

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

Review Petition Nos. 3, 4 & 5 of 2013

Dated: 30th April, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

R.P. No. 3 of 2013 & IA No. 126 of 2013

in

Appeal No. 172 of 2011

In the matter of:

Sardar Power Pvt. Ltd.,

104, Swarganivas Enclave,

71-619/A, East Srinivas Nagar,

Ameerpet, Hyderabad-500 038

Represented by its Managing Director,

Movva Shrinivas, S/o Sri Satyanarayana,

R/o Hyderabad

**... Review Petitioner/
Appellant**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
#11-4-660, 4th Floor, Singareni Bhavan, Red Hills,
Hyderabad-500 004.
2. **Central Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
Corporate Office, 6-1-50, Mint Compound,
Hyderabad-500 063
3. **Southern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
Renigunta Road, Tirupati-517 501
4. **Northern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
1-1-504, Chaitanyapuri,
Hanamkonda, Warangal (AP)-506 004
5. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
P&T Colony, Seethammadhara,
Visakhapatnam-530 013

6. **Transmission Corporation of Andhra Pradesh,**
Rep. by its Managing Director,
Vidyut Soudha, Khairatabad,
Hyderabad-500 082

7. **State of Andhra Pradesh,**
Represented by its Principal Secretary,
Energy Department,
Andhra Pradesh Secretariat,
Hyderabad-500 063

...Respondent(s)

Counsel for the Review Petitioners/

**Appellant (s) :Mr. Gopal Choudhary
Ms. Swapna Seshdari with
Mr. K.M. Panda (Rep.) (173/12)**

**Counsel for the Respondent(s): Mr. K.V. Mohan,
Mr. K.V. Balakrishnan for APERC
Mr. A. Subba Rao for R.2 to 6**

**R.P. No. 4 of 2013
in
Appeal No. 166 of 2011**

In the matter of:

1. **Biomass Energy Developers Association,**
6-2-913/914, Progressive Towers, 1st Floor,
Khairatabad,
Hyderabad-500 004,
rep. by its Vice-President,
Sri. B. Jayarami Reddy, R/o Hyderabad
2. **Suryateja Power Projects Pvt. Ltd.,**
Giri Sikara Apartments,
Flat No. A3, 6-3-600/2/B, Padmavathi Nagar,
Khairatabad,
Hyderabad-500 004,
Andhra Pradesh.
rep. by its Managing Director,
Sri. B. Jayarami Reddy, R/o Hyderabad
3. **Balaji Agro Oils Ltd.,**
74-2-19, Old Checkpost Centre, Krishna Nagar,
Vijawada-520 007
Rep. by its Joint Managing Director,
Sri V. Suraj Kumar, R/o Vijayawada

4. **Gowthami Bio Energies Pvt. Ltd.,**
E-506, Keerti Apartments,
Behind Sarathi Studios Ameerpet,
Hyderabad-500 073
rep. by its Managing Director,
Sri. M.Ravikanth Reddy, R/o Hyderabad
5. **The Gowthami Solvent Oils Pvt. Ltd.,**
Post Box No. 7, Pydiparru,
Tanuku-534211, West Godavari District,
rep. by its Managing Director,
Sri. M.Ramachandra Rao, R/o Tanuku
6. **Indur Green Power Pvt. Ltd.,**
NSL Icon, Plot No. 1 to 4, 4th Floor,
8-2-684/2/A, Road No. 12, Banjara Hills,
Hyderabad-500 034,
rep. by its Managing Director,
Sri. M.Ramakoteswara Rao, R/o Hyderabad.
7. **Jocil Ltd.,**
Box No. 216, Arundalpet, Guntur-522 002,
rep. by its Managing Director,
Sri. J. Muralimohan, R/o Guntur
8. **Jyothi Bio Energy Ltd.,**
4th Floor, Mayank Towers,
Raj Bhavan Road,
Hyderabad-500 082
rep. by its Executive Director,
Sri. N. Padma Rao, R/o Hyderabad
9. **Greenko Energies Pvt. Ltd.,**
Plot No. 1071, Road No. 44,
Jubilee Hills, Hyderabad-500 034
rep. by its Director,
Sri. Ch. Anil Kumar, R/o Hyderabad
10. **Sri Kalyani Agro Industries,**
Prathipadu-534146, Penatapadu Mandal Tadepalligudem,
W.G. Distt.,
rep. by its Managing Director,
Sri. V. Narayana Rao, R/o Tadepalligudem

