

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO. 82 OF 2015
AND
APPEAL NO. 136 OF 2015
AND
APPEAL NO. 274 OF 2015
AND
APPEAL NO. 285 OF 2015 &
AND
APPEAL NO. 58 OF 2016**

Dated : 16th April, 2019

**PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

APPEAL NO. 82 OF 2015

IN THE MATTER OF :

Tata Power Delhi Distribution Ltd.

NDPL House,

Hudson Line, Kingsway Camp,

GTB Nagar, Delhi – 110 009

... Appellant(s)

VERSUS

Delhi Electricity Regulatory Commission

Viniyamak Bhawan, 'C' Block, Shivalik,

Malviya Nagar, New Delhi – 110 017

... Respondent(s)

Counsel for the Appellant (s) :

Mr. Gopal Jain, Sr. Adv.

Mr. Gaurav Dhama

Mr. Sumit Gaur

Mr. Anurag Bansal

Ms. Sakshi Mehrotra (Rep.), TPDDL

Counsel for the Respondent(s) :

Mr. Dhananjay Baijal

for Mr. Nikhil Nayyar for R-1

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. RELIEF SOUGHT IN APPEALS

The Appellants in these appeals sought the following reliefs which are as follows:

1.1 APPEAL 82 of 2015-

- a) Admit the present appeal; and/or
- b) Set aside the order dated 09.01.2015 passed by Delhi Electricity Regulatory Commission in Petition No. 6/2010, and
- c) Set aside/quash the direction passed by Delhi Commission to the appellant to obtain Registration/accreditation with the State Nodal Agency for REC mechanism; and/or
- d) Grant the approval and adoption of Generic Tariff to the appellant for Keshavpuram Project; and/or.
- e) Pass any other appropriate order/directions accordingly.

1.2 APPEAL NO.285 OF 2015

- a) Admit the present Appeal; and/or
- b) Set aside the impugned order dated 16.03.2015 passed by Delhi Commission determining tariff for 20 months using arbitrary norms failing to determine the tariff for the remaining period as per the documents, records placed before it; and not granting of the

Generic Tariff as notified by the Central Commission for the relevant period; and/or

c) Pass any other appropriate order/directions accordingly.

1.3 APPEAL NO. 136 of 2015

a) Admit the present Appeal; and/or

b) Set aside the order dated 16.03.2015 passed by Delhi Electricity Regulatory Commission in Petition No. 30/2011 and

c) Set aside/quash the direction passed by Delhi Commission to the appellant to obtain Registration/accreditation with the State Nodal Agency for REC mechanism; and/or

d) Grant the approval and adoption of Generic Tariff to the Appellant's 60 kWp Solar PV plant at DSIIDC-II Grid Station, Narela, Delhi; and/or for Keshavpuram Project; and/or

e) Pass any other appropriate order/directions accordingly.

1.4 APPEAL NO. 274 OF 2015

a) Admit the present Appeal; and/or

b) Set aside the impugned order dated 07.01.2015 passed by Ld. Delhi Commission arbitrarily adding/modifying the Terms and Conditions of the Appellant's agreement to sell entire power generated from its Rooftop Solar PV Project; and/or

- c) Set aside/quash the direction passed by Ld. Delhi Commission to the appellant to obtain Registration/accreditation with the State Nodal Agency for REC mechanism; and/or

- d) Pass any other appropriate order/directions accordingly

1.5 APPEAL 58 OF 2016

- a) Admit the present Appeal

- b) Set aside the impugned order dated 07.01.2016 passed by the Ld. Delhi Commission determining tariff for 18 months using arbitrary norms and failing to determine the tariff for the remaining period as per the documents, records placed before it; and non-granting of the Generic Tariff as notified by the Ld. Central Commission for the relevant period; and

- c) Pass any other appropriate order/directions accordingly.

- d) Pass such further or other order(s) as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.

2. QUESTIONS OF LAW:

The Appellant in various Appeals has raised following questions of law for adjudication on this Tribunal:-

- 2.1** Whether the Delhi Commission can on its own motion determine the tariff for a generation project for part of the term in terms of generic tariff and remaining terms as the average pooled cost of power of the distribution licensee?
- 2.2** Whether the Delhi Commission can grant piece meal tariff by determining levelised tariff for only 2 years and then variable tariff linked with Distribution Business of the Appellant for a period of 23 years and not determining tariff for the entire tariff period under Regulation 10(1) read with Regulation 6(3) of the CERC Regulations, 2009?
- 2.3** Whether the Delhi Commission can arbitrarily adopt an alien methodology by using Distribution Business Tariff norms for determining certain tariff components, CERC Regulations, 2009 norms for certain other components and considered Actual costs for certain components of the Appellant's Keshavpuram Project after having expressly adopted the CERC Regulations, 2009?
- 2.4** Whether the Delhi Commission was justified in passing non speaking order not giving reasons for determining project specific tariff, which was not prayed for by the Appellant instead of generic tariff?

