Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 124 of 2012

Dated: 04th Jan, 2013

Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:
M/s. Indian Oil Corporation Ltd.
Pipelines Division,
A-1, Udyhog Marg, Sector-I
NOIDA-201 301 (U.P)

…Appellant

Versus

1. **Gujarat Electricity Regulatory Commission**
   1st Floor, Neptune Tower
   Ashram Road
   Ahmedabad-380 009

2. **Paschim Gujarat Vij Company Ltd (PGVCL)**
   Laxmi Nagar, Nana Mava Main Road,
   Rajkot, Gujarat-360 004

3. **Uttar Gujarat Vij Company Ltd. (UGVCL)**
   Visnagar Road,
   Mehasana-384 001, Gujarat

4. Gujarat Energy Transmission Corporation Ltd (GETCO)
Sardar Patel Vidyut Bhawan,
Race Course,
Vadodara-390 007

…..Respondent(s)

Counsel for the Appellant(s) : Mr. V N Koura
Ms. Mona Aneja

Counsel for the Respondent(s): Ms.Swapna Seshadri for R-2-R-4

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Indian Oil Corporation Limited is the Appellant herein.

2. Aggrieved by the impugned order dated 4.5.2012 passed by the Gujarat State Commission dismissing its Petition praying for the direction to the Distribution Licensees not to deduct 15% from the tariff determined by the State Commission for the sale of surplus energy available after captive use; the Appellant has filed this Appeal.

3. The short facts are as under:

(a) The Indian Oil Corporation Limited, the Appellant is a Wind Power Generator. The Gujarat State Commission is the First Respondent. Paschim Gujarat Vij Company Limited the 2nd Respondent and Uttar Gujarat Vij Company Limited the 3rd Respondents are the Distribution Licensees. Gujarat Energy Transmission Corporation Limited, the 4th Respondent is a Transmission Utility.

(b) The Appellant during the Financial Year 2008-09 installed 21 MW Wind Turbine Generators comprising of 14 Nos. of Wind Turbine Generators of 1.5 MW each for the purpose of wheeling of power to its industrial units in Gujarat in accordance with the Wind Tariff orders No.2 of 2006 and No.3 of 2006 dated 11.8.2006 issued by the State Commission.

(c) The Appellant signed a Wheeling Agreement with Transmission Utility (R-4) on 9.3.2009. Thereafter, the Appellant signed an Agreement for sale of its surplus power from its Wind Farms with the Distribution Licensee (R-2) on 22.4.2009

and another Agreement with another Distribution Licensee (R-3) on 15.4.2009.

(d) According to these Agreements, the Appellant is eligible to wheel the energy from the date of generation and the energy so wheeled shall be set off against the monthly consumption of the Appellant's units.

(e) In terms of clause 3.4 of the said Agreements, any excess energy after subtracting the set off against the monthly consumption shall be treated as sale to the Distribution Licensees @ 85% of the applicable tariff rate of Rs.3.37 Per Unit.

(f) The Appellant, challenging the above mentioned terms of the Agreements with regard to the payment by the Distribution Licensees of only 85% of the applicable tariff for the purchase of surplus energy, filed Petition No.1004 of 2010 before the State Commission. However, the State Commission by the order dated 13.5.2010, rejected the said petition and held that the Appellant would be entitled to the price for

purchase of surplus energy which is only @ 85% of the applicable tariff namely Rs.3.37 per unit.

(g) Thereafter, the Appellant came to know that in another Petition No.1029 of 2010 filed by M/s. Kutch Salt And Allied Industries Limited challenging the payment of 85% by the Distribution Licensee from the applicable tariff, the State Commission allowed the prayer and consequently directed the Distribution Licensee not to deduct 15% from the tariff determined by the State Commission by the order dated 10.8.2010.

(h) When the said order was challenged by the Transmission Licensee, this Tribunal in Appeal No.190 of 2010 upheld the said order by the judgment dated 31.5.2011.

(i) Since the point raised by the Appellant in its Petition was decided in its favour in the other matter filed by the other party in the order dated 10.8.2010 and in the Tribunal judgment in Appeal No.190 of 2010 dated 31.5.2011, the Appellant filed a Review Petition In No.1121 of 2011 before

the State Commission for review of the earlier order dated 13.5.2010 passed in his Petition No.1004 of 2010, on the strength of the above order and judgment.

(j) After hearing the parties, the State Commission by the order dated 16.4.2012 dismissed the said Review Petition on the ground of maintainability.

(k) The Appellant, thereupon preferred another Petition before the State Commission in Petition No.1123 of 2011 Under Section 86 (1) (a) (b) (e) of the Act, 2003 seeking for the similar prayer for not directing the Distribution Licensee not to deduct 15% from the applicable tariff of Rs.3.37 per unit as determined by the State Commission. Alternatively, the Appellant prayed for determining the fresh tariff u/s 64 of the Act.

(l) After hearing the parties, the State Commission dismissed the said Petition by the impugned order dated 4.5.2012 on the ground that a similar prayer had been rejected earlier by the order dated 13.5.2010 which had not been challenged and that therefore, the prayer made by the

Appellant is barred by res judicata. With regard to the alternative prayer, it held that the tariff @ 85% of Rs.3.37 Per unit was in accordance with the Agreement between the parties and that therefore, the Petition cannot be treated U/s 64 of the Electricity Act, 2003 for fresh determination of the tariff.