11. **Matrix Power Pvt. Ltd.,**
8-2-269/3/1, No. 257, Road No. 2,
Banjara Hills, Hyderabad-500 034
rep. by its Managing Director,
Sri. K.V. Krishna Reddy, R/o Hyderabad
12. **My Home Power Ltd.,**
My Home Hub, 3rd Block,
5th Floor, Hi Tech City,
Madhapur, Hyderabad-500 081
rep. by its Director,
Sri. R.K. Roy Choudhury, R/o Hyderabad
13. **Om Shakti Renergies Ltd.,**
Plot No. 1115, Road No. 54, Jubilee Hills,
Hyderabad-500 034,
rep. by its Managing Director,
Sri. G. Sivaramakrishna, R/o Hyderabad
14. **Perpetual Energy Systems Ltd.,**
NSL Icon, Plot No. 1 to 4,
4th Floor, 8-2-684/2/A, Road No. 12,
Banjara Hills, Hyderabad-500 034
rep. by its Managing Director,
Smt. K. Asha Priya, R/o Hyderabad
15. **Ritwik Power Projects Ltd.,**
Flat No. 201, Plot No. 20,
Sri Chaitanya Residency, Sagar Society,
Road No. 2,
Banjara Hills, Hyderabad-500 034
rep. by its Director,
Sri. D. Radhava Rao, R/o Hyderabad
16. **Roshini Powertech Ltd.,**
Plot No. 1071, Road No. 44,
Jubilee Hills, Hyderabad-500 034,
rep. by its Director,
Sri. Ch. Anil Kumar, R/o Hyderabad
17. **Satyamaharshi Power Corpn. Ltd.,**
Flat No. 202, Plot No. 20,
Sri Chaitanya Residency, Sagar Society,
rep. by its Director,
Sri. D. Raghava Rao, R/o Hyderabad

18. **Shalivahana Green Energy Ltd.,**
7th Floor, Minerva Complex,
S.D. Road, Secunderabad-500 003,
rep. by its Managing Director,
Sri. M. Komaraiah, R/o Secunderabad
19. **Shree Papers Ltd.,**
Post Box No. 6, G. Ragampet,
Samalkot-533 440,
rep. by its Executive Director,
Sri P. Sreedhar Chowdary, R/o Rajahmundry
20. **Sree Rayalaseema Green Energy Ltd.,**
KPS Complex, Station Road, Gooty-515402,
rep. by its Managing Director,
Sri. K. Madhusudhan, R/o Gooty
21. **Satyakala Power Projects Pvt. Ltd.,**
Ganguru-521 139, Penamaluru Mandal,
Krishna Distt.
rep. by its Managing Director,
Smt. Bhavani Prasad, R/o Vijayawada
22. **Saro Power & Infrastructure Ltd.,**
19-2-217/2, Mir Alam Tank Road,
Hyderabad-500 064
rep. by its Managing Director,
Sri Mirza Hasan, R/o Hyderabad
23. **Suchand Powergen Pvt. Ltd.,**
309, Bachupally, Khurbullapur Mandal,
Hyderabad-500 072
rep. by its Managing Director,
Sri. T. Subbarayudu, R/o Hyderabad
24. **Veeraiah N C Power Projects Ltd.,**
Kurumaddali-51157, Pamarru Mandal,
Krishna Distt.
rep. by its Joint Managing Director,
Sri P. Poorna Veeraiah, R/o Gudivada.
25. **Velagapudi Power Generation Ltd.,**
74-2-12A Ashok Nagar,
Vijayawada-520 007
rep. by its Managing Director,
Sri. V. Sambasiva Rao, R/o Vijayawada

26. **Varam Power Projects Ltd.,**
8-4-120/3, Raja Complex,
G.T. Road, Srikakulam-532001,
rep. by its Managing Director,
Sri. A. V. Narasimham, R/o Srikakulam

27. **Vijaya Agro Products Pvt. Ltd.,**
Enikepadu-521108, Vijayawada,
rep. by its Chairman,
Sri. M. Rajaiah, R/o Vijayawada

**...Review Petitioners/
Appellant (s)**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
11-4-660, 4th Floor, Singareni Bhavan, Red Hills,
Hyderabad-500 004.
2. **Central Power Distribution Company of Andhra Pradesh Ltd.,**
Corporate Office, 6-1-50,
Mint Compound,
Hyderabad-500 063
Rep. by its Managing Director
3. **Southern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
Upstairs, Hero Honda Showroom,
Renigunta Road, Tirupati-517 501
4. **Northern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
1-1-504, Chaitanyapuri,
Hanamkonda, Warangal (AP)-506 004
5. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
P & T Colony,
Seethammadhara, Visakhapatnam-530 013
6. **Transmission Corporation of Andhra Pradesh,**
Vidyut Soudha, Khairatabad,
Hyderabad-500 082,
Represented by its Managing Director
7. **The State of Andhra Pradesh**
Rep. by its Principal Secretary, Energy Department,
Andhra Pradesh Secretariat,
Hyderabad-500 063.

