

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 396 OF 2018**

**Dated : 26<sup>th</sup> AUGUST, 2019**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**IN THE MATTER OF :**

1. M/s Arya Energy Ltd.  
Through its Director  
Third Floor, E-14,  
Shyam Plaza, Pandri,  
Raipur – 492 001
  
2. M/s Orient Green Power Co. Ltd.  
Through its Director  
Sigappi Achi Building – 4th Floor,  
No.18/3,Rukmani Road(Marshalls Road)  
Egmore, Chennai – 600 008

**VERSUS**

1. Madhya Pradesh Power Management Company Ltd.  
Through its Chief Manager  
Shakti Bhawan, Rampur, Vidyut Nagar, Jabalpur (M.P.) – 482008
  
2. Madhya Pradesh Electricity Regulatory Commission  
Through its Secretary  
5<sup>th</sup> floor, Metro Plaza,  
E-5, Bittan Market, Bhopal – 462023                      ... Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Ashwin Ramanathan  
Ms. Neha Garg

Counsel for the Respondent(s) : Mr. Nitin Gaur for R-1  
  
Mr. S. Venkatesh, Mr. Somesh  
Ms. Nishtha, Mr. Vikas Maini for R-2

**J U D G M E N T**

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

1. The present Appeal has been filed by M/s Arya Energy Ltd. and M/s Orient Green Power Co. Ltd (hereinafter referred to as the "Appellants") under Section 111 of the Electricity Act, 2003 challenging the Order dated 16.11.2018 passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter called the '**State Commission**') in Petition No. 32 of 2018. By the Impugned Order, the State Commission has dismissed the Petition filed by the Appellants for seeking payment of fixed charges/interest bills in pursuance of the Order dated 29.05.2018 passed by this Tribunal in Execution Petition No. 02 of 2017 and thus, this Appeal.

**2. Brief facts of the case :-**

- 2.1** The Appellants are biomass generating companies in the State of Madhya Pradesh. The Appellant No. 1 – M/s Arya Energy Ltd. is a developer which has set up a 12 MW biomass based plant in District Annuppur in Madhya Pradesh. The Appellant No. 2 - M/s Orient Green Power Limited is a company incorporated under the Companies Act, 1956 which has set up a 10 MW biomass based power plant in District Narsinghpur in the State of Madhya Pradesh.
- 2.2** The Respondent No. 1 – Madhya Pradesh Power Management Co. Ltd. (hereinafter referred to as “**MPPMCL**”) is a fully owned company of the Government of Madhya Pradesh and entrusted for procurement of power for three Distribution companies of the State viz. Madhya Pradesh.
- 2.3** The Respondent No. 2 – Madhya Pradesh Electricity Regulatory Commission (hereinafter “**State Commission**”) is the Regulatory Commission for the State of Madhya Pradesh exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

**3. Questions of Law:**

The Appellants have raised followed questions of law:

- 3.1** Whether the State Commission has correctly interpreted the Order of the Hon'ble Supreme Court dated 26.04.2018 in Civil Appeal No. 4550-4551 of 2017 and the Order of this Tribunal dated 29.05.2018 in Execution Petition No. 02 of 2017?
- 3.2** Whether anywhere in the country, any Electricity Regulatory Commission has applied the merit order dispatch on the total tariff?
- 3.3** Whether the State Commission, being an expert regulator can proceed in a totally illogical manner and refuse to follow its own Scheduling and Dispatch Code which applies the merit order on variable costs only?
- 3.4** Whether the State Commission has correctly decided the principle of application of MOD on the biomass projects of the Appellants?
- 3.5** Whether any plant anywhere in the country is subjected to merit order dispatch principle without being paid at least its fixed costs / capacity charges?

**4. Smt. Swapna Seshadri, learned counsel appearing for the Appellants has filed the written submissions for our consideration as under:-**

**4.1** The appeal is against the Order dated 16.11.2018 passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter called the 'State Commission') in Petition No. 32 of 2018. By the Impugned Order, the State Commission has dismissed the Petition filed by the Appellants for seeking payment of fixed charges/interest bills in pursuance of the Order dated 29.05.2018 passed by this Tribunal in Execution Petition No. 02 of 2017.

**4.2** The finding of the State Commission in the Impugned Order is as under –

*“12. Having heard the petitioners and the respondent and on considering their written submissions, the Commission is of the view that:*

- i. The petitioners have mentioned in their petition that consequences of MOD has not been dealt by the Hon'ble Supreme Court in its order dated 26.04.2018. Having signed the PPA on 18.01.2016 by the petitioner no. 2 with MPPMCL and having agreed to for MOD vide clause 5.1 of the PPA and for single part tariff as per clause 7.1, where single part tariff for 20 years is shown in the table, the petitioner no.2 has no ground to question the consequences of MOD or of single part tariff. Both things have been agreed between the petitioner*

*no.2 and the respondent and finalized in the form of PPA on 18.01.2016. The Supreme Court in its order dated 26.04.2018 has also stated that having signed the PPA, the tariff order has now become final between the parties to the agreement, which provides for single part tariff.*

- ii. Similarly, the LOI dated 11.10.2013 issued by the MPPMCL to the petitioner no. 1 also confirmed the single part tariff and the operation of MOD along with other terms and conditions requesting to acknowledge the receipt and acceptance of rate and terms and conditions. Based on the aforesaid LOI, the petitioner has raised the bills towards supply of power to the MPPMCL. As such, the petitioner no.1 has no ground to question the consequences of MOD or of single part tariff. Both things have been agreed between the petitioner no.1 and the respondent through LOI.*
- iii. Since the two-part tariff cannot be applicable in these cases, hence there cannot be any justification for claiming the fixed charges and consequential interest by the petitioners.*

*13. In view of above, the Commission does not find any merit in this petition in light of the judgment of the Hon'ble Supreme Court issued vide order dated 26.04.2018 in Civil Appeal No. 4550 – 4551 of 2017. Therefore, the petition no. 32/2018 stands disposed of.”*

**4.3** The main issue to be decided is whether the Appellants can be denied the payment of fixed charges when the MOD is applied. The Appellants are biomass generating companies in the State of Madhya Pradesh. The State Commission has erred in not allowing the payment

of fixed charges to the Appellants in contravention of the intent of the Order of this Tribunal dated 29.05.2018 in Execution Petition No. 02 of 2017. Because of the Impugned Order, the Appellants have been put under grave financial prejudice as the plants of the Appellants have been declared as NPA.

- 4.4** The matter in issue is with regard to the consequences of imposition of the Merit Order Dispatch (MOD) by MPPMCL on the biomass generating plants of the Appellants from 17.01.2017 onwards when MPPMCL had stopped scheduling the power from the Appellants' projects by applying MOD erroneously and the plants had to shut down.
- 4.5** The present issue has arisen after 5 rounds of litigation regarding applicable tariff for the sale of power from the biomass generating units of the Appellants to MPPMCL and has attained finality up to the Hon'ble Supreme Court.
- 4.6** It is pertinent to mention that the issue of what would be the consequence of imposition of merit order dispatch has not been either raised or decided in any of the proceedings before the State

Commission or the Appellate Tribunal or the Hon'ble Supreme Court prior to the Impugned Order. This is because MPPMCL continued to give schedule and take power from the biomass plants of the Appellants till 17.01.2017. It was only after this date when Appeal No. 338 of 2016 against the Order dated 30.11.2016 was pending before the Tribunal that the Merit Order Dispatch was applied by MPPMCL.

**4.7** Since the Tribunal in the Judgment dated 20.03.2017 had set aside the conditions imposed by the State Commission in the Order dated 30.11.2016 including the condition of Merit Order Dispatch, the Tribunal never went into the issue of consequence of imposition of Merit Order Dispatch.

**4.8** However, in the Review Order dated 02.08.2017 in the Review Petitions moved by the State Commission and MPPMCL for review of the Judgment dated 20.03.2017, Tribunal held as under –

*“.....we have also noticed that the Review Petitioner in Review Petition No. 4 of 2017 is not even paying the fixed costs.”*

**4.9** The only issue which was contested by MPPMCL in Civil Appeals No. 4550-4551/2017 filed against the Order dated 20.03.2017 passed by this Tribunal in Appeal No. 338 of 2016 and the Order dated



02.08.2017 passed in Review Petition No. 02 of 2017, was whether in terms of the relevant Regulations, Tariff Order dated 02.03.2012 and PPAs, the MOD can be imposed on the Appellants or not.