(m) Aggrieved by this order dated 4.5.2012, Indian Oil Corporation Limited, has filed this Appeal.

4. The Learned Counsel for the Appellant has raised the following issues:

(a) The State Commission has erroneously applied the principle of res judicata.

(b) The order of the State Commission dated 10.8.2010 in petition No.1029 of 2010 filed by an another party (Kutch Salt and Allied Industries Ltd) who is similarly situated with that of the Appellant was upheld by the Appellate Tribunal in Appeal No.190 of 2010 by the judgment dated 31.5.2011 and this order and judgment are squarely applicable to the present case of the

Appellant and as such, the Appellant also is entitled to the same relief.

(c) Alternatively, the State Commission ought to have treated the proceedings as a fresh tariff determination process u/s 64 of the Act, 2003 which the State Commission has omitted to consider the same.

5. In reply to the above arguments, the learned Counsel for the Distribution Companies (Respondents) pointed out the various reasoning given by the State Commission in the impugned order and submitted that the Appellant's contention urged before this Tribunal have no substance as the impugned order is well reasoned and well justified one.

6. In the light of the rival contentions, the following questions would arise for consideration:

(a) **Whether the principle of res judicata is applicable to the present case?**

(b) **Whether the Respondents are entitled to deduct 15% from the tariff determined by the State Commission for sale of surplus energy available after captive use under the terms of**

the Agreements especially when in a similar case, both the State Commission as well as this Tribunal had held that the Distribution Licensees are not entitled to deduct 15% from the tariff already determined by the State Commission?

(c) **Whether the Appellant is entitled to the relief sought for through the alternative prayer claiming that the Petition filed by it, ought to have been treated U/S 64 of the Act, 2003 for determining the tariff afresh?**

7. Before dealing with these questions, it would be better to recall the factual background of the case.

8. This case has got a chequered history. In order to understand the core of the issues and conduct of the parties, it would be necessary to refer to the chronological events leading to filing of this Appeal:

(a) The State Commission by its order No.2 of 2006 dated 11.8.2006 determined the price @ Rs.3.37 per unit for procurement of power by the Distribution Licensee in Gujarat from the Wind Energy Generators.

(b) On the very same date, i.e. on 11.8.2006, the State Commission passed yet another order No.3 of 2006 for bringing the Generating Stations of Gujarat State, Distribution Licensees and other Persons under the purview on Intra State Availability based tariff.

(c) The Appellant during the Financial Year 2008-09 commissioned 21 MW Wind Turbine Generators consisting of 14 Nos of Wind Turbine Generators of 1.5 MW each for the purpose of wheeling of power to its industrial units in Gujarat for which the tariff as per the order dated 11.8.2006 is applicable.

(d) The Appellant signed the wheeling Agreement with the Transmission Utility (R-4) on 9.3.2009. Thereafter, the Appellant signed Agreements for sale of excess power from its Wind Farms with the distribution Licensee (R-2) on 22.4.2009. Similarly, the Appellant entered into another Agreement with another Distribution Licensee (R-3) on 15.4.2009.

(e) As per the Agreement, the Appellant has agreed to sell such surplus power to the Distribution Licensee @ 85% of Rs.3.37 Per unit. The relevant clause 3.4 is mentioned in these Agreements. Clause 3.4 is as follows:

"Clause 3.4: Purchase of Surplus Energy

In accordance with the Gujarat Electricity Regulatory Commission's (GERC) order no. 2 of 2006 dated 11th August 2006, any excess energy (Net of Wheeling/Transmission loss/ Charges approved by GERC for wind farms and after subtracting the set off against monthly consumption) shall be treated as sale to the DISCOM. As per the Clause No.3 of the amended wind power policy, 2007 (notified vide G.R.No.WND-11-2008-232-1-B dated 7th Jan'09) DISCOMS are allowed to purchase the surplus power from wind farms wheeling the power for their captive use after adjustment of energy against consumption at recipient unit (s) at the rate of 85% of tariff applicable to WTGs (Rs.3.37 per Unit) selling power to GUVNL and/or Distribution Licensee. ***Hence, the company has agreed to sell such surplus power to Distribution licensee at the rate 85% of Rs.3.37 per Unit or as notified by the Government or Regulatory Commission or any other Competent Statutory Authority from time to time.*** *The payment of such energy agreed to be purchased will be*

released within 30 days from the date of invoice received from wind energy generator in this regard.

Any excess consumption by the participant unit will be treated as sale by the DISCOM at retail tariff rates applicable to that consumer category (to which facility of wind energy owner belongs) as determined by GERC from time to time"

(f) Even though these Agreements were entered into between the parties as early as on 9.3.2009, 15.4.2009 and 22.4.2009, the Appellant had never raised any objection with reference to the above rate. But, strangely, the Appellant challenging the said clause relating to the rate in the said Agreement filed a Petition before the State Commission in Petition No.1004 of 2010 contending that the price fixed for the purchase of power i.e. at the rate 85% of 3.37 per unit under Clause 3.4 of Wheeling Agreement was in direct contravention of the order No.2 of 2006 passed by the State Commission on 11.8.2006.

(g) In the said Petition, the Appellant prayed for a direction to the Distribution Licensees to pay the applicable tariff as determined by the State

Commission in the Order No.2 of 2006 without deducting 15% of the applicable tariff.