- 2.5 Whether the Delhi Commission was justified in the inordinate delay taken in tariff determination exercise for the Appellant's Keshavpuram Project?
- 2.6 Whether the Delhi Commission can thrust REC mechanism upon the Appellant for its project commissioned in 2010 when the same has nowhere been made mandatory in terms of the In Principle Approval granted or the CERC Regulations, 2009 as adopted by the Delhi Commission?
- 2.7 Whether the Delhi Commission can ignore the principles to be relied upon when determining tariff from renewable sources and link the tariff of power derived from renewable sources of energy with cost of power from conventional sources of energy in terms of Paragraph 6.4 of National Tariff Policy?
- 2.8 Whether the impugned orders are in sync with the object of Section 86(1) (e) of the Act and the RPO Regulations?

3. BREIF FACTS OF THE CASE

Brief facts of the case are as follows:

- 3.1 The Appellant, Tata Power Delhi Distribution Limited is a Company incorporated under the provisions of the Companies Act, 1956 with registered office at NDPL House, Hudson Line, Kingsway Camp, Delhi- 110009. The Appellant is a joint venture of the Tata Power

Company Limited and Delhi Power Company Limited (fully owned by the Government of NCT of Delhi) with majority shareholding of 51% being with the Tata Power Company limited pursuant to reforms in electricity Distribution sector undertaken by GNCTD in the year 2002.

- 3.2** The Appellant distributes electricity in the North and North-West areas of Delhi catering to around 14.2 lakhs consumers. The distribution and sale of power by TPDDL is regulated under the provisions of the Electricity Act, 2003 (“Act”) by the Delhi Electricity Regulatory Commission (“DERC” or the “Delhi Commission”), the Respondent herein.

APPEAL NO. 82 OF 2015

- 3.3** The Appellant, Tata Power Delhi Distribution Limited has filed this Appeal under Section 111 of the Electricity Act, 2003 against the impugned Order dated 09.01.2015, passed by the Delhi Electricity Regulatory Commission (DERC) in Petition No. 6 of 2010, whereby the DERC has passed the order determining the tariff for the Appellant’s Keshavpuram Solar PV Project.

3.4 The Appellant is aggrieved by the Impugned Order passed by the Delhi Electricity Regulatory Commission which has rendered lower tariff than its actual entitlement and thus filed the present appeal.

APPEAL NO. 136 OF 2015

3.5. The Appellant, Tata Power Delhi Distribution Limited has filed this Appeal under Section 111 of the Electricity Act, 2003 against the impugned Order dated 16.03.2015, passed by the Delhi Electricity Regulatory Commission in Petition No. 30 of 2011 relating to generation of electricity from 60kWp Solar Photo Voltaic Project, at NDPL DSIDC-II Grid Sub-station, Narela, Delhi.

3.6 The Appellant is aggrieved by the Impugned Order passed by the Delhi Electricity Regulatory Commission granting tariff much lower than its entitlement and thus filed the present appeal.

APPEAL NO. 274 OF 2015

3.7 The Appellant, Tata Power Delhi Distribution Limited has preferred this Appeal under Section 111 of the Electricity Act, 2003 against the impugned Order dated 07.01.2015, passed by the Delhi Electricity Regulatory Commission in Petition No. 18 of 2011 for approval of Terms and Conditions for procurement of its Solar

Energy generated from 60 KW Solar Project at DSIDC-II Grid, Narela, Delhi.)

- 3.8** The Appellant is aggrieved by the Impugned Order passed by the Delhi Electricity Regulatory Commission, thus filed the present appeal.

APPEAL NO. 285 OF 2015

- 3.9** The Appellant, Tata Power Delhi Distribution Limited has filed this Appeal under Section 111 of the Electricity Act, 2003 against the impugned Order dated 24.04.2015, passed by the Delhi Electricity Regulatory Commission in Petition No. 08 of 2011 relating to for generation of electricity from 25kWp Solar Photo Voltaic Project, at CENNET Building, Pitampura, Delhi.

- 3.10** The Appellant is aggrieved by the Impugned Order passed by the Delhi Electricity Regulatory Commission, thus preferred the present appeal.

APPEAL NO. 58 OF 2016

- 3.11** The Appellant, Tata Power Delhi Distribution Limited has filed this Appeal under Section 111 of the Electricity Act, 2003 against the impugned Order dated 07.01.2016, passed by the Delhi Electricity

Regulatory Commission in Petition No. 31 of 2011 seeking adoption of generic tariff for generation of electricity from grid interactive 25kWp Solar Photo Voltaic Project at TPDDL GTK Grid Sub-Station, Delhi.

