

JUDGMENT

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

1. The Appellant has filed the present Appeal under Section 111 of the Electricity Act, 2003, aggrieved by the common order dated 30.12.2016 passed by the Assam Electricity Regulatory Commission in Petition Nos. 20 – 31 of 2016 (herein after the “Impugned Order”).
 - 1.1 The Appellant is a company incorporated under the provisions of the Companies Act, 1956 and has its registered office at DLF Galleria Building, 12th Floor, DLF City, Phase IV, Gurgaon – 122 002. The Appellant’s company was formerly known as DLF Power Limited (till 20.06.2008) and thereafter, consequent to change of name, it came to be known as “Eastern India Powertech Limited”.
 - 1.2 Respondent No.1 is Assam Electricity Regulatory Commission.
 - 1.3 Respondent No.2 is Assam Power Distribution Company Ltd engaged in electricity distribution, trading and supply in the State of Assam or outside in accordance with provisions of applicable law.
2. **Facts of the Case :-**

The facts of the case are as follows:-

 - 2.1 On or about 1992, the Government of the State of Assam (hereinafter “GOD”) invited competitive bids for the construction of independent power plants. The Appellant submitted its bid for the development, construction and operation of gas based power plants at Basankadi and at Adamtilla in Assam (hereinafter collectively "Power Plants").
 - 2.2 The Appellant was declared the successful bidder and on 09.02.1995 entered into a Power Purchase Agreement (hereinafter “PPA” with the Assam State Electricity Board (hereinafter “ASEB”) based on the representations contained in the PPA.
 - 2.3 Subsequently, the Electricity Act, 2003 was enacted to consolidate the laws relating to electricity in India and re-vitalize the sector. The Electricity Act, *inter alia*, revamped the regulatory mechanism in the

electricity sector. Consequently, the ASEB was unbundled and all its obligations under the PPA were transferred to the Assam Power Distribution Company Ltd. (hereinafter "APDCL").

- 2.4 On account of the failure of APDCL to pay the tariff as per the PPA, and, *inter alia*, on account of supply of electricity taking place between the generator and the distribution licensee, the Appellant, under cover of its letter dated 28.1.2008, preferred a combined Tariff Petition for its Power Plants before the Respondent Commission for the financial year 2008-09 (hereinafter "2008-09 Tariff Petition").
- 2.5 The Respondent Commission, after hearing the 2008-09 Tariff Petition passed its common final Order on 20.10.2011 (hereinafter "2008-09 Tariff Order").
- 2.6 On 16.12.2011, aggrieved by the 2008-09 Tariff Order, APDCL filed a Review Petition bearing no. 6 of 2012 before the Respondent Commission (hereinafter "2008 -09 Review Petition"). The Respondent Commission issued its final Order dated 12.02.2013 in the Review Petition (hereinafter "Review Order" wherein it was pleased to affirm the 2008-09 Tariff Order and held the Tariff determined therein to be applicable to future years i.e. 2009-10 onwards.
- 2.7 Aggrieved by the Review Order, APDCL filed an appeal bearing no. 76 of 2013 before this Tribunal. In response, the Appellant filed a cross appeal, bearing no. 82 of 2013 before this Tribunal (hereinafter collectively the "2008 -09 Appeal". This Tribunal vide its final Order and Judgment dated 12.08.2014 in the 2008 -09 Appeal (hereinafter "Judgment" set aside the Review Order to the extent it extended the tariff of FY 2008-09 to FY 2009-10 onwards. However, in the interest of sustaining generation at the Appellant's Power Plants and maintaining power supply this Tribunal directed APDCL to make interim payment for FY 2009-10 to 2014-15.
- 2.8 Further, in the said Judgment this Tribunal, *inter alia*, directed the Respondent Commission to determine tariff for the Power Plants of the Appellant for the period 2009-10 to 2014-15. It is pertinent to note that no appeal was

preferred by the APDCL against the Judgment and the same has become final and binding.

- 2.9 On 01.04.2015 aggrieved by APDCL's failure in making interim payments as directed by this Tribunal in the Judgment the Appellant filed an execution petition bearing E.P. No. 2 of 2015 before this Tribunal and sought the payment of Rs. 165.67 crores from APDCL and ASEB (hereinafter the "Execution Petition").
- 2.10 On 16.09.2015 the Respondent Commission sent a letter directing the Appellant to submit the tariff petition, in accordance with the Assam Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 (hereinafter "2004 Regulations") and in line with the Judgment of the Hon'ble Appellate Tribunal, for determination of tariff for its Power Plants from the financial year 2009-10 till the Power Plants were closed.
- 2.11 The Appellant, vide its letter dated 23.11.2015, undertook the exercise to file the requisite Tariff Petition as directed by the Respondent Commission and requested 15 days of time from the Respondent Commission for filing the same.
- 2.12 On 01.12.2015, in compliance of the directions and the past practice of the Respondent Commission, the Appellant filed a common Tariff Petition, being Petition no. 19 of 2016, for FY 2009-10 to 2014-15 for its Power Plants (hereinafter "**Combined Tariff Petition**"). It is pertinent to mention here that the Appellant also paid Rs. 20 lacs towards the processing fee in respect of the said Tariff Petition, which was consistent with the fees applicable for a tariff determination for FY 2009-10 to 2014-15 or a determination purporting to do such a tariff determination.
- 2.13 Subsequently, the Respondent Commission, vide its letter dated 17.02.2016 informed the Appellant that as per the Assam Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2006 (hereinafter "**2006 Tariff Regulations**"), the Appellant was required to file individual annual petitions for each power plant for current year and true up

petition for previous year. Therefore, the Respondent Commission directed the Appellant to submit individual annual tariff petitions for both its the Power Plants at Banskandi and Adamtilla. The Respondent Commission also informed the Appellant that under the Assam Electricity Regulatory Commission (Payment of Fees etc.) Regulations, 2015 (hereinafter "2015 Fees Regulations") the Appellant was required to pay separate fee for each Tariff Petition and therefore intimated that the processing fees of Rs 20 lacs already paid by the Appellant was insufficient with respect to the fees required to be paid by the Appellant for each Tariff Petitions for both its power plants at Banskandi and Adamtilla.

- 2.14 On 05.08.2016 the Respondent Commission while dealing with Petition Nos. 3, 4, and 5 of 2016 (pertaining to the calculation of Interim Payments as directed by this Tribunal in the Judgment) directed the Appellant to submit year wise separate tariff petitions for its power plants at Banskandi and Adamtilla respectively from FY 2009-10 to closure of the Power Plants on or before 24.08.2016.
- 2.15 In compliance of the aforesaid order, on 24.08.2016 the Appellant filed the separate Tariff Petitions for separate financial years, being Tariff Petitions, i.e. Tariff Petition Nos. 20 to 25 of 2016 for its Adamtilla Power Plant and Petitions nos. 26 to 31 of 2016 for its Banskandi Power Plant (hereinafter collectively the "Tariff Petitions").
- 2.16 On 01.09.2016 the Respondent Commission in Petition Nos. 3, 4 and 5 of 2016 passed an order stating that the plant wise Tariff Petitions filed by EIPL for the period 2009-10 to 2014-15 would be dealt through separate proceedings.
- 2.17 In view of the separate year wise and plant wise tariff petitions being filed by the Appellant, the Respondent Commission by its Order dated 16.09.2016 passed in Tariff Petition nos. 20 -31 of 2016, the Respondent Commission disposed off the Combined Tariff Petition.
- 2.18 Thereafter on 24.10.2016, the Respondent Commission passed an order in Petition Nos. 20 to 31 of 2016 directing the Appellant to deposit separate court fee towards the process of the separate Tariff Petitions for separate

years. The Appellant on 14.11.2016 filed an application before the Respondent Commission seeking waiver from filing court fees as directed in the above noted order of the Respondent Commission.

- 2.19 Subsequently the Respondent Commission issued a notice dated 18.11.2016, *inter alia*, alleging default on the part of the Appellant with respect to the payment of processing fees for the Tariff Petition Nos. 20 to 31 of 2016 (hereinafter "Notice"). It was alleged that the default had occurred under the 2015 Fees Regulations as per the notice of the Respondent Commission dated 17.02.2016. Further, the Respondent Commission directed the Appellant and APDCL to appear for a hearing on 30.11.2016 with regard, *inter alia*, to the alleged non-payment of filing fees for filing its separate year wise Tariff Petitions.
- 2.20 On 30.11.2016, the Appellant filed its response to the Notice and, *inter a/ia*, submitted that the Appellant was not liable to pay separate fees for the individual Tariff Petitions.
- 2.21 Further, during the hearing held on 30.11.2016 before the Respondent Commission on the issue of the alleged non-compliance, APDCL served on the Appellant a copy of its submissions with regard to the Notice. In the said submissions APDCL, *inter alia*, contended that the Appellant has not furnished the adequate fee for filing the Tariff Petitions.
- 2.22 The Appellant orally replied to the objections raised by the APDCL and sought liberty from the Respondent Commission to file detailed response addressing the issues raised by APDCL by 02.12.2016. Accordingly, on 02.12.2016, the Appellant filed a detailed reply to the objections of APDCL, including those on the issue of fee payable for filing the Tariff Petitions.
- 2.23 The Respondent Commission, by its email dated 03.12.2016, communicated its Order dated 30.11.2016 on the Non- Compliance Notice issued in the Tariff Petitions. In the said Order, the Respondent Commission rejected the oral submissions of the Appellant and held that though the requisite

fee had not been paid by the Appellant the Respondent Commission would determine the tariff in the Tariff Petitions. Further, the Respondent Commission directed the Appellant to submit the requisite fee by 12.12.2016.