...Respondent(s)

**Counsel for the Review Petitioners/
Appellant (s) :Mr. Gopal Chaudhury**

**Counsel for the Respondent(s): Mr. K.V. Mohan,
Mr. K.V. Balakrishnan for APERC
Mr. A. Subba Rao for R.2 to 6**

Review Petition No. 5 of 2013 & IA No. 115 of 2013

**In
Appeal No. 168 of 2011**

In the matter of:

1. **M/s. The South Indian Sugar Mills Association,**
Andhra Pradesh having its Registered Office,
At Door No. 5-9-22/69,
Adarshnagar,
Hyderabad-500 063
2. **M/s. Parrys Sugar Industries Ltd.,**
Formerly M/s. GMR Technologies & Industries Ltd.,
Sankali Village, R. Amudalavalasa Mandal,
Srikakulam District.
3. **M/s. the Jeypore Sugar Company Limited.**
Regd. Office at Ramakrishna Buildings, 239,
Annasalai, Chennai-600 006.
4. **M/s. Sagar Sugars & Allied Products,**
Rayala Towers, IInd Floor, 158, Anna Salai,
Chennai-600 002.
5. **M/s. Ganapathi Sugars,**
Post Box No. 29,
Kulbgoor/Fasalwadi Village,
Sangareddy- 502 294,
Medak District
6. **M/s. Gayatri Sugars,**
B-2, 2nd Floor, 6-3-1090, TSR Towers,
Rajbhavan Road,
Somajiguda,
Hyderabad- 500 082
7. **M/s. Navabharat Ventures Limited,**
Samalkot-533 440,
East Godavari District.

**... Review Petitioners/
Appellant (s)**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
4th & 5th Floor, Singareni Bhavan, Red Hills,
Hyderabad-500 004.
2. **Transmission Corporation of Andhra Pradesh,**
Vidyut Soudha,
Hyderabad-500 082,
Represented by its Chairman & Managing Director
3. **Central Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
11-5-423/1/A, First Floor, Singareni Collieries Bhawan,
Lakdi-ka-pul, Hyderabad-500 063
4. **Southern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
Upstairs, Hero Honda Showroom,
Renigunta Road, Tirupati-517 501
5. **Northern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
11-5-423/1/A, First Floor, 1-7-668 Postal Colony
Hanamkonda, Warangal (AP)-506 001
6. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,**
Represented by its Managing Director,
Sai Shakti, Opp: Saraswati Park,
Daba Gardens, Visakhapatnam-530 013
7. **The Government of Andhra Pradesh**
The Principal Secretary, Energy Department,
D-Block, Floor-2, Room No. 359,
Secretariat, Hyderabad-500 022. **...Respondent(s)**

Counsel for the Review Petitioner/

**Appellant (s) :Mr. Chhala Guna Ranjan
Mr. Mullapudi Rambabu**

Counsel for the Respondent(s):

**Mr. K.V. Mohan,
Mr. K.V. Balakrishnan for APERC
Mr. A. Subba Rao for R.2 to 6**

ORDER

These Review Petitions have been filed against the judgment of this Tribunal dated 20.12.2012 in Appeal no. 150 of 2011 and batch regarding tariff for biomass, bagasse and mini hydel projects. The Review Petitioners are Renewable Energy Generators and their Associations.

2. Appeal no. 150 of 2011 and batch were filed by Renewable Energy Generators and their Associations and the Distribution Licensees against the three distinct and separate tariff orders passed by the three members of the Andhra Pradesh Electricity Regulatory Commission communicated to them on 12.9.2011 in pursuance of the directions of the Hon'ble Supreme Court. In these Appeals, the Tribunal rendered judgment dated 20.12.2012 giving

directions to the State Commission to re-determine the tariff for biomass, bagasse and mini hydel based projects based on the findings of the Tribunal.