**4.10** The Hon'ble Supreme Court, vide its Judgment dated 26.04.2018 had allowed the civil appeals only on the issue whether MOD can be applied to the Appellants or not. No ground or issue was raised regarding the consequence of imposition of MOD. One of the reasons given by the Tribunal to hold that MOD cannot be applied was that there is a single part tariff fixed by the State Commission. This is what was not accepted by the Hon'ble Supreme Court in its Order dated 26.04.2018 and the observations in Para 8 of the Order as under have to be read in the above context –

*“8. We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulations, 2010. The fact remains that the said Regulation stands substituted by the MPERC tariff order 2012 and thereafter in the PPA it was agreed that clause 8.10 of the Tariff Order as amended on 03.05.2013 will apply. The said tariff order has now become final between the parties to the agreement which provides for single part tariff. Thus, the findings of two part tariff cannot be sustained. We are unable to uphold the findings that clause 8.10 of the tariff order dated 02.03.2012 will not apply in these circumstances.*

*9. Accordingly, we set aside the impugned order and restore the order of the MPERC dated 30.11.2016 insofar as condition (b) of*

*Para 15 quoted above is concerned. The remaining conditions will remain unaffected.*

*10. The appeals are, accordingly, disposed of.*

*11. Pending execution application(s) may now be decided in accordance with law.”*

**4.11** The Hon'ble Supreme Court had upheld the single part tariff and has set aside the finding of this Tribunal with regard to the application of MOD on the Appellants' projects. These two findings are independent of each other and the consequences of application of MOD have nowhere been discussed by the Hon'ble Supreme Court.

**4.12** The main reason given by the State Commission in the Impugned Order is that the Appellant is not entitled to the fixed charges as the said issue has been adjudicated upon by the Hon'ble Supreme Court. This is an erroneous finding. Had the Hon'ble Supreme Court rejected the claim for fixed charges in the Judgment dated 26.04.2018, there would be no reason for the Tribunal to see merits in the EP No. 2 of 2017 and remand the matter back to the Commission vide Order dated 29.05.2018.

**4.13** The contention of MPPMCL which has been accepted by the State Commission is that a specific finding has been returned by the Hon'ble Supreme Court in the Order dated 26.04.2018 on the entitlement of the Appellant to fixed charges. This is absolutely incorrect and misleading. This was never the issue before the Hon'ble Supreme Court. MPPMCL by misinterpreting the Order of the Hon'ble Supreme Court has denied the fixed costs to the Appellants.

**4.14** The entire purpose of application of MOD is to avoid the variable costs and MOD is applicable only if the fixed and variable costs of generation are known. Even the State Commission being a regulatory body has not appreciated the principles of application of MOD and has given a perverse finding to reject the claim of the Appellants. The Impugned Order is so illogical that it amounts to something which is unknown to the electricity law i.e application of MOD in a single part tariff regime resulting in denial of fixed charges to the generators being subjected to MOD.

**4.15** It is out of comprehension of the Appellants that how can the Appellants be put to such injustice and financial crisis in contravention to the settled principles of electricity law.

**4.16** Neither the PPAs, nor the Tariff Orders nor the Renewable Energy Regulations notified by the State Commission deal with the consequences and how to apply merit order dispatch principles on the Appellants. However, the State Commission has notified the MPERC Balancing and Settlement Code, 2015 which provides as under –

*5 (3) Merit Order Operation: Discoms or Madhya Pradesh Power Management Company Limited on behalf of Discoms (on receipt of requisition from Discoms) will give their requisitions on day ahead and real time basis as per individual Merit Order i.e. in ascending order of the cost of energy (i.e. variable cost) of Inter State Generating Station, State Area Generating Station excluding Hydro Power Stations, Independent Power Producer and other Long Term, Medium Term Open Access and intra state short term Open Access allocated to individual Discom /Madhya Pradesh Power Management Company Limited.*

*7 (3) Discoms (through Madhya Pradesh Power Management Company Limited) shall pay to the respective State Area Generating Station/Independent Power Producers Capacity Charges corresponding to Plant Availability and Energy Charges for the Scheduled Despatch (on ex-Power Plant basis), as per the relevant notifications and orders of Madhya Pradesh Electricity Regulatory Commission. The bills for these charges shall be issued by the respective State Sector Generating Station to each Discom (through Madhya Pradesh Power Management Company Limited) on monthly basis.*

**4.17** The principle for applicability of Merit Order is that it would apply when there is a two part tariff. When there is a single part tariff, as in this case, the same also has been derived by clubbing the fixed cost component and the variable cost component. Therefore, it is just a matter of computation for the State Commission / MPPMCL to segregate the fixed costs from the single part tariff and pay the same to the Appellants as their rightful entitlement on being subjected to MOD.

**4.18** In the Order dated 02.03.2012, the State Commission had decided the Tariff Design on determination of tariff for biomass power procurement as being two part. The fixed charge component was determined by the State Commission in the Tariff Order dated 02.03.2012 at Rs. 1.87 per kWh. The said fixed charges of Rs 1.87/KwH as determined by the State Commission itself way-back in the year 2012 and on the same principle, the Appellants had calculated the claimed fixed charge component. The Appellants are not even seeking a re-determination or any enhanced fixed costs.

**4.19** The concept of merit order is that among the various competing generating sources, the most efficient and cheapest source of power is to be chosen since this would be a prudent practice. The genesis of the principle of merit order is in the Availability Based Tariff (**ABT**) introduced by the Central Electricity Regulatory Commission (**CERC**) Order dated 04.01.2000. The Appellants crave leave to refer to the contents of the Order dated 04.01.2000 during the course of hearing.

**4.20** The concept of merit order dispatch in the Electricity Sector across all regulators is as under –

- i. The concept of merit order is that among the various competing generating sources, the most efficient and cheapest source of power is to be chosen since this would be a prudent practice.
- ii. In the merit order, a list is made of the variable costs of all the generating sources. This is because the purchasing entity has to in any case pay the fixed costs of such generating sources. Once the fixed costs are paid, the purchasing entity can decide as to which sources of power to schedule and which not to.

- iii. This is because a source having a cheaper variable cost can be purchased as compared to another more expensive source. The merit order principle can be applied only if the fixed and variable costs of all the generating sources are known.

**4.21** The State Commission has wrongly held that since the Appellants had accepted the application of MOD in the single part regime, the Appellants are not entitled to the consequence of MOD i.e the fixed charges.

**4.22** The tariff for the biomass power projects was determined vide Tariff Order dated 02.03.2012 passed by the State Commission. In the said Order, a two part tariff was determined with fixed and variable costs. The said tariff design was changed in the tariff Order dated 03.05.2013 wherein single part tariff was introduced. However, the single part tariff was arrived at by merely clubbing the fixed costs and variable costs. The same tariff design has continued in the subsequent tariff Orders with the tariff being a summation of the fixed costs and the variable costs. Therefore, the contention of MPPMCL that the Appellants

cannot seek fixed charges when MOD has been applied by considering total tariff as a variable cost and fixed cost as “0” in single part tariff regime is misconceived and the said stand is taken by MPPMCL to just wriggle out of its obligations to pay the fixed charges to the Appellants even though it is just a matter of computation to allow the Appellants the consequences of application of MOD.

**4.23** The State Commission itself has followed the above principle while deciding the tariff for two other biomass plants in the State of Madhya Pradesh, namely it has culled out the fixed cost from the single part tariff. The following orders are relevant on this aspect –

**Order dated 20.11.2013 in Petition No. 49/2013 – M/s ASN Industries Ltd v MPPMCL**

*Regarding determination of tariff for this project, the Commission is of the view that since the plant was commissioned on 08.12.2011, the fixed cost as computed in the tariff order dated 07.08.2007 would be applicable. In the order dated 30.08.2013, the Commission appreciated the difficulty of the petitioner in view of the wide variation in the fuel cost making tariff unviable given to the petitioner vide order dated 07.08.2007. The fuel cost, being a variable factor depends on prevailing biomass price. Therefore, the biomass price shall be applicable as considered in the Commission’s order dated 03.05.2013 for the FY 2013-14 and onwards. Accordingly, the year wise tariff w.e.f. FY 2013-14 for the balance period of project life works out to as under:*



*The Commission directs the respondent to enter into PPA with the petitioner for balance life of the project at the aforesaid tariff. The Commission also directs the petitioner to clear the dues outstanding against the permanently disconnected HT connection before execution of PPA with the respondent.*

**Order dated 08.02.2016 in Petition No. 58/2015 – Shalivana Green Energy Pvt. Ltd v MPPMCL**

*“9. The Commission has noted that though the tariff order dated 02.03.2012 as amended on 03.05.2013 provides that the tariff is applicable from the date of commissioning of the project, but in the instant case, the plant was ready for commissioning within the control period of the tariff order dated 07.08.2007 but actually commissioned in the financial year 2015-16. Therefore, in the interest of justice to both the petitioner and the respondent no.1, it would be appropriate that the fixed charges may be allowed as per tariff order dated 07.08.2007 which was applicable for the projects commissioned before 02.03.2012. In view of the above facts and to prevent the abuse of the process of the Commission, it is necessary to invoke inherent powers of the Commission under clause 46(1) of the MPERC (Conduct of Business) Regulations, 2004 to decide the applicability of tariff in the instant case. Therefore, the Commission decides to allow fixed charges based on the tariff order dated 07.08.2007. Also, as the Commission already decided vide order dated 13.08.2015 to continue the same tariff for the projects commissioned during FY 2014-15 & 2015-16 as determined for the projects commissioned during the FY 2013-14, the variable charges may be allowed based on the order dated 03.05.2013 as determined for FY 2013-14 as follows:*

