

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 381 OF 2018

Dated: 02nd May 2022

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

In the matter of:

COGENERATION ASSOCIATION OF INDIA

[Through its Secretary]

First Floor, Sakhar Sankul,
Shivajinagar,
Pune – 411 005

.... Appellant(s)

VERSUS

**1. MAHARASHTRA ELECTRICITY REGULATORY
COMMISSION**

[Through its Secretary]

World Trade Centre,
Centre No.1, 13th Floor, Cuffe Parade,
Colaba,
Mumbai-400005

**2. MAHARASHTRA STATE ELECTRICITY
DISTRIBUTION CO. LTD.**

[Through its Managing Director]

Plot No. G-9, Prakashgad,
Bandra (East),
Mumbai 400 051

3. THE TATA POWER COMPANY LTD.

[Through its Managing Director]

Corporate Center, 34,
Sant Tukaram Road,
Carnac Bunder,
Mumbai-400 009

4. MAHARASHTRA ENERGY DEVELOPMENT AGENCY

[Through its Secretary]

MHADA Commercial Complex, II floor,

Opp: Tridal Nagar, Yerwada

Pune - 411 006

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Vishal Gupta
Mr. Divyanshu Gupta

Counsel for the Respondent (s) : Mr. S.K. Rungta, Sr. Adv
Ms. Pratiti Rungta for R-1

Ms. Deepa Chawan
Mr. Anup Jain
Mr. Akshay Goel for R-2

J U D G M E N T

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

1. This matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The sole issue that needs to be addressed in this appeal is as to whether the *Maharashtra Electricity Regulatory Commission* (for short "MERC" or "the State Commission"), while determining the tariff in terms of section 62 of the Electricity Act, 2003, could have applied the tariff discovered by bidding process under section 63 as the benchmark.

3. The appeal at hand seeks to assail part of the Order dated 18.08.2018 passed by MERC in case no. 204/2018 determining the tariff for the non-fossil fuel based co-generation projects of the members of the appellant association for control period financial year (FY) 2018-19

returning a finding that though the tariff computed in terms of parameters set out in the *Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2015*, (hereinafter referred to as “the RE Tariff Regulations, 2015”) works out to Rs.6.45 per unit, the tariff rate of Rs.4.99 per unit being the one discovered through competitive bidding in the State of Maharashtra for such non-fossil fuel based projects, the lower tariff of Rs.4.99 per unit deserved to be adopted and enforced as the generic tariff.

4. The Electricity Act provides detailed guidelines on the subject of “Tariff” in Part-VII. Section 61 sets out the prime principles to be followed in such exercise by the regulatory authorities. It may be quoted, to the extent relevant, as under:

“61. Tariff regulations.—The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—

(a) ...;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(f) ...

(e) ...

(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:”

[Emphasis supplied]

5. It is vivid from the above that while good performance and efficiency are to be rewarded, commercial principles to be adhered to wherein optimum investments and competition are encouraged, the co-generation of electricity being promoted, a balance has to be struck wherein interest of the consumers at large is safeguarded even while reasonable returns for the investors in electricity generation are ensured.

6. There are two routes for power projects to come up. One is known as cost-plus route of Section 62 and other the tariff based competitive bidding which is encouraged under section 63. The power projects which come up through the latter route are governed by guidelines framed by the central government wherein transparency of the bidding process is the hallmark. In the bidding route, the project proponent or developer is expected to take into account the investments which it would require to muster, and put in, and to quote the price at which it will be willing to sell the electricity thereby generated bearing in mind the competition expected to be faced. Such proponents while participating in bidding process follow the guidelines and workout their own expectations on reasonable returns, there being some protection available with regard to future inflationary effect emanating from

such factors as Change in Law, the provision made in the bidding documents and the contracts that are entered in the wake of such projects by incorporating restitutionary principles. In sharp contrast, the power projects which are established for operation on cost-plus basis under section 62 have the statutory assurances of reasonable returns through the guidelines provided in section 61 (as quoted above), which form the basis of tariff regulations that are framed to guide the process of regulatory commissions. The tariff determination in such route is through the process envisaged in section 64 which may be quoted as under:

“64. Procedure for tariff order.—(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,—

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the

Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.”

