IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

APPEAL NO. 150 OF 2016

Dated: 27th May, 2019

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF:

M/s Siwana Solar Power Project (P)Ltd
H.No. 874, Sector – 6,
Bahadurgarh- 124507, Haryana … **APPELLANT**

VERSUS

1. Haryana Electricity Regulatory Commission
Bays No. 33-36, Sector-4,
Panchkula-134109
Haryana

2. Haryana Power Purchase Centre,
Shakti Bhawan,Sector-6,
Panchkula-134112
Haryana

3. Haryana Renewable Energy
Development Agency (HAREDA),
Plot No.-1, Sector-17
Panchkula-134109
Haryana …**RESPONDENTS**

Counsel for the Appellant **:** Mr. Hemant Singh
Mr. NIshant Kumar
Mr. Matrugupta Mishra
Ms. Shikha Ohri
Mr. Shourya Malhotra

Counsel for the Respondent : Mr. Nishant Ahlawat for R-1

Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Mr. Pulkit Agrwal for R-2

JUDGMENT

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

1.1 The present appeal has been preferred by M/s Siwana Solar Power Project Ltd. (herein "Appellant") under Section 111 of the Electricity Act, 2003 challenging the Order dated 20.01.2016 ("Impugned Order") passed by the Haryana Electricity Regulatory Commission (hereinafter referred to as the 'Commission') in Case No. 24 of 2015.

1.2 The Appellant is an Independent Power Producer having a 5 MW Solar Energy Power Plant in Village Mithi of District Bhiwani, Haryana. The Appellant executed a Power Purchase Agreement dated 21.02.2014 for supply of 5 MW power to Haryana Power Purchase Centre (herein Respondent No.2).

1.3 The Appellant is mainly aggrieved by the decision of the Respondent No. 1 Commission vide the impugned order dated 20.01.2016, whereby the said Commission has entitled the Respondent No. 1 to make payments to the Appellant for the power procured, contrary to the terms

of the PPA dated 21.02.2014 as well as contrary to the statutory principles.

1.4 The present appeal raises the following issues:

i) the Commission has approved payment of tariff for the power sourced by the Appellant contrary to Article 4.1 of the PPA. As per the said Article, the Appellant is entitled to a lower of the tariff determined by the said Commission vide order dated 13.08.2014 as compared to the lowest tariffs discovered by the Respondent No. 2 and the Respondent No. 3 in two independent bidding processes. As per the Appellant, Article 4.1 of the PPA, qua the bidding processes, cannot be implemented as the bidding processes being conducted by the Respondent Nos. 2 and 3 are non-est and a nullity, on account of the fact that the said bidding has been conducted without any Bidding Guidelines issued by the Central Government for renewable energy sources. Unless any such Guidelines are issued, there cannot be any legal bidding process conducted as per Section 63 of the Electricity Act, 2003 for ultimate procurement of power by the distribution licensees. Hence, in the light of the above, the Appellant is entitled to the tariff as determined by the Respondent Commission vide the tariff order dated 13.08.2014.

ii) the impugned order makes the Appellant liable to make payment of transmission/ wheeling charges, even though the entire power is being sold to the Respondent No. 2/ Haryana Discoms and no power is being sold to any third party. As such, there can be no wheeling charges which could be made applicable to the Appellant.

iii) the impugned order denies the Appellant the benefit of deemed generation, even though deemed generation was permitted by the Respondent Commission to the Solar projects as per an order dated 24.12.2010. Further, the regulations of the Respondent Commission do not prohibit such benefit.

2. Brief Facts of the Case:-

2.1 The Appellant is a company incorporated under the Companies Act, 1956 having its registered office at H.No. 874, Sector – 6, Bahadurgarh-124507, Haryana. The Appellant is an Independent Power Producer and has set up a 5 MW Solar Power Project in Village Mithi of Distt. Bhiwani (herein "Power Project").

2.2 The Haryana Electricity Regulatory Commission (herein "Respondent No. 1"/ "Respondent Commission") is the State Electricity Regulatory

Commission constituted under section 82 of the Electricity Act, 2003 (herein "EA, 2003").

2.3 The Respondent No. 2 herein is an entity which acts as a procurer of electricity on behalf of the Distribution Licensees of the State of Haryana.

2.4 The Respondent No. 3 is a nodal agency of the State of Haryana, responsible for permission and development of Renewable Energy.

3. Questions of Law:-

The Appellant has raised following questions of law for our consideration:-

(a) Whether the Respondent Commission failed to appreciate that Article 2.1.41 (b) and (c), and Article 4.1 (b) and (c) of the PPA can only be implemented when a bidding process under Section 63 of the Electricity Act, 2003 is conducted in accordance with the Bidding Guidelines issued by the Central Government for renewable sources of energy, for the ultimate power procurement by the Distribution Licensees?

(b) Whether a bidding process under Section 63 of the Electricity Act 2003 for procurement of power by the Distribution Licensees can be conducted without the mandatory guidelines, for renewable sources of energy, issued by the Central Government?

(c) When in the absence of the Bidding Guidelines for renewable sources of energy, the bidding process conducted by the Respondent Nos. 2 and 3 became a non-est and a nullity, which could not have been taken as a benchmark for implementation of Article 2.1.41 (b) and (c), and Article 4.1 (b) and (c) of the PPA?

(d) Whether the Respondent Commission erred in allowing levy of wheeling charges on the Appellant when the entire power was being sold to the Distribution Licensees, and not to any third party, which is a sine qua non for imposing the said charges?

(e) Whether the Respondent Commission erred in allowing imposition of wheeling charges when the delivery/ metering point was the plant switchyard and it was the Respondent No. 2 who had to wheel power through its own network?

(f) Whether the Respondent Commission erred in denying deemed generation benefit contrary to its directions dated 24.12.2010?

(g) Whether the Respondent Commission failed to consider that the HERC (Terms and Conditions for determination of Tariff from Renewable

Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 do not prohibit the benefit of deemed generation granted by the Commission's order dated 24.12.2010?

4. <u>Learned counsel, Mr. Hemant Singh, appearing for the Appellant has filed following written submissions for our consideration:-</u>

4.1 The Appellant has executed a power purchase agreement (hereinafter referred to as "PPA") dated 21.02.2014 with the Respondent No.2, which Respondent is the nodal agency for procurement of electricity by the Haryana Distribution Licensees.

4.2 The present appeal is with respect to the following issues:

a) Which tariff is applicable to the Appellant, in terms of Article 4.1 of the PPA;

b) Whether the Appellant is liable to bear wheeling charges;

c) Whether the Appellant is entitled for deemed generation benefit beyond backdown of 87.6 hours in a particular contractual year.

A. Which tariff is applicable to the Appellant, in terms of Article 4.1 of the PPA

4.3 As per the impugned order, the Respondent Commission has arbitrarily and wrongfully subjected the Appellant to a tariff of Rs. 6.44 per kWh, contrary to the terms of the PPA.