3.12 The Appellant is aggrieved by the Impugned Order passed by the Delhi Electricity Regulatory Commission, thus filed the present appeal.

4. Shri Gopal Jain, the learned Sr. counsel appearing for the Appellant, has filed the written submissions for our consideration as under:-

4.1 The in-Principle Approval dated 22.07.2009 given was supposed to be guided by various rules/regulations/instructions/ incentives issued by MNRE, Govt. of India, applicable regulation of CERC as and when issued. The State Commission should have fully followed this in letter and spirit.

4.2 The Commission had adopted CERC regulations vide a letter dated 09.07.2010 under the CERC Regulations, the generic tariff is Rs.18.44.

- 4.3** The Commission had to decide the Tariff determination, PPA approval matter in the extant regime but did not do so. The Commission has deviated from this statutory mandate, which is a fatal error. As a result, the tariff is unviable and resulted in steep gap/shortfall.
- 4.4** This arbitrary approach of the Delhi Commission creates Regulatory uncertainty, which is against the rule of law and in teeth of the objectives sought to be achieved by the Electricity Act, 2003.
- 4.5** This impugned order and approach defeats the objective of policy which is to promote clean energy. The impugned decision is arbitrary and violative of Article 14 of the Constitution.
- 4.6** The Commission should have determined the right tariff for the entire period of 25 years i.e. the useful life of the plant (As per the CERC regulations)
- 4.7** The Respondent Commission has however fixed a piece meal tariff for 2 years only. This is contrary to the regulation 6.3 and 10 of CERC regulations.

4.8 REC Mechanism was at a very nascent stage when projects of Appellant were executed. Further the registration for obtaining REC was optional and not mandatory.

4.9 In the course of arguments on 15.03.2019, the stand of the Commission was that this resort to REC mechanism was optional and was not mandatory. Resultantly this is a 'Non- Issue' without prejudice.

4.10 Further the price of the REC fluctuates. The fluctuating price of the REC's will also defeat the purpose and object of the projects in renewable sector and procurement of energy from renewable sources.

4.11 The impugned decision proceeded on the basis that REC Mechanism was not optional. But in lieu of that submission, the impugned order holds no good and is without basis.

4.12 The tariff determined under the impugned order will result in huge under recovery as the tariff is not viable. The Appellant will not recover its investment. The objective of policy and mandate of sec

86(1) (e) of the Act and clause 6.4 (1) of the National Tariff Policy would stand defeated.

4.13 The approach of the Respondent Commission is flawed as the decision results in a piece-meal tariff and the period has been wrongly bifurcated. The correct approach would have been to fix the tariff subject to the extant CERC regulations for the entire period/useful life of the project i.e 25 years.

4.14 The Respondent Commission has used wrong norms/yardsticks. It has linked the tariff for power generation from renewables with the cost of power from the conventional sources. This is totally arbitrary and perverse.

4.15 The Respondent Commission should have determined project specific tariff in line with its decision dated 09.07.2012 adopting the CERC tariff regulations read along with Sec 61 (a) of the Electricity Act, 2003.

4.16 The communication of the Respondent Commission dated 09.07.2010 clearly and unequivocally states that the generic tariff

would be granted to all the projects eligible for GBI under MNRE schemes.

5. Shri Nikhil Nayyar, the learned counsel appearing for the Respondent Commission has filed the written submissions for our consideration as follows:-

5.1 The Appellants through the present appeals has challenged the order of the Respondent Delhi Electricity Regulatory Commission dated 9.01.2015, by which it has not granted the Appellant the generic solar tariff of Solar Photovoltaic ["PV"] projects of Rs. 18.44/kmw for 25 years as per the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009 [Hereinafter "**CERC Regulations**"].

5.2 The Appellant has based its Appeals on the following premises:

- (i) That the Appellant was entitled to Rs. 18.44 per unit for 25 years under the CERC Regulations.
- (ii) That the Respondent Commission could not deviate once it had been granted an in-principal approval.
- (iii) That the Commission could not have bifurcated the tariff of the Appellant in the manner it did.
- (iv) That the direction to avail of the REC mechanism was incorrect.