Fixed tariff		(Tariff @ Rs./unit)								
Year	1	2	3	4	5	6	7	8	9	10
Tariff	1.91	1.87	1.83	1.79	1.75	1.72	1.68	1.65	1.62	1.58
Year	11	12	13	14	15	16	17	18	19	20
Tariff	1.19	1.22	1.26	1.29	1.33	1.37	1.41	1.46	1.50	1.55

Variable tariff										
Year	1	2	3	4	5	6	7	8	9	10
Tariff	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38	4.60	4.83
Year	11	12	13	14	15	16	17	18	19	20
Tariff	5.07	5.32	5.59	5.87	6.16	6.47	6.79	7.13	7.49	7.86

Total tariff										
Year	1	2	3	4	5	6	7	8	9	10
Tariff	5.02	5.14	5.26	5.39	5.53	5.69	5.85	6.03	6.22	6.41
Year	11	12	13	14	15	16	17	18	19	20
Tariff	6.26	6.54	6.85	7.16	7.49	7.84	8.20	8.59	8.99	9.41

*10. The Commission, therefore, directs the respondent no.1 to make the payment accordingly as above from the date of actual commissioning of the project i.e.12.06.2015. The Commission is also constrained to note that the respondent no.1 was issuing Letter of Intent to the petitioner from time to time at its requests without critically examining the current status of the project. The Commission, therefore, directs the respondent no.1 to take necessary action in future while issuing Letter of Intent in such cases.”*

**4.24** The two part tariff and single part tariff is only a manner of billing. If there is a two part tariff, the generator will bill the fixed costs on the basis of availability and the variable costs on the basis of energy supplied. In the case of single part tariff, the entire billing will be done for the units supplied on one tariff.

**4.25** For ready reference, the bills raised by generators on two part tariff basis to MPPMCL, namely Jaypee Nigrie and Jhabua Power and in

contrast, the bills raised by the Appellants have been placed along with the rejoinder. The Appellants crave leave to refer to the same.

**4.26** Every Electricity Regulatory Commission applies merit order dispatch only on the basis of variable charges.

**4.27** Further, the Central Electricity Regulatory Commission (CERC) in its Order dated 01.03.2018 with regard to determination of generic tariff for all renewable energy sources has held as under –

***“TARIFF STRUCTURE***

*4. Clause (1) of Regulation 9 of the RE Regulations stipulates that the tariff for RE projects shall be single part tariff consisting of the following fixed cost components:*

- a. Return on equity;*
- b. Interest on loan capital;*
- c. Depreciation;*
- d. Interest on working capital;*
- e. Operation and maintenance expenses;*

*For renewable energy technologies having fuel cost component, such as biomass power projects and non-fossil fuel based cogeneration, single part tariff with two components i.e. fixed cost component and fuel cost component, is to be determined.”*

**4.28** The capacity of Appellant No. 1's biomass plant is 12 MW and that of Appellant No. 2 is 10 MW. The ARR of MPPMCL is Rs. 30,000 crores. The fixed costs to be paid for the 2 generators works out to Rs. 26 crores on an annual basis. The total energy being generated from both these units works out to 150 MUs as compared to 65000 MUs which is the annual requirement of MPPMCL. Even if full schedule is given to the units, the impact of tariff on the ARR of MPPMCL will be very less. Further, if only the fixed charges are paid, the impact will be even lesser i.e. of 0.005 paise per unit. In the circumstances, the State Commission is only punishing the Appellants for getting its Tariff Order repeatedly set aside before this Tribunal. The actions of the State Commission and MPPMCL have driven the Appellants to becoming NPAs.

**4.29** The other erroneous finding of the State Commission is that Appellant No. 1 – Arya Energy Limited has no PPA with MPPMCL but only an LOI. In this regard, following facts are brought out:-

- i. Arya Energy wrote to the MPPMCL on several occasions to enter into the PPA but there was no response from the MPPMCL.

- ii. On a real time basis, from the COD of the plant on 31.05.2013, the Arya Energy generated and supplied electricity to the MPPMCL on month to month basis and till 17.01.2017.
- iii. When the matters stood thus, the MPPMCL vide letter dated 16.11.2016 unilaterally terminated the LOI effecting from 30.11.2016.
- iv. Against the illegal termination of the LOI, the Arya Energy approached the Hon'ble High Court of Madhya Pradesh at Jabalpur by filing Writ Petition No, 19772/2016. The Hon'ble High Court, vide Order dated 05.12.2016, stayed the termination and directed the MPPMCL to act on the letters of the Arya Energy.
- v. Thereafter, a draft PPA was sent by the MPPMCL to the Arya Energy vide the letter dated 04.01.2017. In the said PPA, the plant of the Arya Energy had been subjected to conditions in deviation of the Tariff Orders in force having been passed by this Tribunal and the State Commission and contrary to the understanding under the LOI.
- vi. In protest, the Arya Energy wrote letters dated 13.01.2017, 17.01.2017 and 18.01.2017.

- vii. In response, the MPPMCL vide letter dated 17.01.2017 took the position that no clause is negotiable and the draft copy is the only approved format of PPA.
- viii. Arya Energy was then constrained to execute the PPA under protest on 18.01.2017. The PPA signed on 18.01.2017 was however not released to the Arya Energy.
- ix. When the matters stood thus, the MPPMCL once again vide letter dated 28.02.2017 arbitrarily terminated the LOI with effect from 14.01.2017 stating that the Arya Energy had not come forward to sign the PPA.
- x. The above termination was challenged by the Arya Energy before the Hon'ble High Court by filing Writ Petition 3819 of 2017.
- xi. By the Order dated 15.05.2017 in WP 3819 of 2017, the Hon'ble High Court has set aside the termination and has restored status quo ante and revived the Letter of Intent. The SLP against the Order dated 15.05.2017 is pending before the Hon'ble Supreme Court.
- xii. A perusal of the Termination Letter dated 28.02.2017 states that the only reason for termination of the LOI is that the Arya Energy

did not come forward to sign the PPA till seven days from the MPPMCL's letter dated 04.01.2017. However, the parties actually signed the PPA on 18.01.2017. Therefore, the period of seven days was not mandatory.

- xiii. Even after signing the PPA on 18.01.2017, the MPPMCL did not release the same to the Arya Energy since it wanted some approval from the State Commission. This being the case, there was no basis for MPPMCL to terminate the LOI since the PPA was not signed within 7 days from 04.01.2017.

**4.30** The issue of PPA had been discussed and findings rendered by this Tribunal both in the Judgment dated 20.03.2017 and the Review Order dated 02.08.2017 which have achieved finality right upto the Hon'ble Supreme Court. The relevant findings of this Tribunal are as under –

*“17.20 The State Commission's contention that the tariff shall be applicable for the projects for which PPA has been executed at the time of commissioning of the projects has no meaning as the Respondent No. 2 is unable to finalize the draft copy of the PPA to enter into PPA with the biomass generators at the time of taking of power from the Appellant's projects. Further, as per the submissions of the Appellants, the Appellant No. 3 Arya Energy Limited approached the Hon'ble High Court of Jabalpur which stayed the termination of Lol and directed Respondent No.2 to act on the letters of the appellant No.3 and disposed of the writ petition on 30.11.2016 directing the Respondent No. 2 to take a decision on the PPA execution. As per the*

*directions of the High Court of Jabalpur, draft PPA was sent to the Appellant on 04.01.2017 by the Respondent No. 2 and appellant, Arya Energy Limited executed PPA under protest on 18.01.2017.”*

**4.31** This Tribunal in the Review Order dated 02.08.2017 held as under:-

*“11. An issue is raised by Review Petitioner in Review Petition No.4 of 2017 that there is no PPA between it and Arya Energy Limited whereas this Tribunal has recorded in paragraph 17 that a PPA has been entered into under protest. Mr. Ramachandran, counsel for Respondent No.1 contended that this stand of the Review Petitioner lacks bonafides and is not only incorrect but also misleading.*

*12. It is pointed out that Arya Energy Limited was supplying power to the Review Petitioner under Lols dated 19/09/2013 and 11/10/2013 which was to operate till a PPA is entered into between the parties. Despite several letters, the Review Petitioner could not give a draft PPA to Arya Energy.*

*13. The Review Petitioner vide letter dated 16/11/2016 unilaterally terminated the Lol effectively from 30/11/2016. This was the date of the impugned Tariff Order. Arya Energy approached the High Court of Jabalpur which stayed the termination and directed Oriental Green Power Co. Ltd. to act on the letters of Arya Energy. Thereafter, a draft PPA was sent vide letter dated 14/01/2017 by MPPMCL. In protest, Arya Energy wrote letters dated 17/01/2017 and 18/01/2017 raising the issue of merit order dispatch along with other issues. In response, the Review Petitioner vide letter dated 17/01/2017 took the position that no clause is negotiable and Arya Energy executed the PPA under protest on 18/01/2017. When the matters stood thus, the Review Petitioner (MPPMCL) once again vide letter dated 28/02/2017 terminated the Lol with effect from 14/01/2017 stating that Arya Energy had not come forward to sign the PPA, which was challenged by Arya Energy before*