7. To highlight the difference between the two routes, it is essential also to take note of the provision contained in section 63 which reads as under:

“63. Determination of tariff by bidding process.— Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

8. Noticeably, in dealing with an application for tariff determination under section 64, the Commission invites attention of the public at large to the proposals, considers objections / suggestions or inputs, if any received pursuant thereto, and then passes an order fixing the tariff following, in this context, the tariff regulations which would have been framed earlier under section 61. On the other hand, in the bidding route, the commission's responsibility is only to ensure that the bidding process was transparent and in accordance with the guidelines issued by the central government.

Generally speaking, if the Commission reaches the satisfaction on both said aspects it proceeds to “adopt” the tariff discovered by the bid process.

9. By virtue of section 181 (2)(z)(d), the Commission is vested with the power to make regulations on the subject of “*the terms and conditions for determination of tariff under section 61*”. The State Commission, in terms of section 86 (a) (b), is further responsible for not only determining the tariff, *inter alia*, for supply of electricity within the State but also to regulate the power procurement process of distribution licensees including the price at which electricity may be purchased from the generating companies etc. In exercise of power vested in it by Sections 61, 66, 86 and 181 of the Electricity Act, the respondent State Commission had framed the RE Regulations earlier in 2010 which were valid for the control period ending with FY 2014-15. The said regulations were replaced and substituted by the RE Regulation, 2015, which were notified on 10.11.2015.

10. For further discussion, we may quote the following provisions of RE Tariff Regulations, 2015:

“2. Definitions and Interpretation

2.1 In these Regulations, unless the context otherwise requires,—

(ee) ‘Review Period’ means the period during which the norms for determination of tariff specified in these Regulations shall remain valid;

...

3. Scope of Regulations and extent of application

3.1 These Regulations shall apply to those new RE Projects which are commissioned in the State of Maharashtra for the generation and sale of electricity to Distribution Licensees in the State, are Eligible Projects for the purposes of these Regulations, and whose tariff is to be determined by the Commission under the provisions of Section 62 read with Section 86 of the Act :

Provided that, where a RE Project opts for the Renewable Energy Certificate ('REC') mechanism specified in the MERC (Renewable Purchase Obligation, its Compliance, and Implementation of REC Framework) Regulations, 2010, its pricing mechanism shall be governed by the provisions of those Regulations or as may be specified in future.

3.2 The tariff and other terms and conditions applicable to existing RE Projects shall be governed by the provisions of the RE Tariff Orders issued by the Commission from time to time :

Provided that conditions stipulated under Second Proviso of Regulation 5.1 of Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2010 shall continue to apply in case of such Existing RE Projects.

...

5. Competitive Bidding for procurement of power generated by grid-connected RE Projects

The Commission shall adopt the tariff for a RE Power Project where such tariff has been determined through a transparent process of competitive bidding in accordance with guidelines under Section 63 of the Act as and when issued by the Central Government.

6. Review Period

6.1 The Review Period under these Regulations shall be five financial years (FY), upto the end of FY 2019-20. The first year of the Review Period shall commence from the date of notification of these Regulations.

...

7. Tariff Period

7.1 The Tariff Period for Wind Power, Biomass-based, Solar PV, Solar Roof-top PV and Non-Fossil Fuel-based Co-Generation Projects shall be thirteen (13) years.

...

Chapter 5 : Technology-specific parameters for Biomass-based Power Projects

36. Technology

The norms for tariff determination specified in this Chapter are for Biomass-based Power Projects based on Rankine Cycle technology application using water-cooled condenser.

37. Applicability

37.1 The Capital Cost and performance norms specified in this Chapter shall be applicable only to new Biomass-based Power Projects commissioned after notification of these Regulations.