4.4 The Respondent Commission notified the HERC RE Tariff Regulations on 03.02.2011. The said Regulations were amended on 05.09.2011 (first amendment of HERC RE Tariff Regulations), whereby Regulation 64(3) was added .

As per the above amendment, it was mandated that in the event a renewable energy generator offers to sell its electricity, then the Respondent No. 2 has to necessarily execute a PPA with the said generator.

4.5 However, the Respondent No. 2 delayed execution of a PPA with the Appellant. This compelled the Appellant to file a Petition before the Respondent Commission, being Case No. HERC/PRO-29 of 2013. The Respondent Commission passed a final order dated 05.11.2013, wherein the Respondent No.2 was directed for signing a PPA with the Appellant. It was also observed that the Appellant had to start generation of power by 31.03.2014.

4.6 Finally, the PPA was executed between the Appellant and the Respondent No. 2 on 21.02.2014

4.7 For the purpose of the issue of tariff, as raised in the present Appeal, Article 4.1 of the PPA is relevant. As per Article 4.1, the Respondent No. 2 has to pay tariff to the Appellant which is the lowest of the following:

a) the tariff determined by the Respondent Commission, i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.03.2014, or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.06.2014;

b) the lowest tariff quoted and accepted in the long-term bid process conducted by the Respondent No. 2 before 31.12.2015; and

c) the lowest tariff quoted and accepted in the long-term bid process conducted by HAREDA before 31.12.2015.

From the above, it is evident that the applicable tariff qua the Appellant was either the tariff determined by the Commission or the bid tariff, whichever is lower.

4.8 As stated hereinbefore, the Respondent Commission vide its final order dated 05.11.2013 observed that the Appellant had to start generation of power by 31.03.2014. However, the implementation of the solar project by the Appellant got delayed.

4.9 Accordingly, the Appellant filed a petition, being HERC/PRO-51 of 2014, seeking extension of time in implementing the project. The Respondent Commission passed a final order dated 22.07.2014,

wherein it was mandated that the Appellant had to construct its solar power plant by 31.10.2014, and that the tariff applicable would be as determined by the Respondent Commission for FY 2014-15.

As per Article 4.1(a) of the PPA, the tariff mentioned therein was applicable in case the plant of the Appellant is commissioned by 30.06.2014. Hence, the above order modified para 4.1(a) of the PPA.

4.10 The implementation of the solar project got further delayed. The Appellant filed another petition seeking extension of time, being HERC/PRO-56 of 2014. The Respondent Commission passed a final order dated 29.09.2014, wherein time was extended till 31.12.2014. Further, the applicable tariff for the Appellant was specified as the tariff determined by the Respondent Commission for FY 2014-15. The Appellant, thereafter, commissioned its solar plant by 31.12.2014.

4.11 As per the above Article 4.1 of the PPA, the Appellant is entitled to either the tariff determined by the Respondent Commission, or the tariff discovered in the competitive bids to be issued by 31.12.2015, whichever is lower.

It is pertinent to mention herein that a bidding process is conducted by a distribution licensee under Section 63 of the Electricity Act, 2003. As

per the said provision, the bidding can only be done in accordance with the guidelines issued by the Central Government.

4.13 A bidding process was conducted by the Respondent No. 2, wherein the lowest tariff quoted was Rs. 6.50/kWh for 1 MW. During negotiations, the L1 bidder with capacity of 1 MW offered to lower the tariff to Rs. 6.44/kWh. However, as on date of the above bidding process, no bidding guidelines were issued by the Central Government. Hence, the entire bidding process was *non-est* and illegal from its inception.

4.14 Therefore, as per Article 4.1 of the PPA, the Appellant became entitled to option provided under 4.1(a). Articles 4.1(b) and 4.1(c) are not applicable since for them to become applicable, a legally valid competitive bidding process has to be in place, which is not there in the present case.

4.15 Accordingly, the Appellant was raising bills as per the tariff provided under Article 4.1(a) of the PPA.

In this context, the Appellant again refers to the aforementioned final order dated 29.09.2014, wherein the Respondent Commission extended the time for the Appellant to construct its solar plant by 31.12.2014. Further, the applicable tariff for the Appellant was specified

as the tariff determined by the Respondent Commission for FY 2014-15.

The above order dated 29.09.2014 amended Article 4.1(a) of the PPA by providing that instead of Rs. 7.58 per kWh, the applicable tariff would be the one determined by the Commission for FY 2014-15.

4.16 The Respondent Commission passed a tariff order dated 13.08.2014 in Case No. HERC/PRO- 50 of 2014. Vide the said order, the Respondent Commission determined a levelized tariff of Rs. 7.45 per kWh for Solar Power Plants commissioned in FY 2014-15.

Accordingly, as per Article 4.1(a) of the PPA, read with the aforementioned orders dated 29.09.2014 and 13.08.2014, the Appellant became entitled to a tariff of Rs. 7.45 per kWh.

4.17 However, the Respondent No. 2 was paying an arbitrary tariff of Rs. 6.44 per kWh. Accordingly, the Appellant filed a petition before the Respondent Commission, being Case No. HERC/PRO – 24 of 2015.In the said petition, the Commission passed the impugned order, wherein the following has been recorded :

> *"1.10 The Petitioner has submitted that the Respondent No.1 made the payments at tariff of Rs.6.44/kWh instead of making payment as per the approved tariff. The*

Respondent No.1 made various illegal deductions which are as under:

…….

2.3 That the Distribution Licensee cannot be made to pay a price higher than what has been agreed to between the generator and the procurer. HPPC is making the payments to the Petitioner for the monthly energy bills raised as per the Terms & Conditions of the Power Purchase Agreement as under:

……

That HPPC had floated tender to purchase 50 MW Solar Power in April 2014 and has signed PPA with four developers on 25.6.2015 for 23MW capacity at the lowest discovered tariff i.e. Rs.6.44/kWh. Thus, HPPC is making the payment to monthly energy bills raised by M/s Siwana in compliance to the Terms & Conditions of the PPA.

4. Commission's Analysis and Order

…..

4.2 The Petitioner, in its Petition and during arguments has submitted that the generic tariff determined by this Commission for Solar PV (Crystalline) Power Projects commissioned in the FY 2014-15 vide Order dated 13.08.2014 should be paid by the Respondent instead of Rs. 6.44 per kWh discovered through bidding. Per contra, Respondent No.1 submitted that they are paying the Petitioner as per the terms and conditions of the PPA signed between the parties.

….

Further, during the course of arguments, the Commission suggested that the year to year tariff should be worked out corresponding to the levellised tariff of Rs. 6.44 per unit and the year to year tariff so worked out be paid to the Petitioner by Respondent No. 1. This proposal was agreed to by the Respondent No. 1. Accordingly, the Commission directs

> *Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levellised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year."*
>
> (Underline supplied)

It is evident from the above that the Respondent Commission suggested the tariff of Rs. 6.44 per kWh solely on the basis that the same was lowest discovered in terms of the bidding process undertaken by the Respondent No. 2 (Articles 4.1(b) and (c) of the PPA).