*the High Court. By order dated 15/05/2017, the High Court set aside the termination and has restored status quo ante and revived the Lol.*

*14. The Review Petitioner (MPPMCL) signed the PPA with Arya Energy on 18/01/2017 and suddenly decided to approach the State Commission. According to Respondent No.1, the general condition mentioned in paragraph 15(e) of the Oder dated 30/11/2016 as upheld by this Tribunal in the judgment under review does not even apply to the Respondents and is for future projects to be commissioned in the State of Madhya Pradesh. According to Respondent No.1, the tariff was settled by this Tribunal and the plant of Arya Energy is already commissioned and, therefore, the above condition (e) is not applicable to Arya Energy. The Merit Order Dispatch has been set aside by this Tribunal. We find substance in this submission of Respondent No.1.”*

**4.32** MPPMCL itself before the Hon’ble High Court of Jabalpur in Writ Petition No. 3819 of 2017 has stated as under –

*“Thereafter, the draft PPA was signed by authorized signatory of the Petitioner on 18/01/2017 and the same was to be signed by the authorized signatory of the answering respondent. While signing the draft PPA, the signatory of the answering respondent was faced with the difficulty as to why was the Petitioner raisin multiple questions on various clauses of the draft PPA and requesting for their amendment and repeatedly changing their stand?”*

*Thus, the answering respondent signed only one of the two copies of the draft PPA, and it was decided to obtain clarification from the Electricity Regulator i.e the Madhya Pradesh Electricity Regulatory Commission (“MPERC”) regarding the applicable tariff etc., and approval of draft PPA for execution with Arya Energy.”*

**4.33** In terms of the above, it is prayed that this Tribunal may kindly direct MPPMCL to release the PPA signed on 18.01.2017 to Arya energy without any further delay.

**4.34** The appeal deserves to be allowed and the Impugned Order of the State Commission is liable to be set aside. MPPMCL needs to be directed to pay the fixed costs to the Appellants for the period from 17.01.2017 along with the delayed payment surcharge of @ 1.25% per month. The relevant clause of the LOI dated 11.10.2013 of Arya Energy Limited reads as follows -

*“2(e) Surcharge for Late payment – A surcharge of 1.25% per month shall be payable by MPPMCL on the amount outstanding after the 30<sup>th</sup> day of the receipt of the bill. Surcharge shall be calculated on day to day basis.”*

The relevant clause of the PPA executed by Orient Energy Limited reads as follows:

*“7.6.4 In case the Procurer makes full payment within 15 days from the date of submission of bill by Seller, an incentive @ 1% of billed amount shall be allowed by the Seller towards prompt payment. In case of delay beyond the 30 days payment period, the Procurer will pay delayed payment penalty on outstanding amount at the rate of 1.25% per month or part thereof.”*

5. **Shri Nitin Gaur, learned counsel appearing for the Respondent No. 1/ MPPCL has filed the written submissions for our consideration as under:-**

**A. Submissions on maintainability of appeal (res-judicata):**

5.1 The instant Appeal is filed against the order dated 16.11.2018 passed by the Respondent no.2 in Petition No. 32 of 2018. The petition no. 32 of 2018 was filed by the Appellants before the Respondent no.2 seeking following relief:-

*“a) Direct the Respondent no.1 to pay the fixed costs bills raised by the Petitioner for the period 17.01.2017 onwards whereby despite the interim order passed by the Tribunal, Respondent no.1 took coercive steps and stopped giving scheduling to the plants of the Petitioner;*

*(b) Further direct Respondent no.1 to apply MOD principal only on variable component of the tariff;*

*(c) Direct the Respondent no.1 to pay delayed payments surcharge @ 1.25% per annum on the above adjudicated fixed cost.”*

5.2 The Appellant in Petition no. 32 of 2018 made a specific averment that the consequence of imposition of merit order dispatch has not been either raised or decided in any of the proceedings before the Commission or the APTEL or the Hon'ble Supreme Court. The Learned Commission vide its order dated 16.11.2018 dismissed the petition holding that Appellants have signed Letter of Intent 'LOI' and PPA with the Respondent no.1 with specific conditions of MOD along

with single part tariff hence there is no ground to question the consequences of MOD or of single part tariff. Hence the Appellants have filed the instant appeal.

**5.3** The issue raised by the Appellants before the State Commission and now before this Tribunal was specifically raised before the Hon'ble Supreme Court in their reply to defend the imposition of MOD with single part tariff. The filing of Petition no. 32/2018 and the present appeal constitutes '*Res-judicata*' as the Appellant is trying to raise and agitate same issues which were raised and considered by the Hon'ble Supreme Court in Civil Appeal no. 4550-4551 of 2017 while holding that MOD will apply with Single Part Tariff.

**5.4** The Respondent no.1 had filed the Civil Appeal no.4550-4551 of 2017 (SLP (c) no. 25150-25151 of 2017) against the order dated 20.03.2017 in Appeal no. 338 of 2016 and Review Petition no. 03 of 2017. The issue before the Hon'ble Supreme Court was whether the plants of the Appellants will be covered under 'Must Run' or 'Merit Order Dispatch' with single part tariff. The Appellants while defending the applicability of Must Run filed reply to the Civil Appeal on 10.10.2017 and stated that the applicability of merit order dispatch principles can only be

when there is a two part tariff, namely fixed charges and variable charges. In the case of the generators there is a single part tariff and merit order dispatch principles are impossible to implement. The Appellants primary arguments to defend the Must Run status was that if the Respondent no.1 stops giving scheduling under the MOD principles then nothing will be paid to the generators. Hence the Appellants were aware of each and every factor arising out of the MOD principles with single part tariff and the same was raised and argued before the Hon'ble Supreme Court. The relevant paragraphs of the reply filed by appellant no.1 and 2 along with other generators dated 10.10.2017 in S.L.P. (c) no. 25150-25151 of 2017 (Civil Appeal no. 4550-4551) is reproduced herein:-

*“16. That the Appellant Tribunal in the Judgment dated 20.03.2017 has only examined the conditions imposed and held that the same are contrary to not just the Regulations framed by the State Commission but also the basic principle of electricity tariff. The applicability of merit order dispatch principles can only be when there is a two part tariff, namely fixed charges and variable charges. In the case of the Answering Respondents there is a single part tariff and merit order dispatch principles are impossible to implement.*

*17. That the concept of merit order is that among the various competing generating sources, the most efficient and cheapest source of power is to be chosen since this would be a prudent practice. The genesis of the principle of merit order is in the Availability Based Tariff (ABT) introduced by the Central Electricity Regulatory Commission*

*(CERC) in its Order dated 04.01.2000. A true copy of the order dated 04.01.2000 passed by the Central Electricity Regulatory Commission, New Delhi is annexed herewith as Annexure R-7 (pages 503-570). The Answering Respondents crave leave to refer the contents of the order dated 04.01.2000 during the course of hearing.*

*19. That therefore, in the merit order, a list is made of the variable costs of all the generating sources. This is because the purchasing entity has to in any case pay the fixed costs of such generating sources. Once the fixed costs are paid, the purchasing entity can decide as to which sources of power to schedule and which not to. This is because a source having a cheaper variable cost can be purchased as compared to another more expensive source. The merit order principle can be applied only if the fixed and variable costs of all the generating sources are known.....*

*22. That the Appellant Tribunal has therefore rightly concluded that in a single part tariff, the merit order dispatch cannot be applied at all. It cannot be that the Petitioner will apply the merit order principle on the Answering Respondents and nothing at all will be paid. Even if for the sake of arguments it is taken that the merit order dispatch principle is applicable, the Petitioner ought to pay the fixed charges to the Answering Respondents.”*

**5.5** The Appellants (herein) further in the Civil Appeal pending before the Hon'ble Supreme Court filed an application to bring on record development and for directions. The Appellants in the said application prayed for exactly similar relief which is sought here and the same is stated as under:-

*“7. That in any event, the application of the Merit Order Dispatch Principle effective 17.11.2017 does not in any manner affect the*

*liability of the Petitioner to pay the fixed charges. The application of the Merit Order Despatch Principle will have the implication of the Petitioner not drawing electricity on account of variable cost but with an obligation to pay fixed charges. The entire Merit Order Despatch Principle is applied based on the extent of the variable charges and considering the binding obligation of the petitioner to pay the fixed charges.*

*10. That further, for the period from 17.01.2017, the petitioner has forcibly shut down the plants of Respondents by applying the Merit Order Dispatch Principle even though there was an interim order of the Appellate Tribunal stating 'No Coercive Steps' in favour of the Respondents. For the period from 17.01.2017, the Petitioner has neither taken the electricity nor paid the fixed charges to the Respondents.*

Prayer

a) Xxx

b) *Direct the petitioner to pay the arrears for the period from 2013 till January 2017 and the fixed costs from January 2017 onwards along with interest of 15% to the Respondents immediately"*

Hence from the above it is evident that the Appellants are raising and agitating the same issues before the State Commission and this Tribunal which have already been raised, agitated and decided by the Hon'ble Supreme Court in its Judgment dated 26.04.2018 and the same amounts to Res-judicata.