3. Sardar Power Pvt. Ltd., a hydro generating company in R.P. no. 3 of 2013 has raised the following issues:

- 3.1 **Scope of Tariff/Control Period, interim tariff and tariff beyond 1.4.2009:** In the very first paragraph of the judgment dated 20.12.2012, the Tribunal has wrongly stated that the orders of the three members of the State Commission determine the tariff for the period 1.4.2004 to 31.3.2009. While the Member-Technical had determined a single part tariff from 1.4.2004 till the completion of 10th year of operation of operating power plant, the Chairman and

Member-Finance had determined a two part tariff comprising of fixed cost for the first 10 years of operation and variable cost from 1.4.2004 to 31.3.2009. The Tribunal in the interim order dated 1.2.2012 had also noted that the fixed charges for biomass and bagasse based plants and tariff for hydro plants in the impugned order was for a period of 10 years. On reading the judgment as a whole, it appears that the judgment is construed as determining all the parameters only for the period 2004-2009 and not thereafter, and consequently the State Commission has to determine the tariff for the period 2004-09 only and not for the first 10 years of operation with effect from 1.4.2004. The Tribunal has also not determined the parameters for tariff with respect to the period from 1.4.2009

onwards. In view of above, there is difficulty about the interim tariff to be adopted till the final order is passed by the State Commission as also the tariff for the period from 1.4.2009 onwards.

3.2 Auxiliary Consumption: The Tribunal has relied upon the Central Commission's Regulation, 2009 for determining of auxiliary consumption of 1% in respect of hydro projects. However, the Tribunal overlooked the fact that the Central Commission was considering the inter-connection point as the line isolator of the outgoing feeder on the HV side of the generator transformer whereas the inter-connection point and the metering point in Andhra Pradesh is at the Licensee's sub-station. Therefore, the line losses in the evacuation line from the generating station to the Licensee's sub-station should also be accounted for in the tariff.

The Review Petitioner/Appellant has now furnished a statement of meter reading at the power station and the Licensee's sub-station to substantiate its argument that the auxiliary consumption should be enhanced to 1.5%.

3.3 Interest on loans: The Tribunal has accepted the Central Commission's Regulations as basis for the fixation of interest rate on the basis of State Bank of India Prime Lending Rate ("SBI PLR"). Considering SBI PLR data for the period 2004-09 the Tribunal decided interest rate of 12% considering the control period of 2004-09. However, the Tribunal has omitted to consider the make up of 1.5% over and above the PLR rate as per the Central Commission's Regulations, 2009. There is also increase in the PLR beyond

31.3.2009 and the Tribunal should decide the interest rate to be applied after 31.3.2009.

3.4 Return on Working Capital Margin: The Tribunal has erroneously disallowed Return on Equity (RoE) on 30% of the working capital as the cash surplus of the generating company used in working capital cannot be treated as equity. There is no cash surplus in the first year of operation of the company. Further, in view of very low tariff there was never a cash surplus.

3.5 Operation & Maintenance escalation: The Tribunal has directed that the O&M escalation be fixed on the basis of the Compound Annual Growth Rate (CAGR) for the period 2004-09 of the actual Wholesale Price Index (WPI) and Consumer Price Index (CPI) indices with 60:40 weightage.

The Tribunal should have specifically spelt out the indices to avoid any uncertainty as number of WPI and CPI indices are being used. It would be appropriate that WPI index for all commodities and CPI index for industrial workers are considered for computing the escalation.

3.6 Adjustment in PLF for grid/evacuation

interruptions: The Tribunal has given liberty to the Power Projects to approach the State Commission with actual data of grid interruptions in case it has resulted in achieving a Plant Load Factor (PLF) below the threshold PLF and the plant is unable to recover the fixed cost. The Tribunal's prescription is of uncertain outcome and may result in penalty rather than relief if interpreted in some way contrary to intention.

Thus, the Tribunal should clarify or modify the judgment.

3.7 Computation of Working Capital: The Tribunal has inadvertently omitted to specify that the working capital shall change for each financial year with escalation in O&M expenses. This was specifically provided in case of biomass but was omitted in case of mini hydro. Consequently, the working capital will also change for each financial year on account of change in receivables consequent to change in O&M expenses.

3.8 Treatment of capital subsidy: The Tribunal has inadvertently decided that the actual subsidy amount received by the Project developer from Government of India after adjusting the pre-payment penalty shall be recovered by the

Licenseses. This is inconsistent with the discussions in the preceding paragraphs of the judgment. The decision appropriates the benefit intended to be given by the Government of India to the project developer to the benefit of the Distribution Licenseses. Thus, this decision needs to be reviewed.

3.9 Electricity Duty: While allowing the electricity duty as a pass through, the Tribunal has not specified the manner in which the same is to be claimed. It may specifically be provided that the electricity duty on the energy sold during the billing months shall be claimed in the monthly bills along with the energy charges and that the same shall form part of the amount payable by the Licensee for the billing month within the due date for payment of the bills.

3.10 Hearing before final order: The Tribunal has directed that a public hearing is not required for the State Commission to issue the final order in terms of the judgment. It needs to be clarified that the same does not apply to the Appellants so as not to prejudice the Appellants.

4. In Review Petition no. 4 of 2013 filed by Biomass Energy Developers Association in Appeal no. 166 of 2011, the Review Petitioner/Appellant has raised some common issues which have been raised in Review Petition no. 3 of 2013 as described in paragraphs 3.1,3.4, 3.5, 3.7, 3.9 and 3.10 above. Other issues raised in the Review Petition no. 4 of 2013 specific to biomass projects are as under:

4.1 Operation & Maintenance expenses: The Chairman and Member-Finance had decided to increase the O&M expenses at 5% for first year of operation of the power plant. The Tribunal while agreeing that the O&M expenses had to be increased, decided O&M at 5.5% for the first year of the control period 2004-09. This would amount to less than the O&M expenses allowed by the Chairman and Member-Finance in their respective orders for the power plants set up prior to 2004. The O&M expenses ought to have been provided at 5.5% for the first year of operation of the power plant instead of the first year of the Control Period 2004-09.

4.2 Specific Fuel Consumption: The Tribunal has not considered and dealt with the submissions of the Appellants regarding adjustment of the

calorific value of the fuel for the excess moisture content in the fuel “as purchased”. Thus, the judgment is required to be reviewed in the interest of justice.

4.3 Fuel Price Escalation: The Tribunal did not consider the fuel price escalation on the basis of principles of CAGR on the ground that the price determined in the year 2009 was an independent finding. The fuel price escalation during the intervening period should have been taken mathematically by the CAGR based on the fuel prices in 2004 and 2009.

4.4 Revision of variable cost and operational parameters for the period 2009-14: The State Commission in its order dated 31.3.2009 had determined the variable cost applying the

operational parameters of specific fuel consumption and fuel cost escalation as determined in the 2004 order and was subject to the outcome of the Appeal arising out of the 2004 order which was then pending before the Hon'ble Supreme Court. Accordingly, the Appellants had specifically prayed for such directions to consequently recompute and revise the fixed and variable costs from 1.4.2009 onwards.

5. M/s. South Indian Sugar Mills Association, the Review Petitioner/Appellant in R.P. no. 5 of 2013 in Appeal no. 168 of 2011 has pointed out error apparent on the face of record as grounds regarding method and manner of arriving Plant Load Factor for the purpose of computing fixed cost for bagasse based plants which was raised in the main Appeal has not been considered by the

Tribunal. The Review Petitioner has also raised the common issue raised in the Review Petition no. 3 of 2013 as explained in paragraphs 3.1 and 3.5 above and issue regarding revision of tariff for the period 2009-14 as raised in R.P. no. 4 of 2013 and elaborated in paragraph 4.4 above.

6. Shri A. Subba Rao, learned counsel for the Respondents 2 to 6 submitted as follows:

“The Distribution Licensees had filed an Appeal against the judgment dated 20.12.2012 of the Tribunal before the Hon’ble Supreme Court and the same has been admitted. Therefore, the Review Petitions were not maintainable as per Order 47 Rule-1 of CPC. The Distribution Licensees in the Appeal before the Hon’ble Supreme Court have raised the issue of

maintainability of the Appeals before the Tribunal as the orders passed by the three members of the Commission without there being any majority opinion, cannot be treated as an order made by the State Commission under the Act for which appeal under Section 111 of the Act would get attracted. If this submission is accepted by the Hon'ble Supreme Court, the question of entering into the merits of the Review on each item would not survive”.

Apart from this contention regarding the maintainability of the Review Petitioner, he filed replies and written submissions on each of the issues raised in the Review Petitions.

7. We have heard the learned counsel for the Review Petitioners, Shri Gopal Chaudhary and Shri

Challa Gunaranjan, and the learned counsel for the Respondents, Shri Subba Rao who argued at length. We have given our careful considerations to these submissions.

8. In view of the preliminary objection raised by the Ld. Counsel for the Respondents regarding maintainability of the Review Petitions, it would be proper to first examine whether the review is maintainable under Order 47 Rule 1 of CPC before taking up the other issues raised by the Review Petitioners.

9. Shri Subba Rao, the learned counsel for the Respondents submit the following:

“As per sub-section (1)(a) of Order 47 Rule 1, any person considering himself aggrieved by an order from which an appeal is allowed, but from which

no appeal has been preferred, he can file a Review Petition. In this case, an Appeal has been filed as against the judgment of this Tribunal before the Hon'ble Supreme Court by the Distribution Licensees and the same is pending. Hence, the Review Petitions are not maintainable. Further, the grounds raised in the Appeal filed by the Respondents pending with the Hon'ble Supreme Court are also the same as raised in the Review Petition. Therefore, the Review Petitioners could present their case in the said Appeal pending before the Hon'ble Supreme Court".

In support of his argument he has cited several authorities rendered by the Hon'ble Supreme Court. They are as follows:

- i) 2000-6 SCC 359 in the matter of Kunhayammed and Others vs. State of Kerala;
- ii) 2004-1 SCC 712 in the matter of Dharam Dutt and Others vs. Union of India and Others;
- iii) 2004-2 SCC 747 in the matter of Union of India vs. West Coast Paper Mills Ltd.
- iv) 2010-13 SCC 158 in the matter of Om Prakash Verma and Others vs. State of Andhra Pradesh.

In the light of the above arguments, let us first consider the question of maintainability of the Review Petition.

10. Order 47 Rule 1 of CPC reads as under:

“1. Application for review of judgment: (1) Any

person considering himself aggrieved,—

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b)

(c)

(2) A party who is not appealing from a decree or order may apply for review of judgment, notwithstanding pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when being respondent, he can present to the Appellate Court the case on which applies for the review”.

11. Under the sub-rule (2) of Order 47, Rule 1, the Review Petitioners who have not filed any Appeal against the judgment of the Tribunal can apply for review of the judgment before this Tribunal notwithstanding the pendency of the Appeal filed

by the other party i.e. Distribution Licensees provided that the grounds of the Appeal are not common or when being Respondents the Review Petitioners can present their case before the Hon'ble Supreme Court.

12. Shri Gopal Chaudhary, learned counsel for the Appellant stated that the grounds of the Review Petition are not the same as the grounds in the Appeal filed by the Distribution Licensees. The Review Petitioners have made out a case for improvement of the various parameters and norms to increase the tariff while the grounds raised by the Distribution Licensees in the Appeal are for tightening of the parameters and norms so as to reduce the tariff. Further the Review Petitioners have pointed out some errors apparent

on the face of the record which can only be raised in a Review Petition.

13. We are in agreement with Shri Gopal Chaudhary, the learned counsel for the Petitioner that the Review Petitions are maintainable as per sub-Rule (2) of Order 47 Rule 1 of CPC, as the grounds of the Review Petitions are not the same as the grounds of the Appeals filed by the Distribution Licensees. We feel that the Review Petitioners can not argue their case regarding improvement of various parameters and norms over and above that decided by this Tribunal or an error apparent on the face of the record in the judgment of the Tribunal before the Hon'ble Supreme Court in the Appeal filed by the Distribution Licensees. The judgment in the cases referred to by Shri Subba Rao, learned counsel for the Respondents are not

relevant to the present case where sub-rule (2) of order 47 Rule 1 is applicable. Thus, we hold that the Review Petitions are maintainable.

14. Let us now take up the issues raised in the Review Petitions.

15. **Scope of Tariff/Control Period, interim tariff and tariff beyond 1.4.2009:** This issue has been raised in all the three appeals. The Tribunal has given findings on various normative parameters of biomass, bagasse and mini hydro power plants which were considered in the tariff orders passed by the Chairman and Member-Finance. The Tribunal has not altered the structure and scope of tariff as decided by Chairman and Member-Finance. The Chairman and Member-Finance in their respective Tariff Orders have determined the

fixed charges for 10 years and the variable charges for the period 1.4.2004 to 31.3.2009. The scheme of things is clear from the judgment. The normative parameters as decided by the Tribunal are applicable to the Biomass, Bagasse and Mini hydro power plants which were existing as on 31.3.2004 and those commissioned between 1.4.2004 to 31.3.2009 for sale of electricity to the Distribution Licensees. The fixed charges by biomass and bagasse plants and tariff for hydro plants for ten year period has to be determined by the State Commission as per the directions of the Tribunal in the same way as decided in their respective impugned orders. Also, the variable charges for biomass and bagasse plants are to be determined by the State Commission as per the price of fuel and other parameters decided in the

judgment for the period 2004-2009 in the same way as was done in the orders of the Chairman and Member-Finance. For variable charges for the period 2009-14, the State Commission has passed a separate order which was not challenged in the above Appeals before the Tribunal. If the State Commission has to pass a consequential order for variable charges for the period beyond 31.3.2009 in terms of its own order, then the Review Petitioners will have to approach the State Commission for the same. Thus, we find no error apparent on the face of the record.

16. Auxiliary Consumption for mini hydel plants:

We do not find any error apparent on the face of the record in deciding the auxiliary consumption for hydel plants. The Review Petitioners have now submitted new data regarding meter readings at

the generator terminal and Licensee's sub-station to substantiate their claim for higher auxiliary consumption. Admittedly, this data is now available with the Review Petitioners but was not furnished in the main Appeal. We, therefore, cannot go into this data to reconsider the matter in the Review.

17. Interest on loans in respect of hydel plants:

The Tribunal has given a clear finding for fixing the interest rate for term loan and working capital for hydel plants in paragraph 33.6 of the judgment. The Review Petitioners now want us to reconsider the issue which is not permissible in review.

18. Return on Working Capital Margin: This is a common issue for the Review Petitions 3 and 4 of

2013. The Review Petitioners state that they do not have any cash surplus in the first year of operation of the plant and in view of low tariffs there is no question of cash surplus. The Tribunal has given a clear finding on this issue in paragraph 33.8 of the judgment that RoE is allowed on 30% of the capital expenditure on the capital assets created and cannot be allowed on 30% of the working capital. So, this cannot be reviewed.

19. **Operation & Maintenance escalation:** It is common issue for all the three Review Petitioners. The Review Petitioners now want us to specify the Wholesale Price Index (WPI) and indices to be considered to computing the escalation factor for Operation and Maintenance. We feel that we should have specified the WPI and CPI indices.

Accordingly, we direct that the State Commission should consider WPI index of all commodities and CPI index for industrial workers in the State in computing the escalation factor for Operation and Maintenance.

20. **Adjustment in Plant Load Factor (PLF) for Grid interruptions:** This issue is raised in R.P. no. 3 of 2013. The Tribunal had not allowed any provision for deemed generation but had given liberty to the individual Power Projects to approach the State Commission with actual data for grid interruptions in case it has resulted in the Power Plant achieving a PLF below the threshold PLF and the Power Plant has been unable to recover the full fixed cost. The State Commission in individual cases shall consider to exclude the period of interruption in the evacuation system

from the total time period for computation of the PLF. The Petitioners now give examples for hydro plants and want that under no circumstances the judgment should be interpreted to the detriment of the generators. In order to avoid any controversy we want to clarify our directions. We make it clear that the Tribunal has given liberty to approach the State Commission only in case the PLF is lower than the benchmark PLF i.e. 32% in case of mini hydel plants resulting in the plant not recovering the Annual Fixed Charges i.e. the amount due at the approved tariff for generation at 32% PLF. Thus, the examples given by the Review Petitioner for PLF more than 32% are not relevant. According to the judgment, a hydro plant can exercise the liberty granted by the Tribunal only if it is not able to achieve the

threshold PLF of 32%. For example, the annual PLF of a hydro plant in a year is 30% and the plant was forced to shut down for 'x' hours due to problem in transmission system resulting in loss of generation, then the power plant can approach the State Commission with supporting data for claim. If the revised PLF for (8760-x) hours of operation is say 32.8%, then the State Commission will consider to grant that the power plant is entitled to recover the annual payment at the approved tariff at 32% PLF i.e. full Annual Fixed Charges from the distribution licensees. If the revised PLF is say 31%, then the annual payment will be considered at 31/32 of the amount it would receive at 32% PLF i.e. 31/32 of the Annual Fixed charges. This clarifies the judgment of the Tribunal.

21. **Computation of working capital:** This issue has been raised in R.P. no. 3 of 2013. According to the Review Petitioner, the Tribunal has inadvertently omitted to specify that the working capital shall change for each financial year with escalation of O&M expenses. This was specifically provided in case of biomass, but was omitted in case of mini hydro. The Tribunal in case of biomass plants has specifically mentioned that the working capital will change every year with escalation in O&M expenses. It is clarified that in case of mini hydel plants also the working capital has to be re-determined with change in O&M expenses due to escalation and change in 2 months receivables with change in tariff every year. Accordingly, clarified.

22. **Treatment of capital subsidy:** This pertains to R.P. no. 3 of 2013 in respect of mini hydel projects. The Review Petitioner has made submissions to reconsider the findings with regard to capital subsidy. The Tribunal has given a reasoned order for not deducting the capital subsidy from the capital cost and adjustment of actual subsidy amount received by the developer after adjusting pre-payment penalty to be adjusted against the payments made to the Developers in paragraphs 33.1 (xi) and (xii) of the judgment. Thus, the Tribunal has allowed the benefit of subsidy to be passed on to the consumers. The Review Petitioner now wants us to reconsider the same on the same ground which were urged in the main Appeal. This is not permissible in the Review.

23. **Electricity Duty:** This issue is common to Appeals 3 and 4 of 2013. The Review Petitioners state that the Tribunal has not specified the manner in which the electricity duty is to be claimed. As indicated in paragraphs 31.14 and 33.10 of the judgment, the electricity duty has to be allowed as pass through as decided by the Chairman and Member-Finance in their respective orders. Thus, the Tribunal has only endorsed the findings of the Chairman and Member-Finance in respect of electricity duty. It is not proper to consider the modalities of payment in the Review. The modalities of payment has to be decided by the State Commission. Accordingly, the State Commission is directed to decide the modalities of payment of Electricity Duty while determining the tariff.

24. **Hearing before the final order:** The Review Petitioners want that in order to avoid any error or omissions in issuing the final order pursuant to the judgment of the Tribunal and to avoid needless litigation, the Tribunal may issue directions to the State Commission to issue notice of the draft final tariff order with calculation sheets and data and seeking objections from the generating companies and then the State Commission may issue the final order considering the objections. We give liberty to the Review Petitioners and also to the distribution licensees if they so desire, to approach the State Commission with the above request and the State Commission shall consider the same.

25. **Operation & Maintenance Expenses:** This issue has been raised in R.P. no. 4 of 2013 in respect of biomass plants. While the Chairman and Member-Finance decided O&M expenditure of 5%, the Tribunal has allowed the same at 5.5%. The plants commissioned prior to 1.4.2004 will be entitled to fixed charges corresponding to nth year to be decided by the State Commission which will include the base O&M expenses at 5.5% plus the escalation. Thus, we find no merit in the submissions of the Review Petitioners on this issue.

26. **Specific Fuel consumption and Fuel Price Escalation:** These issues have been raised in Appeal no.4 of 2013. The Tribunal has rendered the findings with proper reasonings on these issues in the Judgment. The Review Petitioner

now wants us to reconsider these issues giving the submissions which they had already made in the main Appeal. This is not a valid ground for Review. Accordingly, rejected.

27. Revision of variable cost for the period 2009-

14: The Review Petitioners want us to give directions to the State Commission regarding revision of variable cost for the period 2009-14 determined by the State Commission by order dated 31.3.2009 which according to them was subject to the outcome of the Appeal arising out of the 2004 order. The order dated 31.3.2009 of the State Commission was not challenged in the Appeals filed before the Tribunal. Therefore, the Tribunal has not gone into the variable cost determined under the order dated 31.3.2009. The Review Petitioners may approach the State Commission to pass

consequential order as per its own findings in its order dated 31.3.2009 regarding subjecting the order to the final outcome of the Appeal arising out of the 2004 order.

28. Regarding the issue of method of computation of PLF raised in R.P. no. 5 of 2013, we have to state that this issue was not dealt with in the orders of Chairman, Member-Finance and Member-Technical and is specific to the Appellants in Appeal no. 168 of 2011. According to the Review Petitioner, the State Commission decided not to deal with the issue as the Appeals were pending before the Tribunal and only wants liberty to be granted to the Petitioner to raise this issue before the State Commission. Accordingly, we grant liberty to the Review Petitioner to raise this issue before the State Commission.

29. With the clarifications and directions, referred to above, all these Review Petitions are disposed of.

No order as to costs.

30. Pronounced in the open court on this

30th day of April, 2013.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Reportable/Non-Reportable

vs