4.18 Thereafter, the Respondent Commission issued two orders dated 12.09.2016 and 19.09.2016, passed in Case Nos. HERC/PRO-6 of 2016 and HERC/PRO-9 of 2016, respectively. In the said orders, the Respondent Commission set aside the bidding processes conducted by the Respondent No. 2.

Hence, based on the above orders, the impugned order dated 20.01.2016, wherein the Respondent Commission suggested a tariff of Rs. 6.44 per kWh based on the bidding processes, becomes *non-est*. The above orders dated 12.09.2016 and 19.09.2016 go to the root of the impugned order dated 20.01.2016.

4.19 The above orders 12.09.2016 and 19.09.2016 cancelling the bid process were challenged before this Tribunal in *Appeal No. 278 of*

2016 & 307 of 2016. This Tribunal in the judgment dated 09.03.2018 held as follows:

a) the Respondent Commission and the Respondent No. 2 made a "mistake" as the bid process was based on non-existent guidelines/ Standard Bidding Documents;

b) this Tribunal referred to the judgment of the Hon'ble Supreme Court in *Energy Watchdog Vs. CERC*, reported in (2017) 14 SCC 80, wherein it has been held that bidding process can be conducted even without the guidelines, provided that the said bidding process is blessed by the appropriate Commission by using its regulatory powers available under Section 86(1)(b) of the Electricity Act, 2003.

4.20 Hence, as per the *Energy Watchdog* judgment of the Hon'ble Supreme Court, for a bid process to become valid in the absence of the guidelines of the Central Government, an approval of the State Commission under Section 86(1)(b) of the Act is required.

4.21 Therefore, in the present case, the Respondent State Commission vide its aforementioned subsequent orders dated 12.09.2016 and 19.09.2016 rejected the "regulatory approval" of the bid process. The

said orders, on this specific issue, were not interfered by this Hon'ble Tribunal in its above judgment dated 09.03.2018, and as such, the impugned order, wherein the Respondent Commission suggested a tariff or Rs. 6.44 per kWh for the Appellant, based on the bidding processes, becomes *non-est*.

4.22 Under Electricity Act, 2003 a generator, when supplying electricity to a distribution licensee, is entitled to a tariff either as determined under Section 62 (cost plus) or Section 63 (bidding route) of the said Act.

In the absence of the applicability of Section 63, as evident through the aforementioned orders dated 12.09.2016 and 19.09.2016 of the Commission, read with the judgment dated 09.03.2018 of this Tribunal, the tariff qua the Appellant has to be necessarily as per Section 62. This is also the intent of Article 4.1 of the PPA, which provided an option of either the tariff determined by the Respondent Commission (Section 62), or the tariff through bidding route (Section 63). When the Section 63 option is nullified on account of the above orders, then the Appellant becomes entitled to tariff under option as per Article 4.1(a) of the PPA.

4.23 As per the Electricity Act, 2003, the tariff in a PPA is a statutory component, and cannot be termed as voluntary. In this context,

reference be made to the judgments of the Hon'ble Supreme Court in the following cases:

a) *India Thermal Power Ltd. v. State of M.P.*, reported in *(2000) 3 SCC 379*;

b) *Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd*., reported in *(2016) 8 SCC 743*.

In accordance with the above judgments, the Appellant has a right to be awarded tariff, which is statutory, and as per the provisions of Electricity Act, 2003. There has to be a legally valid tariff applicable to a generator (Appellant) when supplying to a distribution licensee (Respondent No. 2), otherwise the provisions of the Electricity Act 2003 read with the aforementioned judgments of the Hon'ble Supreme Court (rendered in *Energy Watchdog, India Thermal Power Ltd and Gujarat Urja Vikas Nigam Ltd*.) will be rendered otiose.

4.24 Hence, the Appellant, as a generator, cannot be forced to agree to a tariff of Rs. 6.44 per kWh as per the impugned order, when the very basis of the said order has been wiped out by way of the subsequent orders dated 12.09.2016 and 19.09.2016 of the Commission, and the judgment dated 09.03.2018 of this Hon'ble Tribunal.

4.25 In view of the above, the Appellant is entitled to the tariff as provided under Article 4.1(a) of the PPA, as modified vide the order dated 29.09.2014 which provided that the tariff order for FY 2014-15 would be applicable upon the Appellant. Further, as per the tariff order dated 13.08.2014 passed by the Respondent Commission for FY 2014-15, the applicable tariff qua the Appellant becomes Rs. 7.45 per kWh.

4.26 Hence, the Respondent No. 2 ought to pay a tariff of Rs. 7.45 per kWh to the Appellant strictly in accordance with Article 4.1(a) of the PPA.

B. Whether the Appellant is liable to bear wheeling charges

4.27 The Respondent No. 2 has been claiming wheeling charges from the Appellant. It is the case of the Appellant that no such charges can be claimed by the Respondent No. 2.

4.28 The Respondent Commission notified the HERC RE Tariff Regulations on 03.02.2011. The said Regulations were amended on 05.09.2011 (first amendment of HERC RE Tariff Regulations), whereby Regulation 73 was added.

As per the said amendment, it was provided that wheeling charges were to be levied by the distribution licensee from renewable energy generator, only in a situation whereby a transmission line is to be

constructed for selling the power from the renewable energy generator to the distribution licensee.

4.29 As per the 3rd amendment of the HERC RE Tariff Regulations notified on 15.07.2014, the protocol to pay wheeling charges was slightly modified by inserting Regulation 72(2). However, the said wheeling charges were mend only if a transmission line is to be constructed for selling the power from the renewable energy generator to the distribution licensee.

4.30 Thereafter, the Respondent Commission notified the 4th amendment of the HERC RE Tariff Regulations on 12.08.2015, wherein Regulation 73(2) was amended in order to provide that no "wheeling charges" shall be leviable on the renewable energy generators, if the entire energy injected into the grid is purchased by the distribution licensee.

4.31 The case of the Respondent No. 2 is that it is not levying any wheeling charges after the 4th amendment upon the Appellant. Hence, as per the Respondents, the Appellant shall be liable to bear "wheeling charges" for the period governed by the 3rd amendment of the HERC RE Tariff Regulations, which is from 31.12.2014 (date of commissioning of the project) to 12.08.2015.

4.32 The above understanding of the Respondents is fundamentally flawed, on account of the following:

a) the 1st and the 3rd amendment of the HERC RE Tariff Regulations only apply where the delivery point of electricity, i.e. the point from where electricity is to be delivered by the renewable generator to the distribution licensee, is away from the generator and therefore, a transmission line is to be constructed for selling the power from the renewable energy generator to the distribution licensee;

b) in the PPA of the Appellant, the delivery point, i.e. the point from where electricity is picked up by the Respondent No. 2, is the Appellant's generation switchyard;

c) this means that there is no requirement of any transmission line between the generator/ Appellant and the point from where the distribution licensee/ Respondent No. 2 receives electricity from the Appellant; and

d) hence, when no transmission line is required for delivery of power by the Appellant to the Respondent No. 2, then no wheeling charges can be levied.