37.2 The fuel-related aspects specified in Regulations 44 to 50 shall be applicable to both existing and new Biomass-based Power Projects :

Provided that the norms in respect of SHR and Auxiliary Consumption factor for existing Biomass-based Power Projects shall be as stipulated in the respective RE Tariff Orders referred to in Regulation 3.2.

38. Capital Cost

The normative Capital Cost of Biomass-based Power Projects shall be considered as Rs. 494.32 lakh/MW for the first year of the Review Period for the purpose of tariff determination, and shall be revised in respect of Projects commissioned in each subsequent year of the Review Period as specified in Regulation 39.

39. Capital Cost Indexation Mechanism

The Capital Cost of the Biomass-based Power Projects shall be revised for each year of the Review Period considering the indexation mechanism specified under the CERC RE Tariff Regulations.

40. Plant Load Factor

40.1 The PLF for the purpose of determining the fixed charge component of the tariff for Biomass-based Power Projects shall be:

- 1) During stabilisation: 60%;*
- 2) During the remaining period of the first year (after stabilisation): 70%;*
- 3) From 2nd year onwards: 80%.*

40.2 The stabilisation period shall not be longer than 6 months from the date of commissioning of a Project.

41. Auxiliary Consumption

The Auxiliary Power Consumption for Biomass-based Power Projects shall be 10% for the purpose of tariff determination.

42. Station Heat Rate

The SHR for new Biomass-based Power Projects shall be 4200 kcal/kWh for the purpose of tariff determination.

43. Operation and Maintenance Expenses

43.1 Normative O&M expenses for the base year of the Review Period shall be 5.32% of the Capital Cost for the purpose of tariff determination.

43.2 Normative O&M expenses allowed under these Regulations shall be escalated at the rate specified in the Regulations of the Commission governing Multi Year Tariff, to compute the levelised tariff.

44. Fuel Mix

44.1 The Biomass-based Power Project shall be designed in such a way that it uses different types of non-fossil fuels available within its vicinity such as crop residues, agro-industrial residues, forest residues, etc. or other biomass fuels as may be approved by MNRE.

44.2 The Project Entity shall prepare fuel management plans to ensure adequate availability of fuel to meet the Project requirements.

45. Use of Fossil Fuel

The use of fossil fuels shall be limited to the extent of 15% of the total fuel consumption on an annual basis, or to such other extent as may be stipulated by MNRE from time to time.

46. Monitoring of use of Fossil Fuel

46.1 The Project Entity shall, along with its monthly energy bill, furnish a monthly fuel procurement and fuel usage statement certified by a Chartered Accountant to the Distribution Licensee with whom an EPA has been entered into, with a copy to State Nodal Agency, for the purpose of monitoring the fossil and non-fossil fuel consumption. The statement shall include details such as –

- a. Quantity of fuel (in tonnes) for each fuel type (biomass fuels and fossil fuels) procured and consumed during the month for power generation;*
- b. Cumulative quantity (in tonnes) of each fuel type procured and consumed till the end of the month during the year;*
- c. Actual (gross and net) energy generation (in kWh) during the month;*
- d. Cumulative actual (gross and net) energy generation (in kWh) until the end of that month during the year;*

- e. *Opening fuel stock quantity (in tonnes);*
- f. *Receipt of fuel quantity (in tonnes) at the power Project site;*
- g. *Closing fuel stock quantity (in tonnes) for each fuel type (biomass fuels and fossil fuels) available at the power Project site.*

46.2 Non-compliance in any financial year with the conditions regarding fossil fuel usage shall render such Biomass-based Power Project ineligible to avail the generic tariff determined in accordance with these Regulations from the date of and for the duration of the default during such financial year:

Provided that such defaulting Biomass-based Project shall continue to sell power to the Distribution Licensee during the period of default at the APPC of such Licensee for the relevant year.

