100 kCal/kWh and SHR of 4200 kCal/kWh based on the reports of Deputy Commissioner of NRED, Bhopal, as per the report of the Committee constituted by CERC, reports of NRED and as per the report of the Expert Committee of Central Electricity Authority (CEA), for survival of the Biomass plants and directed the State Commission to re-determine the tariff as per these values.

- 17.6 It is pertinent to mention here that as per the request of the State Commission, the Deputy Commissioner, NRED, Bhopal conducted the tests on biomass available in the state of Madhya Pradesh and submitted the values on GCV of fuel and SHR vide letter No. 2354 dated 23.03.2015 but the State Commission considered their earlier values of 3600 Kcal/kg of Gross Calorific Value and 3800 Kcal/Kwh of Station Heat Rate.
- 17.7 The State Commission failed to specify any basis or type of biomass fuel while considering the GCV of fuel as 3600 Kcal/kg in the Tariff Order approved by the State Commission. i.e. dated 02.03.2012, 03.05.2015 and 13.08.2015.
- 17.8 It is pertinent to mention that the article 7.8 of the PPA specifies monitoring mechanism for use of fossil fuel which is reproduced below:

“7.8 Monitoring Mechanism for use of fossil fuel: MPERC has prescribed procedure this in Clause 8.25 and 8.26 of the Tariff Order for procurement of power from biomass based power projects dated 02.03.2012 as follows:

The project developer shall furnish a monthly fuel procurement and fuel usage statement duly certified by Chartered Accountant, to the appropriate agency designated by the Commission for the purpose of monitoring the fossil and non-fossil fuel consumptions. However, the compliance of the condition of fossil fuel usage shall be monitored on annual basis.

The statement shall cover details such as:-

- a) Quantity of fuel (in tones) for each fuel type (biomass fuels and fossil fuels) procured and consumed during the month for power generation purposes.*
- b) Cumulative quantity (in tones) of each fuel type procured and consumed till the end of that month during the year.*
- c) Actual (gross and net) energy generation (denominated in Kwh) during the month.*
- d) Cumulative actual (gross and net) energy generation (denominated in Kwh) until the end of that month during the year.*

e) Opening fuel stock quantity (in tones)

f) Receipt of fuel quantity (in tones) at the power plant site and

g) Closing fuel stock quantity (in tones) for each fuel type (biomass fuels and fossil fuels) available at the power plant site.

17.9 Thus, the State Commission designated an appropriate agency for monitoring the type of fuels used by the Biomass Power Plant. The State Commission can easily get the details of the Biomass used by the generators of Biomass plants and can check the GCV & SHR values based on the records. Biomass fuels are of varied nature and depends upon the region and the appellants use and every biomass available in the region considering numerous benefits of adding electricity generation, capacity based on environmentally benign biomass as fuel comprising of rice husk, other agricultural residue, woody mass from regeneration plantation crops etc. to conserve fast depleting fossil fuel reserve, to gainfully utilize local source of renewable source of energy. The State Commission has designated a Nodal Agency to act on behalf of the Commission for promotion of renewal energy projects in the State of Madhya Pradesh.

17.10 Further, the State Commission did not mention anywhere in the tariff orders regarding type of biomass to consider GCV of fuel as 3600 kCal/Kg.

17.11 Thus, we do not agree with the State Commission in stating that Impugned Order is subject to the usage of biomass fuels of rice husk, wheat husk, mulberry and coal (15% of annual usage of coal) without considering the ground realities and ratio of mixing up the various types of biomass fuels fixing the specific condition towards usage of biomass fuel is not correct.