4.33 This Tribunal in a *judgment dated 09.04.2014* passed in *Appeal No. 90 of 2013*. The said judgment is with respect to the same Respondents as are there in the present Appeal. In the said judgment, the following has been held:

a) when a generator is supplying the entire energy generated at its power plant for use by the distribution licensee, and is not wheeling any power for captive use or for sale to third party, then as per the definition of wheeling charges provided in Section 2(76) of the Electricity Act, 2003, no wheeling charges can be levied;

b) the banking and wheeling charges are not applicable where the generator is supplying the entire power at its bus bars to the distribution licensee for which the State Commission has determined the ex-bus tariff;

c) according to the PPA, the delivery point of the power is the switchyard of the power plant;

d) the distribution licensee has to refund amount wrongly deducted as wheeling charges to the generator within 45 days of the above judgment. In case of delay in making payment beyond 45 days

simple interest @ 12% per annum will be payable to the generator.

4.34 The above judgment is squarely applicable in the present case, on account of the following:

a) the entire power from the Appellant herein is being supplied to the Respondent No. 2. This is not under dispute by the Respondents; and

b) as per the PPA of the Appellant, the delivery point is the switchyard of the said Appellant.

4.35 Hence, in view of the above, the Respondent No. 2 ought to refund the entire wheeling charges collected from the Appellant between 31.12.2014 and 12.08.2015, along with interest @12% per annum in accordance with the above judgment of this Tribunal.

C. Whether the Appellant is entitled for deemed generation benefit beyond backdown of 87.6 hours in a particular contractual year

4.36 As per the impugned order, the Respondent Commission did not allow the benefit of deemed generation to the Appellant for back down of generation by the Respondent No. 2 beyond 87.6 hours in a year. The “deemed generation" was allowed through an order of the Respondent Commission dated 24.12.2010. As per the above order, the renewable energy generators were declared as “must run”. This meant as follows:

a) the renewable generators cannot be backed down; and

b) whatever power is generated has to be 100% procured by the beneficiary, in the present case the Respondent No. 2.

4.37 The above further means that renewable energy generators can never be backed down. However, the Respondent Commission gave a benefit to the Respondent No. 2 by stipulating that the said Respondent can back down a renewable energy generator for only 1% of the hours in a year, i.e. for 87.6 hours out of 8760 hours in a year.

As a result of the above, it meant that in the event a renewable generator is backed down for more than 87.6 hours in a year, then the Respondent No. 2 has to treat the backed down energy (beyond 87.6 hours) as "deemed generation", meaning thereby that the renewable generator/ Appellant becomes entitled to claim PPA tariff for the electricity backed down beyond 87.6 hours in a year.

4.38 The Respondent Commission has "regulatory" powers in terms of Section 86(1)(b) of the Electricity Act, 2003, qua determination of tariff for generation of electricity. This has been upheld by the Hon'ble Supreme Court in its judgments passed in *Energy Watchdog* and *Gujarat Urja Vikas Nigam Limited* (supra).

4.39 By using its regulatory powers, the Respondent Commission provided for a tariff protocol in the State of Haryanathat for backing down beyond 87.6 hours in a year, the quantum so backed down has to be treated as "deemed generation".

4.40 Admittedly, the HERC RE Tariff Regulations do not contain any prohibition against granting any benefit of deemed generation. Rather, the said regulations are silent on the said issue. It is therefore, stated that qua the field of deemed generation, the order of the Respondent Commission dated 24.12.2010 carries the force of law. As such, the benefit of deemed generation has to be granted to the Appellant.

4.41 Hence, the reasoning of the Commission in the impugned order that there is no provision regarding "deemed generation" in the PPA, is completely misplaced. This is further on the account of the fact that it is a settled principle of law, as declared by the Hon'ble Supreme Court, that tariff in a PPA is "statutory". In this context, reference be made to the judgments passed in *India Thermal* and *Gujarat Urja Vikas Nigam Limited* (supra). As such, any tariff protocol created by a regulatory order (in the present case qua "deemed generation") has to be honoured by the Respondents.

4.42 Therefore, after the passage of the above order dated 24.12.2010, the benefit of "deemed generation" cannot at all be denied to the Appellant.

4.45 In view of the above, the appeal filed by the Appellant ought to be allowed.

5. <u>Learned senior counsel, Mr. M.G. Ramachandran, appearing for the Respondent No.2 has filed following written submissions for our consideration:-</u>

5.1 The Petition being Case No. 24 of 2015 was filed by the Appellant before the State Commission seeking the following reliefs:

> *"It is, therefore, most humbly prayed that considering the submissions brought out above and sincere efforts made by the Petitioner to set up the Solar Project in Haryana, the Hon'ble Commission may kindly consider the following prayers:*
>
> *1. Hon'ble Commission may kindly accept the petition in its present form;*
>
> *2. Hon'ble Commission may kindly direct the Respondent Nigam to pay for the energy injected by the Petitioner at the tariff rates approved by Hon'ble Commission through its latest Generic Tariff order dated 13.08.2014;*
>
> *3. Hon'ble Commission may kindly direct the Respondent Nigam not to deduct any wheeling charges for the Solar Power Project of the Petitioner;*
>
> *4. Hon'ble Commission may kindly direct the Respondent Nigam to allow deemed generation benefit for the period when power is not injected into the system due to the fault of the Respondent Nigam beyond 87.6 hours a year, allowed by the Hon'ble Commission.*
>
> *5. Hon'ble Commission may kindly give any other relief, so deemed fit, in the present case.*"

5.2 The State Commission has rejected the Petition filed by the Appellant and the relevant findings of the State Commission are at Paras 4.2 to 4.4. In the Appeal filed, broadly, the Appellant has raised the following issues:

5.3 The State Commission ought not to have approved the tariff of Rs. 6.44 per Kwh being paid by the Respondent No. 2- Haryana Power Purchase Centre (hereinafter referred to as **'HPPC'**) to the Appellant for the energy supplied by the Appellant to HPPC in terms of the Power Purchase Agreement dated 21.02.2014 entered into between the parties, as the same is contrary to the PPA. The Appellant is entitled to the tariff of Rs 6.44 per Kwh.