- 5.3** The Appellant has failed to demonstrate the applicability of the CERC Regulations to its projects and a perusal of the record would show that the Appellant is not entitled to the benefit of the CERC Regulations.
- 5.4** The Respondent Commission adopted the CERC Regulations only for those Solar PV Projects, which were eligible for a Generation Based Incentive (GBI) under the Jawaharlal Nehru National Solar Mission [JNNSM] and the Ministry of New and Renewable Energy [MNRE] Guidelines No. 5/23/2009-P&C dated 16.6.2010 for roof top PV and small power generation projects. It is submitted that this is fully borne out by the Respondent Commission's order adopting the CERC Regulations, dated 9.7.2010.
- 5.5** The in-principle approval granted to the Appellant's project did not at any point state that they would be granted a specific tariff. On contrary, the said approval specifically noted that this was on an experimental basis and that the said *'project shall be guided by various Rules/Regulations/Instructions/Incentives issued by MNRE Govt. of India'*.
- 5.6** The Appellant's very petition was predicated on the Appellant being eligible for incentives and subsidies from the MNRE. The Appellant's Petition to the Commission stated as follows:

“1.8....The project has a useful life of 25 years from the date of commercial operation. The Petitioner is pleased to intimate that the Ministry of New and Renewable Energy (MNDRE), Government of India also advised Petitioner to set up this project under Jawaharlal Nehru National Solar Mission and accordingly Petitioner will be extended all the benefits accruing under the Jawaharlal Nehru National Solar Mission policy....” E.S.

It is therefore submitted that the issue of MNRE subsidies as well as incentives was crucial to the Appellant's claim for the tariff of Rs. 18.44. It is submitted that on admitting the Appellant's appeal the Respondent Commission noted that the issues including the issue of the MNRE subsidy were to be considered at the stage of final hearing. The Appellant has vide its response dated 19.6.2012 as well as its affidavit dated 26.10.2012 stated that no subsidy or incentive from the MNRE was applicable. It is therefore submitted that a fundamental assertion made by the Appellant in its petition before the Respondent Commission was false and therefore it could not have persisted with its claim for the generic tariff as per the CERC Regulations.

5.7 It is also important to note that the Appellant got registered its projects for GBI on IREDA website but was not eligible for GBI as registration was made after the cap of 110 MW, and had written to the Executive Officer of the State Nodal Agency viz. Energy Efficiency and Renewable Energy Management Center and stated as follows:

“...We would request you to use your good office to get these projects sanctioned and registered with IREDA on Merit basis else Delhi will be deprived of the Solar Energy Projects that it deserves.”

It is therefore abundantly clear that the Appellant’s projects were not viable and this was within the Appellant’s knowledge. It is further apparent that the Appellant was not covered by the Respondent Commission’s order dated 9.7.2010 and therefore could not have expected to have been granted the Rs. 18.44 generic tariff and the same was correctly rejected by the Respondent Commission.

5.8 The Appellant’s case was a unique case where the Generator and the Distributor had the same parent company. It is therefore submitted that the grant of the generic tariff of Rs. 18.44 to the Appellant would have resulted in a disproportionate increase in the

tariff of the citizens of Delhi. It is submitted that this was a concerning issue for the Commission and ultimately the Commission vide its final order had given directions to ensure that sufficient safeguards were implemented to ensure that such a situation where the generator and distributor are the same entity is avoided in the future.

5.9 In fact, the Respondent Commission had to evolve a mechanism using its regulatory powers to ensure that some opportunities were given to the Appellant to extract some return in investment without creating an excessive burden on the consumers of Delhi.

5.10 The powers of the Regulatory Commission to regulate in the absence of specific regulations have been upheld by the Constitution Bench of the Hon'ble Supreme Court in *PTC India Ltd. Vs CERC & Ors.*, (2010) 4 SCC 603, in which it was held as follows:

“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court

*which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. **An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process.** Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.”*

E.S.

In view of the above, the Respondent Commission was therefore fully entitled to create the 23+2 year tariff plan for the Appellant given the fact that the Appellant was not covered by the Respondent Commission's order dated 9.7.2010.

5.11 It is submitted that once it was made apparent that the Appellant was not receiving any incentive or subsidy that would enable it to claim the benefit of the Respondent Commission's order dated 9.7.2010 adopting the CERC Regulations, the Respondent Commission directed that the Appellant could register itself with the REC mechanism under the CERC Regulations in order to gain the benefits of the REC market. It is submitted that this order was passed by the Commission on 1.2.2013.

5.12 Regarding contention of the Appellant that REC mechanism is not mandatory, it is submitted that though this was not mandatory but had the Appellant exercised this option it would have been able to participate in the REC market and thereafter extract the market value of its generated renewable energy. The REC mechanism allows the cost of the renewable energy to be spread over the entire grid and not force the cost on the producer state. It is therefore submitted that this mechanism was the best mechanism available to ensure that the Appellant would be able to extract the best value for its produced energy without burdening the consumers in Delhi.

5.13 Since the Appellant was not entitled to the generic tariff, the Respondent Commission sought to grant the Appellant a levelized Tariff for 2 years. This was to ensure that the Appellant was not prejudiced for the period before which the Commission had directed the Appellant to apply for RECs. For the period after the Appellant has been granted tariff on Average Pooled Purchase Cost [APPC] basis and was free to apply for Renewable Energy Credits and sell them on the market and earn market value for its investments.

5.14 The APPC was calculated on the basis of data requested by the Respondent Commission and provided by the Appellant. It is also submitted that wherever the actual data for tariff determination were available, the Delhi Commission has considered those since otherwise it would result that the tariff is determined on assumptions even though the actual audited figures were available. It is submitted that the Impugned Order also contains detailed reasoning on the basis of calculation of the tariff and there is no infirmity in the Impugned Order.

5.15 Hence, the mechanism followed by the Respondent Commission is wholly appropriate since it balances the equities and is fully consistent with the Electricity Act, 2003.

5.16 In view of the submissions made hereinabove, the appeals are without merit and misconceived and are liable/deserve to be dismissed with cost.

6. In all these appeals relief sought by the Appellants involves similar issues and arise from the identical orders by the Respondent Delhi Electricity Regulatory Commission. Therefore, we thought fit to take up all the appeals together by passing common judgment and order in the interest of justice and equity.

7. We have heard learned counsel appearing for the Appellant and learned counsel appearing for the Respondent Commission at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and

submissions available, the following principal issues emerge in the instant Appeals for our consideration:-

Issue No.1: Whether in the facts and circumstances of the cases, the Appellant is entitled to the tariff applicable as per CERC regulations?

Issue No.2: Whether the State Commission can thrust REC mechanism upon the Appellant for its projects commissioned in the year 2010?

Issue No.3: Whether the Impugned Order is passed in violation of the relevant provision of Section 86 (1) (e) of the Act and RPO Regulations?

Issue No.4: Whether, the State Commission can determine levelized tariff for two periods, i.e. one for two years and the other for 23 years?

OUR ANALYSIS AND FINDINGS:

8. ISSUE NO.1:-

8.1 Learned counsel for the Appellant submitted that in-principal approval for setting up Solar PV project was granted by the State Commission on 22.07.2010 which was supposed to be guided by

various rules/regulations/instructions/incentives issued by MNRE, Govt. of India as well as the CERC Regulations which was adopted by the State Commission vide letter dated 09.07.2010. Vehemently, the learned counsel submitted that as per CERC Regulations, Generic tariff for solar PV projects was Rs. 18.44 per unit and the State Commission was accordingly required to grant the tariff and approve the PPA. However, the State Commission has deviated from its statutory mandate and as a result, the Appellant has been granted an unviable tariff.

8.2 Learned counsel further submitted that such arbitrary approach of the State Commission creates regulatory uncertainty which is against the settled principles of law and in teeth of the objects envisaged to be achieved by the Act, National Electricity Policy, Tariff Policy etc. Further, the Impugned Order is arbitrary and violative of Article 14 of the Constitution of India .

8.3 Per-Contra, learned counsel for the Respondent Commission contended that the Appellant in fact has failed to demonstrate the applicability of CERC Regulation to its projects. He was quick to point out that the Commission adopted CERC Regulations only for those Solar PV Projects which were eligible for the Generation

Based Incentive (GBI) under the Jawahar Lal Nehru Solar National Mission piloted by MNRE, Govt. of India.

8.4 Learned counsel for the Commission further submitted that the in-principal approval granted to the Appellant's at no point, said that they would be granted specific tariff and on the contrary, the said approval specifically noticed that the same was on experimental basis and also, it shall be guided by various rules/regulations/instructions/incentives issued by MNRE, Govt. of India.

8.5 Learned counsel further submitted that the Appellant's petition was premised on the fact that the Appellant being eligible for incentives and subsidies from MNRE. The relevant extract of the Appellant's petition to the State Commission is reproduced as under::

*1.8....The project has a useful life of 25 years from the date of commercial operation. **The Petitioner is pleased to intimate that the Ministry of New and Renewable Energy (MNDRE), Government of India also advised Petitioner to set up this project under Jawaharlal Nehru National Solar Mission and accordingly Petitioner will be extended all the benefits accruing under the Jawaharlal Nehru National Solar Mission policy....***

E.S.

8.6 Learned counsel for the Respondent Commission advancing his arguments, vehemently submitted that issue of MNRE subsidy as well as incentives was crucial to the Appellant's claim for the generic tariff of Rs.18.44 per unit. He contended that while admitting the Appellant's petitions, the Respondent Commission noted that all the issues including issues of MNRE subsidy was to be considered at the stage of final hearing. However, the Appellant, vide its reply dated 19.06.2012 as well as its affidavit dated 26.10.2012, categorically indicated that no subsidy or incentive from MNRE was available to it.