**5.6** The Appellants have stated that the Hon'ble Supreme Court did not deal/consider the submissions in the Judgment dated 26.04.2018 which is totally incorrect as the same was considered and the final order of MOD with Single Part Tariff was passed by the Hon'ble

Supreme Court. It is submitted that if the Appellants feel the issue was not considered by the Hon'ble Supreme Court, then a review petition could only be filed before the Hon'ble Supreme Court raising these issues and no other court or commission could have entertained the same or the same cannot be collaterally challenged. The Hon'ble Supreme Court in the Judgment of "*Omprakash Verma and Others vs. State of Andhra Pradesh & Others*" reported in (2010) 13 SCC 158, while dealing with the issue of pleadings and averments made but not considered, in para 70 stated as under:-

*"70, This Court has approved this well-settled principle that a Judgment of the Supreme Court cannot be Collaterally challenged on the ground that certain points had not been considered. This Court in Anil Kumar Neotia v. Union of India held that it is not open to contend that certain points had not been urged or argued before the Supreme Court and thereby seek to reopen the issue....."*

Xxx

Xxx

*71. In Palitana Sugar Mills (P) Ltd. v. State of Gujarat this Court reiterated the principle that a judgment if this Court is binding on all and it is not open to contend that the full facts had not been placed before the Court. Para 62 of the judgment reads as follow: (SCC p. 665)*

*"62. It is well settled that the judgments of this Court are binding on all the authorities under Article 141 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and/or the Judgment of this Court in the earlier*



*proceedings had only collaterally or incidentally decided the issue.”*

72. In *A.V. Papayya Sastry v. Govt. of A.P.* this Court observed as under: (SCC p. 236, para 38).

*“38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a Competent Court of Law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special leave petition but after granting leave decided the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order”.*

**5.7** The Hon'ble Supreme Court in the case of *“South Central Railways Employees Cooperative Credit Society Employees Union vs. B. Yashodabai and Others”* reported in 2015 2 SCC 727 has held as under:-

*“15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when C.A. No.4343 of 1988 was decided. If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that*

*ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the Subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India.*

*16. We do not want to go into the arguments advanced by the learned counsel appearing for the respondents before the High Court for the simple reason that it was not open to them to advance any argument which would run contrary to the judgment delivered by this Court in South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies. In our opinion, the High Court did something which would be like setting aside a decree in the execution proceedings."*

Therefore on the basis of above the Appeal deserves to be dismissed as the issues cannot be raised again before the State Commission or this Tribunal which was urged and decided by the Hon'ble Supreme Court.

**B. SUBMISSION ON MERITS**

**5.8** The two part tariff as granted in the tariff order dated 02.03.2012 was converted into single part tariff by order dated 03.05.2013. The Appellants never challenged the concept of single part tariff in any of four appeals filed by them against the amended tariff before this Tribunal. The appellant no.1 and the appellant no.2 on the one hand were fighting for Must Run principle for their biomass based power plant but on the other hand very consciously entered into a PPA dated

18.01.2016 (appellant no.2) and LOI dated 11.10.2013 with conditions of MOD with single part tariff where the applicable tariff was of order dated 03.05.2013. The Appellants therefore loose all rights to contest the consequences of MOD with single part tariff as the same has been mutually agreed between the parties and as rightly held by the State Commission in its order dated 16.11.2018 that since the two part tariff cannot be applicable in these cases, hence there cannot be any justification for claiming the fixed charges and consequential interest by the appellants. The Appellants after getting into contract cannot agitate for the change or amendment of the conditions of the PPA which will be deterrent to the Respondent no.1 who has to protect the interest of the consumer.

- 5.9** The Hon'ble Supreme Court while dealing with the issue of sanctity of PPA (contract) between the parties in the judgment of "*Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited and Another*" reported in (2017) 16 SCC 498 has held as under:-

*"68. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word 'tariff' has not been defined in the Act. Tariff means a schedule of standard/prices or charges provided to the category or categories for*

*procurement by the licensee from the generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Section 61(a) to (i), the State Commission determines the tariff rate for various categories including solar power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order, 2010 is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, Respondent no.1 is bound by the terms and conditions of PPA entered into between Respondent 1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties.”*

**5.10** The Respondent no.1 since the commissioning of the plants has procured power when required in terms of the PPA and LOI i.e. MOD with Single Part Tariff. The Respondent no.1 has paid payments for the power procured as per tariff order dated 03.05.2013 which is single part tariff and after February, 2017 the Respondent no.1 who is not legally bound to procure energy from the Appellants as other cheaper sources were available did not make any payments. The Appellants cannot demand payment in a situation when no power is purchased by the Respondent no.1. The Appellants are totally aware of this fact as they have mutually agreed in the PPA and LOI. Therefore any change in the condition of the PPA on the basis of change in tariff payment will affect the contract between the parties and the parties to

the contract shall have complete right and freedom to either to novate the new conditions or exit from its contractual obligations.

**5.11** The conduct of the appellants has to be seen before any relief is granted to them. The Appellants on the one hand enter in to a contract on specific conditions and later on move before State Commission for alteration of those conditions which existed prior to execution of the LOI and PPA. The appellants are completely at their will to terminate the contract if they have failed to make a prudent decision while entering the same and sell power in open market on any rate suitable to them as the Respondent no.1 supreme duty is to protect the interest of its consumers who will have to buy expensive power in case the demands of the Appellants are allowed. It is lastly submitted that the Appellants were aware of every situation and when they did not get relief from the Hon'ble Supreme Court has come up with the issue of consequences of MOD with Single Part Tariff where the same was under consideration before the Hon'ble Supreme Court which was the only basis of defence by the Appellants for implication of Must Run, which was rejected by the Hon'ble Supreme Court.

**5.12** On the basis of the submissions made above the appeal of the Appellants deserves to be dismissed.

**6. We have heard learned counsel appearing for the Appellants, learned counsel for the Respondent No.1 at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeals for our consideration:-**

**Issue No.1:** Whether as per the Order of the Hon'ble Supreme Court dated 26.04.2018 in Civil Appeal No. 4550-4551 of 2017, the Appellants are prohibited from claiming fixed charge component when MOD is applied to them?

**Issue No.2:** Whether the Respondents have correctly applied MOD principles as per the regulatory framework in the instant case on both the appellants?

**Issue No.3:** Whether the single part tariff determined by the State Commission prohibits the Appellants from claiming fixed charges component when MOD is applied and what relief are the appellants entitled to?

**Issue No.4:** Whether the Appellant No. 1 has a valid PPA with the Respondent No. 1?

**OUR ANALYSIS AND FINDINGS:**

**7. ISSUE NO.1:-**

**7.1** The State Commission in the Impugned Order has proceeded on the basis that in the Judgment dated 26.04.2018 in Civil Appeal No. 4550-4551 of 2017, Hon'ble Supreme Court has denied the right to claim the fixed charge component to the Appellants when MOD is applied to them. We have perused the judgment dated 26.04.2018 passed by the Hon'ble Supreme Court carefully and we quote below the portions being relied on by the Respondents to contend that fixed charge component have been denied to the Appellants by virtue of the said Order –

*“7. We have heard learned counsel for the parties on the correctness of the issue whether the principle of MR will apply or of MOD in relation to respondents 2,3 and 4 having regard to the agreement with the said parties.*

*8. We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulations, 2010. The fact remains that the said Regulation stands substituted by the MPERC tariff order 2012 and thereafter in the PPA it was agreed that clause 8.10 of the Tariff Order as amended on 03.05.2013 will apply. The said tariff order has now become final between the parties to the agreement which provides for single part tariff. Thus, the findings of two part tariff cannot be sustained. We are unable to uphold the findings that*

*clause 8.10 of the tariff order dated 02.03.2012 will not apply in these circumstances.*

*9. Accordingly, we set aside the impugned order and restore the order of the MPERC dated 30.11.2016 insofar as condition (b) of Para 15 quoted above is concerned. The remaining conditions will remain unaffected.*

*10. The appeals are, accordingly, disposed of.”*

Thus, the Hon'ble Supreme Court has only restored Condition (b) from the Order dated 30.11.2016 of the State Commission which Condition reads as under –

*“b) The project for more than 2 MW are subjected to the ‘scheduling’ and ‘merit order dispatch principles’ in terms of para 8.10 of the tariff order dated 02.03.2012 since the date of commissioning.”*

**7.2** The findings of the Hon'ble Supreme Court have to be read in context of the issue placed before it. The only issue which the Hon'ble Supreme Court was dealing with was, whether, as per the existing Regulations, Orders of the State Commission and Agreement between the parties, the Appellants could claim Must Run (MR) Status or would be subjected to MOD. Since one of the reasons given by this Tribunal for application of MR principle was that there was a single part tariff, the Hon'ble Supreme Court has observed that the *“findings of two part tariff cannot be sustained”*. However, we are of the considered opinion



that the Hon'ble Supreme Court has not dealt with the consequences of application of MOD on single part tariff in the above Order since this was not an issue in the Appeals at all and the Hon'ble Supreme Court has rightly not touched upon the issues concerning application and modalities of Merit Order Dispatch Process.