5.4 The tariff of Rs. 6.44 per Kwh ought not to have been approved by the State Commission as the bidding processes conducted by HPPC is nullity on account of the fact that the bidding has been conducted without any bidding guidelines issued by the Central Government for renewable energy sources and therefore, the bidding is not in accordance with Section 63 of the Electricity Act, 2003;

5.5 The benefit of deemed generation charges ought to be given to the Appellant.

5.6 The wheeling charges could not have been made applicable to the Appellant;

5.7 In respect of the above issues, the submissions of HPPC are as under:

I. TARIFF APPLICABLE TO THE APPELLANT IN TERMS OF THE PPA DATED 21.02.2014

5.8 The contention of the Appellant that tariff of Rs. 6.44 as discovered under the first tariff based competitive bidding initiated by HPPC should not be applied is erroneous for reasons brought out hereinuder:-

5.9 The Appellant and HPPC entered into a PPA dated 21.02.2014 for sale and supply of power to be generated from 5 MW solar power plant established by the Appellant. The Appellant is entitled to the tariff as per the following clauses of PPA:

> *2.1.41 "Tariff" means the rate payable by HPPC for every kWh of net delivered energy at the delivery point and accepted by Solar Power Developer. The tariff shall be the lowest rate out of the following three options:*
>
> *a) Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014.*

b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.*

c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015., as per solar policy of Govt. of Haryana.*

However, the lowest tariff from the above will provisionally be paid to the firm at the time of Commissioning and the final lowest tariff as and when discovered out of the above three options will be payable with effect from the date of commissioning.

Note: The deadline for decision of tariff in respect of b) & c) above shall be 31.12.2015.

4.1. Sale of Energy by Company:

The HPPC shall purchase and accept all energy made available at the Delivery point from the Company's facility, pursuant to the terms and conditions of this agreement as per the amount claimed by the Company for the energy delivered for sale (including captive/ auxiliary consumption of Solar Power generated less the energy imported by IPP) of electricity generated from Solar PV crystalline Power Plant valid for a period of 25 years during the Billing period at the following tariff whichever is the lowest rate out of the following three options:

a) *Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014*

b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.*

c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015., as per solar policy of Govt. of Haryana*

However, the lowest tariff from the above will provisionally be paid to the firm at the time of Commissioning and the final lowest tariff as and when discovered out of the above three options will be payable with effect from the date of commissioning. The deadline for decision of tariff in respect of b) & c) above shall be 31.12.2015.

5.10 The PPA dated 21.02.2014 has been approved by the State Commission vide Memo. No. 4698/HERC/Tariff/PPA-Siwana Solar dated 21.02.2014.The Memo, inter-alia, reads as under

"The Commission has considered the draft PPA and approves the same with the condition that the generator shall start generating and supplying power before 31.3.2014. In case he fails to do so, the tariff for FY 2014-15 onwards shall apply subject to clause 2.1.41 of the PPA. In case the generator fails to generate and supply by 30.6.2014, the PPA shall lapse.

HPPC may sign the PPA as approved by the Commission and submit a copy signed by both the parties to the Commission."

5.11 Thus, after the approval of the PPA by the State Commission, the PPA became valid and binding between the parties.

5.12 In terms of the Clause 2.1.41 and 4.1 of the PPA, the lowest of the tariff as accepted by the HPPC or the Haryana Renewable Energy Development Agency**(HAREDA)** in the first long-term bidding floated by HPPC/HAREDA till 31.12.2015 or the generic tariff determined by the State Commission for the relevant period shall be applicable to the Appellant.

5.13 On 16.04.2014, HPPC floated Notice Inviting Tender (NIT) No. 51/CE/HPPC for purchase of 50 MW solar power. In the said NIT, HPPC has entered into PPAs with 4 Nos. of Solar Power Developers whereby HPPC has been able to procure 23 MW of solar power through four Nos. solar power developers at a tariff of Rs. 6.44/kwh which was the lowest discovered price quoted and accepted by the bidders. As per the terms of PPA entered with the Appellant, HPPC started making payment at the tariff of Rs. 6.44 per Kwh against the monthly energy bills raised by the Appellant.

5.14 However, HPPC had filed a Petition bearing No. Case No PRO-06 of 2016 before the State Commission for approval of the PPAs entered into with the 4 Solar Power Developers.

5.15 Vide the order dated 12.09.2016, the State Commission did not approve the competitive bidding process and the Power Purchase Agreements (PPAs) entered into by HPPC with the selected bidders on the ground that the process and the PPAs are not in line with the competitive bidding guidelines for renewable energy generation under Section 63 of the Electricity Act, 2003, the deviations were not

approved by the State Commission and hence the power purchases are not valid.

5.16 The order dated 12.09.2016 passed by the State Commission was challenged by various bidders, including JBM Solar Private Limited before this Hon'ble Tribunal. On 09.03.2018, this Tribunal was pleased to allow the Appeal being Appeal No. 278 of 2016 filed by JBM Solar Private Limited and directed the State Commission to approve the PPAs signed between HPPC and the selected bidder at a lower tariff of Rs. 5.68 per Kwh in line with the generic tariff determined by the Central Electricity Regulatory Commission for the Financial Year 2016-17.

5.17 The specific issue involved in the Appeal No. 278 of 2016 filed by JBM Solar Private Limited before this Tribunal was:

> *"(iii) We observe that the whole issue of power purchase/PPAs is hovering around the application of Section 63 of the Act which says that the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guideline issued by the Central Government. In the present case, actually no guidelines/ SBD have been issued/notified by GoI at that point of bidding and till completion of the bid process and even up to the Impugned Order date. The Respondent No. 2 initiated the bidding process on draft guidelines only and informing the State Commission the same at a later stage when the bidding process was completed and approached the State Commission for the approval of the PPAs it entered into with the selected bidders. The State Commission has*

also not gone into the details by checking whether such guidelines /SBD has been notified by GoI. The State Commission vide letter dated 8.8.2014 has also given go ahead for the bidding process to the Respondent No. 2.

5.18 This Tribunal has considered the above issue and has, inter-alia, held as under:

(viii) Further, the PPA executed by the Respondent No. 2 with M/s Siwana Solar Power Projects on 21.2.2014 was prior in point of time as compared to the PPAs with the Appellants and the approval was granted vide order dated 20.1.2016. The PPAs in the present case were executed on a subsequent date during June 2015 and the approval to the PPAs was sought from the State Commission on 16.7.2015. The price of the solar panels are falling progressively as indicated by various bidding process cannot be ignored. At the same time the absence of finalised guidelines by GoI cannot be considered as a ground for not approving the PPAs, particularly in the context of Section 63 of the Act which states that the bidding has to be "in accordance with the guidelines" in case of Energy Watchdog v. CERC decided by the Hon'ble Supreme Court on 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016. The relevant extract from the said judgement is reproduced below:

"19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be

harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.

From the above it is clear that in case where there are no guidelines, regulatory powers under Section 79 (1) (b) and under Section 86 (1) (b) of the Act empowers the CERC and the State Commission respectively to provide for necessary approval for bidding process and approve the PPA including the price at which the electricity should be procured by or on behalf of the distribution licensees.

(ix)Considering the circumstances of the case equitably and the fact that the Solar Power Projects have been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy need to be promoted, it would be appropriate to approve the PPAs between the Appellants and the Respondent No. 2 for procurement of solar

power at the tariff of Rs. 5.68/kWh (without accelerated depreciation) as allowed in the interim Orders dated 13.12.2016 and 29.3.2017 of this Tribunal.