2.24 On 30.12.2016 the Respondent Commission passed the Impugned Order whereby it again directed the Appellant to pay the allegedly outstanding fee for the Tariff Petitions. The Respondent Commission further held that the determination of Tariff in the Tariff Petitions would not be deemed to be a waiver of the fee.

2.25 On the same day, i.e. 30.11.2016, the Respondent Commission passed the Tariff Orders in Petition Nos. 20 to 31 of 2016.

2.26 Subsequently on 09.01.2017, during the hearing in E.P. No.2 of 2015, the counsel of the Respondent Commission informed this Tribunal of the Impugned Order and the issue with respect to the payment of fees for the Tariff Petitions by the Appellant. This Tribunal was pleased to pass an Order of the said date whereby it directed the Appellant to deposit the allegedly outstanding fee for the Tariff Petitions by 16.01.2016.

2.27 In view of the directions of this Tribunal, the Appellant under the cover of its letter dated 09.02.2017 wherein the Appellant submitted allegedly outstanding fee, which was deposited as directed by the Respondent Commission, under protest.

3. Questions of Law:-

The Appellant has raised the following questions of law:-

3.1 Whether the Appellant is required to file separate year wise and plant wise Tariff Petitions for a tariff period which has elapsed?

3.2 Whether the 2015 Fee Regulations are applicable for the determination of Tariff till FY 2014-15 when the said Regulations came into effect on 31.08.2015, i.e. after the end of the Tariff Period?

3.3 Whether the separate year wise and plant wise Tariff Petitions ought

to be considered as a single Tariff Petition in this case?

- 3.4 Whether the fee for filing the Tariff Petitions ought to have been provided to the Appellant as pass through in the Tariff determined by the Respondent Commission?
4. **Learned counsel on behalf of the Appellant has filed following Written submissions:-**
- 4.1 The Impugned Order has been passed by the Respondent No. 1 in violation of its own Regulations. Further, the Respondent No. 1 has deviated from past practice adopted by it, on account of which, the Appellant is entitled to refund of excess court fees.
- 4.2 By way of the Impugned Order, the Respondent No. 1 has rejected the various pleas of the Appellant, inter alia including:
- a. application of correct regulations for fees; and
 - b. exercise of power to waive the filing fee;
- 4.3 The Impugned Order is bad in law and determination of separate fee is totally unjust, untenable and arbitrary.
- 4.4 At the outset, it is submitted that this Tribunal, *vide* its Judgment dated August 8, 2014, had directed the Respondent No. 1 Commission to undertake the determination of tariff as a composite exercise given the long delay in tariff fixation (Paras 22 and 24 read with 104 of the Judgment). Therefore, the payment of the fees separately for each Tariff Petition, as held in the Impugned Order does not meet the ends of justice. Further, such fees are in the nature of pass through under the regulations of the very Respondent No. 1. Therefore, the Respondent No. 1 erred in insisting upon separate fees for separate petitions, which had been filed in the first place at the instance of the Respondent No. 1 as noted in its Order dated August 5, 2016 passed in E.P. Nos. 3-5 of 2016. Hence, the fees of Rs. 20 Lacs already paid covers the fees for both power plants under the Assam Electricity Regulatory Commission (Fees) Regulations, 2009 ("**2009 Fees Regulation**") if fees is not insisted upon for year-wise filing individually.

4.5 The fees payable under the 2009 Fees Regulations and the Assam Electricity Regulatory Commission (Fees) Regulations, 2015 differ and the same are set out below for ease of perusal of this Hon'ble Appellate Tribunal for Electricity:

Fees payable by the Appellant under the Assam Electricity Regulatory Commission (Fees) Regulations, 2015 [See Regulation 3 read with Clause 5.2(i) of the Schedule]

5.2	Application for determination of tariff for supply of electricity to any distribution Licensee including a deemed Licensee by a generating company of following categories.	Rs. 5,000 per MW of installed capacity or part thereof subject to a minimum of Rs. 20,00,000/- (Rupees twenty lakh)
	(i) Conventional fuel (coal, gas, oil etc.) based plant except captive generating plant.	Rs. 5,000 per MW of installed capacity or part thereof subject to a minimum of Rs. 1,00,000/- (Rupees one lakh)
	(ii) Conventional fuel (coal, gas, oil etc.) based captive generating plant.	

i. *Fees payable by the Appellant under the Assam Electricity Regulatory Commission (Fees) Regulations, 2009 [See Regulation 3 read with Clause 3.2(i) of the Schedule]*
Licensee

3.2	Application for determination of tariff for supply of electricity to any distribution Licensee including a deemed Licensee by a generating company of following categories.	
	(i) Conventional fuel (coal, gas, oil etc.) based plant except captive generating plant.	Rs. 2,000 per MW of installed capacity or part thereof subject to a minimum of Rs. 10 lakh
	(ii) Conventional fuel (coal, gas, oil etc.) based captive generating plant.	Rs. 2,000 per MW of installed capacity or part thereof subject to a minimum of Rs. 50,000

4.6 In order to identify the fees payable for a tariff determination pertaining to FY 2009-10 to 2014-15 i.e. the period of 01.04.2009 to 31.03.2015, one would have to see the applicable Regulations framed by the Respondent No. 1 Commission for the same. The Assam Electricity Regulatory Commission (Fees) Regulations, 2015, dated 20.08.2015 came into effect from 31.08.2015 i.e. the date of their publication in the official gazette [See Regulation 1.1.3]. Upon coming into effect, Assam Electricity Regulatory Commission (Fees) Regulations, 2015, repealed the 2009 Fees Regulations [See Regulation 11 of the Assam Electricity

Regulatory Commission (Fees) Regulations, 2015]. Therefore, the 2009 Fees Regulations applied from FY 2009-10 to 2014-15. The below table clearly shows that the regulations applicable for determination of filing fee payable by the Appellant are the 2009 Fees Regulations:

Sr. No.	Tariff Petition No.	Tariff Petition Details	Applicable Regulations
1.	Petition No. 20	Petition for determination of Tariff for Adamtilla Plant for FY 2009-10	2009 Fees Regulation
2.	Petition No. 21	Petition for determination of Tariff for Adamtilla Plant for FY 2010-11	2009 Fees Regulation
3.	Petition No. 22	Petition for determination of Tariff for Adamtilla Plant for FY 2011-12	2009 Fees Regulation
4.	Petition No. 23	Petition for determination of Tariff for Adamtilla Plant for FY 2012-13	2009 Fees Regulation
5.	Petition No. 24	Petition for determination of Tariff for Adamtilla Plant for FY 2013-14	2009 Fees Regulation
6.	Petition No. 25	Petition for determination of Tariff for Adamtilla Plant for FY 2014-15	2009 Fees Regulation
7.	Petition No. 26	Petition for determination of Tariff for Banskandi Plant for FY 2009-10	2009 Fees Regulation
8.	Petition No. 27	Petition for determination of Tariff for Banskandi Plant for FY 2010-11	2009 Fees Regulation
9.	Petition No. 28	Petition for determination of Tariff for Banskandi Plant for FY 2011-12	2009 Fees Regulation
10.	Petition No. 29	Petition for determination of Tariff for Banskandi Plant for FY 2012-13	2009 Fees Regulation
11.	Petition No. 30	Petition for determination of Tariff for Banskandi Plant for FY 2013-14	2009 Fees Regulation
12.	Petition No. 31	Petition for determination of Tariff for Banskandi Plant for FY 2014-15	2009 Fees Regulation

4.7 In light of the above, it is evident that the Fees payable under the 2009 Fees Regulations are much lower than those under the Assam Electricity Regulatory Commission (Fees) Regulations, 2015. It is therefore, submitted that the Appellant has a vested right to have the fees of any petition for FY 2009-10 to 2014-15 to be determined as per the 2009 Fees Regulations as the same apply to Multi Tariff Year period under review.

4.8 Accordingly, the Impugned Order ought to be set aside, being bad in law for the following reasons:

I. The Impugned Order is contrary to the Regulations of the Respondent No. 1

4.9 Single Tariff Petition for a Generating Company for multiple generating stations: The 2006 Tariff Regulations permit filing of single tariff petition by a generating company for multiple generating stations. In this regard, the relevant provisions of 2006 Tariff Regulations are

reproduced hereunder:

“6.4 If a person holds more than one licence and /or is deemed to be licensee for more than one area of distribution or transmission, he shall submit separate petitions in respect of each licence or area of transmission or distribution.”

6.5 In its tariff petition, a generating company shall submit information to support the determination of tariff for each generating station.”
(emphasis supplied)

4.10 It is pertinent to mention that under the Assam Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, it is provided that the Respondent No. 1 has the power to dispense with requirements of the Regulations. In this regard, the relevant provision is reproduced hereunder:

“43. Power to dispense with the requirement of the Regulations:- The Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties to dispense with the requirements of any of the Regulations in a specific case or cases subject to such terms and conditions as may be directed by the Commission.”

4.11 Further, the 2009 Fee Regulations provide for the fees to be included in tariff as a pass-through. In this regard the relevant provision of 2009 Fee Regulations is reproduced hereunder:

“8. Inclusion in tariff - The Licensee shall be entitled to take into account any fee or charge paid by it under these Regulations as an expense in the determination of tariff, provided that any penalty paid under the provisions of the Act shall not be allowed as an expense in the determination of tariff.”

An identical provision is also provided for in the Assam Electricity Regulatory Commission (Fees) Regulations, 2015 [*Regulation 9*]. In light of the above, the Impugned Order is contrary to its very own Regulations, and is therefore, liable to be set aside.

II. The Impugned Order is contrary to past practice adopted by the Respondent No. 1

4.12 The Impugned Order is contrary to the past practice adopted by the Respondent No. 1 at the time of determination of tariff for the financial year 2008-09. In this regard, it may be noted that on 20.10.2011, the Respondent No. 1 passed a common Tariff Order for the two plants of the Appellant, being Adamtila and Banskandi for FY 2008-09 in a common petition being, Petition No. 14 of 2008. Accordingly, the Respondent No. 1's action of directing that different tariff petitions be filed for the plants, not being in consonance with its own past practice

qua the Appellant herein is bad in law.

III. Several requests have been rejected

4.13 It may be noted that the Respondent No. 1 insisted upon payment of the Fees by the Appellant, in complete disregard of multiple requests that had been made by the Appellant during the tariff determination process. On November 11, 2016, as directed in the order of Respondent No. 1 Commission dated October 24, 2016, the Appellant filed an application before the Respondent Commission seeking waiver from filing court fees. Thereafter, on November 30, 2016, the Appellant, *vide* its detailed reply in Petition Nos. 20-31 of 2016, submitted that it was not liable to pay separate fees for the Individual Tariff Petitions. On December 2, 2016, the Appellant filed a detailed reply to the objections of APDCL, including those on the issue of fee payable for filing the tariff petitions, thereby reiterating its position in law and facts. Again, on February 9, 2017, the Appellant wrote a letter to the Respondent No. 1, reiterating its position on the irregularity of the fees demanded by the Respondent No. 1 commission. However, in accordance with the Order dated January 9, 2017 and under protest, the Appellant paid a sum of Rs. 2,20,00,000/- in favour of the Respondent No. 1 commission. Accordingly, the Impugned Order, having been passed in a mechanical manner in complete disregard of the aforementioned and in ignorance of the submissions of the Appellant is bad in law and is consequently liable to be set aside by this Tribunal.

4.14 In light of the above, it is respectfully submitted that the demand of Rs. 20 Lacs per petition is wholly unreasonable and contrary to the Respondent No. 1's own Regulations, namely the 2009 Fees Regulations, which ought to apply to the tariff fixation process for FY 2009-10 to 2014-15. Consequently, no default could have been attributed to the Appellant for the failure to pay Rs. 20 Lacs per petition. Accordingly, the Impugned Order is bad in law and is liable to be set aside.

4.15 In light of the aforesaid, the Petitioner submits that it is entitled to a

refund of Rs. 2,20,00,000/- (Rupees Two Crore Twenty Lacs) as excess court fee paid by it.

5. **Learned counsel on behalf of the Respondent Commission / Respondent No.1 has filed following Written submissions:-**

5.1 The instant Appeal has been filed by the Appellant against the Order dated 30.12.2016, passed by Respondent No. 1 in Petition No. 20 to 31 of 2015. Vide the Impugned Order, the State Commission passed the following directions:

"7. After considering all the matter, the Commission decided the following:

7.1. Even though the Fee of Rs. 20 Lacs was paid along with the disposed of Petition No. 19 of 2016, using the power to relax and considering the continuity of the matter, the paid amount of Rs. 20 Lacs is considered to be as Fee towards the processing of Petition No. 20 of 2016 to 31 of 2016.

7.2. Furthermore, as because there are 12 separate plant wise year wise tariff petition, the Fee of Rs. 20 Lac is allotted equally to each Tariff Petition, i.e. Rs. 1.67 Lac per petition and hence the pending fee per petition is Rs. 18.33 Lac. Thereby, the total balance Fee payable by EIPL is Rs. 220 Lac.

7.3 With regard to determination of Tariff even after non-payment of Fee, only to comply with direction of the Hon'ble APTEL regarding determination of Tariff for the plants of EIPL from FY 2009-10 to FY 2014-15, the Commission will go ahead with the Tariff determination process even after non-payment of requisite fee

However determination of tariff by the Commission shall not be considered as a waiver/relaxation to the Petitioner towards payment of the processing fees of the Tariff Petitions. The Petitioner is once again directed to pay the Balance amount of Fee for the Tariff Petitions on or before 16.01.2017.

7.4. In case, EIPL does not pay the Balance Fee by 16.01.2017, the Commission will take necessary steps for recovery of the outstanding fee amount as per Law."

Previous Orders on the same issue stand unchallenged

5.2 Prior to passing of the Impugned Order, the State Commission had passed three different Orders dated 05.08.2016, 24.10.2016 and 30.11.2016 directing the Appellant to file year wise Tariff Petitions separately for each generating station. All the three Orders stand unchallenged. In fact, these orders were complied with and the Appellant on 24.08.2016 filed year-wise Tariff Petitions for each of the generating stations.

5.3 Vide application sent vide email dated 14.11.2016 and paper copy given on 18.11.2016 to the State Commission, the Appellant prayed for exemption from payment of fees on the ground that it is beyond his

reach to pay the fees. The Appellant further prayed in the alternative that the State Commission may adjust Court fee from the amount payable by Respondent No. 2/APDCL in the final tariff. This application was rejected vide Order dated 30.11.2016. No appeal has been filed against this order and as such, this order has become final.

Conduct of Appellant

5.4 Despite four separate Orders of the State Commission, including the final Order being the Impugned Order, the Appellant did not pay the pending fees to the State Commission. It is only after the Tribunal vide Order dated 09.01.2017 refused to consider any prayer of the Appellant in its Execution Petition (EP No. 2 of 2015) for interim payments from APDCL (Respondent No. 2 herein), until payment of fees is made to the State Commission, did the Appellant finally pay the pending fees on 09.02.2017. The relevant part of the Order is extracted below:

“Accordingly, we hereby direct the Petitioner to deposit the court fees with the State Commission before the next date of hearing. If the court fees are not paid we will not consider any prayer made by the Petitioner on the next date of hearing.”

The grounds taken by the Appellant in its Appeal and during arguments and the Response of the State Commission to each ground is as below:

5.5 The Appellant has asserted in the Appeal that the State Commission ought to have taken a composite determination of the tariff for the relevant tariff period, as the same had already expired and there was no necessity to deal with individual tariff years. Consequently, the Appellant should only be required to pay the fee of a single tariff petition.

Tariff Petition is filed annually as per the Regulations

5.6 The Appellant had sought determination of tariff for the FY 2009-10, FY 2010-11, FY 2011-12, FY 2012-13, FY 2013-14 and FY 2014-15 for its two Plants, one at Adamtilla (9 MW) and the other at Banskandi (15.5 MW). The aforementioned Plants are two distinct generating stations/plants situated in two different districts in the State of Assam. In terms of Regulation 6.1 of AERC Tariff Regulations, 2006, a generating company shall file a tariff petition *annually* with the State

Commission for determination of tariff. Surely, a generating company can have several generating stations, which are located in different places and may have different capacity and technology. Although the petition is filed by the generating company (which is a juristic person) the tariff is determined for a station. There cannot be a single tariff for a generating company having multiple stations. It has to be station-specific like in the NTPC etc. It is clear that for each financial year a separate tariff petition is required to be filed. Regulation 6.1 is extracted below:

“6.. Petition for determination of tariff

6.1 The licensee and generating company shall file a tariff petition annually with the Commission to determine changes to the current tariff not later than 1st December unless an extension is granted by the Commission upon application.”

5.7 In its Notes on Arguments, submitted to the Tribunal during the course of hearing on 18.09.2019, the counsel for the Appellant for the first time made the following additional submission:

a. Only a single Tariff Petition for a generating company is to be filed for multiple generating stations. The AERC Tariff Regulations, 2006 permit filing of single Tariff Petition by a generating company for its multiple generating stations. The Appellant has relied on Regulations 6.4 and 6.5 of the AERC Tariff Regulations, 2006. These Regulations have been extracted below:

“6.4 If a person holds more than one license and/or is deemed to be licensee for more than one area of distribution or transmission, he shall submit separate petitions in respect of each license or area of transmission or distribution.