47. Compliance Monitoring for Biomass-based Power Projects

47.1 The Distribution Licensee procuring power from them shall be responsible for monitoring compliance by Biomass-based Power Projects with these Regulations.

47.2 The concerned Distribution Licensee shall maintain all data relevant to these Regulations, including technical and commercial details, in respect of Biomass-based Projects from whom it is procuring power, and shall make the data available in the public domain by publishing it on its website and updating it on a quarterly basis.

47.3 Project Entities shall submit the information to Distribution Licensee procuring power in the templates specified in Annexure-B of these Regulations.

48. Calorific Value

The average Calorific Value of the biomass fuel(s) used for the purpose of determination of tariff for new Biomass-based Power Projects shall be 3611 kcal/kg.

49. Fuel Cost

The biomass fuel price shall be considered as Rs. 3987/MT during the first year of the Review Period, and shall thereafter be linked to the indexation mechanism specified in Regulation 50.

50. Fuel Price Indexation Mechanism

50.1 In the case of both existing and new Biomass-based Power Projects, the following indexing mechanism for

adjustment of fuel prices for each year of operation will be applicable for determination of the variable charge component of tariff:

The Variable Charge for the nth year shall be computed as under :

$$VC_n = VC_1 \times (P_n / P_1)$$

where,

VC₁ represents the Variable Charge based on Biomass Price P₁ for first year as specified under Regulation 49, and which shall be determined as under :

$$VC_1 = \frac{\text{Station Heat Rate (SHR)}}{\text{Gross Calorific Value (GCV)}} \times \frac{1}{(1 - \text{Auxiliary Consumption Factor})} \times \frac{P_1}{1000}$$

P_(n) = Price per tonne of biomass for the nth year to be considered for tariff determination

P_(n-1) = Price per tonne of biomass for the (n-1)th year to be considered for tariff determination.

P₁ shall be the Biomass price for FY 2015-16 as specified under Regulation 49.

The Biomass fuel price shall be revised by the Commission taking into consideration the Biomass fuel price determined by the Central Commission or a normative escalation factor of 5% per annum, as it may consider appropriate.”

11. Pertinent to observe here itself that RE Regulations, 2015 have no connection whatsoever with the tariff based competitive process of section 63. It was fairly conceded at the bar during the hearing that the bid discovered price under section 63 is not mentioned even remotely as one of the parameters or benchmarks for determination of tariff on an application under section 64.

12. After the RE Regulations 2015 had been notified and brought in force for FY 2015-16 w.e.f. 10.11.2015, and prior to the impugned order being issued, MERC had the occasion to pass three tariff orders of such nature

as at hand. The said earlier generic tariff orders for RE technologies for FY 2015-16, 2016-17 and 2017-18 were promulgated on 25.01.2016, 29.04.2016 and 28.04.2017 respectively. There is no dispute that the said earlier generic tariff orders were in accord with the mandate of Section 62 and RE Tariff Regulations, 2015.

13. On 09.07.2018, the MERC initiated the fresh process for RE tariff order for next control period i.e. FY 2018-19. It is here that a departure from the existing view was proposed through the draft RE tariff order that was published. The Commission was of the view that two alternative approaches could be made to the subject of determination of such tariff, they being styled as 'Approach-1' and 'Approach-2', explained as under:

“Under the ‘Approach 1’, the State Commission proposed to calculate the Generic Tariff “as per the Financial Principles and Technology-specific parameters in RE Tariff Regulations, 2015” only if “no tariff is adopted by this Commission for eligible RE technology by way of competitive bidding carried out by any distribution licensee within the State of Maharashtra”

Whereas, under the ‘Approach 2’, the State Commission proposed that “if tariff adopted by this Commission which is discovered through competitive bidding process carried out by any distribution licensee within the State of Maharashtra is lower than the tariff calculated by way of Financial Principles and Technology-specific parameters as defined in RE Tariff Regulations, 2015, then such tariff discovered through competitive bidding is considered to be the Generic Tariff.”