5.19 Further, the Hon'ble High Court of Gujarat in *Indian Wind Energy Association –v- Gujarat Urja Vikas Nigam Limited,* decision dated 3.11.2017 by the Single and dated 04.11.2017 by the Division Bench has also held that in the absence of any guidelines, the Regulatory Commission can approve a Competitive Bid Process under the exercise of its regulatory powers under section 86 of the Electricity Act, 2003.

5.20 In light of the above decisions of this Tribunal and High Court, the contention of the Appellant that there cannot be any valid competitive bidding unless there are guidelines issued by the Central Government and therefore, the tariff of Rs. 6.44 per Kwh as discovered under the first competitive bid initiated by HPPC should not be applicable to the Appellant is baseless and has already been decided against the Appellant as per the principles laid down in the above mentioned judgments.

5.21 In the circumstances mentioned above and in terms of the Clauses 2.1.41 and 4.1 of the PPA, the tariff of Rs 5.68 per Kwh decided by the Tribunal in 09.03.2018 in Appeal No. 278 of 2016 in the case of JBM

Solar Private Limited is the applicable tariff, being the lowest tariff. The tariff issue is squarely covered by the said decision of the Tribunal.

5.22 HPPC submits that the reliance placed by the Appellant on the order dated 22.07.2014 passed by the State Commission to contend that the three different options provided in Article 4.1 of the PPA are not to be considered and only the generic tariff determined for FY 2014-15 should be made applicable is preposterous.

5.23 By the said order, the State Commission had only clarified that in view of the delay in the completion of the project i.e. the commissioning extending to FY 2014-15, the generic tariff of FY 2013-14 would not be applicable and the tariff as may be determined by the State Commission for FY 2014-15 shall be applicable tariff, subject to Clause 2.1.41 and 4.1 of the PPA. In all respects, the tariff provision in the PPA was not altered i.e. subject to above modification. The three alternatives provided in Clause 4.1 of the PPA with the stipulation "whichever is lower" continued to apply and was not modified.

II. DEEMED FIXED CHARGES

5.24 The Appellant has relied on the order dated 24.12.2010 to contend that the deemed fixed charges should be given to it as the State

Commission had given the benefit of deemed fixed charges to some developers under the said order.

5.25 HPPC submits that the benefit of deemed fixed charges was allowed to certain Solar Power Projects under Rooftop PV & Small Solar Power Generation Programme (RPSSGP) for first phase of the Jawaharlal Nehru National Solar Mission (JNNSM) undertaken by Ministry of New and Renewable Energy under Govt. of India in the year 2010. Under this scheme, eight developers with 7.8 MW capacity were selected by IREDA which had commissioned their projects in Haryana and whose PPAs were approved by the State Commission.

5.26 The benefit of deemed generation cannot be given to the Appellant as at the time when the order dated 24.12.2010 was passed by the State Commission, there were no notified Regulations regarding renewable energy issued by the State Commission. However, on 03.02.2011, the State Commission notified HERC (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 and the State Commission did not provide for deemed generation in the said Regulations.

5.27 Moreover, in terms of the order dated 24.12.2010, the PPAs entered into by HPPC with various developers were specifically amended to provide for the deemed fixed charges benefit. In the present case, there is no provision in the PPA or the Regulations notified providing for deemed fixed charges. The Appellant having entered into the PPA with HPPC with open eyes, cannot now, as an afterthought, rely on the order dated 24.12.2010 to contend that the benefit of deemed fixed charges should be extended to it also. The order dated 24.12.2010 was passed in context of the situation prevalent in the Year 2010 and was not a generic order to be applied to all the solar developers in the State of Haryana for all times to come.

III. WHEELING CHARGES

5.28 The issue in regard to the wheeling charges has also been decided by this Tribunal in the decision dated 09.04.2014 in Appeal 90 of 2013- M/s Puri Oil Mills –v- Haryana Power Purchase Centre and subsequently in the decision dated 15.03.2016 in *Appeal 183 of 2015- Star Wire (India) Vidyut Private Limited –v- Haryana Electricity Regulatory Commission.* This Tribunal in the above mentioned judgments has concluded that when the generator sells energy “at the bus bar” to the distribution licensee then wheeling charges cannot be made applicable to the generator.

5.29 The issue of transmission/wheeling charges as decided by the Tribunal has been challenged in Appeal being Civil Appeal No. 5345 of 2016 (Haryana Power Purchase Centre –v- Star Wire (India) Vidyut Private Limited and others). The Civil Appeal has been admitted by the Hon'ble Supreme Court vide order dated 17.07.2016**.**

5.30 It is also submitted that at present no wheeling charges are being deducted from the monthly energy bills of the Appellant from the date of notification of the 4th Amendment in HERC Regulations 2010 i.e. 12.08.2015 and the issue in the present case only pertains to the period in between 31.12.2014 to 12.08.2015 for which HPPC had deducted wheeling charges to the tune of approx. Rs. 5 lacs.

5.31 The above appeal can be disposed in terms of the above submissions of the HPPC, the Respondent No 2.

6. We have heard learned counsel appearing for the Appellant and learned counsel appearing for the Respondents at considerable length of time and we have considered 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 Appeal for our consideration:-

Issue No.1: Whether the Appellant is entitled to a tariff of Rs.6.44 per KWH or higher in terms of the PPA dated 21.02.2014.?

Issue No.2: Whether the Appellant is entitled for deemed fixed charges as per State Commission's order dated 24.12.2010 ?

Issue No.3: Whether the Appellant is liable to pay the wheeling charges for the energy supplied to the distribution licensee?

Our Consideration & Analysis:-

7. Issue No.1:-

Learned counsel for the Appellant submitted that as per Article 4.1 of the PPA, the Respondent No.2 (HPPC) has to pay the tariff to the Appellant which is the lowest of the following:-

a) the tariff determined by the Respondent Commission, i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.03.2014, or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.06.2014;

b) the lowest tariff quoted and accepted in the long-term bid process conducted by the Respondent No. 2 before 31.12.2015; and

c) the lowest tariff quoted and accepted in the long-term bid process conducted by HAREDA before 31.12.2015.

The Appellant's counsel further submitted that however, the Respondent Commission has arbitrarily allowed tariff of Rs.6.44/kWh as per the impugned order which is in utter contravention of the PPA.

He contended that the bidding process through which the lowest tariff of Rs.6.44/kWh was discovered has been held illegal by the State Commission as the same was not as per the bidding guidelines. Accordingly, the Appellant became entitled to the tariff as the Article 4.1(a) above as Articles 4.5(b) and 4.1(c) are not applicable since for them to become applicable a legally valid competitive bidding process has to be in place which was not there in the instant case. Learned counsel vehemently submitted that the Respondent Commission determined the levelised tariff of Rs.7.45/kWh for solar power plants commissioned during FY 2014-15 and hence the Commission ought to have allowed the Appellant a tariff of Rs. 7.45/kWh and not Rs.6.44/kWh. Appellant's counsel further submitted that the State Commission vide orders dated 12.09.2016 and 19.09.2016 cancelled the bid process which was subsequently challenged before this Tribunal in Appeal No.278 of 2016 & 307 of 2016. This Tribunal held that (i) the Respondent Commission and Respondent No.2 made a mistake as the bid process was based on non-existent guidelines/Standard Bidding Documents; and (ii) As per *Energy Watchdog Vs. CERC*, reported in (2017) 14 SCC 80, Hon'ble Supreme Court held that bidding process can be conducted even without the guidelines, provided that the said bidding process is blessed by the appropriate Commission by using its regulatory powers available under the Act.

7.2 Learned counsel for the Appellant further submitted that as per the Act, the tariff in a PPA has a statutory component and cannot be termed as voluntary. To substantiate his contentions, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in *India Thermal Power Ltd. v. State of M.P.*, reported in *(2000) 3 SCC 379* and *Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd*., reported in *(2016) 8 SCC 743*. Learned counsel was quick to submit that as per above judgments, the Appellant , as a generator, cannot be forced to agree to a much lower tariff of Rs. 6.44 per kWh allowed as per the impugned order.

7.3 ***Per contra,*** learned senior counsel for the Respondent No.2/HPPC submitted that in response to Notice Inviting Tender (NIT) dated 16.04.2014, a tariff of Rs. 6.44/kwh was the lowest discovered price quoted and accepted by the bidders. Accordingly, as per the terms of PPA entered with the Appellant, the payment was being made at the same rate against the monthly energy bills raised by the Appellant. However, vide the order dated 12.09.2016, the State Commission did not approve the competitive bidding process and the Power Purchase Agreements (PPAs) entered into by HPPC with the selected bidders on the ground that the process and the PPAs are not in line with the competitive bidding guidelines for renewable energy generation under Section 63 of the Electricity Act, 2003. The decision of the State

Commission was mainly on the premise that the deviations were not approved by the State Commission and hence the PPAs are not valid. However, the said order of the Commission was challenged before this Tribunal by JBM Solar Private Limited in which the Tribunal directed the State Commission to approve the PPAs signed between HPPC and the selected bidder at a lower tariff of Rs. 5.68 per Kwh in line with the generic tariff determined by the Central Electricity Regulatory Commission for the Financial Year 2016-17.

7.4 Advancing his arguments further, learned senior counsel for the Respondent No.2 relied on the judgments of Hon'ble High Court of Gujarat in in *Indian Wind Energy Association –v- Gujarat Urja Vikas Nigam Limited,* decision dated 3.11.2017 which also held that in the absence of any guidelines, the Regulatory Commission can approve a Competitive Bid Process under the exercise of its regulatory powers under section 86 of the Electricity Act, 2003. Learned counsel further contended that in the light of the above decisions of this Tribunal and High Court, the contentions of the Appellant that there cannot be any valid competitive bidding unless there are guidelines issued by the Central Government and therefore, the tariff of Rs. 6.44 per Kwh as discovered under the first competitive bid initiated by HPPC should not be applicable to the Appellant is devoid of merits. Learned counsel was

quick to point out that as decided by this Tribunal in its judgment dated 09.03.2018 in Appeal No. 278 of 2016 in the case of JBM Solar Private Limited, the applicable tariff is Rs.5.68/kWh, which is further lower than the tariff being paid to the Appellant at Rs.6.44/kWh. Learned counsel accordingly reiterated that the three alternatives provided in Clause 4.1 of the PPA with the stipulation "whichever is lower" continued to apply to the Appellant and has in no way been modified by the Commission.

Our Findings:-

7.5 We have considered the rival contentions of the learned counsel for the Appellant as well as learned counsel for Respondent No.2. It is relevant to note that in pursuance of the order dated 05.11.2013 of the Respondent Commission, the Appellant had to start generation of power by 31.03.2014, however, the commissioning of the solar project by the Appellant got delayed and finally the project got commissioned only on 31.12.2014. The State Commission while passing the final order dated 21.09.2014 vide which the commissioning of the solar project was extended till 31.12.2014, stipulated that the applicable tariff for the Appellant would be the tariff as determined by the Commission for FY 2014-15. While learned counsel for the Appellant contend that the tariff of Rs.6.44/kWh discovered by HPPC through a competitive

bidding is not applicable to the Appellant due to the fact that the said bidding was declared null and void by the State Commission and as such the levalised tariff of Rs.745/kWh determined by the Commission for FY 2014-15 for solar power plants should apply. On the other hand, learned counsel for the Respondent submits that as per terms of the PPA, the Appellant is entitled for the tariff lowest of the three alternatives provided in Clause 4.1 of the PPA. Learned counsel for the Respondent also contends that the competitive bidding process undertaken by HPPC has been held as valid by this Tribunal vide its judgment dated 09.03.2018 in A.No.278 of 2016 in case of JBM Solar Private Limited. In fact, the State Commission had not approved the bidding process and the PPAs only on account of the deviations not being approved by it and not due to any other reasons. As per the directions of this Tribunal, the State Commission approved the PPAs signed between HPPC and the selected bidders. As such the contentions of the Appellant that the bidding process was illegal is not correct. While taking note of the judgments of this Tribunal and Hon'ble Gujarat High Court, it emerges that the bidding process undertaken by HPPC was legally sustainable and as such the lowest tariff discovered in the process has to be applied to the case of the Appellant i.e. the tariff at Rs.6.44/kWh. In view of these facts, we are of the opinion that the State Commission has allowed the tariff applicable to the

Appellant's solar project appropriately and the impugned order does not suffer from any legal infirmity. Hence, interference from this Tribunal is not called for.

8. Issue No.2:-

Learned counsel for the Appellant submitted that the deemed generation benefits were allowed by the State Commission through an order dated 24.12.2010 for the RE generators who were declared as "must run". Learned counsel further submitted that consequent upon getting the "must run" status, the renewable generators cannot be backed down beyond 1% of the hours in a year, i.e. for 87.6 hrs. out of the 8760 hours in a year. In other words, in case of backing down instructions by the Respondents beyond 87.6 hours in a year, the Appellant becomes entitled to claim fixed charges as per PPA tariff for the electricity backed down beyond the threshold limit in a year by considering the same as deemed generation. Learned counsel vehemently submitted that the State Commission has erroneously disallowed deemed generation benefit to the Appellant contrary to its own above said order. To strengthen his submissions, learned counsel placed reliance on the judgment of the Apex court in *Energy Watchdog* and *Gujarat Urja Vikas Nigam Limited* (supra) vide which it has been held that the Respondent Commission has "regulatory" powers in

terms of Section 86(1)(b) of the Electricity Act, 2003, qua determination of tariff for generation of electricity. Additionally, the Appellant's counsel also cited the judgment of Hon'ble Supreme Court passed in *India Thermal* and *Gujarat Urja Vikas Nigam Limited* (supra). Learned counsel for the Appellant accordingly summed up his submissions that any tariff protocol created by a regulatory order as in the present case regarding deemed generation has to be honoured by the Respondents.