8.7 It is pertinent to note that the Appellant made efforts to get registered its projects for GBI under IREDA website but could not become eligible for GBI as registration was made after the cap of 110 Mega Watt.

8.8 Learned counsel accordingly summed up that the Appellants projects were unviable for want of subsidy/incentives from MNRE and the same was within full knowledge of the Appellant. Additionally, the Appellant was not covered by the State Commission's order dated 09.07.2010 and therefore, could not

have expected to receive the generic tariff of Rs. 18.44 per unit and accordingly, the Commission has correctly rejected the said claim of the Appellant. Hence, the appeal filed by the Appellant may kindly be dismissed with cost.

OUR FINDINGS:-

8.9 We have carefully considered the contentions of the learned counsel for the Appellant and learned counsel for the Respondent Commission and also taken note of the provisions of regulations of DERC as well as REC regulations of CERC. The State Commission vide its order dated 23.02.2008 had given directions to the Appellant to achieve one percent of total power procurement from RE sources and also expressed its willingness to allow higher quantum of renewable power to address the adverse impact of climate change and global warming. The approval of Keshavpuram solar project was accorded by the State Commission by order dated 22.07.2009 subject to various conditions as reproduced below

“7....NDPL to file a detailed petition with the Commission for fixation of tariff for this project at least 03 months before commissioning of the project.

8.....the approval is being given to this project as a pilot project on experimental basis to promote use of renewable and to mitigate global warming and it will not be construed as a precedent for other projects to come up.

9....This project shall be guided by various Rules/Regulations/Instructions/Incentives issued by MNRE Govt. of India and applicable regulations of CERC as and when issued.”

E.S.

8.10 As required under the relevant guidelines, the solar projects of the Appellant were pre registered with the Energy Efficiency and Renewable Energy Management Centre, Govt. of NCT, Delhi on 14.07.2010. However, for availing the subsidy and incentives from MNRE, the projects were to be registered with IREDA online as per the guidelines issued by MNRE on a specific date. It is relevant to note that on 15.07.2010, i.e. the date of opening of registration under the MNRE guidelines, the solar projects of the Appellant could not be registered due to some technical problem with the website of IREDA. After the identification of the technical problem, the number of schemes from other States of the country had already been registered as the programme was considered for eligible projects on ‘first come first serve basis’ with the capacity cap of 110 MW.

- 8.11** It is submitted that the matter was taken up by the Appellant with the concerned department explaining the difficulties faced in registering on the website of IREDA and requesting to get the projects sanctioned/registered on merit basis. It, however, did not yield any result.
- 8.12** It is not in dispute that Keshavpuram Solar Project was approved by the State Commission as a pilot project on experimental basis to promote RE generation and the project was to be guided by rules/regulations/incentives issued by MNRE, Government of India as well as relevant regulations of CERC. An approval to take up other similar solar PV projects was granted by the State Commission vide order dated 17.05.2010. The Appellant's counsel contended that once the State Commission had adopted the CERC regulations vide its letter dated 09.07.2010, the generic tariff of Rs. 18.44 per unit is required to be granted to its projects.
- 8.13** Learned counsel for the Respondent Commission contended that the State Commission adopted the CERC regulations only for those Solar PV Projects which were legible for Generation Based Incentive (GBI) under the Jawahar Lal National Solar Mission and the MNRE guidelines for Solar PV and similar power generation projects.

- 8.14** Learned counsel for the Respondent Commission vehemently submitted that in principal approval granted to the Appellants projects did not state that they would be granted the specific tariff or generic tariff of Rs. 18.44 as the Appellant's projects were not eligible for GBI. Learned counsel for the Appellant contended that its projects were taken up after clear approval of the State Commission that it was guided by regulations of CERC. He was quick to point out that there was no such pre-condition that the tariff as per CERC regulations will be applicable only if incentive scheme of MNRE is availed by the project.
- 8.15** Learned counsel for the Respondent Commission emphasized that the instant case of the Appellant was a unique case where generator and distributor had the same parent company and therefore, if the generic tariff of Rs. 18.44 was granted to the Appellant, the same could have resulted in disproportionate increase in the tariff of consumers of Delhi.

8.16 Having regard to the contentions of the learned counsel for the Appellant as well as Respondent Commission we find that due to one or the other reason, the Appellant's projects could not be registered on IREDA website for availing applicable incentives/subsidy from MNRE and accordingly, the State Commission applying its prudence did not grant generic tariff of Rs. 18.44 per unit. In the light of these facts, we hold that the decision of the State Commission for not granting tariff of Rs. 18.44 per unit is just and reasonable and does not call for our intervention.

9. ISSUE NO.2 :-

9.1 Learned counsel for the Appellant submitted that when its projects were executed, the REC mechanism was at a very initial stage. He further submitted that the State Commission cannot thrust upon the Appellant to opt for registration for obtaining REC route as such mechanism is optional and in no way mandatory. He was quick to submit that in the course of arguments on 15.03.2019, the stand of Regulatory Commission became crystal clear that REC mechanism was optional and not mandatory, resulting this into a non-issue without prejudice.

9.2 *Per contra*, learned counsel for the Respondent Commission contended that in view of the Appellant, not receiving any incentive or subsidy, the State commission directed the Appellant to get itself registered under the REC mechanism in order to gain the benefit of REC mechanism. Learned counsel further submitted that though REC mechanism is not mandatory but had the Appellant exercised this option, he could have been able to extract the market value of REC, in turn, without burdening the consumers of Delhi.

OUR FINDINGS:-

9.3 We have considered the rival contentions of both the counsels and analyzed their submissions in this regard. Under the CERC, REC regulations two distinct categories have been notified, i.e. REC or non REC mechanism and the choice to select any of the two categories rests with the developer. Once the selection/option is exercised by the RE generator, the State Commission is not entitled to thrust upon another mechanism beyond the selection of the developer. We are unable to accept the contentions of learned counsel for Respondent commission that directions to opt for REC mechanism was directed for the sole benefit of the Appellant.

Hence, we find that the directions of the State Commissions to opt for REC mechanism are against the settled principal of law especially that under the doctrine of selection.

10. ISSUE NO.3 :-

10.1 Learned counsel for the Appellant submitted that the decision of the Respondent Commission defeats the mandate of Section 86(1) (e) of the Electricity act and Clause 6.4 (1) of the National Tariff Policy which is to encourage generation from renewables. He further submitted that vide its order dated 23.02.2008, the State Commission had advised the Appellant to achieve 1% of total power purchase from renewables. The relevant clause 2.151 of the order is produced below

“2.151 The Commission is of the view that to encourage use of clean fuel and to mitigate pollution, the Petitioner should try to achieve 1% of the total power purchase from renewable sources. The Commission is inclined to allow higher quantum of renewable power to address the menace of pollution and global warming and promote use of clean fuel subject to its availability and convenience taking into account the overall power purchase cost allowed in the ARR.”

10.2 Learned counsel for the Appellant vehemently submitted that the Impugned Order is contrary to the earlier orders of the State Commission which provided a view focused on development of RE generation in Delhi. As a result, it has created regulatory uncertainty, which is against the rule of law and in teeth of the objectives sought to be achieved by the Act and Policies of the Government of India to promote clean energy. Learned counsel contended that the impugned decision of the State Commission is arbitrary and violative of Article 14 of the Constitution of India.

10.3 *Per contra*, the learned counsel for the Respondent Commission submitted that the whole contentions of the Appellant revolved around the allowing generic tariff of Rs. 18.44 for 25 years under the CERC regulations and the Commission could not deviate, once it had been granted in principal approval. To substantiate his submissions, learned counsel relied on the judgment of the Hon'ble Supreme Court in **PTC India Ltd. Vs. CERC & Ors. (2010) 4 SCC-603**, which has held as follows:

“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if

there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. **An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process.** Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.”

E.S.

10.4 Learned counsel emphasised that the State Commission is entitled to regulate and in the process to evolve a mechanism using its regulatory powers in absence of specific regulations. Keeping this

in view, the State Commission has adopted the balanced approach to ensure some opportunities were given to the Appellant to extract the return on investment without causing excessive burden on the consumers.

OUR FINDINGS:

10.5 We have carefully considered the contentions of both the counsels appearing for the Appellants and Respondents and also taken note of the judgments relied upon by them. Once, the generic tariff as per CERC regulations was not admissible to projects of the Appellant, Commission being mandated to regulate the power industry in the State has evolved the mechanism to strike a balance between the developer/distributor and the consumers. We do not notice any legal infirmity or perversity in the findings of the State Commission in this regard and hence, our inference is not called for.

11. ISSUE NO.4 :-

11.1 Learned counsel for the Appellant submitted that as per the Regulations 6.3 and 10 of CERC Regulations, the State Commission should have determined the applicable tariff for the

projects for the entire period of 25 years, i.e. the useful life of the plants. He further contended that the State Commission in utter contravention of the settled law and regulations has however adopted a piecemeal tariff for first two years and the tariff for the remaining 23 years period. Learned counsel vehemently submitted that the approach of the State Commission is flawed as the useful life of the projects has been wrongly bifurcated. Further, the State Commission has applied wrong norms/yardsticks as it has linked the determination of tariff from RE sources with cost of power from the conventional sources. Learned counsel quick to submit that the tariff determination under the Impugned Order will result in huge under recovery of investment as the tariff emerges to be totally unviable.

