

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO.165 OF 2018 &  
IA NO. 790 OF 2018,  
APPEAL NO. 166 OF 2018 &  
IA NO. 794 OF 2018,  
APPEAL NO. 219 OF 2018 &  
IA NO. 1083 OF 2018**

**Dated: 27.01.2022**

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**APPEAL NO. 165 OF 2018 &  
IA NO. 790 OF 2018**

**In the matter of:**

**M/S RESPONCE RENEWABLE ENERGY LTD.**

13, Subol Dutt Building,  
Brabourne Road,  
Kolkata-700001

... **Appellant(s)**

**VERSUS**

**1. BIHAR ELECTRICITY REGULATORY COMMISSION**

*[Represented by its Secretary]*

Vidyut Bhawan – II,  
Jawahar Lal Nehru Marg,  
Patna 800021

**2. SOUTH BIHAR POWER DISTRIBUTION COMPANY LTD.**

*[Represented by its Managing Director]*

Vidyut Bhawan – I  
Jawahar Lal Nehru Marg,  
Patna 800021

**3. NORTH BIHAR POWER DISTRIBUTION COMPANY LTD**

*[Represented by its Managing Director]*

Vidyut Bhawan – I  
Jawahar Lal Nehru Marg,  
Patna 800021

**4. BIHAR STATE POWER HOLDING COMPANY LIMITED**

Vidyut Bhawan, Bailey Road,  
Patna 800021

... **Respondents**

**APPEAL NO. 166 OF 2018 &  
IA NO. 794 OF 2018**

**In the matter of:**

**M/S GLATT SOLUTIONS PVT LTD.**

76, Pandit Purshottam Roy Street, 3<sup>rd</sup> Floor,  
Kolkata-700007

... **Appellant(s)**

**VERSUS**

**1. BIHAR ELECTRICITY REGULATORY COMMISSION**

*[Represented by its Secretary]*

Vidyut Bhawan – II  
Jawahar Lal Nehru Marg,  
Patna 800021

**2. SOUTH BIHAR POWER DISTRIBUTION COMPANY LTD.**

*[Represented by its Managing Director]*

Vidyut Bhawan – I  
Jawahar Lal Nehru Marg,  
Patna 800021

**3. NORTH BIHAR POWER DISTRIBUTION COMPANY LTD**

*[Represented by its Managing Director]*

Vidyut Bhawan – I  
Jawahar Lal Nehru Marg,  
Patna 800021

**4. BIHAR STATE POWER HOLDING COMPANY LIMITED**

Vidyut Bhawan, Bailey Road,  
Patna 800021

... **Respondents**

Counsel for the Appellant (s) : Mr. Avinash Menon

Counsel for the Respondent (s) : Mr. Ravi Kishore for R-1

Ms. Ashtha Sharma  
Ms. Narayani Anand for R-2 to R-4

**APPEAL NO. 219 OF 2018 &  
IA NO. 1083 OF 2018**

**In the matter of:**

**SUNMARK ENERGY PROJECT LIMITED**

239, Okhla Industrial Estate,  
Phase-III,  
New Delhi

... **Appellant(s)**

**VERSUS**

**1. BIHAR ELECTRICITY REGULATORY COMMISSION**

*[Represented by its Secretary]*

Vidyut Bhawan – II  
Jawahar Lal Nehru Marg,  
Patna 800021

**2. SOUTH BIHAR POWER DISTRIBUTION COMPANY LTD.**

*[Represented by its Managing Director]*

Vidyut Bhawan, Bailey Road,  
Patna 800021

**3. NORTH BIHAR POWER DISTRIBUTION COMPANY LTD**

*[Represented by its Managing Director]*

Vidyut Bhawan, Bailey Road,  
Patna 800021

**4. BIHAR STATE POWER HOLDING COMPANY LIMITED**

Vidyut Bhawan, Bailey Road,  
Patna 800021

... **Respondents**

Counsel for the Appellant (s) : Mr. Hemant Sahai  
Ms. Amrita Narayan  
Mr. Ashwin Rakesh  
Ms. Nikita Bhardwaj

Counsel for the Respondent (s) : Mr. Ravi Kishore for R-1  
  
Mr. S.B. Upadhyay, Sr. Adv.  
Ms. Gargi Srivastava for R-2 to R-4

**J U D G M E N T (Oral)**

**PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON**

1. These matters have been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The three appeals, being Appeal nos. 165 of 2018, 166 of 2018 & 219 of 2018, have been filed by developpers of Solar PV Power Projects who feel aggrieved by denial of the tariff determination in respect of

category to which they belong by Order dated 29.02.2016 passed by the respondent/Bihar Electricity Regulatory Commission (hereinafter referred to as “BERC” or “State Commission” or “Commission”) in Suo-Motu proceedings vide Case no. SMP-31/2015, as modified by a Corrigendum Order passed on 11.03.2016.

**3.** The appellants had entered into Power Purchase Agreements (PPAs) with the respondent Distribution Licensees (hereinafter referred as to as “Discoms”) operating in the State of Bihar some time in 2012/2013, the date(s) of Commercial Operation (“COD”) planned at that stage having not been met, there being delays for various reasons including on the ground of change of locations. The appellants had sought extension of the COD but the prayer to that effect was rejected by BERC by a common Order passed on 06.05.2015 governing all these three project developers in Case nos. 4/2015, 7/2015, 8/2015, 9/2015 and 15/2015.

**4.** The tariff determination exercise for such category as above is goverend by Bihar State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Solar Energy Sources) Regulations, 2010 (hereinafter referred to as “2010 Regulations”). We may add here that in terms of Regulation 5 of the 2010 Regulations, the tariff is determined for a control period of three years, first control period ending with FY 2012-13. The tariff determined in that respect by Order dated 29.05.2012 was Rs. 10.90/kwh(hereinafter referred to as “the first Tariff Order”). The Commission, thereafter, had proceeded to determine the tariff

for the second control period which was covered by the Tariff Order dated 29.02.2016 (hereinafter referred to as “the second Tariff Order”), the order having been modified, as noted earlier, by the Corrigendum Order dated 11.03.2016. The Commission, subsequently, passed the tariff order for the third control period i.e. period beginning with FY 2016-17, such order having been passed on 18.10.2016 (hereinafter referred to as “the third Tariff Order”). The tariff determined by the third tariff order was Rs.5.67/kwh, reduced from Rs.7.02/kwh.

5. The second Tariff Order dated 29.02.2016 did not clarify as to the control period to which it pertained. This and other reasons necessitated the corrigendum to be issued on 11.03.2016. The entire controversy brought before us revolves around the construction of Corrigendum Order dated 11.03.2016 which, therefore, must be noted in extenso. It reads as under:-

*“Corrigendum*

*Dated 11.03.2016*

*The Commission after issue of the order passed in case no SMI 31/2015 on 29.02.2016 determining the generic levelised tariff for Solar PV power projects including rooftop solar PV noted that the control period and applicability of the tariff has not been clearly specified in the said order.*

*In view of the above, the Commission as per provision of the Regulations 31 of Bihar Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 issues this corrigendum to the order as below-*

- (1) *Para 4.2.11 shall be substituted by the following:-  
The Commission has proposed a control period of three years as per provision in the BERC (Terms and conditions for*

determination of tariff for solar energy sources) Regulations, 2010, control period is from FY 2013-14 to FY 2015-16.

(2) Para 5.3 shall be substituted by the following-

The generic levelized tariff determined on the basis of above parameters for solar PV power projects including roof top solar PV shall be applicable for such projects which are commissioned upto 31.03.2017 and for which PPA is signed upto 31.03.2016.

However till such time new tariff is determined, tariff determined in this order shall remain applicable for the projects for which the PPA is signed before issuance of new tariff order and the projects is commissioned within one year from the date of signing of PPA.

The order passed on 29.02.2016 in case no. SMP-31/2015 is modified/reviewed upto the extent stated above.”

6. It is necessary at this stage to take note of the relevant facts pertaining to the execution of PPA and the attainment of COD by the three appellants before us. This information is gleaned from para 9.17 of the impugned Order dated 16.05.2018, which reads thus:

<i>S.No.</i>	<i>Name of Companies</i>	<i>Date of letter of BSPHCL for fresh PPA</i>	<i>Date of PPA</i>	<i>Date of CoD</i>
1	<i>M/s Sunmark Energy Projects Ltd.</i>	<i>19.05.2016</i>	<i>07.06.2016</i>	<i>16.11.2016</i>
2	<i>M/s Response Renewable Energy Pvt. Ltd</i>	<i>09.09.2016</i>	<i>14.09.2016</i>	<i>30.03.2017</i>
3	<i>M/s Glatt Solutions Pvt. Ltd</i>	<i>09.09.2016</i>	<i>14.09.2016</i>	<i>28.02.2017</i>

7. We have mentioned earlier that the appellant had entered into PPAs with the Discoms in 2012/2013. We have also mentioned that the COD scheduled at that stage was not attained, the prayer for extension having been rejected by the Commission by its Order dated 06.05.2015. It is

against the said backdrop that upon the insistence of the Discoms that fresh PPAs came to be executed by the parties, the date of the fresh PPAs having been noted in the above tabulated information. We must also note here that it is expressly stated in the fresh PPAs that they were executed against the above-mentioned background and upon insistence of the Discoms by their letters dated 19.05.2016 and 09.09.2016, the act of execution of fresh PPA being that it “*extinguishes, supersedes, substitutes and novates*” the previous PPAs. Thus, there is absolutely no doubt that, for all practical purposes, the rights of the parties will have to be regulated with reference to the fresh PPAs, it being dated 07.06.2016 in case of appellant Sunmark Energy Project Limited and 14.09.2016 in case of the other two appellants viz. M/s Response Renewable Energy Ltd and M/s Glatt Solutions Private Limited respectively.

**8.** We may also note here, based on the above information accepted by the Commission in its order, that the appellants concededly achieved COD within a year of the date of execution of the said PPAs.

**9.** The Corrigendum Order dated 11.03.2016, as noted above, had not only clarified the control period to be FY 2013-14 to FY 2015-16 but also, crucially, by substitution of original para 5.3, that the generic levelized tariff thereby determined would be applicable for such projects as have been commissioned up to 31.03.2017 and for which PPA was signed up to 31.03.2016. Admittedly, the case of the appellants would not fall under the said category.

**10.** It is the second sub-para of Para 5.3 as brought in by the correction order dated 11.03.2016 which is at the core of the controversy brought before us. The plain language of the said order makes it clear that the Commission had put in position a tariff thereby determined to be applicable for such projects as well the PPAs in which respect had been signed before the issuance of the new tariff order and the project was commissioned within one year from the date of signing of the PPA. Going by the chronology of the events with regard to the execution of PPAs and the attainment of COD as noted above, the appellants are squarely covered by this part of the tariff determination made by the State Commission, in as much as they had signed the PPAs before the next tariff order dated 18.10.2016 had come in and they had achieved the COD within one year from the date of these PPAs.

**11.** The controversy, however, arises because the Commission had qualified the above determination by words "*till such time new tariff is determined*". The next tariff order dated 18.10.2016 had admittedly come in before the COD was achieved in each of these cases. The crucial question that needs to be addressed is as to whether the corrigendum order amounts to extension of control period beyond the control period for which it was meant and as to whether the subsequent tariff order dated 18.10.2016 would supervene and come into effect from 01.04.2016 notwithstanding the benefit that had been extended by the tariff order for



the project that has been commissioned within one year of the PPA signed during the previous control period.

**12.** The learned counsel for the respondents relies on fourth amendment of the 2010 Regulations which were notified on 13.10.2016 substituting third proviso to Regulation 5 in terms of which it was clarified that the control period would be for corresponding Financial Year. They also rely on the quantifying words “*till such time new tariff is determined*” to submit that the corrigendum order had run its course as soon as the third tariff order had come in on 18.10.2016. The respondent refer to the judgment in the case of *Gujarat Urja Vikas Nigam Limited v Solar Semiconductor Power Company Ltd* (2017) 16 SCC 498 to contend that the corrigendum order is bad in law since it amounts to extending the control period.

**13.** Having heard the learned counsel on all sides, we find the views taken by the State Commission to be incorrect, in the teeth of the letter and spirit of its own Order dated 29.02.2016 read with Corrigendum Order dated 11.03.2016. The Corrigendum Order dated 11.03.2016 determined the tariff to be applied for the period till a new tariff order is passed. It does not tantamount to extending the control period within the mischief adversely commented upon by the Hon’ble Supreme Court in the case of *Solar Semiconductor (supra)*. We see no reason why the Tariff Order dated 18.10.2016 should apply retrospectively in as much as there is nothing in the said order for it to be made applicable accordingly.

**14.** The general rule that the tariff order continues to apply till new order is passed naturally means that such new tariff order comes into force on the date on which it is passed. The language employed in the second sub-para of substituted para 5.3 of the Order dated 29.02.2016, as modified on 11.03.2016, leaves no room for doubt that the tariff determined at that stage will apply to all such project developers as had executed the PPA before the issuance of the next tariff order and were able to achieve the commissioning within one year of signing the PPA. The appellants meet the said twin criteria and, therefore, in their case the tariff stood determined as on 11.03.2016. The subsequent order passed on 18.10.2016 cannot take away from them the benefit of the tariff order which had come to be applied to them by virtue of the previous order.

**15.** The Commission has observed in the impugned Order dated 16.05.2018 that the appellant could not take the benefit of the second Tariff Order dated 29.02.2016 because their project had been delayed; they had been denied extension of COD by Order dated 06.05.2015 and that they had not got their subsequent PPA approved. We do not agree with such reasoning applied by the State Commission. There is no denial of the fact that the procurement of power by the State Discoms from these entities had received the approval of the State Commission. The Commission had determined the tariff which was the second part of its responsibility under Section 86 of the Electricity Act, 2003. The amendment of 2010 Regulations cannot have the effect of amending the tariff order

already passed. The only effect of the denial of extension of COD by Order dated 06.05.2015 is that the appellants lost the benefit of the first Tariff Order dated 29.05.2012. Even going by the directions in the said Order dated 06.05.2015, it is clear that they were to be entitled to the tariff determined for the relevant control period “as applicable”.

**16.** In the above facts and circumstances, the appeals must succeed. The impugned order to the extent thereby the benefit of the second Tariff Order dated 29.02.2016 read with Corrigendum Order dated 11.03.2016 has been denied to the appellants and they have been directed to execute amended PPAs, is set aside. It is directed that the appellant will be entitled to the tariff as determined by Tariff Order dated 29.02.2016 modified by the Corrigendum Order dated 11.03.2016 for the period of twenty five years in terms of the PPAs as specified in the relevant Regulations and Tariff Order.

**17.** Needless to add, the respondent Discoms will be obliged to pay arrears of tariff calculated in terms of the above directions and also account for carrying cost in accordance with the PPAs subject, of course, to the appellants raising proper invoices.

**18.** The appeal and the pending applications are disposed of in above terms.

**(Sandesh Kumar Sharma)**  
Technical Member

*vt/tp*

**(Justice R.K. Gauba)**  
Officiating Chairperson