(h) The State Commission after hearing the parties, dismissed the said Petition filed by the Appellant in Petition No.1004 of 2010 by the order dated 13.5.2010. In this order, the State Commission disallowed the Appellant's Petition to the extent that the Appellant prayed for the relief by the payment of Distribution Licensees of the applicable full rate of tariff fixed by the State Commission under Order No.2 of 2006 dated 11.8.2006. The relevant portion of the order is as follows:

> "10. *Regarding purchase of surplus energy of 85% of applicable tariff the Respondents have argued that the tariff determined by the Commission is applicable to Wind Energy purchased to comply with the Renewable Purchase Obligation (RPO) and that they had already fulfilled their RPOs. As such, the surplus energy for petitioner's WTG is being purchased by them @ 85% of the applicable tariff, as agreed by the Petitioner in the Agreement. We agree with the Respondent and the Petitioners' prayer in this respect is not acceptable".*

(i) The Appellant, in spite of the fact that its prayer relating to the rate was not accepted by the State Commission did not challenge the above decision of the State Commission before the Appellate Tribunal. As such, their remained no dispute between the parties with regard to the rate as per the Agreement.

(j) On the other hand, both the parties acted upon the terms and conditions contained in Clause 3.4 of the Agreement. As such, the order dated 13.5.2010 attained finality as no steps have been taken by the Appellant for challenging the said order. On the other hand, the payment of 85% has been accepted by the Appellant made by the Distribution Licensees as per the terms Clause 3.4 of the Agreement without any objection.

(k) This fact which has not been disputed would show that the Appellant decided not to challenge the said order dated 13.5.2010 either by filing the Review before the State Commission or by filing the Appeal before the Tribunal. Not only that, the Appellant after accepting the said order has acted

upon the same by accepting to receive the payment by Distribution Licensee of 85% of the tariff as per the Agreement.

(l) At that stage, the Appellant came to know that another Company namely Kutch Salt And Allied Industries Ltd preferred a Petition before the State Commission in 1029 of 2010 seeking for the similar prayer and challenging the deduction by the Distribution Company of 15% from the applicable tariff determined in Order No.2 of 2006 dated 11.8.2006.

(m) The State Commission decided the said petition in Petition No.1029 of 2010 filed by M/s. Kutch Salt And Allied Industries Limited and allowed the prayer made by the said Petitioner and directed the Distribution Licensee not to deduct 15% from the tariff determined by the State Commission for the surplus energy available after captive use. This order came to be passed on 10.8.2010.

(n) In spite of the fact that similar prayer in the other Petition had been allowed by the State Commission, the Appellant did not chose to

approach the State Commission seeking for the similar relief by filing appropriate Petition before the State Commission. The Appellant has also not chosen to file the Appeal before this Tribunal as against the order dated 13.5.2010 passed in the Petition, on the strength of different stand taken by the State Commission on the similar Petition filed by M/s. Kutch Salt and Allied Industries Limited.

(o) On the other hand, on coming to know that the order dated 10.8.2010 passed by the State Commission had been challenged by the Distribution Licensee in Appeal No.190 of 2010, the Appellant had chosen to wait for the result of the said Appeal. In this Appeal, this Tribunal while dismissing the said Appeal confirmed the order of the State Commission dated 10.8.2010. Only then the Appellant filed the Petition No.1121 of 2011 on 12.7.2011 before the State Commission seeking for the review of the order dated 13.5.2010 passed in their Petition No.1004 of 2010 on the strength of the order passed by the State Commission in the other matter as well

as the judgment of this Tribunal in favour of M/s. Kutch Salt And Allied Industries Limited.

(p) The State Commission entertained the Review Petition dated 12.7.2011 but dismissed the same by the order dated 16.4.2012 on the ground of delay as well as on the ground that the Review was not maintainable in terms of the Order 47 Rule 1 of the Code of Civil Procedure, 1908.

(q) The curious part to be noticed in this context is that even during the pendency of this Petition for review in No.1121 of 2011, before the State Commission seeking to revise the order dated 13.5.2010, the Appellant simultaneously filed another fresh Petition before the State Commission in Petition No.1123 of 2011 raising the same issue which were raised by the Appellant in Petition No.1004 of 2010.

(r) The prayer made in Petition No.1123 of 2011 filed U/S 86 (1) (a) (b) and (e) of the Electricity Act is as follows:

(i) To direct PGVCL and UGVCL not to deduct 15% from the tariff determined

by the Commission, for the sale of surplus energy available after captive use, during the term of the Agreements with the distribution companies;

(ii) To direct the Respondents to agree for deletion of “the rate 85 percent of” as appearing in Clause 3.4 of the Agreements for purchase of surplus power, executed by the DISCOMs with the Petitioner.

(iii) To make payment of the differential amount towards 15 percent deducted from the tariff rate towards surplus power purchased by the Respondents, from the date of commissioning of the WTGs.

(iv) Alternatively, to treat the petition as an application under Section 64 of the Act for determination of tariff on full rate i.e. Rs.3.37 for sale of surplus power.

The reading of the above prayers would show that the Distribution Licensees must be directed

to pay for surplus energy at the full rate as determined by the State commission and not as per the Agreement i.e. 85% of the rate determined by the State Commission.