**7.3** Further, the Hon'ble Supreme Court was aware of the Execution Petition No. 2 of 2017 pending before this Tribunal in which fixed cost component had been claimed by the Appellants when MOD was applied to them and still, the Hon'ble Supreme Court directed as under –

*“11. Pending execution application(s) may now be decided in accordance with law.”*

Pursuant to the above, when this Tribunal took up the Execution Petition No. 2 of 2017, this Tribunal found merits in the claims of the Appellants but held that since no adjudication had been done on the specific claims for fixed charge component in the earlier rounds of litigation, it would be appropriate for the Appellants to approach the State Commission, which is the court of first instance.

7.4 After the above Order, when the Appellants approached the State Commission for fixed charges, the claim has been rejected holding as under -

*“12. Having heard the petitioners and the respondent and on considering their written submissions, the Commission is of the view that:*

- iv. The petitioners have mentioned in their petition that consequences of MOD has not been dealt by the Hon’ble Supreme Court in its order dated 26.04.2018. Having signed the PPA on 18.01.2016 by the petitioner no. 2 with MPPMCL and having agreed to for MOD vide clause 5.1 of the PPA and for single part tariff as per clause 7.1, where single part tariff for 20 years is shown in the table, the petitioner no.2 has no ground to question the consequences of MOD or of single part tariff. Both things have been agreed between the petitioner no.2 and the respondent and finalized in the form of PPA on 18.01.2016. The Supreme Court in its order dated 26.04.2018 has also stated that having signed the PPA, the tariff order has now become final between the parties to the agreement, which provides for single part tariff.*
- v. Similarly, the LOI dated 11.10.2013 issued by the MPPMCL to the petitioner no. 1 also confirmed the single part tariff and the operation of MOD along with other terms and conditions requesting to acknowledge the receipt and acceptance of rate and terms and conditions. Based on the aforesaid LOI, the petitioner has raised the bills towards supply of power to the MPPMCL. As such, the petitioner no.1 has no ground to question the consequences of MOD or of single part tariff. Both things have been agreed between the petitioner no.1 and the respondent through LOI.*

- vi. *Since the two part tariff cannot be applicable in these cases, hence there cannot be any justification for claiming the fixed charges and consequential interest by the petitioners.*

*13. In view of above, the Commission does not find any merit in this petition in light of the judgment of the Hon'ble Supreme Court issued vide order dated 26.04.2018 in Civil Appeal No. 4550 – 4551 of 2017. Therefore, the petition no. 32/2018 stands disposed of.”*

**7.5** In our view, the State Commission committed an error by holding that a finding has been rendered by the Hon'ble Supreme Court in the Order dated 26.04.2018 on the entitlement of the Appellants to fixed charge component. This is not correct and the State Commission has misinterpreted the Judgment & Order of the Hon'ble Supreme Court to deny the fixed charge component to the Appellants when MOD is applied to them. We have already noted that the Hon'ble Supreme Court was not dealing with the issue of consequence of application of MOD and therefore, could not have rendered any finding on the entitlement of the Appellants to fixed charges component when MOD is applied to them.

**7.6** In view of the above, we hold that the Order of the Hon'ble Supreme Court was confined to the application of MR or MOD and did not

prohibit the Appellants from claiming the fixed charge component if MOD was applied to them.

**8. ISSUE NO.2:-**

**8.1** It is imperative to review the applicable regulations governing Merit Order Dispatch Process in the State of Madhya Pradesh. The concept of the MOD was introduced as a part of Availability Based Tariff Mechanism (“**ABT**”). ABT was envisaged to be implemented as a solution for technical and commercial problems in grid operation in India. In 1993, ABT mechanism was examined and endorsed by the Government of India. In the year, 2000 the Central Electricity Regulatory Commission has issued Order for implementation of ABT. As the name signifies, the major part of payment for the stations’ output in this tariff scheme is based on availability, rather than on installed capacity. Payment under ABT basically comprises of three parts- capacity charge, energy charge and charges for deviation. The capacity charge for time block is paid for the declared MW output capacity of the station for that particular time block. The capacity charge is meant to cover the total fixed cost for the generating station i.e. interest on loan, return on equity, loan repayment provision or depreciation/amortization, fixed O&M Cost, insurance, tax etc. The

Energy Charge is meant to cover the variable cost of the station that is the fuel cost component which goes up with amount of energy generated. Charges for deviation are those charges which are payable in terms of applicable Forecasting and Scheduling Regulation.

- 8.2** Para 5.7.1 (b) of National Electricity Policy, 2005 (“**NEP**”) advised State Electricity Regulatory Commissions to introduce ABT regime at state level. Para 5.7.1 of NEP reads as below:

*The ABT regime introduced by CERC at the national level has had a positive impact. It has also enabled a credible settlement mechanism for intra-day power transfers from licenses with surpluses to licenses experiencing deficits. SERCs are advised to introduce the ABT regime at the State level within one year.*

- 8.3** MPERC placing reliance on the afore stated policy issued MPERC Balancing and Settlement Code, 2015, *which stipulates process of implementation of MOD in the state of Madhya Pradesh.*

Preamble of MPERC Balancing and Settlement Code reads as below:

***Preamble :- The National Electricity Policy (NEP) envisages implementation of the Availability Based Tariff (ABT) at State level to establish a credible settlement mechanism for Intra-day power transfers among Intra-State Entities. As per the Tariff Policy, this framework should be extended to Generating Stations (including Grid connected Captive Plants of capacities as determined by the State Electricity Regulatory Commission). This Code has been specified to***

*give effect to the intentions of Section 5.7.1(b) and (d) of the National Electricity Policy as well as section 6.2(1) and 6.3 of the Tariff Policy. Central Electricity Regulatory Commission has notified Deviation Settlement Mechanism and Related Matters Regulations, 2014 and Central Electricity Regulatory Commission (UL charges and related matters), Regulations, 2009 have been repealed. In view of the aforesaid, the Madhya Pradesh Electricity Balancing and Settlement Code, 2015 are notified.*

- 8.4** Para 5 (3) of the MPERC Balancing and Settlement Code, 2015 (“Settlement Code”) stipulates that MP Power Management Company Limited procure power as per merit order i.e. in ascending order of the cost of energy (i.e. variable cost). Therefore, it is imperative for MPPMCL to demonstrate ascending order of the cost of energy (i.e. variable Cost) of generating stations. It is illegal for MPPMCL to not procure energy without demonstrating ascending order of the variable cost of the generating station.

Para 5 (3) of Settlement Code reads as below:

*“5 (3) Merit Order Operation: Discoms or Madhya Pradesh Power Management Company Limited on behalf of Discoms (on receipt of requisition from Discoms) will give their requisitions on day ahead and real time basis as per individual Merit Order i.e. in ascending order of the cost of energy (i.e. variable cost) of Inter State Generating Station, State Area Generating Station excluding Hydro Power Stations, Independent Power Producer and other Long Term, Medium Term Open Access and intra state short term Open Access allocated to individual Discom /Madhya Pradesh Power Management Company Limited.”*

**8.5** Settlement Code further directs MPPMCL to make payment of the Capacity Charges corresponding to the plant availability and Energy Charges for the Scheduled Dispatch.

*7 (3) Discoms (through Madhya Pradesh Power Management Company Limited) shall pay to the respective State Area Generating Station/Independent Power Producers Capacity Charges corresponding to Plant Availability and Energy Charges for the Scheduled Dispatch (on ex-Power Plant basis), as per the relevant notifications and orders of Madhya Pradesh Electricity Regulatory Commission. The bills for these charges shall be issued by the respective State Sector Generating Station to each Discom (through Madhya Pradesh Power Management Company Limited) on monthly basis.*

**8.6** Bare perusal of the aforestated paras of Settlement Code reflects that it is imperative for MPPMCL to procure electricity from the generation stations by putting them in ascending order of the cost of energy (i.e. Variable cost) and it is mandatory to make payment of capacity charges to generating stations corresponding to plant availability. It is immaterial whether electricity was actually procured by MPPMCL or not for the payment of capacity charges. In view of these facts, it is evident that MOD principles have not been applied correctly by the Respondents for the plants of the Appellants.

**9. ISSUE NO.3:-**

**9.1** The tariff provided in LOI / PPA and subsequent Tariff Order 2016 which is applicable to the Appellants is a single part tariff. The single part tariff consist of two components Fixed Cost Component and Variable Cost component and both the components are payable to the generators for the electricity supplied by them. As per the tariff order of MPERC dated 02/03/2012, the fixed cost component is determined for a period of 20 years at a normative PLF of 80%,which means that if a plant operates at an annual PLF of 80% for 20 years, only then can it recover the entire fixed cost component reflected in tariff. In so far as variable cost component is concerned, the same is recoverable based on actual generation in the relevant year.

**9.2** We note that in the Order dated 02.03.2012, the State Commission has depicted the tariff as a two-part tariff. In the subsequent Orders dated 03.05.2013, 13.08.2015 and 30.11.2016, the tariff design/structure followed by the State Commission was of Order dated 02.03.2012. However, in the computation, the State Commission clubbed the fixed charge component and variable charge component and gave a single part tariff. This tariff design followed by the State



Commission is as per the Central Electricity Regulatory Commission's yearly Renewable Energy Tariff Orders.

**9.3** Here, we note that the Central Electricity Regulatory Commission has been passing yearly Tariff Orders fixing generic tariff for all Renewable Sources of Energy including biomass from the year 2012 onwards. It is relevant to note that even though single part tariff is fixed in these Orders, the single part tariff is nothing but a summation of the fixed charge component and variable charge component. We quote hereinbelow the relevant extracts from the CERC Order dated 01.03.2018 with regard to determination of generic tariff which has settled the position that single part tariff has two components -

***“TARIFF STRUCTURE***

*4. Clause (1) of Regulation 9 of the RE Regulations stipulates that the tariff for RE projects shall be single part tariff consisting of the following fixed cost components:*

- a. Return on equity;*
- b. Interest on loan capital;*
- c. Depreciation;*
- d. Interest on working capital;*
- e. Operation and maintenance expenses;*

*For renewable energy technologies having fuel cost component, such as biomass power projects and non-fossil fuel based cogeneration, single part tariff with two components i.e. fixed cost component and fuel cost component, is to be determined.”*

- 9.4** The above is also true for all the Renewable Energy Tariff Orders passed by the CERC from the year 2012 onwards. Further, the State Commission itself has passed two earlier Orders dated 20.11.2013 and 08.02.2016 for other biomass plants in the State of Madhya Pradesh, by culling out the fixed cost component and the variable cost component from the single part tariff.
- 9.5** MPPMCL has also not produced the details of any other plant in M.P. or elsewhere from which it is purchasing power, applying the MOD and not paying the fixed charge component. The State Commission itself has recognized the principle of MOD in the Balancing and Settlement Code which is binding on all the parties including MPPMCL.
- 9.6** From all of the above, we can clearly conclude that the two part tariff as well as the single part tariff have the very same components, i.e. the fixed charge component and variable charge component. While in the Order dated 02.03.2012, the tariff was depicted as a two-part tariff, in the subsequent Orders dated 03.05.2013, 13.08.2015 and 30.11.2016, the fixed cost component and the variable cost component has been

clubbed and depicted as a single part tariff. Therefore, there is no embargo or difficulty in finding and paying the fixed cost component to the Appellants while MOD is applied on them even with a single part tariff.

**9.7** Having held as above, we now have to answer the question as to what fixed cost component must be paid to the Appellants when MOD is applied to them. We note that the State Commission has culled out the Variable Cost Component out of the single part tariff in Order dated 03.5.2013 to the other biomass based power plants within the state in its other Orders as under –

**ORDER DATED 20.11.2013 IN CASE OF ASN INDUSTRIES**

*“The fuel cost, being a variable factor depends on prevailing biomass price. Therefore, the biomass price shall be applicable as considered in the Commission’s order dated 03.05.2013 for the FY 2013-14 and onwards. Accordingly, the yearwise tariff w.e.f. FY2013-14 for the balance period of project life works out to as under:*

	(Amount in Rs./unit)							
<b>Year</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>	<b>2017-18</b>	<b>2018-19</b>	<b>2019-20</b>	<b>2020-21</b>
<b>F.C.</b>	1.91	1.87	1.83	1.79	1.75	1.72	1.68	1.65
<b>V.C.</b>	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38
<b>Total</b>	5.02	5.14	5.26	5.39	5.53	5.69	5.85	6.03

2021-22	2022-23	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	2029-30	2030-31
1.62	1.58	1.19	1.22	1.26	1.29	1.33	1.37	1.41	1.46
4.60	4.83	5.07	5.32	5.59	5.87	6.16	6.47	6.79	7.13
6.22	6.41	6.26	6.54	6.85	7.16	7.49	7.84	8.20	8.59

**ORDER DATED 08.02.2016 IN CASE OF SHALIVANA GREEN ENERGY PVT. LTD**

*“....Also, as the Commission already decided vide order dated 13.08.2015 to continue the same tariff for the projects commissioned during FY 2014-15 & 2015-16 as determined for the projects commissioned during the FY 2013-14, the variable charges may be allowed based on the order dated 03.05.2013 as determined for FY 2013-14 as follows:*

*Fixed tariff(Tariff @Rs./unit)*

Year	1	2	3	4	5	6	7	8	9	10
Tariff	1.91	1.87	1.83	1.79	1.75	1.72	1.68	1.65	1.62	1.58
Year	11	12	13	14	15	16	17	18	19	20
Tariff	1.19	1.22	1.26	1.29	1.33	1.37	1.41	1.46	1.50	1.55

*Variable tariff*

Year	1	2	3	4	5	6	7	8	9	10
Tariff	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38	4.60	4.83
Year	11	12	13	14	15	16	17	18	19	20
Tariff	5.07	5.32	5.59	5.87	6.16	6.47	6.79	7.13	7.49	7.86

*Total tariff*

Year	1	2	3	4	5	6	7	8	9	10
<b>Tariff</b>	<b>5.02</b>	<b>5.14</b>	<b>5.26</b>	<b>5.39</b>	<b>5.53</b>	<b>5.69</b>	<b>5.85</b>	<b>6.03</b>	<b>6.22</b>	<b>6.41</b>
Year	11	12	13	14	15	16	17	18	19	20
Tariff	6.26	6.54	6.85	7.16	7.49	7.84	8.20	8.59	8.99	9.41

“

The above two Orders clearly reflect the variable cost component of the tariff determined in the Order dated 03.05.2013. Therefore, the Fixed Cost component can be arrived for the Appellant by deducting Variable Cost component (being same for all plants) from single part tariff determined in the Order dated 03.05.2013 and is as under –

**Table A**(Tariff @Rs./unit)

Year	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
<b>Single Part Tariff as per 3.05.2013 Order</b>	<b>5.64</b>	<b>5.32</b>	<b>5.45</b>	<b>5.59</b>	<b>5.74</b>	<b>5.90</b>	<b>6.08</b>	<b>6.26</b>	<b>6.46</b>	<b>6.67</b>
Variable Component as per order 8/2/2016 and 20/11/2013	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38	4.60	4.83
Fixed Cost Component	2.53	2.05	2.02	1.99	1.96	1.93	1.91	1.88	1.86	1.84
Year	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	2029-30	2030-31	2031-32	2032-33
<b>Single Part Tariff as per 3.05.2013 Order</b>	<b>6.55</b>	<b>6.85</b>	<b>7.16</b>	<b>7.50</b>	<b>7.84</b>	<b>8.21</b>	<b>8.60</b>	<b>9.00</b>	<b>9.43</b>	<b>9.88</b>
Variable Component as per order 8/2/2016 and 20/11/2013	5.07	5.32	5.59	5.87	6.16	6.47	6.79	7.13	7.49	7.86
Fixed Cost Component	1.48	1.53	1.57	1.63	1.68	1.74	1.81	1.87	1.94	2.02

**9.8** We observe that the order 03.05.2013 was revised by Commission on 30.11.2016, wherein the tariff was increased due to increase in

variable cost component which in turn marginally increased the fixed cost component due to increase in interest cost on working capital. At the very least, the Appellants are entitled to the above fixed costs component when kept under MOD (from 17.01.2017 )by MPPMCL and power not scheduled, on the normative PLF of 80% determined by the State Commission in all its Tariff Orders.

**9.9** Even though the Appellants have placed the calculation of fixed cost component as per the Order dated 30.11.2016 before us and the same has not been disputed by MPPMCL and MPERC. However, the State Commission would need to verify the said figures based on its prevailing orders. As an interim measure, the MPPMCL should pay to the Appellants fixed cost component as indicated in the table A hereinabove on the normative PLF of 80% of contracted capacity along with interest subject to final reconciliation of fixed cost component of 30.11.2016 order, to be duly verified by the State Commission.

**9.10** Further, since the fixed cost component will be paid to the Appellants after substantial delay, the interest @ 1.25% per month which is provided both in the PPA and the LOI will also be required to be paid

on the fixed charges component to the Appellants. As held hereinbefore, the final reconciliation is required to be done by the parties after the verification of the charges by the State Commission.