6.5 In its tariff petition, a generating company shall submit information to support the determination of tariff for each generating station.”

Fees is Generating Station wise

5.8 While the Tariff Regulations enable filing of a petition by a generating company, the appropriate regulation to determine fees to be paid for filing a petition before the State Commission is AERC (Payment of Fees etc.) Regulations, 2015 (hereinafter referred to as “**AERC Fee Regulations, 2015**”)

Fees is separate for each generating station under Fee Regulations, 2015

5.9 Regulation 3 of the AERC Fee Regulations, 2015 provides for payment of fees upon filing of petitions, application or grievance before the State Commission. Regulation 3 of the AERC Fee Regulations, 2015 has been extracted below:

“3. Fees on Petitions, Applications etc:

3.1 Every petition, application or grievance filed before the Commission shall be accompanied by such fee as specified in the “Schedule of Fees” of these Regulations. However, every application for grant of license under Section 14 of the Act shall be accompanied by such fee as prescribed by the State Government under Section 15 of the Act.”

5.10 Provision 5 of the Schedule of Fees provides for the fee payable for determination of tariff under the provisions of Clause (a) of sub-section 1 of Section 62 of the Electricity Act 2003. The relevant provision in the schedule is provision 5.2(i). Provision 5 has been extracted below for reference:

“5. Determination of tariff under the provisions of Clause (a) of sub-section 1 of Section 62 of the Act.

<i>S. No.</i>	<i>Nature of Application</i>	<i>Fee</i>
5.1	<i>Application for determination of tariff for supply of electricity, wholesale, bulk or retail, by a distribution Licensee including a deemed Licensee as also for determination of tariff/charges of wheeling in respect of such distribution Licensee including a deemed Licensee.</i>	<i>Paise 5 per 100kWh proposed to be transmitted and/or wheeled during the control period for which the application is being filed subject to a minimum of Rs. 25,00,000/- (Rupees twenty five lakh)</i>
5.2	<i>Application for determination of tariff for supply of electricity to any distribution Licensee including a deemed Licensee by a generating company of following categories. (i) <u>Conventional fuel (coal, gas, oil etc.) based plant</u> except captive generating plant. (ii) <u>Conventional fuel (coal, gas, oil, etc.) based captive generating plant.</u> (iii) <u>For determination of tariff for a class of project (Non-conventional and renewable energy-based plants including Wind, Solar, Small Hydro Plant and Co-generation Plant etc.)</u> (iv) <u>Hydro generating station including pumped storage plant other than mini or small hydro generating station and captive hydro generating plant.</u> (v) <u>Captive hydro generating station other than mini or small hydro generating station.</u></i>	<i>Rs. 5,000 per MW of installed capacity or part thereof subject to a minimum of Rs. 20,00,000/- (Rupees twenty lakh) Rs. 1000 per MW of installed capacity or part thereof subject to a minimum of Rs. 1,00,000/- (Rupees one lakh)</i>
5.3	<i>Application for determination of tariff/charges for transmission of electricity of a transmission Licensee including a deemed Licensee.</i>	<i>Paise 3 for each 100 kWh proposed to be transmitted and/or wheeled during the control period for which the application is being filed subject to a minimum of Rs. 15,00,000/- (Rupees fifteen lakh)</i>

- 5.11 The Tariff Petitions of the Appellant have been filed under Section 62 of Electricity Act 2003 and as such provision 5 of Schedule of Fees, of AERC Fee Regulations, 2015 is applicable. Sub provision 5.2 (i) states that an application for determination of tariff by a generating company for a conventional fuel-based plant including gas-based plants, will be accompanied by fees at the rate of INR 5000/MW of installed capacity subject to a minimum of INR 20 Lacs. It is clear from a plain reading of provision 5.2 (i) that the fees that is paid by a generating company is to be paid depending on nature of generating plant and therefore, the fees is chargeable separately for tariff determination of each generating plant.
- 5.12 The fact that the AERC Fee Regulations, 2015, provide for determination of fee separately for tariff of each generating station/ plant, makes the question whether separate tariff petitions need to be filed for the two generating stations of the Appellant, irrelevant. This is because regardless of whether a common tariff petition is filed or separate tariff petitions are filed, the fees is applicable on incidence of determination of tariff of each generating station separately.
- 5.13 This assertion is further buttressed by a holistic reading of the provisions of AERC Tariff Regulations, 2006. For instance, Regulation 6.5 provides that a generating company shall submit information to support determination of tariff of each generating station. Regulations 30.1 provides that tariff in respect of generating stations under these regulations shall be determined as a whole for each generating station based on PPA submitted to the State Commission for approval. Regulation 30.2 states that a generating company shall submit annual information station wise. The definitions in Regulation 31 make it amply clear that the components involved in determination of tariff have been defined in relation to a generating station and not a generating company. For e.g., auxiliary energy consumption, availability, declared capacity, gross calorific value etc, are all defined in context to a generating station. Each of these components have to be considered separately for each generating station and therefore the process of

tariff determination is separate for each generating station. Regulation 42 provides that working capital will be determined separately for coal based generating stations and gas based generating station. Therefore, if a generating company has both types of generating stations, their working capital will have to be determined separately. Regulation 46 provides energy charges to be computed separately for each generating station. Therefore, it is crystal clear that the tariff determination process is separate for each generating station and accordingly, it is apt that as per the fee regulations, the fees to be charged is separate for the tariff determination of each generating station. This new tariff is determined qua generating stations across the country.

5.14 The Appellant has also erroneously stated that the determination of tariff by the State Commission was for Multi Tariff Year period and therefore, only one fee is to be paid. In terms of Regulation 6.1 of AERC Tariff Regulations, 2006, tariff is to be determined separately for each year. Consequently, the State Commission has determined tariff for Adamtilla Plant and tariff for Banskandi Plant separately, for each financial year from 2009-10 to 2014-15, vide its Orders dated 30.12.2016. Year wise Tariff determined for each Plant is mentioned in the table below:

<u>Financial Year</u>	<u>Generating Station of the Appellant</u>	<u>Tariff Determined in INR (Net Per Unit Cost of electricity)</u>
2009-10	Adamtilla	1.78
	Banskandi	1.73
2010-11	Adamtilla	2.19
	Banskandi	2.24
2011-12	Adamtilla	1.02
	Banskandi	2.48
2012-13	Adamtilla	1.06
	Banskandi	2.70
2013-14	Adamtilla	1.08
	Banskandi	1.16
2014-15	Adamtilla	1.10
	Banskandi	1.19

5.15 Without prejudice to the fact that the payment of fee is independent of

the number of petitions filed by a generating company, it is submitted that Appellant is erroneously placing reliance on Regulation 6.5 of the AERC Tariff Regulations, 2006 to suggest that each generating company has to file only one Tariff Petition for all its generating stations. Regulation 6.5 states that in its Tariff Petition a generating company shall submit information to support the determination of tariff for each generating station. If this is interpreted to mean that one petition has to be filed for all generating stations, then the whole objective of providing information for determination of tariff for each generating station gets defeated, i.e. there may be several generating stations owned by a generating company in different parts of the State or in different States, and filing one Petition for all generating stations would be cumbersome and useless since tariff has to be determined separately for each generating station individually. Therefore, the only logical interpretation to the provision which is also supported by holistic reading of the AERC Tariff Regulations, 2006 is that a separate petition ought to be filed separately for each generating station. It is submitted that a tariff petition is filed for the asset i.e., the generating station, and the company (which is a juristic person) is only an agency/ vehicle through which the tariff petition is filed.

AERC Regulations is to be interpreted in light of CERC Regulations

5.16 The AERC Tariff Regulations, 2006 ought to be interpreted in the light of CERC (Terms and Conditions of Tariff) Regulations, 2019 (“**CERC Tariff Regulations, 2019**”). This is so because Regulations 3.1 of the AERC Tariff Regulations, 2006 provides that the State Commission is guided by principles specified by Central Commission for determination of tariff applicable to generating companies, which is in accordance with Section 61 of the Electricity Act, 2003. Regulation 3.1 of the AERC Tariff Regulations, 2006 is extracted below:

“2. Determination of tariff

3.1 The Commission shall determine the tariff in accordance with Sections 61 and 62 of the Electricity Act, 2003 (36 of 2003). As per Section 61, the Commission shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees; ..”

5.17 Regulations 8 and 9 of the CERC Tariff Regulations, 2019 provide for tariff to be determined separately for each generating station. AERC Tariff Regulations, 2006, ought to be read in view of these CERC Regulations. The CERC regulations are extracted below:

"8. Tariff determination

- (1) *Tariff in respect of a generating station may be determined for the whole of the generating station or unit thereof, and tariff in respect of a transmission system may be determined for the whole of the transmission system or element thereof or associated communication system.*****"*

"9. Application for determination of tariff

- (1) *The generating company or the transmission licensee may make an application for determination of tariff for new generating station or unit thereof or transmission system or element thereof in accordance with the Procedure Regulations within 60 days of the anticipated date of commercial operation.*
- (2) *In case of an existing generating station or unit thereof, or transmission system or element thereof, the application shall be made by the generating company or the transmission licensee, as the case may be, by 31.10.2019, based on admitted capital cost including additional capital expenditure already admitted and incurred up to 31.3.2019 (either based on actual or projected additional capital expenditure) and estimated additional capital expenditure for the respective years of the tariff period 2019-24 along with the true up petition for the period 2014-19 in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2014."*

The practice of filing separate petitions for tariff determination is the same across all State

5.18 Furthermore, the CERC Regulation for payment of fee for an application for determination of tariff provides that such fee be payable separately each generating station. Regulation 3 of the CERC (Payment of Fees) Regulations, 2012 provides as follows:

"3. Fee for Application for Determination of Tariff: (1) An application for determination of tariff of a generating station or a unit thereof, shall be accompanied by a fee payable at the rate of Rs. 4000/MW/annum and Rs. 4400/MW/annum for the years 2012-13 and 2013-14, respectively corresponding to the installed capacity of such generating station or unit thereof."

Further, in the States of Gujarat, Maharashtra, Karnataka, Himachal Pradesh etc, also the fee is made payable per tariff determination of each generating station. Gujarat Electricity Regulatory Commission (Fees, Fines and Charges) Regulations, 2005 provides for fee to be paid generating station wise. Similar provision can be found in the Maharashtra Electricity Regulatory Commission (Fees and Charges) Regulations, 2004, the Karnataka Electricity Regulatory Commission

(Fee) Regulations, 2016 and MPERC (Fees, Fines and Charges) (Revision-I) Regulations, 2010 [RG-21 (I) of 2010 etc.

NTPC also files separate Tariff Petitions for each of its generating stations

- 5.19 The National Thermal Power Corporation (NTPC), a generating company with several generating stations, files separate tariff petition for each generating station before the CERC for determination of tariff and this further establishes that the determination of tariff is an exercise undertaken by the State Commission for the 'generating station' and the tariff petition is filed by the generating company separately for each generating station. Orders of the CERC in separate petitions filed by NTPC for its generating stations show that NTPC has filed separate tariff petitions for each of its generating stations. NTPC also pays separate fee for each of these petitions filed for its generating stations. It is submitted that a similar practice is followed by other State Commissions also. For example, in the State of Madhya Pradesh, M/s Jaiprakash Power Ventures Ltd., files separate tariff petitions for each of its two generating stations, 2x250MW (Phase I) coal based Thermal Power Station at Bina and 2X660 MW Super Critical Coal Based Thermal Power Station at Nigrie, District Singrauli.
- 5.20 The Appellant has itself admitted in its submissions, that at the time of filing the Tariff Petitions, it paid fees of INR 10 Lacs separately for each generating station, totalling to INR 20 Lacs. Without prejudice to the fact that even this payment was not in accordance with the applicable fee regulations i.e. AERC Fee Regulations, 2015, under which the correct fees is INR 20 Lacs per year per generating station, the Appellant's submission that it paid fee separately for each generating station (INR 10 Lacs each), while made to further its erroneous assertion that AERC Fee Regulations, 2009 and not 2015 were applicable, is a clear admission that even the Appellant knows that its interpretation of Regulation 6.5 is wrong.
- 5.21 The Appellant erroneously asserts that the State Commission has erred in applying the AERC Fee Regulations, 2015 to determine the fee

payable by the Appellant for filing the Tariff Petition No. 20-31 of 2015. The AERC (Fees) Regulations, 2009 (**"AERC Fee Regulations, 2009"**), which were in force during the relevant period, are the appropriate Regulations since the tariff being determined or purporting to be determined by the State Commission was for the FY 2009-10 to 2014-15.

The Appellant cannot rely on repealed Regulations

5.22 The assertion of the Appellant that the fee payable by the Appellant should be determined under AERC Fee Regulations, 2009 and not AERC Fee Regulations, 2015 is absurd on the face of it. The AERC Fee Regulations, 2015 were published in the official gazette of the Government of Assam on 31.08. 2015. Regulation 1.3 provides that *"these Regulations shall come into force from the date of their publication in the official Gazette of Govt. of Assam"*. Therefore, from 31.08.2015, the AERC Fee Regulations, 2015 are the applicable Regulations for determining the fee payable for filing petitions etc. before the State Commission. The Appellant had initially filed a combined tariff petition, only pursuant to the State Commission's notice dated 16.09.2015, on 01.12.2015 i.e., after coming into force of the AERC Fee Regulations, 2015 and subsequently upon the direction of the State Commission (vide its letter dated 17.02.2016) filed twelve separate Tariff Petitions on 24.08.2016. Regulation 11 of the AERC Fee Regulations, 2015 repealed AERC Fee Regulations, 2009. Appellant's reliance on Regulation 12 of the Fee Regulations, 2015 to state that AERC Fee Regulations, 2009 will continue to apply is erroneous since Regulation 12 is only a savings clause which says that any action which has already been taken or purported to have been done under the repealed regulations shall continue to be valid. For this savings clause to be applicable an action should have already been done and in this case the fees should have already been charged under the Fee Regulations, 2009 which has not happened. Therefore, Regulation 12 is completely inapplicable. In the case of *Hari Singh and Ors. V. Military Estate Officer and Ors.*,) the seven-judge bench of the Hon'ble Supreme Court has held that *"the word "purported" was used*

only to describe or identify past action taken under a repealed Act and it had no effect beyond that.” The Hon’ble Supreme Court was interpreting provision Section 20 of the Public Premises Act, 1971 the language of which provision is the same as Regulation 12 of the AERC Fee Regulations, 2015.

5.23 In fact, the Appellant itself had paid the fees for the combined Tariff Petition under the AERC Fee Regulations, 2015 and not the AERC Fee Regulations, 2009 as is evident from the fee originally paid by the Appellant i.e. 20 lacs. Had the Appellant paid fees under the Fee Regulations, 2009, the fees would have been as per its Schedule of Fees, i.e., only INR 10 Lacs. Thus, as per the AERC Fee Regulations, 2009, the Appellant would have paid only a fee of INR 10 lacs. Whereas, the Appellant made a payment of INR 20 Lacs. Therefore, even the Appellant at the time of filing the petition at the first instance was conscious of the fact that AERC Fee Regulations, 2015 were applicable and the attempt to pay fee under AERC Fee Regulations, 2009 is only an afterthought.

5.24 It is also relevant to mention that the Appellant is solely responsible for the delay in filing the Tariff Petitions. Pursuant to the Order dated 12.08.2014 passed in Appeal No. 76 and 82 of 2013, the Appellant ought to have filed the Tariff Petitions at the earliest. But the Appellant failed to do so. On 16.09.2015, the State Commission sent a letter directing the Appellant to submit the Tariff Petitions. To this, the Appellant responded vide letter dated 23.11.2015 and stated that no time period for filing the Tariff Petitions for the future years i.e. 2009-10 onwards has been specified by the Tribunal’s Order. The Appellant decided by itself that the Tariff Petitions would be filed only after its payment dispute with APDCL (Respondent No.2) was settled. The extract from the Appellant’s letter dated 23.11.2015 is as below:

“We are indeed pleased to know that the Hon’ble Commission is keenly interested in the implementation of the APTEL Order dated 12/08/14. Therefore, in view of the above, we request the Hon’ble Commission to persuade APDCL for immediate release of the payments in line with para 26 of the APTEL order. We also request the Hon’ble Commission to take up the hearing on the earlier petitions of EIPL under Section 11 (2) and the adjudication of commercial disputes for the past periods. Since the tariff to be determined for the future years i.e. 09-10 onwards as per the APTEL Order is

only for the purpose of adjustment of payments to be immediately made by APDCL, it is requested that all actions are first concentrated on achieving the first step of the APTEL order, i.e. immediate release of Rs. 165.66 crores as mentioned in our E.P. no. 3 of 2015.

Moreover, no time period for filing the Tariff Petitions for future years i.e. 2009-10 onwards has been specified in the APTEL order simply because, it has to happen after completion of the first step i.e. immediate release of Rs. 165.66 Crores. We, therefore, humbly submit in the interests of justice that the tariff petitions for the years 09-10 onwards may be preferred only after execution of the E.P. no. 3 of 2015, which is for the release of payments which are already delayed by more than seven years.”

- 5.25 Finally, it was only on 01.12.2015, that the Appellant filed the combined Tariff Petitions and subsequent to the letter dated 17.02.2016, filed the twelve Tariff Petitions on 24.08.2016. Therefore, had the Appellant acted diligently and filed its Tariff Petitions prior to coming into force of AERC Fee Regulations, 2015, the Appellant would have then paid fee under AERC Fees Regulations, 2009. However, because of the Appellant's own delay, the AERC Fee Regulations, 2009 which have ceased to exist are not applicable. Since the AERC Fee Regulations, 2015 had already come into force, any determination of fee for determination of tariff undertaken after the coming into force of the new fee regulations shall be as per the current and existing regulations only. In this context, it is necessary to appreciate that even after the Tribunal by its Order dated directed the Appellant to file tariff petition before the State Commission, the Appellant chose not to do so. For this, one needs to refer to the Appellant's response letter dated 23.11.2015.
- 5.26 The Appellant's assertion that the court fees should be paid as per the year to which the tariff pertains to is contrary to the law prevalent across the country. It is submitted that court fees is paid as per the fee regulations existing at the time of filing the petition/application. Even in cases of true-up petitions, the fees is charged as per the regulations prevalent at the time of filing the true-up petition and not as per the regulations which prevailed in the period for which true-up is being filed. If the interpretation of the Appellant is accepted then it would mean that the court fees for all petitions filed in all forums across the country would be determined on the basis of when the cause of action of the petition arose and not when the petition was filed. This would

lead to absurdity and complete chaos in forums across India.

- 5.27 The Appellant erroneously submitted that the State Commission has ignored its past practice. The State Commission had accepted filing of a composite Tariff Petition by the Appellant for both the power plants in the FY 2008-09. The Tariff Petition for FY 2008-09 was also filed under the AERC Tariff Regulations, 2006, same as the subject petitions, and therefore, the directions of the State Commission requiring the Appellant to file separate Tariff Petitions for both its power plants for each year, and to pay separate filing fee for each Tariff Petition is wrong.

Different Regulations were applicable for fee determination for FY 2008-09

- 5.28 The Appellant's reliance on past practice in the State Commission, at the time of determination of tariff for the FY 2008-09, is incorrect since at that time *different Regulations* were applicable for determination of fee for determination of tariff. The petition for determination of tariff for FY 2008-09 was filed on 03.12.2008, at which time fees for filing of tariff petition was determined under AERC Conduct of Business Regulations, 2004. Regulation 39 of the AERC Conduct of Business Regulations, 2004, specifies that every petition filed before the State Commission shall be accompanied by the fees as specified in the schedule given at Appedix-4. Serial No. 4 of Appendix-4 specifies a fee of INR 2 lacs for each petition for determination of tariff. Regulation 39 was repealed by Regulation 10 (1) AERC Fees Regulations, 2009.
- 5.29 At the time of filing the present Tariff Petitions for the years 2009-2015, the applicable regulations for payment of fees were AERC Fee Regulations, 2015. Thus, the past practice which was under a completely distinct Regulations (being Conduct of Business Regulations, 2004) is of no relevance to the issue at hand. Moreover, the payment of fee is independent of the number of petitions filed and fee payable is generating station wise. In fact the Appellant has already

admitted in its submissions that it had paid the fees generating station wise (INR 10 Lacs each, total INR 20 Lacs) at the time of filing its Tariff Petition. It is reiterated that it is mandatory for the Appellant to pay fee as per the AERC Fee Regulations, 2015 for each Tariff Petition, each year for each generating station, which totals to INR 2.40 Crores. (2 generating stations, 6 Financial Years, $2*6*20$ Lacs= 2.40 Crores)

- 5.30 The Appellant has asserted that the State Commission has failed to consider that the fee payable by the Appellant for filing the Tariff Petitions is to be passed through by way of tariff. It is submitted that the Appellant never claimed tariff fee in its Tariff Petitions being Petition Nos. 20-31 of 2016. Further the Tariff Order was issued on 30.12.2016 while the fees was paid much later by the Appellant on 09.02.2017. Therefore, the issue of passing through processing fee as tariff never arose before the State Commission. The Appellant can approach the State Commission in truing up proceedings with Statement of Accounts for the power plants and claim the additional expense, if any.
- 5.31 In view of the above-submissions, it is submitted that the instant appeal is without any merits and is liable to be dismissed. The State Commission has not levied any excess fees and the fee levied by the State Commission is as per the prevalent regulations. The State Commission has given due consideration to all averments made before it by the Appellant and passed the Impugned Order in conformity with the regulations. This Tribunal may consider the submissions made above in adjudicating the instant appeal.

6. Learned counsel on behalf of the Respondent No.2 (APDCL) has filed following Written submissions:-

- 6.1 The issues raised in the memo of appeal by the appellant is related to fee levied by the respondent no.1 on the Appellant. The answering respondent no.2 have very limited scope in replying to the submissions of the parties herein. However, the answering respondent begs to submit limited submission before this Tribunal to the effect that the Appellant has submitted that the State Commission while passing the

Impugned Order failed to consider that the fee payable by the Appellant for filing of the Tariff Petitions is to be passed through by way of tariff. Further, it was submitted by the Appellant that the State Commission has already passed the Tariff Orders in Petitions Nos. 20-31 of 2016 for FY 2009-10 to 2014-15 without accounting for the fee to be paid by the Appellant.

6.2 In above context, it is submitted herein that the respondent No. 1 order vide No. AERC.576(A)/2016/Pt-I & AERC.576(B)/2016/Pt-I Dated 30.12.2016 in regard to payment of fees has mentioned as under:

“With regard to determination of Tariff even after non-payment of Fee, only to comply with direction of the Hon’ble APTEL regarding determination of Tariff for the plants of EIPL from FY 2009-10 to FY 2014-15, the Commission will go ahead with the Tariff determination process even after non-payment of requisite fee. However, determination of tariff by the Commission shall not be considered as a waiver/relaxation to the Petitioner towards payment of the processing fees of the Tariff Petitions. The Petitioner is once again directed to pay the Balance amount of Fee for the Tariff Petitions on or before 16.01.2017.”

6.3 The fees paid/payable for determination of tariff for FY 2009-10 to FY 2014-15 falls due in the FY 2015-16. As such, the same is subject to recovery as O&M (A&G) expenditure for FY 15-16 as a tariff component. Meanwhile in the tariff order dated 30.12.2016, an amount of Rs. 46.95 Crore as O&M expenditure on normative basis as shown below:

All amounts in Rs. Crore								
Particulars	FY 08-09	FY 09-10	FY 10-11	FY 11-12	FY 12-13	FY 13-14	FY 14-15	Total
Adamtilla	2.10	2.19	2.28	2.37	2.46	2.56	2.66	16.62
Banskandi	3.84	3.99	4.15	4.32	4.49	4.67	4.86	30.33
Total	5.94	6.18	6.43	6.69	6.95	7.23	7.52	46.95

6.4 The answering respondent begs to place the above fact for the consideration of this Tribunal for the adjudication of the aforesaid memo of appeal filed by the Appellant.

7. We have heard learned counsel appearing for the Appellant and the learned Counsel appearing for the Respondent No.1 and Respondent No.2 at considerable length of time and gone through their written submissions carefully. After thorough critical evaluation of the relevant material available on records, the following issue arises in the appeal for our consideration:-

- Whether in the facts and circumstances of the case, the State Commission was justified in directing the Appellant to deposit the court fee yearwise as well as generating stationwise in accordance with subsequent regulations notified by it

7. **Our Analysis & Findings:-**

7.1 Learned counsel for the Appellant submitted that this Tribunal vide its judgment dtd. August 8, 2014 had directed the Respondent Commission to undertake the determination of tariff as a composite exercise given the long delay in tariff fixation. Learned counsel alleged that, therefore, the payment of the fees separately for each tariff petition yearwise as held in the impugned order does not meet the ends of justice. He vehemently submitted that such fees under the Regulations are in the nature of pass through and, therefore, the Commission erred in insisting upon separate fees for separate petitions. Hence, the fees of Rs.20 lakhs already paid covers the fees for both power plants under the AERC (Fees) Regulations, 2009.

7.2 Learned counsel for the Appellant further submitted that in order to identify the fees payable for a tariff determination pertaining to a period of 01.04.2009 to 31.03.2015, one has to see the applicable Regulations framed by the Commission for the same. In fact, the AERC (Fees) Regulations, 2015 came into effect from 31.08.2015 and, therefore, the case is entirely governed by the 2009 Fees Regulations which is reflected in the tariff petitions numbering 20-31. Learned counsel reiterated that the Impugned Order is as such contrary to the Regulations of the Respondent Commission. Learned counsel referred to the 2006, Tariff Regulations viz Clause 6.5

regarding filing of single tariff petition by a generating company for multiple generating stations. The said clause of the Regulations is reproduced hereunder:

“6.4 If a person holds more than one licence and /or is deemed to be licensee for more than one area of distribution or transmission, he shall submit separate petitions in respect of each licence or area of transmission or distribution.

6.5 In its tariff petition, a generating company shall submit information to support the determination of tariff for each generating station.”
(emphasis supplied)

7.3 Learned counsel further contended that, the 2009 Fee Regulations provide for the fees to be included in tariff as a pass-through as under:

“8. Inclusion in tariff - The Licensee shall be entitled to take into account any fee or charge paid by it under these Regulations as an expense in the determination of tariff, provided that any penalty paid under the provisions of the Act shall not be allowed as an expense in the determination of tariff.”

Learned counsel brought out that the identical provision is also provided for in the AERC (Fees) Regulations, 2015 under Regulation 9. Learned counsel for the Appellant was quick to submit that the Impugned Order is also contrary to the past practice adopted by the Commission. The same would be evident from the order dated 20.10.2011 vide which tariff for the two plants of the Appellant, being Adamtila and Banskandi for FY 2008-09 was determined through a common petition being, Petition No. 14 of 2008. Accordingly, the State Commission's action of directing that yearwise different tariff petitions could be filed for each of the plants is not in consonance with its own past practice. Besides in complete disregard of multiple requests that had been made by the Appellant, the State Commission insisted upon payment of the additional fees.

7.4 Learned counsel further contended that in spite of reiterating its position on the irregularity of the fees demanded by the Respondent Commission, the Appellant was forced to deposit an additional fees of Rs. 2,20,00,000/- which obviously was made under protest by the Appellant. Learned counsel for the Appellant pointed out that the Appellant deposited the alleged outstanding fees of Rs. 2,20,00,000/- in the compliance with the directions of this Tribunal. Learned counsel

for the Appellant emphasised that in light of the aforesaid submissions, the Appellant is entitled to refund of Rs. 2,20,00,000/- as excess fee paid by it to the Respondent Commission.

7.5 **Per contra**, learned counsel for the Respondent Commission vehemently submitted that prior to passing of the Impugned Order, the State Commission had passed three different Orders dated 05.08.2016, 24.10.2016 and 30.11.2016 directing the Appellant to file year wise Tariff Petitions separately for each generating station. All the three Orders stand unchallenged. In fact, these orders were complied with by the Appellant and year-wise Tariff Petitions for each of the generating stations were filed by the Appellant on 24.08.2016. Learned counsel pointed out that on 14.11.2016, the Appellant prayed the State Commission for exemption from payment of fees on the ground that it is beyond his reach to pay the fees. The Appellant further prayed in the alternative that the State Commission may adjust Court fee from the amount payable by Respondent No. 2/APDCL. However, this application was rejected vide Order dated 30.11.2016 and no appeal has been filed against this order and as such, this order has attained finality.

7.6 Learned counsel for the Commission emphasized that in spite of four orders of the State Commission including final order being the impugned order, the Appellant did not pay the pending fees to the State Commission. In fact, it is only after the Tribunal vide Order dated 09.01.2017, the Appellant deposited the outstanding fees. The relevant part of the Order is extracted below:

“Accordingly, we hereby direct the Petitioner to deposit the court fees with the State Commission before the next date of hearing. If the court fees are not paid we will not consider any prayer made by the Petitioner on the next date of hearing.”

Learned counsel was quick to submit that the two Plants namely Adamtilla (9 MW) and the other at Banskandi (15.5 MW) are two distinct generating stations situated in two different districts in the State of Assam. In terms of Regulation 6.1 of AERC Tariff Regulations, 2006, a generating company shall file a tariff petition *annually* with the State

Commission for determination of tariff. Admittedly, a generating company can have several generating stations, which are located in different places but the tariff petitions are filed separately for each generating station yearwise.

- 7.7 Learned counsel further submitted that Regulation 3 of the AERC Fee Regulations, 2015 provides for payment of fees upon filing of petitions, application or grievance before the State Commission which is below:

“3. Fees on Petitions, Applications etc:

3.1 Every petition, application or grievance filed before the Commission shall be accompanied by such fee as specified in the “Schedule of Fees” of these Regulations. However, every application for grant of license under Section 14 of the Act shall be accompanied by such fee as prescribed by the State Government under Section 15 of the Act.”

- 7.8 Learned counsel further submitted that the tariff petitions of the Appellant have been filed under Section 62 of the Electricity Act 2003 and as such Provision 5 of the Schedule of fees of AERC Regulations, 2015 is applicable. It is clear from the plain reading of provision 5.2 (i) that the fees that is paid by a generating company is to be paid depending on nature of generating plant and therefore, the fees is chargeable separately for tariff determination of each generating plant. Further, regardless of whether a common tariff petition is filed or separate tariff petitions are filed, the fees is applicable on instance of determination of tariff of each generating station separately. Learned counsel emphasized that in view of the above, it is crystal clear that the tariff determination process is separate for each generating station and accordingly it is apt that as per the fee regulations, the fee is to be charged separately for the tariff determination of each generating station.

- 7.9 Learned counsel for the Respondent Commission submitted that AERC Tariff Regulations, 2006 ought to be interpreted in light of the CERC (Terms & Conditions of Tariff) Regulations, 2019. This is so because Regulation 3.1 of the AERC Tariff Regulations, 2006 provides that the State Commission is guided by principles specified by the Central

Commission for determination of tariff applicable to generating companies which is in accordance with Section 61 of the Electricity Act. Learned counsel further brought out that Regulations 8 & 9 of CERC Tariff Regulations, 2019 provide for tariff to be determined separately for each generating station. Therefore, Regulation, 2006 ought to be read with CERC Regulations. The relevant clause of CERC is reproduced below:-

"8. Tariff determination

(2) *Tariff in respect of a generating station may be determined for the whole of the generating station or unit thereof, and tariff in respect of a transmission system may be determined for the whole of the transmission system or element thereof or associated communication system:*****"*

"9. Application for determination of tariff

(3) *The generating company or the transmission licensee may make an application for determination of tariff for new generating station or unit thereof or transmission system or element thereof in accordance with the Procedure Regulations within 60 days of the anticipated date of commercial operation.*

(4) *In case of an existing generating station or unit thereof, or transmission system or element thereof, the application shall be made by the generating company or the transmission licensee, as the case may be, by 31.10.2019, based on admitted capital cost including additional capital expenditure already admitted and incurred up to 31.3.2019 (either based on actual or projected additional capital expenditure) and estimated additional capital expenditure for the respective years of the tariff period 2019-24 along with the true up petition for the period 2014-19 in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2014."*

7.10 Learned counsel for the Respondent Commission also referred to the practice of separate tariff petitions in the State of Gujarat, Maharashtra, Karnataka, Himachal Pradesh etc. where the fee is made payable per tariff determination of each generating station. In addition to this, NTPC files separate tariff petition for each of its generating stations. Learned counsel was quick to point out that the Appellant has itself admitted in its submissions, that at the time of filing the Tariff Petitions, it paid fees of Rs. 10 Lacs separately for each generating station, totalling to Rs. 20 Lacs. Without prejudice to the fact that even this payment was not in accordance with the applicable fee regulations i.e. AERC Fee Regulations, 2015, under which the correct fees is Rs. 20 Lacs per year per generating station. On the assertion of the Appellant, that the State Commission is erred in applying the AERC Fee Regulation, 2015 instead of Regulation 2009 which were prevalent in the relevant period of FY 2009-10 to FY 2014-15, learned

counsel indicated that from 31.08.2015, the revised Regulations of 2015 are the applicable Regulations for determining the fee payable for filing tariff petitions etc. before the State Commission. The Appellant filed a combined tariff petition, only on 01.12.2015 i.e., after coming into force of the AERC Fee Regulations, 2015, twelve separate tariff petitions would have to be considered for payment of the court fee. As such, the Appellant's reliance on Regulation 12 of the Fee Regulations, 2015 to contest that Regulations, 2009 will continue to apply is erroneous. Regulation 12 is only saving clause which says that any action which has already been taken or purported to have been done under the repealed regulations shall continue to be valid. Learned counsel for the State Commission pointed out that in fact the Appellant itself had paid the fees for the combine tariff petitions under the Fee Regulations, 2015 and not as per the Fee Regulations, 2009 as is evident from the Fee Regulations paid by the Appellant i.e. Rs. 20 lakhs. In other words, had the Appellant paid fees under the Fee Regulations, 2009, the fees would have been as per its Schedule of Fees, i.e., only INR 10 Lacs.

7.11 Learned counsel for the Commission further contended that the Appellant is solely responsible for the delay in filing the tariff petitions perhaps under the impression that the tariff petitions would be filed only after its payment dispute with APDCL (Respondent No.2) was settled. It is thus clear that because of the Appellant's own delay, the Fee Regulations, 2009 ceased to exist and Fee Regulations, 2015 came into force. It is relevant to note that subsequent to the letter dated 17.02.2016, the Appellant filed twelve tariff petitions on 24.08.2016. Therefore, had the Appellant acted diligently and filed its tariff petitions prior to coming into force of AERC Fee Regulations, 2015, the Appellant would have then paid fee under Fee Regulations, 2009. Learned counsel, summing up his arguments reiterated that the instant Appeal is without any merit and hence, is liable to be dismissed.

7.12 Learned counsel for second Respondent (APDCL) outrightly submitted that it has very limited scope in replying to the submissions of the

parties herein. However, under the limited submissions, it is brought out that the Appellant has submitted that the State Commission while passing the Impugned Order has failed to consider that the fee payable by the Appellant for filing of the Tariff Petitions is to be passed through by way of tariff. He further submitted that the State Commission has already passed the Tariff Orders in Petitions Nos. 20-31 of 2016 for FY 2009-10 to 2014-15 without accounting for the fee to be paid by the Appellant. Learned counsel further contended that the fees paid/payable for determination of tariff for FY 2009-10 to FY 2014-15 falls due in the FY 2015-16. As such, the same is subject to recovery as O&M expenses for FY 2015-16 as a tariff component. Meanwhile in the tariff order dated 30.12.2016, an amount of Rs. 46.95 Crore as O&M expenditure on normative basis has been considered. Summing up his submissions, learned counsel for the second Respondent prayed that these submissions may be considered by this Tribunal for the adjudication of the instant appeal filed by the Appellant.

Our Findings:-

- 7.13 We have carefully considered the submissions made by the learned counsel for the Appellant and learned counsel for the first and second Respondents and also taken note of the findings of the State Commission as well as this Tribunal in remand order. It is noticed that subsequent to the tariff orders dtd. 30.11.2016 in Petition Nos. 20-31 of 2016 by the Respondent Commission, the matter came up for adjudication before this Tribunal under EP No.02 of 2015 wherein on 09.01.2017, it was informed by the learned counsel for the Commission that the Appellant has not yet paid requisite fee which was directed to be paid by 16.01.2016. Further, in view of the directions of this Tribunal, the Appellant under the cover of its letter dated 09.02.2017 deposited the outstanding fee to the Commission under protest. While going through the entire submissions of the parties, it emerges that the primary dispute is regarding the payment of fees with the tariff petitions under the notified AERC Fee Regulations from time to time. While the Appellant contends to file composite tariff petitions pertaining to its two generation plants for the period 2009-10 to 2014-15, on the other hand,

it is the direction of the State Commission that tariff petition would need to be filed for each generating plant separately and also yearwise. In other words, against a composite petition, contemplated by the Appellant, the State Commission desires for twelve petitions (2 plants – 6 years).

- 7.14 Learned counsel for the Appellant submitted that determination of tariff in the instant case pertains to FY 2009-10 to FY 2014-15 and as such Fee Regulations, 2009 would apply for payment of requisite fee. Further, the AERC Fee Regulations, 2015 came into effect from 31.08.2015 and thus apply to the period 2015-16 onwards. Therefore, there should not be any doubt that the revised Regulations, 2015 would apply for payment of fee. He was quick to point out that the impugned order is accordingly contrary to the Regulations of the State Commission itself. Learned counsel vehemently submitted that the impugned order is also contrary to the past practice adopted by the State Commission at the time of determination of tariff for the financial year 2008-09. It is relevant to note that on 20.10.2011, the State Commission passed a common Tariff Order for its two generating plants against a common petition being, Petition No. 14 of 2008. Learned counsel also brought to our notice that the State Commission insisted for the payment of the fees considering 12 petitions in complete disregard of multiple requests made by the Appellant during the tariff determination process. Even the applications filed before the Respondent Commission seeking waiver from filing additional court fee was rejected by the State Commission.
- 7.15 Learned counsel for the Appellant further submitted that under the AERC (Conduct of Business) Regulations 2004, it is provided that the State Commission has a power to dispense with requirements of the Regulations in specific cases, however the State Commission did not provide any relief to the Appellant.
- 7.16 Learned counsel appearing for the Respondent Commission vehemently submitted that prior to passing of the impugned order, the

State Commission had passed three orders dated 05.08.2016, 24.10.2016 and 30.11.2016 directing the Appellant to file year wise Tariff Petitions separately for each generating station. All the three Orders remain unchallenged and in fact, these orders were complied with by filing year-wise separate Tariff Petitions for each of the generating plants. He further contended that as per normal practice, tariff petition is required to be filed annually for each of the generating stations and same is the practice in other states of the country. Even under the CERC Regulations, the Central generating stations like NTPC are required to file stationwise/yearwise tariff petitions along with requisite separate fee etc.. Admittedly, the determination of tariff pertains to the period of FY 2009-10 to FY 2014-15 for the petitions were filed in the year 2015-16 (on 01.12.2015) by when the revised Fee Regulations, 2015 were notified by the Commission. As such, as far as fee is concerned, the same cannot be applied as per the repealed Regulations. Learned counsel for the Respondent Commission further submitted that such fee payable by the Appellant is to be passed through by way of tariff, however the Appellant has never claimed the same in its tariff petitions.

7.17 Learned counsel appearing for the second Respondent/APDCL has not contested much on the submissions of the Appellant and the Respondent Commission. However, he has pointed out that the State Commission while passing the impugned order has failed to consider the fee payable by the Appellant as pass through by way of tariff. He has also submitted the fee payable by the Appellant falls due in the FY 2015-16. As such, the same is subject to recovery as O&M expenses for FY 2015-16, as already considered by the Commission on normative basis. Learned counsel for the second Respondent did not plead anything more beyond the same.

7.18 It is not in dispute that the Appellant owns two generating stations in the State of Assam namely Adamtilla and the other at Banskandi and determination of tariff for the same refers to the period FY 2009-10 to FY 2014-15. While the Appellant claims that the Fee Regulations,

2009 notified by the State Commission shall apply to its petition, the Respondent Commission is of the view that the revised Regulations, 2015 notified by it is applicable as far as payable fee is concerned. While going through records placed before us, we note that this Tribunal while disposing the EP No.2 of 2015 directed the Appellant to deposit the outstanding fee which was subsequently complied with by the Appellant. The Appellant deposited an additional fee of Rs.2.20 crores on 09.02.2017 obviously under protest.

7.19 Before making any decision on the dispute, we would like to refer the relevant Regulations of the State Commission as under:-

"3. Fees on Petitions, Applications etc:

3.1 Every petition, application or grievance filed before the Commission shall be accompanied by such fee as specified in the "Schedule of Fees" of these Regulations. However, every application for grant of license under Section 14 of the Act shall be accompanied by such fee as prescribed by the State Government under Section 15 of the Act."

6.5 "In its tariff petition, a generating company shall submit information to support the determination of tariff for each generating station." (emphasis supplied)

"8. Inclusion in tariff - The Licensee shall be entitled to take into account any fee or charge paid by it under these Regulations as an expense in the determination of tariff, provided that any penalty paid under the provisions of the Act shall not be allowed as an expense in the determination of tariff."

"43. Power to dispense with the requirement of the Regulations:- The Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties to dispense with the requirements of any of the Regulations in a specific case or cases subject to such terms and conditions as may be directed by the Commission."

7.20 Further, Regulation 31 makes it amply clear that the components involved in determination of tariff for a generating station are auxiliary energy consumption, availability, declared capacity, gross calorific value etc. and these parameters refer to almost all generating stations having same type of fuel. What thus transpires is that a generating company may file composite petition with stationwise detailed information and also separate plantwise petitions giving requisite relevant information. For the tariff petition pertaining to 2008-09, the Commission has considered composite tariff petition for both the generating plants of the Appellant but subsequently it desired plantwise

and yearwise petitions to be submitted by the same Appellant. Under such a dispensation by the State Commission, while the evaluation of plant parameters may involve similar exercise in tariff determination but the only difference is to be in payment of fee i.e. in place of Rs.20 lakh, the Appellant would need to pay Rs.2.40 crores.

- 7.21 It is noticed from Regulation 8, stated supra that such fee or charge paid/payable fees by the Appellant would be a pass through in the tariff and would ultimately be shared by the end consumers. It is also noted from the records placed before us that the tariff order dated 30.12.2016 passed by the State Commission in Petition Nos.20-31 of 2016 does not account for paid /payable by the Appellant to the tune of Rs.2.40 crores. This may be perhaps due to the reason that tariff order was issued on 30.12.2016 while outstanding fee was paid by the Appellant on 09.02.2017.
- 7.22 In view of the above, we are of the opinion that as the determination of tariff for the period under reference (01.04.2009 – 31.03.2015) has already been completed and tariff order passed by the Commission on 30.12.2016, the additional deposited fee of Rs.2.20 crores has remained with the State Commission only. The same may either be recovered through the revised tariffs during true up proceedings or otherwise waived of by the State Commission by exercising its powers under Regulation 43, stated supra. It is also noticed that the generating plant of the Appellant stand closed and the second Respondent/APDCL owes considerable outstanding dues to be paid to the Appellant.
- 7.23 In that view of the matter and also keeping in mind the principles of natural justice, we opine that the State Commission instead of truing up the decided tariffs upto FY 2014-15, by considering the additional paid up fees of Rs. 2.20 crores which ultimately shall be borne by the end consumers, may exercise its general powers under Regulation 43, may waive the requirement of the additional fee of Rs.2.20 crores and refund the same to the Appellant. This attains more prudence due to

the fact that the plant of the Appellant has closed and discom/APDCL owes considerable outstanding dues to the Appellant in lieu of its supplied power for the past period.

ORDER

For the foregoing reasons stated supra, we are of the considered view that the issue raised in the instant Appeal No. 294 of 2017 have merits and hence the Appeal is allowed. The impugned order dated 30.12.2016 passed by the Assam Electricity Regulatory Commission in Petition Nos. 20-31 of 2016 is hereby set aside to the extent challenged in the Appeal and our findings indicated above.

In view of the disposal of the Batch of Appeals, the reliefs sought in the IA Nos. 668 of 2017, 438 of 2018 & 956 of 2018 do not survive for consideration and accordingly stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this 20th day of October, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

pr