17.12 **[Condition] (d) Whether the State Commission is correct in putting the condition that the tariff fixed in the Impugned Order dated 30.11.2016 shall be applicable for the projects for which PPA has already been executed at the time of commissioning of the project?**

17.13 We have gone through the submissions and noticed the date of commissioning of the biomass power plants of the Appellants – (1) M/s. Orient Green Power Company Limited, (2) M/s. Arya Energy Limited; and (3) M/s. Shalivahana Green Energy Limited. The date of commissioning of the Biomass Power Plants of these Appellants are as follows:

1. **M/s. Orient Green Power Company Limited**

Capacity: 10 MW
Date of commissioning: 22.01.2014

2. **M/s. Arya Energy Limited**

Capacity: 12 MW
Date of commissioning 31.05.2013

3. **M/s. Shalivahana Green Energy Limited**

Capacity: 15 MW
Date of Commissioning 03.10.2015

17.14 Out of the three biomass generators only M/s. Orient Green Power Company Limited has entered into PPA on 18.01.2016 with MP Power Management Company Limited (MPPMCL) and M/s. Arya Energy Ltd. entered into PPA on protest on 18.01.2017.

17.15 (ii) According to Clause 4.1, Tariff is applicable to all new biomass power generation projects in the State of M.P. commissioned on or after the date of issue of this order and the clause did not specify that the Tariff is applicable only for the biomass generating plants who have executed power purchase agreement at the time of commissioning of appellants projects.

17.16 Further, Clause 4.2 of the Tariff Order dated 02.03.2012 specifies for the plants where the PPA has already been executed by the developer is not commissioned prior to issue of this order, the tariff and terms and conditions as per this order shall be applicable to these projects also. This clause was not modified in the revised Tariff Orders dated 03.05.2015 and 13.08.2015.

17.17 We have gone through the records and noticed that all Appellants' projects were commissioned in the years 2013-14 and 2014-15 and these Biomass plants are supplying power to MPPMCL on the basis of Letter of Intent (**LoI**) and none of the plants signed PPA with MPPMCL at the time of the commissioning of the plants. M/s. Orient Green Power Limited (Appellant 2) commissioned its project on 22.01.2014 but entered into PPA with MPPMCL on 18.01.2016 i.e. after a period of two years from the date of commissioning. The appellant No.2 is supplying power to MPPMCL on the basis of LoI only upto the date of entering into power purchase agreement. As per the records, we have noticed that the MP Power Management Company Limited informed to M/s. Arya Energy Limited (Appellant 3) that the PPA is under finalization and would be ready in a few days and further stated till then, we are pleased to place this LoI on you for supply of entire generated power less auxiliary consumptions. The relevant letter is reproduced below:

"No. 05-01/Biomass/LoI/927

Jabalpur, dated 19.9.2013

To

M/s. Arya Energy Limited
E-14, 3rd Floor, Shyam Plaza
Pandri
Raipur - 492001 9CG)

Sub:- LoI for purchase of power by MPPMCL, from your 12 MW Biomass based power plant installed at Village Gondara Tola, Kotma, Dist. Anuppur (M.P).

Ref:- Your letter no. AEL/MPPTCL/PPA/2013-14 dt. 07th Sep. 2013.

Dear Sir,

This is with reference to your above cited letter dated 07th Sep. 2013 and Commissioning Certificate dtd. 16.09.2013. As per Commissioning Certificate, the plant has been commissioned on 30.05.2013. The PPA is under finalization and would be ready in a few days. Till then, we are pleased to place this LoI on you for supply of entire generated power less auxiliary consumptions from your 12 MW Biomass based power plant installed at Village Gondara Tola, Kotma, Dist. Anuppur (M.P). to MPPMCL from the date of issue of LoI or obtaining the connectivity and power injection permission from Discom/Transco whichever is later till the execution of Power Purchase Agreement, at the rate and other terms and conditions to be laid out in the PPA. The other terms & conditions shall be as under: -

1. Commencement of Supply -

- a) M/s. Arya Energy Limited shall initiate to Concern officers of Discom/Transco before commencement of supply under this LoI.

- b) Commencement of supply shall only be done after inspection and written permission of concern officers of Discom/Transco.
- c) SE (O&M) MPPKVVCL Shahdol shall arrange jointly meter reading before commencement of supply to the Grid Substation.

2. Delivery Point:- The delivery point shall be in line isolator of outgoing feeder at Generation Substation.

3. Point of Injection:- It shall be 132 kv bus of 132 kV S/s Kotma Dist. Anuppur of MPPTCL.

Please acknowledge the receipt and acceptance of this LoI as per return fax followed by postal confirmation.

Thanking you,

Yours faithfully,

Chief General Manager (Commercial)
MP Power Management Co. Ltd.
Jabalpur

17.18 As per the records, M/s. Arya Energy Limited has not entered into PPA with MPPMCL due to lack of finalization of PPA by MPPMCL. The Appellant M/s. Arya Energy Limited supplying power to the procurer from the date of commissioning on the basis of LoI only.

17.19 Similarly, M/s. Shalivahana Green Energy Limited supplying power to MPPMCL on the basis of short-term LoI and MPPMCL is extending the LoI to Shalivahana Green Energy Limited from time to time. Accordingly, the Appellants could not enter into PPA on the date of commissioning of their power plants due to lack of readiness of draft PPA by the MPPMCL. We have gone through the records and noticed that M/s. Arya Energy and M/s. Shalivahana Green Energy Limited are requesting in various letters to MPPMCL for early signing of PPAs but still they could not sign the PPA and they are continuing to supply power under LoI.

17.20 The State Commission's contention that the tariff shall be applicable for the projects for which PPA has been executed at the time of commissioning of the projects has no meaning as the Respondent No. 2 is unable to finalize the draft copy of the PPA to enter into PPA with the biomass generators at the time of

taking of power from the Appellant's projects. Further, as per the submissions of the Appellants, the Appellant No. 3 Arya Energy Limited approached the Hon'ble High Court of Jabalpur which stayed the termination of LoI and directed Respondent No.2 to act on the letters of the appellant No.3 and disposed of the writ petition on 30.11.2016 directing the Respondent No. 2 to take a decision on the PPA execution. As per the directions of the High Court of Jabalpur, draft PPA was sent to the Appellant on 04.01.2017 by the Respondent No. 2 and appellant, Arya Energy Limited executed PPA under protest on 18.01.2017.

18. The conditions (e) specified in the para 15 of the Impugned Order is a general direction given to M.P.Power Management Company Ltd., Jabalpur regarding preparation of draft PPA for Commission's approval.

Further, the condition (f) is a Monitoring Mechanism regarding the use of fossil fuel by the Biomass developers in the State of Madhya Pradesh.

In view of the above, we do not find any perversity or illegality with these two conditions (i.e. conditions (e) & (f)) mentioned in para 15 of the Impugned Order, which are as follows:

- (e) *The M.P. Power Management Co. Ltd., Jabalpur shall submit, the draft of the Power Purchase Agreement to be executed, if any, with the developer of biomass based power projects to be commissioned after the date of this order, for approval of the Commission.*
- (f) *The developers shall have to submit monthly information, as required under para 8.25 of the tariff order dated 02.03.2012, to the M.P. Power Management Co. Ltd., Jabalpur by 10th day of each month following the month of information failing which action as per the provisions of para 8.26 of the tariff order dated 02.03.2012 must be ensured by the M.P. Power Management Company Limited.*

ORDER

We set aside the conditions (a), (b), (c) and (d) specified in para 15 of the Impugned Tariff Order dated 30.11.2016.

Accordingly, the appeal, being No. 338 of 2016, is disposed of along with IA Nos. 732 of 2016, 733 of 2016, & 734 of 2016 and 69 of 2017.

No order as to costs.

Pronounced in the open court on this **20th day of March, 2017.**

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

**(T. Munikrishnaiah)
Technical Member**

**(Justice Ranjana P. Desai)
Chairperson**



REPORTABLE / ~~NON-REPORTABLE~~