8.1 ***Per contra,*** learned counsel for the Respondent No.2 submitted that the benefit of referred deemed fixed charges was allowed to certain solar power projects under Rooftop PV & Small Solar Power Generation Programme (RPSSGP) for first phase of the Jawaharlal Nehru National Solar Mission (JNNSM) undertaken by Ministry of New and Renewable Energy under Govt. of India in the year 2010. Under this scheme, only eight developers with total 7.8 MW capacity were selected by IREDA which had commissioned their projects in Haryana and whose PPAs were approved by the State Commission. Learned counsel was quick to point out that the benefit of deemed generation cannot be given to the Appellant as at the time when the order dated 24.12.2010 was passed by the State Commission, there were no regulations notified by it. However, the State Commission notified the relevant Regulations on 03.02.2011 specifying terms and conditions for

determination of tariff from RE sources under which the Commission did not provide for such deemed generation in the said Regulations. Learned counsel further submitted that the Appellant having entered into the PPA with HPPC with open eyes, cannot now, claim such benefit merely relying on the order dated 24.12.2010 to contend that the benefit of deemed fixed charges should also be extended to it.

Our Findings:-

8.2 Having regard to the submissions of the learned counsel for the Appellant as well as Respondent No.2, it is noticed that the referred order dated 24.12.2010 was passed by the State Commission only for few solar developers (8 nos.) with 7.8 MW capacity selected by IREDA under the special programme of MNRE in the year 2010. Accordingly, PPA in respect of these limited solar developers were signed and approved by the State Commission as a special case. After notifying the Regulations for determination of tariff from RE sources, on 03.02.2011, the State Commission did not provide for benefit of deemed generation in the said regulations. In view of this, the contentions of the Appellant to effect the special dispensation given for 8 nos. Solar developers to it is not in accordance with the prevailing Regulations of the State Commission and hence, such claim cannot be acceded to. Thus, we find that the impugned order has been passed

by the Commission in accordance with its RE Regulations and our intervention is not called for.

9. Issue No.3:-

Learned counsel for the Appellant submitted that as per RE Tariff Regulations notified by the Commission on 03.02.2011 and amended on 5.9.2011(Ist Amendment) & 15.7.2014(3rd Amendment), the protocols to pay wheeling charges were slightly modified by inserting Regulations 73 & 72(2) respectively. However, the said wheeling charges were meant only if a transmission line is to be constructed for selling the power from RE generator to the distribution licensee. Learned counsel further submitted that the Respondent Commission notified the 4th amendment of the HERC RE Tariff Regulations on 12.08.2015, in order to provide that no "wheeling charges" shall be leviable on the renewable energy generators, if the entire energy injected into the grid is purchased by the distribution licensee. Accordingly, Respondent No.2 is not levying any wheeling charges after the 4th amendment upon the Appellant. Hence, as per the Respondents, the Appellant shall be liable to bear "wheeling charges" for the period governed by the 3rd amendment of the HERC RE Tariff Regulations, which is from 31.12.2014 (date of commissioning of the Appellant' project) to 12.08.2015 (date of 4th Amendment).

9.1 Learned counsel for the Appellant contended that the above understanding of the Respondents is fundamentally flawed. To substantiate his arguments, learned counsel placed reliance on the judgment of this Tribunal dated 9.4.2014 passed in *Appeal No. 90 of 2013* as per which RE generators are not liable to pay wheeling charges. Learned counsel vehemently submitted that the above judgment is squarely applicable in the present case and accordingly Respondent No.2 ought to refund the entire wheeling charges collected from the Appellant between 31.12.2014 to 12.08.2015 along with interest @ 12% per annum.

9.2 ***Per contra,*** learned counsel for the Respondent No.2 submitted that the issue in regard to the wheeling charges has also been decided by this Tribunal in the decision taken dated 09.04.2014 in Appeal 90 of 2013 and subsequently in the decision dated 15.03.2016 in *Appeal 183 of 2015.* This Tribunal in the above mentioned judgments has concluded that when the generator sells energy “at the bus bar” to the distribution licensee then wheeling charges cannot be made applicable to the generator. Learned counsel further pointed out that the issue of transmission/wheeling charges as decided by the Tribunal has been challenged in Appeal being Civil Appeal No. 5345 of 2016 (Haryana Power Purchase Centre –v- Star Wire (India) Vidyut Private Limited and

others).The said Civil Appeal has been admitted by the Hon'ble Supreme Court vide order dated 17.07.2016**.** Learned counsel was quick to point out that after the 4th Amendment in RE Regulations i.e. from 12.08.2015, no wheeling charges are being deducted from the monthly bills of the Appellant. As such, the issue in the present case only pertains to the period between 31.12.2014 to 12.08.2015 for which HPPC had deducted wheeling charges to the tune of approx. Rs. 5 lacs.

Our Findings:-

9.3 We have carefully considered and evaluated the rival contentions of both the parties. It is not in dispute that the State Commission notified the RE Tariff Regulations on 03.02.2011 and carried out subsequent amendments namely first amendment on 05.09.2011 whereby Regulation 73 was added and third amendment on 15.07.2014 when Regulation 72 (2) was inserted. As per these Regulations, the wheeling charges were applicable when a transmission line is to be constructed for selling the power from the renewable energy generator to the distribution licensee. Thereafter, the State Commission notified fourth amendment to RE Tariff Regulations on 12.08.2015 wherein Regulation 73(2) was amended in order to provide that no wheeling charges shall be leviable on the renewable energy generators if the

entire energy injected into the grid is purchased by the distribution licensees.

9.4 It is noticed that the Respondent No.2 is not levying any wheeling charges upon the Appellant after the fourth amendment i.e. from 12.08.2015. Thus, the dispute regarding payment of wheeling charges is only for the period from 31.12.2014 (date of commissioning of the project) to 12.08.2015 (4th amendment). The main reliance of the Appellant is on the judgment of this Tribunal dated 09.04.2014 passed in Appeal No.90 of 2013 which held that wheeling charges should not be levied on the RE generators. It is, however, relevant to note that the said judgment of this Tribunal has been challenged by the Respondent before the Hon'ble Supreme Court in Appeal being Civil Appeal No.5345 of 2016 which has since been admitted vide order dated 17.07.2016. Having regard to the facts and circumstances of the case, as brought out above, we are of the opinion that after the fourth amendment of RE Regulations, the Appellant is not being charged with any wheeling charges and the wheeling charges deducted for the disputed period i.e. 31.12.2014 to 12.08.2015 would be decided / payable after the outcome of this Civil Appeal No.5345 of 2016. In view of these facts, we do not find any perversity in the impugned order

passed by the State Commission and hence our intervention in the matter is not called for.

ORDER

For the forgoing reasons, as stated supra, we are of the considered view that the issues raised in the present appeal being Appeal No. 150 of 2016 are devoid of merits. Hence, the Appeal filed by the Appellant is dismissed.

The impugned order passed by the Haryana Electricity Regulatory Commission dated 20.01.2016 in Case No. 24 of 2015 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **27th day of May, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Pr