(Emphasis supplied)

14. The appellant filed objections on 30.07.2018, to the following effect:

“APPROACH – 2

- *This approach relates to the tariff determination through competitive bidding process. In this regard it is relevant to note that Regulation 5 of the Regulations provides as under:*
- *From the above it is clear that the Regulations governing the tariff for renewable energy provides for the competitive bidding to be done only in accordance with the guidelines under Section 63 of the Electricity Act, 2003. There cannot be any other way of conducting the competitive bidding except as provided in the Regulations governing the field of tariff for RE technologies. Since the Central Government has not issued any guidelines under Section 63 of the Act for Non-Fossil Fuel-based Co-generation Project (Bagasse based) the question to direct the distribution licensees of the State to procure power from Non-Fossil Fuel-based Co-generation Project (Bagasse based) through competitive bidding is not permissible in law.”*

15. During the course of public hearing, it was argued on behalf of the appellant as under:

“4. It is most respectfully submitted that the above Approach 2 and the adoption of tariff using such an approach as done in Para 6.4 is not permissible in law being contrary to the provisions of the Electricity Act, 2003 and the provisions of the regulations framed thereunder by this Hon'ble Commission.

...

8. It is to be noted that Section 62 of the Act relates to Section 61 where the tariff is to be determined as per the regulation specified by the Hon'ble commission. On the contrary the tariff to be determined / discovered through competitive bidding is to be as per Section 63 of the Electricity Act 2003. It is respectfully submitted that both these sections i.e. Section 62 and Section 63 while dealing with the determination of tariff operate in a completely different manner and cannot be merged”

16. By the impugned order, the Commission held as under:

“Objection of CAI is that Approach- 2 and the adoption of tariff using such an approach is not permissible by law as it is contrary to the provisions of the Electricity Act, 2003 and the provisions of the Regulations framed there under by this Commission. Section 61 of the Electricity Act, 2003 has given this Commission power to specify the terms and conditions for the determination of tariff. The same Section mentions guiding principles for specifying terms and conditions, which are as follows:

- *The principles and methodologies specified by the Central Commission for determination of the tariff*
- *The generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- *The factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- *Safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- *The principles rewarding efficiency in performance;*
- *Multi-year tariff principles;*
- *The tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*
- *The promotion of co-generation and generation of electricity from Renewable sources of energy;*
- *The National Electricity Policy and tariff policy*

Considering the mass interest i.e. the interest of the end consumers, the Commission has to maintain balance in terms of affordable power sold to consumers while determining tariff of cogeneration power plants for sale to Distribution Licensees. So far, Distribution Licensees have purchased power from cogeneration power plants at tariff much higher (preferential tariff) than their average cost of supply. Considering the present scenarios of availability of cheaper power from various RE sources such high tariff would be against the guiding principle of encouraging competition, efficiency, economical use of the resources, good performance and is not succeeding in safe-guarding interest of end consumer of electricity.

The promotion of co-generation and generation of electricity from RE sources of energy can not only be by

way of providing preferential tariff to the generators, but also by way of providing competitive tariff to the Discoms at least from among various co-generation plants. High preferential tariff does not serve the purpose of promoting cogeneration if Discoms are not ready to pay for it and are not ready to enter into an EPA. Change of word 'preferential tariff' to 'generic tariff' in RE Tariff Regulations 2015 is not cosmetic in nature, but implies specific meaning. Change in approach of generators is required so that efficiency and good performance gets promoted. Even proposed amendment in National Tariff Policy has promoted power procurement through Competitive Bidding so that efficiency & good performance gets encouraged.