11.2 *Per contra*, learned counsel for the Respondent Commission submitted that as the Appellant was not entitled to the generic tariff, the State Commission sought to grant the Appellant levelised tariff for two years and the Appellant was directed to apply for REC mechanism to avail benefit of recovery to some costs through sale of RE certificates. Pending such action on the part of the Appellant, the State Commission thought prudent to grant tariff on

Average Power Pool Cost (APPC). Learned counsel further submitted that the APPC was computed based on the actual data provided by the Appellant and the State Commission has rendered detailed reasoning on the basis of calculation of tariff in the Impugned Order and thus, there is no legal infirmity in the impugned order of the State Commission.

OUR FINDINGS-:

11.3 We have analyzed the submissions of the learned counsel for the Appellant and the learned counsel for the Respondent Commission and it is manifest that the State Commission is in fact adopted an adhoc piece-meal approach for determination of tariff for solar projects of the Appellant, namely, calculating tariff for first two years based on the project's cost and other applicable norms and decided to grant tariff at APCC for the balance period i.e. 23 years. We, thus opine that the decision of the State Commission to bifurcate the useful life of the project for determination of tariff in 2 and 23 years, does not appear appropriate. As per the settled norms as well as relevant regulations, the tariff is required to be determined for the entire period of useful life of the projects i.e. 25 years. Whatsoever may be the reason, we are unable to accept

the stand of the State Commission in this regard, as brought out in the Impugned Order. In fact, the State Commission ought to have applied the judicious approach for arriving at the levelised tariff for the entire life of the solar projects based on the actual/audited cost of the projects with application of other associated norms for computation of project wise tariff. In view of these facts, we hold that the Impugned Order of the State Commission suffers from legal infirmity and perversity to the extent of the facts mentioned above.

12. SUMMARY OF FINDINGS:

12.1 In light of our consideration and findings mentioned in the preceding paragraphs, we are of the considered opinion that without getting registered under the GBI scheme of MNRE, Govt. of India, the Appellant is not entitled to the generic tariff of Rs. 18.44 per unit, as applicable under the CERC Regulations. The instant case being unique in nature, where generator and distributor has the same parent company, the grant of generic tariff without GBI would have been a huge burden on the consumers and keeping these aspects in view, the State Commission has

taken a just and reasonable decision in the instant case by not allowing generic tariff.

12.2 The directions of the State Commission that the Appellant should go for REC mechanism to cover up its losses are against the settled principles of law that once the option has been exercised by any generator to follow REC or non REC mechanism, cannot be forced to go beyond the selected route.

12.3 The State Commission vide its Order dated 23.02.2008, advised the Appellant to try to achieve 1% of the total power purchase from renewable sources and accordingly approved the execution of Solar PV Projects. During course of implementation of the projects, the Appellant could not avail the facility of incentive/subsidy from MNRE and as a result the reference projects could not qualify for generic tariff applicable as per CERC regulations. Merely by not allowing generic tariff to the Appellant's projects, does not amount to any violation of the Electricity Act and Policies of the Government to promote the generation from RE sources.

12.4 Thus, we hold that the approach of the State Commission to allow computed tariff for first two years and APCC tariff for balance 23 years is erroneous. We are of the considered opinion that in the facts and circumstances of the instant cases, the State

Commission ought to have computed project wise tariff based on the actual/audited cost and other associated parameters after prudence check.

Having regard to the peculiar facts and circumstances of the case as stated supra, we are constrained to observe that the State Commission has delayed the processing of the tariff petition beyond proportion. There is inordinate delay of 5 years in deciding the claim of the Appellant. We specifically observe that such things should not be repeated in future.

ORDER

For the forgoing reasons, as stated supra, we are of the considered opinion that issues raised in the instant appeals being Appeal No. 82, 136, 274, 285 of 2015 & 58 of 2016 have merit and accordingly, the appeals are partly allowed.

The Impugned orders passed by Delhi Electricity Regulatory Commission dated 09.01.2015, 16.03.2015, 07.01.2015, 24.04.2015 & 07.01.2016 in Appeal Nos. 82, 136, 274, 285 of 2015 & 58 of 2016 are hereby set aside so far it relates to our findings and directions as stated in Paragraph 12.1 to 12.4.

The Respondent State Commission is directed to pass the consequential orders in the light of the observations made in the above paragraphs from 12.1 to 12.4 as expeditiously as possible within a period of 4 months from the date of receipt of this copy of judgment and order.

No order as to costs.

Pronounced in the Open Court on this 16th April, 2019.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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