**9.11** We also note the financial hardship of the two Appellants on whom MOD has been applied and power has not been scheduled from 17.01.2017 till date, without paying the fixed cost component to them. This was also noted by this Tribunal in its Order dated 02.08.2017 in RP 4 & 5 of 2017, para 10 as

***“ We have also noticed that the Review Petitioner in Review Petition No.4 of 2017 is not even paying the fixed costs.”***

which finding has not been disturbed by the Hon'ble Supreme Court and has attained finality. For the last 2 & ½ years, the MPPMCL has simply applied the MOD erroneously and kept the plants shut without paying even fixed cost component. We are therefore of the considered opinion that with the application of MOD, the Appellants are entitled for fixed charges even in single part tariff scenario.

**10. ISSUE NO.4:-**

**10.1** The last issue of PPA is only relevant for the Appellant No. 1 – Arya Energy Limited. We find that the State Commission has erroneously held in the Order Impugned that there is no PPA between the

Respondent with the Appellant No. 1. On the issue of PPA, this Tribunal in the Judgment dated 20.03.2017 had held as under –

*“17.20 The State Commission’s contention that the tariff shall be applicable for the projects for which PPA has been executed at the time of commissioning of the projects has no meaning as the Respondent No. 2 is unable to finalize the draft copy of the PPA to enter into PPA with the biomass generators at the time of taking of power from the Appellant’s projects. Further, as per the submissions of the Appellants, the Appellant No. 3 Arya Energy Limited approached the Hon’ble High Court of Jabalpur which stayed the termination of Lol and directed Respondent No.2 to act on the letters of the appellant No.3 and disposed of the writ petition on 30.11.2016 directing the Respondent No. 2 to take a decision on the PPA execution. As per the directions of the High Court of Jabalpur, draft PPA was sent to the Appellant on 04.01.2017 by the Respondent No. 2 and appellant, Arya Energy Limited executed PPA under protest on 18.01.2017.”*

**10.2** Further, in the Review Order dated 02.08.2017, this Tribunal decided as under –

*“11. An issue is raised by Review Petitioner in Review Petition No.4 of 2017 that there is no PPA between it and Arya Energy Limited whereas this Tribunal has recorded in paragraph 17 that a PPA has been entered into under protest. Mr. Ramachandran, counsel for Respondent No.1 contended that this stand of the Review Petitioner lacks bonafides and is not only incorrect but also misleading.*

*12. It is pointed out that Arya Energy Limited was supplying power to the Review Petitioner under Lols dated 19/09/2013 and 11/10/2013 which was to operate till a PPA is entered into between the parties.*



*Despite several letters, the Review Petitioner could not give a draft PPA to Arya Energy.*

*13. The Review Petitioner vide letter dated 16/11/2016 unilaterally terminated the Lol effectively from 30/11/2016. This was the date of the impugned Tariff Order. Arya Energy approached the High Court of Jabalpur which stayed the termination and directed Madhya Pradesh Power Management Company Limited. to act on the letters of Arya Energy. Thereafter, a draft PPA was sent vide letter dated 4/01/2017 by MPPMCL. In protest, Arya Energy wrote letters dated 17/01/2017 and 18/01/2017 raising the issue of merit order dispatch along with other issues. In response, the Review Petitioner vide letter dated 17/01/2017 took the position that no clause is negotiable and Arya Energy executed the PPA under protest on 18/01/2017. When the matters stood thus, the Review Petitioner (MPPMCL) once again vide letter dated 28/02/2017 terminated the Lol with effect from 14/01/2017 stating that Arya Energy had not come forward to sign the PPA, which was challenged by Arya Energy before the High Court. By order dated 15/05/2017, the High Court set aside the termination and has restored status quo ante and revived the Lol.*

*14. The Review Petitioner (MPPMCL) signed the PPA with Arya Energy on 18/01/2017 and suddenly decided to approach the State Commission. According to Respondent No.1, the general condition mentioned in paragraph 15(e) of the Oder dated 30/11/2016 as upheld by this Tribunal in the judgment under review does not even apply to the Respondents and is for future projects to be commissioned in the State of Madhya Pradesh. According to Respondent No.1, the tariff was settled by this Tribunal and the plant of Arya Energy is already commissioned and, therefore, the above condition (e) is not applicable to Arya Energy. The Merit Order Dispatch has been set aside by this Tribunal. We find substance in this submission of Respondent No.1.”*

These findings were not challenged by the Respondent No. 1 in Civil Appeal No. 4550-4551 of 2018 before the Hon'ble Supreme Court and therefore has attained finality.

**10.3** Also, we find that the Respondent No. 1 itself before the Hon'ble High Court of Jabalpur in Writ Petition No. 3819 of 2017 has admitted the aspect of signing of PPA as under -

*“Thereafter, the draft PPA was signed by authorized signatory of the Petitioner on 18/01/2017 and the same was to be signed by the authorized signatory of the answering respondent. **While signing the draft PPA, the signatory of the answering respondent was faced with the difficulty as to why was the Petitioner raising multiple questions on various clauses of the draft PPA and requesting for their amendment and repeatedly changing their stand?***

***Thus, the answering respondent signed only one of the two copies of the draft PPA, and it was decided to obtain clarification from the Electricity Regulator i.e the Madhya Pradesh Electricity Regulatory Commission (“MPERC”) regarding the applicable tariff etc., and approval of draft PPA for execution with Arya Energy.”***

**10.4** We are unable to comprehend as to why the Respondent No.1 is not releasing the signed PPA to the Appellant No. 1 which has complied with all the terms set by the Respondent No. 1. Further, when the PPA entered into contains the same provisions as the PPA with the

Appellant No. 2, there is no reason to hold back giving copy of the said signed PPA to the Appellant No. 1.

**10.5** In view of our above observations, the findings of the State Commission on the issue of PPA are not justified. As such, the Respondent No. 1 is legally bound to release the PPA to the Appellant No. 1, in any case.

**10.6** Before issuing the final directions in the matter, we would like to remind the Respondent Commission that under Section 86 (1) (e) of the Electricity Act, 2003, the State Commission has a statutory role in promoting renewable energy generation. This is also reflected in the National Tariff Policy and National Electricity Policy. However, there were three rounds of litigation between the Appellants and the Respondents only on the aspect of fixation of a just and fair cost reflective tariff for the biomass generation but without a logical conclusion. When this Tribunal finally decided the norms and parameters vide its Judgment dated 04.05.2016 and the civil appeal filed against the same was dismissed by the Hon'ble Supreme Court, the State Commission ought to have complied with the norms and

parameters so set out and re-determined the tariff in the Order dated 30.11.2016. However, the State Commission instead of granting the Appellants the benefit of the revised tariff, it added certain conditions in the Order dated 30.11.2016 in such a way that none of the Appellants could get benefit of the re-determined tariff. Thereafter, this Tribunal set aside the conditions vide the Full Bench Judgment dated 20.03.2017. On second appeal, the Hon'ble Supreme Court only restored Condition No. (b) i.e. the Appellants would be subjected to Merit Order Despatch. This Tribunal thereafter in the Execution Petition No. 2 of 2017 directed that the claims for arrears as well as fixed charges have merits and ought to be decided by the State Commission. Despite the same, the State Commission has denied the fixed charge component to the Appellants. We are unable to accept the justification and rationale of the State Commission in denying the Appellants their legitimate rights under the Act/Rules/Codes & Policies. We do not wish to comment further on this subject except to say that all courts should respect the judicial discipline.

**12. SUMMARY OF FINDINGS :-**

Based on our detailed analysis and findings on all the issues hereinabove, we summarize the same as under -

**12.1** We hold that the generating plants of the Appellants shall be regulated by applying merit order dispatch as per Madhya Pradesh Balancing and Settlement Code, 2015 and the Appellants shall be entitled to receive fixed charges component from the date (17.01.2017) from which merit order dispatch has been applied and power not scheduled by MPPMCL.

**12.2** We direct MPPMCL that for the period when the MOD has been applied on the Appellants and power not scheduled i.e. from 17.01.2017, the Appellants be paid fixed cost component as mentioned above in table (A) at Para 9.7 considering base year 2103-14 (Rs.2.53 per unit and so on as per the year of operation) at the normative PLF of 80% of contracted capacity, determined by the State Commission in its Tariff Orders. This payment along with interest shall be made within 30 days from the date of this Judgment and Order;

**12.3** The State Commission is directed to verify the actual fixed cost component for which the Appellants are entitled to based on its order dated 30.11.2016. The MPPCL shall reconcile the payments after such verification and pay the arrears, if any, to the Appellants within a period of three months.

**12.4** MPPMCL is also directed to release the signed PPA to Appellant No. 1 – Arya Energy Limited without any further delay.

**ORDER**

In light of the above, we are of the considered opinion that the issues raised in the present Appeal No. 396 of 2018 have merits and hence appeal is allowed.

The impugned order dated 16.11.2018 passed by Madhya Pradesh Electricity Regulatory Commission in Petition No. 32 of 2018 is hereby set aside to the extent of our findings and directions set out at Para 12.1 to 12.4 above.

No order as to costs.

Pronounced in the Open Court on this **26<sup>th</sup> Day of August, 2019.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

Pr