Distribution Licensees have to procure RE power so as to meet their RPO targets. To that extent, Discoms have options to fulfil their targets either by purchase of RE power or purchase of REC's or by combination of these two. The Commission observes that the Consumer Representatives have also stated during various proceedings that besides following Competitive Bidding for Bagasse based Co-generation power, Discoms/MSEDCL in order to meet its non-Solar RPO, (which are not pertaining to any specific RE technology), should also exercise the cheaper option such as Wind power procurement through competitive Bidding route. Under these circumstances, the Generic tariff fixed by the Commission in cases where Competitive Bidding is also permissible will be deemed ceiling rate so as to remove difficulties in adoption of appropriate tariff. Obligated Entities cannot arbitrarily or discriminately adopt higher tariff between the two alternatives - generic tariff determined by the Commission and the tariff discovered through competitive bids. Therefore, in the interest of consumers, Generic tariffs as deemed ceiling rates will, at best, reflect the components of the fixed and the variable costs worked out as per the financial and operational norms fixed under RE Tariff Regulations. Approach-2, this way limits the generic tariff to the market rate of the Cogeneration power as discovered through the Competitive Bidding process approved by the Commission. Still, to remove any ambiguity in interpretation of the statutory provisions and to remove any operational difficulty for implementing the Order, the Commission in exercise of its power under Regulation 82 "Power to remove difficulties" of RE Tariff Regulations 2015, allows generic

tariff to act as ceiling tariff for guiding the Competitive Bidding process.

Tariff achieved in Approach-2 is a benchmark used by this Commission and not tariff determination as per Section 63 itself. Therefore, there is no question of conflict between Section 62 and Section 63 of the Electricity Act, 2003 in Approach-2 as raised by CAI.

In view of above, the Commission has considered Approach-2 for determination of Generic Tariff.”

17. The crucial part of the decision, with which the appellant is aggrieved, reads thus:

“7.16. TARIFF AS PER APPROACH-2 FOR NON-FOSSIL FUEL-BASED COGENERATION PROJECTS

As mentioned in para. 3.1.2 above, the Tariff discovered through Competitive Bidding in the State of Maharashtra proposed (Fixed Charge + Variable Charge) for non-fossil fuel based cogeneration projects for FY 2018-19 is Rs. 4.99/unit as approved by the Commission in its Order in Case No. 165 of 2018 dated 30 June, 2018.

7.17. GENERIC TARIFF FOR NON-FOSSIL FUEL-BASED CO-GENERATION PROJECTS

As per para.7.16 and 7.17, Tariff as per Approach-2 is lower than Tariff as per Approach-1. Following table gives comparison of the two approaches:

Comparison of Co-generation Tariff by Approach-1 and by Approach-2

<i>Particulars</i>	<i>Approach-1</i>	<i>Approach-2</i>
<i>Co-generation</i>	<i>6.45</i>	<i>4.99</i>

Therefore, Rs. 4.99 per unit is adopted as Generic Tariff for non-fossil fuel based cogeneration projects by this Commission.

Note:

- The above Tariff shall be valid for Projects commissioned from 1 August, 2018 to 31 March, 2019.”*

18. The Commission has thus decided that the tariff discovered through competitive bidding process being lower will have to be adopted as generic tariff, as against the tariff calculated on the basis of financial principles and technology-specific parameters as defined in RE Tariff Regulations 2015, the prime quoted justification being the *consumer interest*.

19. While defending the impugned decision, the learned counsel for the distribution licensees operating in the State of Maharashtra submitted that the Regulatory Commission exercises plenary power in the matter of tariff determination, it being responsible to take care of the consumer interest and having found the bid discovered tariff to be more realistic, use of such tariff as the benchmark cannot be questioned.

20. Having heard the learned counsel on all sides, we are of the considered view that the State Commission has fallen into serious error in taking a decision on the subject of tariff determination under Section 64 by using parameters outside the Tariff Regulations framed under Section 61. We must quote here the following observations of Hon'ble Supreme Court in *PTC India Ltd v CERC* (2010) 4 SCC 603:

“54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central

Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even

in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

[Emphasis Supplied]

21. It is also necessary to quote the following part of the decision reported as *Energy Watchdog v CERC* (2017) 14 SCC 80:

“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions.....the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

...