(s) Admittedly, a similar prayer as mentioned above had been made in the Petition No.1004 of 2010 filed by the Appellant. The said prayer had been specifically rejected by the State Commission by the order dated 13.5.2010 with following observations:

> *"Regarding purchase of surplus energy of 85% of applicable tariffs, the Respondents have argued that the tariff determined by the Commission is applicable to wind energy purchased to comply with the Renewable Purchase Obligation (RPO) and that they had already fulfilled their RPOs. As such, the surplus energy for Petitioner's WTGs is being purchased by them @ 85% of the applicable tariff, as agreed by the Petitioner in the Agreement. We agree with the Respondent and the petitioner's prayer in this respect is not accepted."*

9. The State Commission ultimately on noticing that the same issues which were raised by the Appellant in Petition No.1004 of 2011 have been raised in this Petition also i.e.

Petition No.1123 of 2011 has rejected this Petition in the impugned order dated 4.5.2012 mainly on the ground that it is barred by the principle of res judicata. The relevant portion of the findings is as follows:

> *"8.7 The respondents contended that the Commission has in its order dated 13.5.2010 in Petition No. 1004/2010 decided that the surplus energy available after captive consumption should be purchased by the respondents @ 85% of the applicable tariff as agreed by the petitioner in the Agreement. In order dated 13.05.2010 in petition No. 1004 of 2010 the Commission had on the same issue decided as under:*
>
> > *"10. Regarding purchase of surplus energy of 85% of applicable tariff, the respondents have argued that the tariff determined by the Commission is applicable to wind energy purchased to comply with the Renewable Purchase Obligations (RPO) and that they had already fulfilled their RPOs. As such the surplus energy for petitioners WTGs is being purchased by them @ 85% of the applicable tariff, as agreed by the petitioner in the Agreement. We agree with the respondent and the petitioners' prayer in this respect is not acceptable."*
>
> *Thus, the said issue is already decided by the Commission in its order dated 13.05.2010 in Petition No. 1004/2010. Moreover, the decision of the Commission was not challenged by the petitioner. In*

this regard, we refer to Section 11 of the Code of Civil Procedure 1908, which reads as under:

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".*

8.8. In this connection we referred to the judgement of Hon'ble Supreme Court of India in the case of Satyadhan Ghosal v. Smt Deorajin Debi in which the Hon'ble Court held that:

> *"…7. The principle of res judicata is based on the need of giving finality, to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question, of fact or on a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.....*

> *8. The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings…….”*

> *8.9 Thus, once the Commission has already decided in earlier Petition No. 1004 of 2010 between the same parties that the tariff @ 85% of Rs. 3.37 per unit is in accordance with the Wheeling Agreement between the parties as agreed by the petitioner in the Agreement and the above order of the Commission is not challenged by the petitioner, it is final. Thus, the principle of res judicata applicable in the present case is based on the order dated 13.5.2010 in Petition No. 1004 of 2010. On this ground also the prayer of the petitioner is not maintainable and rejected. In view of the above, we decide the Issues No. (i), (ii) and (iii) in the negative.*

10. In this context, it shall be stated that both in the order passed by in the Review No.1121 of 2011 dated 16.4.2012 and the impugned order in Petition No.1123 dated 4.5.2012, the State Commission has specifically mentioned that the order dated 13.5.2010 rejecting the relief for directing the distribution licensees not to deduct 15% of the tariff for surplus energy has already attained finality.

11. At that stage, the Appellant curiously filed the Appeal before this Tribunal challenging the earlier order dated 13.5.2010 passed by the State Commission in Petition No.1004 of 2010 before this Tribunal along with an application to condone the delay of 715 days in filing the Appeal as against the order dated 13.5.2010. This would show that the Appellant took belated decision to file the Appeal as against the order dated 13.5.2010 only in July, 2012 before this Tribunal even though the State Commission has held both in the Review Order dated 16.4.2012 as well as on 4.5.2012 that the order dated 13.5.2010 has attained the finality and the same had already been implemented by the parties.

12. This Tribunal even at the admission stage by the order dated 20.7.2012 dismissed the said application to condone the delay as there was no sufficient cause thereby rejecting the said Appeal challenging the order dated 13.5.2010. This application to condone the delay in IA No.231 of 2012 in DFR No.1091 of 2012 had been filed before this Tribunal on 15.6.2012 which was ultimately dismissed on 20.7.2012.

13. Strangely, it is noticed that the Appellant has filed this Appeal as against the order dated 4.5.2012 on 15.6.2012

itself. In this Appeal, he has not mentioned about the steps taken by the Appellant to file an Appeal as against the order dated 13.5.2010 before this Tribunal along with an application to condone the delay. Similarly, in IA No.231 of 2012 in the application to condone the delay in filing the Appeal as against the order dated 13.5.2010, the Appellant has not mentioned about the order dated 4.5.2012 and the fact of their having already filed an Appeal against the said order on 15.6.2012 while the matter was heard in the application to condone the delay on 20.7.2012. Even on the date of hearing of the application to condone the delay i.e. on 20.7.2012, the Appellant did not bring to the notice of this Tribunal about the said Appeal having been filed as early as on 15.6.2012.

14. These facts would show the conduct of the Appellant in not placing the entire materials before this Tribunal either in the earlier petition to condone the delay in filing the Appeal against the order dated 13.5.2010 or in the present Appeal as against the order dated 4.5.2012, which is not fair.

15. In other words, it is to be stated that the Appellant was not steady in making a decision as to which order is to be appealed in time.

16. Bearing these factual backgrounds in mind, let us now go into the issues.

17. The **First Issue** is relating to the Applicability of Principle of res judicata.

18. As indicated above, the State Commission in the impugned order has specifically held that once the State Commission has already decided the same issue, in the earlier proceedings in No.1004 of 2010 between the same parties on 13.5.2010 to the effect that the tariff @ 85% of Rs.3.37 per unit was in accordance with the Wheeling Agreement between the parties and when the above order of the State Commission had not been challenged before the Appellate Forum, the Petitioner (Appellant) cannot be permitted to raise the very same issue as it is barred as res judicata Under Section 11 of the Code of Civil Procedure. Let us quote Section 11 of the Code of Civil Procedure which is reproduced below:

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has*

been subsequently raised, and has been heard and finally decided by such court".

19. The above provision would make it clear that when the particular issue has already been decided in the former proceedings between the same parties by the Court, the same issue cannot be allowed to be raised and decided by such Court later. In the present case, the issue which had been raised by the Appellant in the earlier Petition in Petition No.1004 of 2010 which has been disposed of on 13.5.2010 dealing with the issue of the purchase of surplus energy @ 85% of the applicable tariff namely Rs.3.37 per unit has been raised again.

20. This issue was decided by the State Commission on 13.5.2010 holding that as per the Agreement, the surplus energy available after captive consumption should be purchased by the Respondent @ 85% of the applicable tariff as agreed by the Petitioner in the Agreement. The very same issue had been raised in the Petition No.1123 of 2011 by seeking the relief for the direction to the Respondent (Distribution Licensee) not to deduct 15% from the tariff determined by the State Commission for the sale of surplus energy available after captive use during the term of Agreement with the Distribution Companies. In fact, the

said issue had been framed for consideration by the State Commission. The said issue is as follows:

> *"Whether the deduction of 15% from the tariff determined by the state Commission for sale of surplus energy available after captive use, by the Respondents is illegal and invalid and any direction needs to be given to the Respondents?*

21. It is not in dispute that the Appellant has made similar prayer in the earlier Petition in Petition No.1004 of 2010 seeking for the direction to pay the full rate for the surplus energy i.e. energy which could not be utilised in captive consumption, as may be determined by the State Commission. The very same issue framed by the State Commission in the order dated 4.5.2012 had been framed in the earlier order dated 13.5.2010 also. Therefore, the State Commission in the impugned order has rightly applied the above principle of res judicata and has rightly held that once the State Commission has already decided the same issue between the same parties and the order not being challenged by the Appellant, the second petition raising the very same issue between the very same parties was not maintainable.

22. As already indicated, the question in both the matters is as to whether the Distribution Companies are entitled to

purchase the surplus energy from the Appellant @ 85% of the applicable tariff as mentioned under Clause 3.4 of the Wheeling Agreements and as to whether the Appellant is entitled to get the refund of the amount of 15% of the tariff of Rs.3.37 per unit deducted by the Distribution Companies.

23. The perusal of the earlier order dated 13.5.2010, would clearly show that this issue had been decided as against the Appellant specifically holding that the Appellant is not entitled to get the refund of the amount of 15% of the tariff of Rs.3.37 per unit deducted by the Respondent Distribution Companies and they are entitled to purchase the surplus energy from the Appellant @ 85% of the applicable tariff as per the Agreements.

24. As laid down by the Hon'ble Supreme Court, as quoted in the impugned order, it is settled law that the principle of res judicata is based upon the need of giving finality to judicial decision and once the issue had been decided between the two parties in the earlier proceedings and the decision becomes final, when no Appeal is taken to Appellate Forum, both the parties would not be allowed to canvass the issue again in a future proceeding between the same parties.

25. In other words, the Court having decided the issue in one way or other at an earlier stage will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. The relevant portion of the judgment of the Hon'ble Supreme Court referred to in the impugned orders is as follows:

> *"…7. The principle of res judicata is based on the need of giving finality, to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question, of fact or on a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.....*
>
> *8. The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings……."*

26. In this Appeal, the Appellant has merely contended that the principles of res judicata are not applicable to the

jurisdiction issue. This contention is not supported by any material whatsoever. The only ground of the Appeal is that in view of the subsequent orders passed by the State Commission in some other matter which has been confirmed by the Appellate Tribunal, res judicata should not be applied. This is not tenable in regard to the applicability of Section 11 of the Code of Civil Procedure with regard to the issue already decided.

27. Therefore, we hold that the **First Issue** has been rightly decided by the State Commission. Accordingly, this point is decided as against the Appellant.

28. Let us now deal with the **Second Issue** regarding the applicability of the order dated 10.8.2010 passed by the State Commission in Petition No.1029 of 2010 and the judgment of this Tribunal in Appeal No.190 of 2010 dated 31.5.2011 in the case filed by M/s. Kutch Salt And Allied Industries Ltd. The contention of the Appellant on this Issue is as follows:

> "It is true that the State Commission in the order dated 13.5.2010 held that since the Distribution Companies have already fulfilled the Renewable Purchase Obligation (RPO), the surplus energy

purchase by the Distribution Licensees only @ 85% of the applicable tariff as agreed in the Agreement between the parties. Therefore, the claim of the Appellant that the entire applicable tariff shall be paid for the purchase of surplus energy, cannot be held to be valid. However, subsequent to the order dated 13.5.2010, the State Commission in the order dated 10.8.2010 in Petition No.1129 of 2010 filed by the another party i.e. Kutch Salt And Allied Industries Limited, had granted the prayer made by the party and directed the Respondent Distribution Companies not to deduct 15% of the tariff determined by the State Commission for the surplus energy available after captive use. The State Commission further held that the payment of surplus energy is to be made at the rate determined by the State Commission through the order in Petition No.2 of 2006 dated 11.8.2006. The said order of the State Commission was confirmed by this Tribunal in Appeal No.190 of 2010. Hence the order dated 10.8.2010 passed by the State Commission and the judgment of this Tribunal dated 31.5.2011 are applicable to the present case of

Appellant and consequently, the same relief should be granted to the Appellant as well ".

29. Before dealing with this contention urged by the Learned Counsel for the Appellant, it would be worthwhile to refer to the findings on this issue rendered by the State Commission which are as under:

> *"8.2. It is fact that the petitioner has commissioned WTGs at different places in the State and signed Wheeling Agreement with GETCO and Respondents No.1 and 2 on different dates as stated in para 2.2 above. Clause 3.4 of the Wheeling Agreement states about purchase of surplus energy by the distribution licensees which read as under:*
>
> > *"Clause 3.4: Purchase of surplus energy:*
> >
> > *In accordance with the Gujarat Electricity Regulatory Commission (GERC)'s Order No: 2 of 2006 dated 11th August 2006, any excess energy (Net of wheeling / Transmission loss / charges approved by GERC for wind farms and after subtracting the set off against monthly consumption) shall be treated as sale to the DISCOM. As per the clause No: 3 of the amended wind power policy 2007 (notified vide G.R. No. WND-11-2008-2321-B dated 7th Jan.09), DISCOMs are allowed to purchase the surplus power from Wind farms wheeling the power for their captive use after adjustment of energy against consumption at recipient unit(s)*

@85% of tariff applicable to WTGs (Rs. 3.37 per Unit) selling power to GUVNL and/or Distribution licensee. Hence, the Company has agreed to sell such surplus power to Distribution licensee at the rate 85% of Rs. 3.37 per Unit or as notified by the Government or Regulatory Commission or any other Competent Statutory Authority from time to time. The payment of such energy agreed to be purchased will be released within 30 days from the date of invoice received from wind energy generator in this regard.

Any excess consumption by the recipient unit will be treated as sale by the DISCOM at retail tariff rates applicable to that consumer category (to which the facility of wind energy owner belongs) as determined by GERC from time to time."

The above clause of the Wheeling Agreement provides that the respondents agree to sell the surplus power available after captive consumption wheeled from WTGs of the petitioner @ 85% of the tariff applicable to the WTGs i.e. Rs. 3.37 per unit decided by the Commission vide order No. 2 of 2006 dated 11.8.2006. The above Agreements have been executed between the parties on 13.4.2009 and 15.4.2009 as stated in para 2.2 above. There is no evidence on record to prove that petitioner had objected that the price to be paid by the distribution licensees for the surplus energy after captive use by the petitioner @ 85% of tariff applicable to WTGs i.e. Rs. 3.37 per unit decided by the Commission vide order No. 2 of 2006 dated 11.8.2006 is illegal and invalid and against the decision of the Commission. Both the petitioner and respondents have acted

based on the above Agreements from the date of commissioning of the WTGs till the date of filing of the petition. Hence, the plea of the petitioner that the respondents are having monopoly and they have compelled the petitioner to sell the surplus power after captive use @ 85% of Rs. 3.37 per unit decided by the Commission vide order No. 2 of 2006 dated 11.8.2006 is not acceptable and the same is rejected.

8.3 *Moreover, the petitioner has relied on the decision of the Commission in Petition No. 1029/2010 in the case of M/s. Kutch Salt and Allied Industries Ltd. Vs. PGVCL and the Judgement of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 190/2010. It is to be noted that the Commission has passed an order dated 10.8.2010 in Petition No. 1029/2010 in which clause 3.4 of the Wheeling Agreement between M/s. Kutch Salt and Allied Industries Ltd. and PGVCL reads as under:*

> *"Clause 3.4: Purchase of Surplus Energy*
>
> *In accordance with the Gujarat Electricity Regulatory Commission (GERC)'s order no. 2 of 2006 dated 11th August 2006, any excess energy (Net of Wheeling/Transmission loss/ Charges approved by GERC for wind farms and after subtracting the set off against monthly consumption) shall be treated as sale to the DISCOM. However, above deemed sale provision at the tariff rate determined by the Commission is applicable only for the purchase of energy from renewable sources up to the*

minimum requirement of power from such sources. The DISCOM has already tied up the purchase of power from renewable sources more than the minimum requirement of power purchase from such sources. Now, DISCOM may purchase power from Company's wind farms at the rate determined through competitive bidding process. Therefore, it is agreed to purchase the power from wind farm at the rate at which DISCOM will agree/sign an Agreement herein after with any other wind farm generator. The payment of such energy agree to be purchased will be released within 30 days from the date of invoice from wind energy generator in this regard.

Any excess consumption by the recipient unit will be treated as sale by the DISCOM at retail tariff rates applicable to that consumer category (to which facility of wind energy owner belongs) as determined by GERC from time to time"

8.4 The said clause provides that the surplus energy available after captive use shall be purchased by PGVCL at the rate determined through competitive bidding process. The PGVCL has not carried out any competitive bidding process. Hence, in the absence of competitive bidding, the surplus energy available after captive consumption should be purchased at the rate determined by the Commission. Accordingly, the Commission has in petition No. 1029/2010 decided that M/s. Kutch Salt and Allied Industries Ltd. shall be entitled to the tariff as determined by the Commission by order No. 2 of 2006 dated 11.8.2006 and the same confirmed by the Hon'ble Appellate Tribunal in Appeal

No. 190/2010. Thus, the facts of the petitioner and M/s. Kutch Salt and Allied Industries Ltd. are different and distinct. Hence, the order of the Commission in Petition No. 1029/2010 and Judgement of Hon'ble APTEL in Appeal No. 190/2010 are not applicable in the present case.

30. These findings would indicate that the State Commission had come to the conclusion that the decision of the State Commission in Petition filed by M/s. Kutch Salt And Allied Industries Limited would not apply to the present case since the facts of that case are entirely different from this case.

31. It is noticed that M/s. Kutch Salt And Allied Industries claimed tariff as per the order No.2 of 2006 passed by the State Commission on 11.8.2006 in Petition No.1029 of 2010. The State Commission allowed the said Petition by the order dated 10.8.2010 and the same was upheld by this Tribunal by the judgment dated 31.5.2011 by interpreting the various clauses in the Wheeling Agreement entered into between those parties.

32. The Wheeling Agreement entered into between the Appellant and the Distribution Company (R-2 and 3) contained different clauses for purchase of surplus energy by the Respondent in contrast to specific clauses in the Wheeling Agreement with M/s. Kutch Salt And Allied

Industries Limited. The Wheeling Agreement between M/s. Kutch Salt And Allied Industries Limited and the Distribution Licensee provided through Clause 3.4 that the surplus energy available from the Wind Project after captive use, would be purchased by the Respondent No.2 at the rate determined through the competitive bidding process.

33. Let us now quote **Clause 3.4** of the Wheeling Agreement entered into between Kutch Salt And Allied Industries Limited and the Distribution Licensee which is as under:

> *"**Clause 3.4: Purchase of Surplus Energy***
> *In accordance with the Gujarat Electricity Regulatory Commission (GERC)'s order no. 2 of 2006 dated 11th August 2006, any excess energy (Net of Wheeling/Transmission loss/ Charges approved by GERC for wind farms and after subtracting the set off against monthly consumption) shall be treated as sale to the DISCOM. However, above deemed sale provision at the tariff rate determined by the Commission is applicable only for the purchase of energy from renewable sources up to the minimum requirement of power from such sources.* ***The DISCOM has already tied up the purchase of power from renewable sources more than the minimum requirement of power purchase from such sources. Now, DISCOM may purchase power from Company's wind farms at the rate determined through competitive bidding process.***
> *Therefore, it is agreed to purchase the power from wind farm at the rate at which DISCOM will*

agree/sign an Agreement herein after with any other wind farm generator. The payment of such energy agree to be purchased will be released within 30 days from the date of invoice from wind energy generator in this regard.

Any excess consumption by the participant unit will be treated as sale by the DISCOM at retail tariff rates applicable to that consumer category (to which facility of wind energy owner belongs) as determined by GERC from time to time"

34. In that case, the Distribution Licensee did not carryout any competitive bidding process.

35. On the other hand, in that case, the Distribution Licensee claimed that only 85% of the Tariff determined by the State Commission would be paid for surplus energy. In the light of the facts of that case while interpreting the said Clause 3.4 of the said Agreement, the State Commission held that full tariff rate as determined by the State Commission would have to be paid. Accordingly, the State Commission decided that Kutch Salt And Allied Industries Limited would be entitled to tariff as determined by the State Commission in the order No.2 of 2006. Thus, neither, the State Commission nor the Tribunal while interpreting the relevant clause of the Agreement in that case interfered with the

Wheeling Agreement between the Kutch Allied And Industries Limited and the Distribution Licensee.

36. But, in the present case, the Wheeling Agreement between the Appellant and the Distribution Licensee provides that the Appellant would sell the surplus power available after captive consumption wheeled from Wind Turbine Generators (WTG) of the Appellant @ 85% of the applicable tariff i.e. 3.37 per unit as decided in the Order No.2 of 2006.

37. Let us now refer to Clause 3.4 of the Wheeling Agreement in the present case. The same is as follows:

> **"Clause 3.4 Purchase of Surplus Energy:**
>
> ……**Hence, the Company has agreed to sell such surplus power to Distribution Licensee at the rate 85% of Rs.3.37 per Unit or as notified by the Government or Regulatory Commission or any other Competent Statutory Authority from time to time………**

38. Thus, in the present case, the Appellant agreed to the above stipulation and signed the Wheeling Agreement. That apart, both the parties namely the Appellant and the Distribution Licensee acted upon the earlier order dated

13.5.2010 and the said Agreement accordingly as per the terms and conditions agreed between the parties under the Wheeling Agreement.

39. As rightly pointed out by the State Commission, the Appellant never objected to the tariff referred to in the Wheeling Agreement till they filed Petition before the State Commission belatedly.

40. Under these circumstances, the Appellant cannot claim a high tariff relying upon the subsequent decision of the State Commission on the basis of the clauses of the Wheeling Agreement which is completely different from the Clause of the Agreement in question in the present case.

41. In our view, the State Commission has correctly interpreted the provisions of the Wheeling Agreements entered into between the Appellant and the Distribution Licensees in the present case. Therefore, the Second Issue is also decided as against the Appellant.

42. The **Third and last issue** is with reference to the alternative submissions made by the Appellant with regard to the prayer to treat the proceedings as tariff determination process U/S 64 of the Electricity Act, 2003. Let us refer to the findings of the State Commission on this issue:

"8.10. Now we deal with the Issue No. (iv) in which the petitioner has prayed for considering the present petition as a tariff petition u/s. 64 of the Electricity Act, 2003. It is clarified that the tariff determination is required to be carried out by the Commission u/s. 62 of the Act for supply of power by a generating company to a distribution licensee. In the present case, the petitioner is a generating company having 21 MW WTGs set up for captive consumption by himself and he has executed Wheeling Agreement and Transmission Agreement with the respondents. The Wheeling Agreement between the parties is having clause for payment of tariff for surplus energy available after captive consumption and accordingly, the respondents have paid the amount to the petitioner. There is no PPA between the petitioner and the respondents to supply power and any energy fed into the grid by the petitioner is unintended, unscheduled and as a consequence of its inability to consume full output of its generators. As such, the question of tariff determination under section 64 of the Act does not arise in the present case".

43. Admittedly, the Appellant has set-up a Wind Turbine Generators for its captive purposes and only the surplus energy is being wheeled to the Grid of the Distribution Licensee. It is not the case of the Appellant that the Appellant has set-up Generating Plant to sell the electricity to the Distribution Licensee.

44. The Tariff Determination is required to be carried by the State Commission U/S 62 of the Act for supply of power by

a Generating Company to a Distribution Licensee. In the present case, the Appellant has executed Wheeling Agreement and Transmission Agreement with the Distribution Licensee and the Transmission Licensee, the Respondent with a Clause for payment of tariff for surplus energy available after captive consumption and accordingly agreed to the tariff.

45. This Wheeling Agreement or Transmission Agreement cannot be construed to be a Power Purchase Agreement. Admittedly, there is no PPA between the parties to supply power and any energy fed into the grid by the Appellant is unscheduled and uncertain and as a consequence of its inability to consume full output for its captive use.

46. Therefore, the State Commission in the impugned order, has rightly held that the question of tariff determination U/S 64 of the Electricity Act does not arise in the case of the Appellant and thus, this issue is also decided as against the Appellant.

47. **Summary of Our Findings**

(a) **The principle of res judicata is squarely applicable to the present case. The issue raised in the earlier proceedings in Petition No.1004/2010**

between the same parties was decided as early as on 13.5.2010. The very same issue had been raised in the Petition No.1123 of 2011 by the same party and in those proceedings, the very same issue had been framed and the decision taken in the proceedings between the same parties had been decided. The State Commission, in the impugned order, has correctly held that the Appellant cannot be allowed to raise the same point as the issue which has been raised in this case had earlier been decided between the two parties in the earlier proceedings and as such, the decision on that issue become final and in the absence of any Appeal the parties in the proceedings, would not be allowed to canvass the issue again in the later proceedings between the same parties.

(b) **The second issue is with regard to the applicability of the other matter filed by another party namely M/s. Kutch Salt And Allied Industries Limited in which the decision has been arrived at by the Tribunal by the order dated 10.8.2010 in favour of the said Applicant which was confirmed**

by this Tribunal in Appeal No.190 of 2010. The decision taken in the other matter would not apply to the present case because the facts of these two cases are entirely different. In the case filed by M/s. Kutch Salt And Allied Industries Limited, the State Commission interpreted Clause 3.4 of the Agreement of that case and came to the conclusion that full tariff as determined by the State Commission without deducting 15% would have to be paid. But, in the present case, Clause 3.4 of the Agreement is entirely different. The Agreement in the present case provides that the Appellant would sell the surplus power available after captive consumption only @ 85% of the applicable tariff i.e. R.3.37 per unit as fixed by the State Commission earlier. Therefore, the interpretation given by the State Commission on the provisions of the Wheeling Agreement entered into between the Appellant and the Distribution Licensees in this present case, which is completely different from the Agreement between M/s. Kutch Salt And Allied Industries Limited and

the Distribution Licensee, is perfectly valid and correct.

(c) **With regard to the issue regarding alternative prayer claiming a fresh tariff U/S 64 of the Act, it is to be stated that in this case, there is no Power Purchase Agreement between the Appellant and the Distribution Licensee to supply power and the Wheeling Agreement or Transmission Agreement cannot be construed to be a Power Purchase Agreement and therefore, the State Commission has rightly held that the question of tariff determined U/S 64 of the Act, 2003 does not arise.**

48. In view of our above findings, there is no merit in this Appeal. Accordingly, the Appeal is dismissed.

49. However, there is no order as to costs.

(Rakesh Nath) (JusticeM. Karpaga Vinayagam)
Technical Member Chairperson

Dated: 04th Jan, 2013
√REPORTABLE/~~NON-REPORTABALE~~