“35. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions “protecting interest of consumers” and Section 61(d) requires that the interests of the consumers are to be safeguarded when the Appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers”

[Emphasis supplied]

22. It is well settled that if the law requires something to be done in particular manner, then such thing has to be done in that manner only [Nazir Ahmad v. The King-Emperor AIR 1936 PC 253 (2); State of Jharkhand & Ors. v. Ambay Cement & Anr. (2005) 1 SCC 368; Competent Authority v. Barangore Jute Factory & Ors. (2005) 13 SCC 477; Chief Information Commissioner & Anr. v. State of Manipur & Anr. (2011) 15 SCC 1; and J. Jayalalithaa & Ors. v. State of Karnataka & Ors. (2014) 2 SCC 401]. In our considered opinion, the State Commission has fallen into serious error by going outside its own Tariff Regulations governing the field. By making an assessment on the basis of various parameters set out in RE Tariff Regulations, 2015 (including technology, capital cost, capital cost indexation mechanism, plant load factor, auxiliary consumption, station heat rate, operation and maintenance expenses, fuel mix, use of fossil fuel,

monitoring of fossil fuel, calorific value, fuel cost, etc.) the Commission itself concluded that the tariff deserves to be fixed was Rs. 6.45/unit. It bears repetition to say that concededly the RE Tariff Regulations do not include the bid discovered tariff of Section 63 as one of the benchmarks or touchstones. The use of such benchmark by the Commission demonstrates that its decision is articulated by extraneous consideration falling outside tariff regulation which had been framed by it and which it was duty bound to follow. It is not a case where there was a vacuum in the Tariff Regulations for which Commission could have looked elsewhere to find a fair solution. The Tariff Regulations, 2015 had been in force and complied with scrupulously in the preceding three control periods. There was no justification for any departure from such dispensation or foray outside the extant framework of the Tariff Regulations.

23. Even otherwise, adoption of Approach-2 was misguided since the Commission failed to bear in mind that price discovery methodology through competitive bidding route functions on the principles of bidders placing the competitive bid considering the scale and size of their power project and individual risk appetite, the final price discovered through the bid being for specific and individual Power Purchase Agreements rather than being a safe method for determining generic tariff. The approach is wrong since it seeks to place the generators of different States and their projects of different vintage on the same pedestal which has the obvious

potential to result in deficient recovery of their prudent costs. This is explicit even from the facts at hand wherein the adoption of bid discovered tariff of Rs. 4.99/unit means only Rs. 0.82/unit will be recovered towards fixed charges which have been otherwise computed by the Commission at Rs. 2.28/unit, variable cost having been determined at Rs. 4.17/unit.

24. It was incorrect on the part of the State Commission to justify the impugned decision only with reference to its responsibility to take care of consumer interest. As observed earlier, consumer interest is prime but has to be balanced against other considerations including the legitimate expectation of the generators for reasonable returns on their cost of generation. By the approach taken, the State Commission has abandoned its own Tariff Regulations making them redundant. This renders the impugned decision incorrect, unjust and unlawful.

25. For the foregoing reasons, the appeal must succeed. We, thus, modify the impugned order to the extent challenged and set aside the determination of generic tariff for non-fossil fuel-based cogeneration projects at Rs. 4.99/unit. Since the Commission had found the tariff computed on the basis of principles set out in Section 62 read with RE Tariff Regulations, 2015 at Rs.6.45/unit, the said rate of Rs. 6.45/unit shall be applied as the generic tariff for the said category for the control period in question i.e. FY 2018-19.

26. Ordered accordingly.

27. In terms of above conclusion and directions, the appellant will be entitled to raise invoices for the differential which the beneficiaries of supply by the appellant, in turn, will be duty bound to honour by requisite payment in terms of the respective contractual obligations.

28. The appeal is disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 02ND DAY OF MAY, 2022**

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson