



**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
4<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P.No. 20 of 2015

Date: 21-04-2018

Present  
**Justice G. Bhavani Prasad, Chairman**  
**Dr. P. Raghu, Member**  
**Sri P. Rama Mohan, Member**

**Between:**

M/s. Empee Power Co (I) Limited

... **Petitioner**

AND

Southern Power Distribution Company of Andhra Pradesh  
Limited

... **Respondent**

This Original Petition has come up for hearing finally on 24-02-2018 in the presence of Sri K. Gopal Choudary, learned counsel representing Sri Challa Gunaranjan, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

**ORDER**

A petition under Section 62 read with Section 86 (1) of the Electricity Act, 2003 to revise the petitioner's tariff as provided in clause 2.2 of the Power Purchase Agreement dated 23-05-2007 or in the alternative, apply generic tariff as fixed in the Commission's order dated 22-06-2013 for all bagasse based co-generation projects, direct the respondent to pay the differential fixed cost from the Commercial Operation Date i.e., 12-03-2010 till the payment of revised tariff with interest at 12% per annum and other appropriate orders.

2. The petitioner's case is that it is a registered company engaged in manufacture and sale of electricity and established a 20 MW bagasse based co-generation plant, the power produced by which is sold to the distribution companies, after meeting captive consumption. The Government of Andhra Pradesh announced uniform incentives to all projects based on renewable sources of energy vide G.O.Ms.No.93 dated 18-11-1997 in view of the guidelines of the Government of India dated 13-09-1993 and G.O.Ms.No.93 was amended by G.O.Ms.No.112 dated 22-12-1998. On the Andhra Pradesh Electricity Reform Act, 1998 coming into force, the Andhra Pradesh Electricity Regulatory Commission was constituted on 03-04-1999 and the incentives were reviewed after 3 years in O.P.No.1075 of 2000 by the Commission on 20-06-2001 after hearing all Non-Conventional Energy Developers, Transmission Corporation of Andhra Pradesh Limited and Indian Renewable Energy Development Agency (IREDA). The Commission directed continuance of the existing incentives till 24-06-2001 and further directed that from the billing month of August, 2001, all the generators of Non-Conventional Energy shall supply power to the Transmission Corporation of Andhra Pradesh Limited only at Rs.2.25 per unit with 5% escalation per annum with 1994-95 as the base year. Again the Commission passed an order in R.P.No.84 of 2003 on 20-03-2004 fixing a two part tariff with fixed cost for 10 years and variable cost for 5 years for the bagasse based co-generation power projects, which order was challenged by South Indian Sugar Mills Association (SISMA) in W.P.No.6207 of 2004. The Hon'ble High Court gave liberty to file a review petition before the Commission, by its order dated 27-04-2004, which review petition should result in appropriate orders within 8 weeks. The interim order passed by the Hon'ble High Court on 01-04-2004 was continued till then.

3. R.P.No.8 of 2004 by SISMA, R.P.No.1 of 2004 by the Transmission Corporation of Andhra Pradesh Limited and other Review Petitions by other developers were disposed of by the Commission on 10-07-2004, modifying the incentives and the tariff, while dismissing R.P.No.8 of 2004 and dismissing R.P.No.1 of 2004 on 11-08-2004. SISMA filed W.P.No.12898 of 2004 in which the Hon'ble High Court ordered on 20-08-2004 making it open to the 2<sup>nd</sup> respondent therein to implement the revised tariff pending further orders with 50% of the differential amount between the old and the revised tariff being paid in addition, for the actual power supplied with effect from 20-08-2004, subject to further orders. The Hon'ble High Court disposed of W.P.No.12898 of 2004 on 15-06-2005 giving liberty to approach the Hon'ble Appellate Tribunal for Electricity and continuing the interim arrangement till 8 weeks from 15-06-2005 or till the Tribunal passes interim orders, whichever is earlier. SISMA filed Appeal No.20 of 2005 and batch, while the Transmission Corporation of Andhra Pradesh Limited, Distribution Companies and the Andhra Pradesh Electricity Regulatory Commission preferred Appeal Nos.46, 48, 49 and 50 of 2005.

4. By a common order dated 02-06-2006, the Hon'ble Appellate Tribunal for Electricity allowed the appeals by SISMA and dismissed the appeals by the Transmission Corporation of Andhra Pradesh Limited and the Distribution Companies and directed the respondents therein to purchase the power generated by Non-Conventional Energy Developers at the same rate paid before the interim order. Transmission Corporation of Andhra Pradesh Limited filed Civil Appeal No.2926 of 2006 and batch before the Hon'ble Supreme Court. Again for the next control period from 01-04-2009 to 31-03-2014, the Commission determined the tariff i.e., variable cost in O.P.No.5 of 2009 on 31-03-2009, subject to the final orders of

the Hon'ble Supreme Court and the orders of the Hon'ble Appellate Tribunal for Electricity dated 02-06-2006. The bagasse units were being paid fixed cost upto the threshold PLF as per the order of the Commission dated 20-03-2004 and variable cost as per the order dated 31-03-2009 with the addition of an incentive of Rs.0.25 ps per unit for generation above threshold PLF. The Hon'ble Supreme Court decided the appeals by judgment dated 08-07-2010 remanding the matters to the Commission which has the jurisdiction to determine the tariff, after hearing the Non-Conventional Energy Developers. The Hon'ble Supreme Court gave further directions to examine about third party sales and objections of the parties except on jurisdiction, estoppel, legitimate expectancy and duress vitiating the Power Purchase Agreements. The order of this Commission dated 20-06-2001 was held to have become final and it was observed that it is necessary for the Regulatory Commission to take practical decisions to help in ensuring existence of these units rather than extinguishing them. The Commission ultimately pronounced its order on 12-09-2011 comprising of three independent orders by the Chairman and the Members. The petitioner and others filed Appeal No.9 of 2012 before the Hon'ble Appellate Tribunal for Electricity and the Hon'ble Appellate Tribunal for Electricity by an order dated 20-12-2012 determined the specific parameters such as capital cost, threshold PLF, auxiliary consumption, O & M escalation, specific fuel consumption etc., and directed passing of consequential orders by the Commission. In so far as the appeal of the petitioner, the Hon'ble Appellate Tribunal for Electricity did not go into the merits and directed the Commission to decide whether the petitioner not challenging the Power Purchase Agreements between the parties providing for a negotiated tariff can challenge the same in the appeal. The petitioner filed Civil Appeal No.11339 of 2013 before the Hon'ble Supreme Court, while the Transmission Corporation of Andhra

Pradesh Limited filed Civil Appeal No.1381 of 2013 and batch, which are pending. The Commission passed a consequential order in the meanwhile on 22-06-2013. The Hon'ble Appellate Tribunal for Electricity held in other cases that the Commission is vested with the powers to revise the tariff under the Power Purchase Agreement, which resulted on account of coercion and force and the conditions of the Power Purchase Agreement are subject to review by the Commission within the parameters of the Electricity Act, 2003. As the tariff fixed in the Power Purchase Agreement is much below the generic tariff determined by the Commission and as the petitioner was unduly forced and coerced to agree for the same, the tariff has to be reviewed in line with the generic tariff applicable to the Non-Conventional Energy Developers. The decisions of the Hon'ble Appellate Tribunal for Electricity in Tarini Infrastructure Limited Vs Gujarat Urja Vikas Nigam Limited, Junagadh Power Projects Private Limited Vs GUVNL & Others, SLT Power & Infrastructure Projects Private Limited Vs APERC and others and Gayatri Sugars Limited Vs APNPDCL were relied on. The petitioner contended that as the Distribution Companies are paying generic tariff to all co-generation plants when it intended to establish this 20 MW co-generation plant to meet the captive needs of its sugar factory and supply the surplus to the Transmission Corporation of Andhra Pradesh Limited, the petitioner made huge investment of Rs.91 crores. Even the respondent agreed to purchase the power as per the Electricity Act, 2003 and the petitioner believed that the respondent will treat all the power producers equally. Fixed cost based on capital investment and variable cost based on inputs for generation of power was not assessed by the respondent as per the Act or the guidelines of the Commission and it offered much lower cost. There is no rationale in arriving at such a lower fixed cost. Though the respondent acted arbitrarily and illegally in dishonouring the guidelines of the

Commission, the petitioner agreed to execute contract under compelling circumstances as it has to submit the Power Purchase Agreement to the Banks for obtaining loans, more so, when it is not permitted to sell any power to any third parties. The petitioner was coerced to agree for the price mentioned in the Power Purchase Agreement. All sales by all generating companies to licensees under any Power Purchase Agreement or any other arrangement should appropriately be at the rates determined in the tariff order passed by the Commission in respect of sales made by renewable energy generating companies of a particular generic category, to achieve the object and purpose of the Electricity Act, 2003. The petitioner is struggling to supply power at the agreement rates and the tariff is insufficient for maintenance of the plant and is causing severe financial hardship. The petitioner approached the respondent for revision of tariff by a letter dated 28-02-2015. The petitioner calculated the actual fixed cost at Rs.3.52 in FY 2010-11, Rs.4.47 in FY 2011-12 and Rs.2.81 in FY 2012-13 per unit. The fixed cost determined by the Commission for 10 years from the Commercial Operation Date by an order dated 22-06-2013 is much more than the tariff paid to the petitioner. Fixing a ceiling on tariff is impermissible. 60 employees and 3500 farmers are dependent on the petitioner, apart from a number of others indirectly benefitted. The petitioner was paid only Rs.32,38,71,656/- towards fixed cost for 21,88,64,249 units supplied up-to-date, whereas it is entitled as per the norms of the Commission to Rs.40,39,15,202/-. The balance of Rs.8,00,43,547/- has to be paid with interest at 12% per annum. The Commission observed that the general opinion expressed is that the objective of encouraging renewable power will be defeated if scope for a negotiated tariff is made available by prescribing a ceiling concept. The petitioner is incurring losses every year due to lower fixed cost and it will be put to irreparable

loss and hardship leading to closure of the plant, due to increase in the cost of production and maintenance. Hence, the petition.

5. The respondent in its counter contended that once the Power Purchase Agreement specified the tariff for a certain period, the Commission is precluded from re-opening the same. The petitioner entered into a Power Purchase Agreement with the respondent on 23-05-2007 for export to grid for sale of 14.30 MW power after auxiliary consumption of 8.1 MW and captive consumption of 3.9 MW during season and 17.35 MW during off-season, after a lesser captive consumption of 0.85 MW. Initially the tariff for 10 years was adopted by the parties as in respect of KCP Sugars for 2006-07. But, the Commission returned the Power Purchase Agreements submitted for consent after finding the tariff for some years to be more than the generic tariff. The parties negotiated and revised the tariff in respect of 10<sup>th</sup> year and the Commission approved the tariff resulting in concluded contract for 20 years. The project was commissioned on 12-03-2010 and the petitioner is receiving payments for the power sold as per Article 2.2 of the agreement. The petitioner is estopped from claiming contrary to the agreement and a contract is not frustrated merely on claiming it to be onerous to the petitioner. The petitioner wilfully entered into agreement with full knowledge of the tariff and receiving payments without any demur since 12-03-2010. The Hon'ble Appellate Tribunal for Electricity held in Appeal No.47 of 2009 on 19-04-2010 that the proper forum for rectification of a Power Purchase Agreement is a civil court and not a summary proceeding by the Commission. The disputes under Section 86 (1) (f) was also held to be a dispute post contract and not in any circumstances prior to contract. The Hon'ble Supreme Court held in Civil Appeal No.5612 of 2012 that there was no scope for the Commission to vary the tariff agreed between the parties under the approved Power

Purchase Agreement. The Punjab State Electricity Regulatory Commission also held in Petition No.58 of 2014 dated 25-06-2015 similarly. Any earlier guidelines become irrelevant once there is a Power Purchase Agreement as held by the Hon'ble Supreme Court in Sai Renewable's case. All the proceedings prior to the Commercial Operation Date i.e., 12-03-2010 of the petitioner are irrelevant to this case. The Hon'ble Supreme Court held in Civil Appeal No.2926 of 2005 and batch on 08-07-2010 that the rights and liabilities arising from a binding contract cannot be escaped on the basis of some presumptions or inferences in relation to the facts leading to the execution of the contract between the parties. The jurisdiction of the Commission arises not only from the statutory provisions but also in terms of the contract between the parties which have binding force. The Hon'ble Appellate Tribunal for Electricity in its order dated 20-12-2012 clearly observed that the three generating companies in Appeal No.9 of 2012 including the petitioner have negotiated Power Purchase Agreements which were not challenged before the Commission or in the appeal and hence any relief by way of tariff, different from what has been agreed upon and specified in the Power Purchase Agreements cannot be agitated. The Commission's order dated 22-06-2013 did not determine the tariff for the projects covered by negotiated Power Purchase Agreements. The claim that the petitioner expected payment of generic tariff is false as the Power Purchase Agreement was entered into by it on 23-05-2007 much later to the order of the Commission dated 20-03-2004. The petitioner never alleged coercion before this petition. The respondent never violated the Power Purchase Agreement or applicable orders of the Commission. Hence, the respondent sought for dismissal of the petition with costs.



**6.** In its reply affidavit to the counter, the petitioner distinguished the decisions relied on by the petitioner. The respondent did not appreciate the increase in the cost of the project and the production cost than the estimated cost due to passage of time. The contents of the counter are either wrong or do not require any reply. Hence, the petition be allowed.

**7.** The petitioner subsequently came up with an additional pleading contending that the dominant position of the respondent did not leave any choice to the petitioner except to accept the tariff. The tariff agreed under the Power Purchase Agreement cannot override the statutory powers of the Commission to fix the tariff, under Sections 61 and 62 of the Electricity Act, 2003. The tariff agreed under the Power Purchase Agreement is illegal, as the distribution licensee and the generating company cannot so agree under the Act. When the tariff is onerous, unworkable, unfair and discriminatory, the Commission can re-open and re-determine the tariff exercising its regulatory power under Section 86 (1) (b), more particularly in respect of Non-Conventional Energy Projects, in view of Section 86 (1) (e) requiring promotion of renewable energy by the Commission. As the tariff under the Power Purchase Agreement does not conform to the approved parameters basing on which the generic tariff was determined by the Commission, the generic tariff would prevail.

**8.** The additional pleading was received on I.A.No.11 of 2016 being allowed on 31-12-2016 and the respondent filed a counter to the same contending that as per the terms of the Power Purchase Agreement, an amendment dated 10-03-2010 for variable cost for FY 2009-10 to FY 2013-14 and a further amendment dated 19-03-2015 for the variable cost for FY 2014-15 to FY 2018-19 were made, as agreed between the parties in negotiations which are equal to the variable cost

determined by the Commission for bagasse projects. The Power Purchase Agreement or the orders of the Commission were never violated by the respondent and any dispute has to be resolved only in terms of the Power Purchase Agreement. Seeking revision in mid-course after 6 years is not tenable or permissible and once an agreement along with tariff is approved by the Commission, revision of tariff under Sections 61 and 62 does not arise. Any dispute has to be settled as per the terms of the Power Purchase Agreement. Any encouragement to renewable energy cannot be detrimental to public interest or consumer interest.

**9.** The petitioner in his reply stated that it was compelled by circumstances to enter into the Power Purchase Agreement. When the generic tariff fixed by the Commission in the order dated 20-03-2004 was set aside by the Hon'ble Appellate Tribunal for Electricity and the matter is pending before the Hon'ble Supreme Court, the fixed cost was therefore adhoc and arbitrary. The variable cost for FY 2004-05 to FY 2008-09 as fixed by the final order of the Commission ought to be the basis for tariff on a non-discriminatory basis. Determination of tariff will have to be done by the Commission after applying its mind and also applying the principles and methodologies in Section 61 of the Act and mere incidental consent of the Commission to an agreement which contains provisions relating to tariff without particular and specific application of mind and process necessary for determination of tariff is an insufficient performance and an abdication of statutory function and duty. Konark case was distinguished by the Hon'ble Supreme Court in (2016) 8 SCC 743 and the observations of the Hon'ble Appellate Tribunal for Electricity in its order dated 20-12-2012 are the basis for the present petition. The power of the Commission to determine the tariff can be exercised from time to time and the tariff

determined by an agreement between the parties is illegal, contrary to law and non-est.

**10.** The petitioner later filed a Memo dated 03-02-2018 stating that it decided not to press the prayer for determining the project specific tariff and confined to the alternative prayer of generic tariff alone and the Memo was recorded.

**11.** Learned counsel for both parties advanced their arguments with reference to the various decisions and documents and the respondent filed written arguments and additional written submissions also.

**12.** Though the petitioner originally prayed for revision of tariff of the petitioner as provided in clause 2.2 of the Power Purchase Agreement dated 23-05-2007 by re-determining the fixed cost of the petitioner's project, in view of the Memo filed on 03-02-2018 which was recorded on the same day, the petition should be dismissed in respect of that prayer as not pressed.

**13.** The point for consideration now, therefore, is whether the petitioner is entitled to claim the generic tariff fixed by the order of this Commission dated 22-06-2013 and whether in consequence, the respondent has to be directed to pay any differential fixed cost and if so for what period and with or without interest, if with interest, at what rate ?

**14.** The Power Purchase Agreement between the respondent and the petitioner executed on 23-05-2007 stated in the preamble about the proposal of the petitioner to set up a Non-Conventional Energy Project to sell by export to the grid, the balance of 14.30 MW during season of 180 days and the balance of 17.35 MW during off-

season of 150 days to the respondent as detailed in Schedule-I to the agreement, after meeting auxiliary consumption and captive consumption. The project was approved by the Non-Conventional Energy Development Corporation of Andhra Pradesh Limited with which the petitioner entered into an agreement/MOU on 16-06-2000. The terms and conditions of the agreement were stated to be subject to the provisions of the Electricity Act, 2003, as amended from time to time and also subject to regulation by this Commission. The agreement was stated to be enforceable subject to obtaining consent from this Commission as per Section 21 of the Andhra Pradesh Electricity Reform Act, 1998 (Act 30 of 1998). Article 2.1 of the agreement stated about Delivered Energy at the interconnection point for sale to the respondent to be purchasable at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the project. Article 2.2 states that the petitioner shall be paid the tariff at the rates specified in Schedule-1A or the tariff as determined by the Commission for bagasse based co-generation power project from time to time or negotiated tariff mutually agreed by both the parties, whichever is less. It is also agreed that a special review of purchase price will be there on completion of ten years from the date of commissioning of the project for reworking of the purchase price on the basis of Return on Equity, O & M expenses and the Variable Cost. Article 6.2 of the agreement obligates the respondent to purchase Delivered Energy from the project as per Article 2.2. The duration of the agreement was stated to be 20 years from the Commercial Operation Date in Article 7, subject to renewal on mutual agreement. Schedule-1A provides for the fixed charges and variable charges as specified upto 10<sup>th</sup> year and 2008-09 respectively, while the fixed charges from the 11<sup>th</sup> year and variable charges beyond 2008-09 were made negotiable with an upper limit of not exceeding the fixed or variable charges fixed by

the Commission for bagasse based power projects from time to time for the corresponding years. Schedule-1A appears to have been amended on 10-03-2010 regarding the payment of variable charges from 01-04-2009 as fixed by the Andhra Pradesh Electricity Regulatory Commission order dated 31-03-2009 and the fixed charges and the variable charges for a period of 10 years and 5 years respectively with the same condition of negotiated tariffs after those periods.

**15.** Since the agreement dated 23-05-2007 or its amendment dated 10-03-2010, the petitioner did not appear to have addressed the respondent on any factors vitiating the contents of the agreement or more particularly the tariff specified in Article 2.2 read with Schedule-1A of the agreement. Even in the letter dated 28-02-2015 about 7 years 9 months after the execution of the agreement, the authorized signatory of the petitioner only stated that they were finding it very difficult in managing the operations because of the increase in cost of sugarcane which is the main raw material and also the other input costs and the Chairman and Managing Director of the respondent was requested to look into the matter and pay them the cost fixed by the Commission for bagasse based co-generation units in Andhra Pradesh. Though the respondent replied promptly on 07-03-2015 that the fixed charges mentioned in the Power Purchase Agreement are fixed/constant upto 10 years from the Commercial Operation Date and shall be negotiated from 11<sup>th</sup> year onwards but not exceeding fixed charges determined by the Commission for bagasse based power projects from time to time for the corresponding year. The respondent therefore clearly stated that their request is not considered and this petition was filed later in which for the first time it was attempted to be alleged that the petitioner strongly believed that all the power producers will be treated equally and that the respondent wrongly offered much lower cost, contrary to the statute and

the guidelines prescribed by the Commission. It was also attempted to be alleged that the respondent insisted on the petitioner agreeing for the financial condition and the petitioner agreed under compelling situations as it had to submit the Power Purchase Agreements in the Banks to obtain loan for erection and commissioning of the plant. The petition states that the financial hardship is due to the tariff being not sufficient for the maintenance of the plant, while the earlier letter dated 28-02-2015 stated that the same is due to increase in the cost of sugarcane and other input costs. While the letter dated 28-02-2015 obviously referred to such increase in costs to be subsequent to the Power Purchase Agreement, there is no reason to believe the costs obviously at a lower level at the time of the Power Purchase Agreement in 2007 were not adequately covered by the fixed costs agreed to be paid under the agreement. The elements of compulsion or coercion alleged in the petition were never alleged earlier nor does the petition specify as to who on behalf of the respondent indulged in such compulsion or coercion. When it came to reply to the counter, Para 6 clearly shows the attempt of the petitioner alleged to have suffered higher cost of the project and production cost due to passage of time than the estimated cost of the project and production cost of the power at the time of the Power Purchase Agreement being entered into. While such increase of cost due to passage of time as indicated in the letter dated 28-02-2015 and Para 6 of the reply to the counter cannot adversely affect or invalidate a validly concluded contract, the same may also indicate that the fixed cost and the variable cost agreed under the agreement might not have been unreasonable or unjust or low or inadequate at the time of the agreement. When it came to the additional pleadings, stronger words were used against the tariff as onerous, unworkable, unfair and discriminatory but the same cannot be considered to be supported by any material on record. The

figurers or data given by the petitioner in table dated 31-03-2015 or extracts of the balance sheets of 2011 to 2013 or invoices of 2011 to 2015 do not *per se* amount to proof of any circumstance vitiating the tariff agreed under Article 2.2 read with Schedule-1A of the Power Purchase Agreement in 2007. The contract becoming onerous or difficult financially due to passage of time or increase of cost may not vitiate an otherwise valid concluded contract. While there is no material on record to presume that the contract is vitiated by coercion or undue influence, even a suit to avoid the Power Purchase Agreement on any such ground of voidability would have been barred by the law of limitation even by the time of the earliest communication requesting for a review of the tariff by letter dated 28-02-2015. In the absence of proof to the contrary, the Power Purchase Agreement may not be open for consideration as voidable even in the proceedings arising under the Electricity Act, 2003 on any such ground.

**16.** The petitioner relied on Gayatri Sugars Limited Vs APNPDCL, Appeal No.310 of 2013 decided on 20-11-2014 in which the Hon'ble Appellate Tribunal for Electricity was considering whether the State Commission has the power to modify a concluded long term Power Purchase Agreement to give impetus to companies generating electricity using renewable resources. The Hon'ble Appellate Tribunal for Electricity stated the same to be squarely covered by SLT Power & Infrastructure Projects Private Limited Vs APERC Appeal No.247 of 2013 decided on 31-07-2014. In Appeal No.247 of 2013, the Hon'ble Appellate Tribunal for Electricity held with reference to the past judgments that the State Commission has a duty to encourage development of renewable sources of energy. The State Commission has power to modify a concluded Power Purchase Agreement between the distribution licensee and the generating company and revise the tariff keeping in view the circumstances

of the case which are uncontrollable and revision of tariff is necessary to meet the objective of the Act and where the tariff for a renewable project agreed to between the parties is unviable, resulting in closure of the power plant. The Commission has to keep in view the guiding principles laid down in Section 61 of the Electricity Act, 2003 while determining the tariff.

17. It is necessary to go back to the orders of Hon'ble Appellate Tribunal for Electricity in Appeal No.150 of 2011 and batch dated 20-12-2012 which arose from the Andhra Pradesh Electricity Regulatory Commission. After the State Commission determined the tariff for procurement of power from various Non-Conventional Energy generators by its order dated 20-03-2004, the appellant in Appeal No.247 of 2013 approached the Commission alleging that it was forced to sign a Power Purchase Agreement on 23-05-2007 at a tariff lower than the generic tariff that was determined by the State Commission, but that petition was dismissed by the Commission. In the meanwhile, on a remand by the Hon'ble Supreme Court, the State Commission re-determined the tariff for the period 2004-09 by three separate orders communicated on 12-09-2011. Several appeals were filed against such orders and the Hon'ble Appellate Tribunal for Electricity decided Appeal No.150 of 2011 and batch by its orders dated 20-12-2012. They directed that the applicability of tariff with specific reference to particular Power Purchase Agreements entered into between the developers and the distribution licensees is to be decided by the State Commission after hearing the concerned appellants separately and the present petitioner was the 3<sup>rd</sup> appellant in Appeal No.9 of 2012. The findings of the Hon'ble Appellate Tribunal for Electricity were on issues related to generic tariff Hence, it did not straightaway determine the tariff applicable under specific Power Purchase Agreements and the Commission passed the consequential orders as per judgment



dated 20-12-2012 on 22-06-2013 in respect of biomass, industrial waste, bagasse co-generation and mini hydel power plants existing as on 31-03-2004 and those commissioned between 01-04-2004 and 31-03-2009 based on the norms indicated by the Hon'ble Appellate Tribunal for Electricity except for the projects covered by negotiated Power Purchase Agreements. The Commission also notified through the order dated 22-06-2013 that the aggrieved parties, if any, regarding applicability of tariff with specific reference to particular Power Purchase Agreements were directed to approach the Commission by filing proper petition within 30 days from the date of that order which would be disposed of after hearing the necessary parties in the matter. The petitioner does not claim to have filed any such petition before the Commission within 30 days from 22-06-2013.

**18.** The Hon'ble Appellate Tribunal for Electricity in its order in Appeal No.247 of 2013 dated 31-07-2014 noted the liberty given by the State Commission to approach it by filing petition regarding applicability of tariff. The Hon'ble Appellate Tribunal for Electricity referred to Tarini Infrastructure Limited Vs Gujarat Urja Vikas Nigam Limited decided by it in which it was held that so far as determination of tariff is concerned, a Power Purchase Agreement cannot be the final say and is always subordinate to the provisions of the Act which empowers the State Commission to determine the tariff, to promote generation from renewable sources of energy, to promote competition, efficiency, economy and to ensure transparency, while exercising its function. It was also held that the right under Section 86 (1) (b) to execute a Power Purchase Agreement is not absolute in as much as the Commission has the statutory duty and power to regulate the electricity purchase and procurement process of the distribution licensees including the price. The Hon'ble Appellate Tribunal for Electricity noted that the Act provides for

determination of tariff on commercial principles with optimum investment reflecting the cost of supply of electricity and at the same time, safeguards the interest of the consumers which must not be forgotten, that it is more so, when it is generation of electricity through renewable sources of energy, so that the developers got encouraged. The Hon'ble Appellate Tribunal for Electricity also referred to other decisions by it and concluded that the findings of the Hon'ble Tribunal in the cited cases clearly establish that the State Commission has a duty to encourage development of renewable sources of energy and has powers to modify a concluded Power Purchase Agreement and revise the tariff keeping in view the circumstances of the case which are uncontrollable and revision of tariff is necessary to meet the objective of the Act and where the tariff of renewable project is unviable, resulting in closure of the power plant. The Commission was directed to keep in view the guiding principles laid down in Section 61, while determining the tariff. On the facts of that case in Appeal No.247 of 2013, the Hon'ble Appellate Tribunal for Electricity concluded that the distribution licensee has used its dominant position to enter into a Power Purchase Agreement at the tariff which is less than the generic tariff determined by the Commission. Though there was no coercion or force, the Hon'ble Appellate Tribunal for Electricity found that the tariff given under the Power Purchase Agreement was unviable. Thus, it was found to be a fit case for intervention by the State Commission to ensure that a reasonable tariff is allowed and it should be noted that the Hon'ble Appellate Tribunal for Electricity did not extend the generic tariff fixed by the order dated 22-06-2013 straightaway and only permitted a revision of tariff prospectively i.e., from 31-07-2014.

**19.** The principles laid down by the Hon'ble Appellate Tribunal for Electricity were the subject of consideration by the Hon'ble Supreme Court in Gujarat Urja Vikas

Nigam Limited Vs Tarini Infrastructure Limited & others (2016) 8 SCC 743 wherein the question considered is whether the tariff fixed under the Power Purchase Agreement is sacrosanct and inviolable and beyond revision and correction by the State Electricity Regulatory Commission which is the statutory authority for fixation of tariff under the Electricity Act, 2003. The Hon'ble Supreme Court, after an exhaustive reference to the statutory provisions, regulations and case law concluded that in view of Section 86 (1) (b), the Court must lean in favour of flexibility and not read any inviolability in the terms of the Power Purchase Agreement in so far as tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation of such power, if public interest dictated by the surrounding events and circumstances requires a review of the tariff.

**20.** The decisions in Appeal No.247 of 2013 dated 31-07-2014, Appeal No.310 of 2013 dated 20-11-2014 and (2016) 8 SCC 743, thus conclusively establish that the State Electricity Regulatory Commission has power to modify a concluded Power Purchase Agreement between the distribution licensee and the generating company and revise the tariff if public interest dictated by the surrounding events and circumstances requires a review of the tariff to promote generation from renewable sources of energy, competition, efficiency, economy and transparency in tune with the broad philosophy of Sections 61, 62, 64 and 86 of the Electricity Act, 2003. The various decisions of the Hon'ble Appellate Tribunal for Electricity show that coercion or force or use of dominant position, recovery of all prudent expenditure of the developer, a reasonable return on investment, viability and other relevant facts and circumstances determine what is a reasonable and acceptable tariff. It is significant that what was ordered wherever there was justification for revision of tariff, is that there shall be a revision of tariff but not straightaway applying the generic tariff

determined by the State Commission for such generators. Therefore, what has to be looked at is not only the fact that tariff applicable during the relevant period was not adopted by the Power Purchase Agreement in question between the petitioner and the respondent, but also whether the tariff agreed under the Power Purchase Agreement can be considered vitiated by any of the facts and circumstances referred to above, so as to require a revision of tariff and it is only then that the question of determining a reasonable tariff arises, which need not be necessarily the generic tariff.

**21.** In the Written Arguments of the respondent, attention was invited to at least 3 other power developers who entered into Power Purchase Agreements with negotiated tariff and the petitioner itself never alleging any coercion or force or compulsion or dominance before the Commission when the Distribution Company approached the Commission for consent to the Power Purchase Agreement or from 2007 to 2012. Apart from claiming estoppel by conduct, the respondent also relied on consent to the agreement by the Commission itself. While the contentions have considerable force, it is true that in Bangalore Electricity Supply Company Limited Vs Konark Power Projects Limited and another, Civil Appeal No.5612 of 2012 decided on 28-09-2015, the Hon'ble Supreme Court observed that there was no scope for the Commission to vary the tariff but the Hon'ble Supreme Court in (2016) 8 SCC 743 pointed out that this was because of the specific provisions of the relevant regulations which sort of prohibition is not claimed to be a part of the regulations governing the present dispute. As such, while it cannot be agreed that this Commission has no jurisdiction at all to revise the tariff agreed under the Power Purchase Agreement between the parties under any circumstances, it also cannot be agreed that the generic tariff determined by the Commission as applicable at the

relevant times should straightaway replace the agreed tariff under a Power Purchase Agreement without a proof of anything more. While the interim orders of the Hon'ble Supreme Court dated 11-03-2014 and 13-03-2014 are placed before the Commission, their effect need not be gone into and considered herein in view of the conclusion that agreed tariff need not be revised to the level of generic tariff fixed by the order dated 22-06-2013 passed in pursuance of the order of the Hon'ble Appellate Tribunal for Electricity dated 20-12-2012. For the same reason, the decisions relied on by the respondent reported in Union of India Vs West Coast Paper Mills Limited 2004 (1) Supreme 1051 and Dharam Dutt and Ors Vs Union of India AIR 2004 SC 1295, about the impact of an appeal on a judgment need not be further considered. The failure of the petitioner herein on merits makes any determination of the impact of the pendency of appeals and interim orders therein against the Hon'ble Appellate Tribunal for Electricity's order dated 20-12-2012 not necessary to be decided on merits. The respondent also relied on the decision of Telangana State Electricity Regulatory Commission in O.P.Nos.4 and 11 of 2015 on its file concerning M/s. Gayatri Sugars Limited and M/s. SLT Power & Infrastructure Projects Private Limited respectively wherein the Telangana State Electricity Regulatory Commission did not interfere with the fixed cost part of the negotiated tariff but only revised the variable cost. But, as the conclusions therein were more on facts and circumstances applicable solely to those cases, they are not being considered to be either binding or of any persuasive value herein.

**22.** While the chronology of events extracted in the petition concerning determination of generic tariff for all Non-Conventional Energy generators in general or the bagasse based generators in particular is admitted, the power of the Commission to revise the tariff even under a Power Purchase Agreement cannot

equally be in dispute, provided that justifying facts and circumstances exist or public interest demands or the provisions of a statute or statutory regulations make it necessary. Merely because a negotiated tariff is less than the generic tariff, no vitiating factors can be presumed to be in existence nor it can be inferred that the necessary ingredients or components that should constitute the tariff were ignored. The claim that the production cost of power per unit will be same in any co-generation unit and that all sales by all generating companies to licensees in the State of Andhra Pradesh have to necessarily be at the rates determined by the Commission is not open to unqualified acceptance, as the quantum of fixed or variable cost or a reasonable and viable tariff may vary in ordinary and natural course of circumstances between generator and generator. That was why the orders dated 20-12-2012 of the Hon'ble Appellate Tribunal for Electricity specifically stated that applicability of tariff with specific reference to a particular Power Purchase Agreement is to be decided by the State Commission after hearing concerned appellants separately and the order dated 22-06-2013 of the Commission also reiterated the same. As already referred to, the Hon'ble Appellate Tribunal for Electricity and the Hon'ble Supreme Court, whenever they found the negotiated tariff to be not justifiable and illegal, directed revision of tariff in accordance with established principles, but not any wholesale or partial adoption of the generic tariff determined by the appropriate Commissions for the relevant periods.

**23.** The petitioner herein was faithfully acting upon the Power Purchase Agreement from 2007 till either filing of Appeal No.9 of 2012 before the Hon'ble Appellate Tribunal for Electricity or the letter dated 28-02-2015 to the respondent and never complained of any vitiating facts and circumstances. While the negotiated tariff is not directly or indirectly prohibited by the Electricity Act, 2003 or the Andhra

Pradesh Electricity Reform Act, 1998 or rules or regulations made there-under, production of either the order of the Hon'ble Central Electricity Regulatory Commission dated 26-04-2010 under 2009 regulations or the Auditor's Report along with audited accounts dated 30-11-2011 or the invoices from 2011 to 2015 or the tabular statement regarding the fixed cost cannot be considered to probablize any unreasonableness in the tariff fixed under Schedule-1A read with Article 2.2 of the agreement dated 23-05-2007. In the absence of any corroborating material and in view of the silent and uncomplaining acceptance of the agreed tariff for not less than 5 years, even if not estopped by conduct, the petitioner cannot persuade the Commission to believe in the unreasonableness of the tariff originally fixed through negotiations. While any force or coercion or compulsion or any other vitiating circumstances due to the dominance of the respondent are not probablized by any material, the calculations of the petitioner showing difference between what was agreed and what was determined by the Commission cannot by themselves show the tariff agreed to be unviable, while the relief is now confined to application of generic tariff to the petitioner. While the power of the Commission to determine the tariff under the statute thus undoubtedly exists, as stated by a distinguished jurist "the existence of a power and the exercise of it are two different things". The present case does not present a situation where the negotiated tariff should be replaced by a generic tariff in public interest or for compliance with the statutory functions or as the negotiated tariff is unviable or due to any other surrounding events and circumstances requiring a review of the tariff.

**24.** As the petitioner is not able to probablize through any evidence or circumstances that it is entitled to claim the generic tariff fixed by the orders of the Commission dated 22-06-2013, the petitioner, not entitled either to generic tariff or

any consequential payment has to fail. However, in the interests of equity and justice, the parties are directed to bear their own costs.

**25.** The Original Petition is dismissed. No costs.

This order is corrected and signed on this the **21<sup>st</sup> day of April, 2018.**

**Sd/-**  
**P. Rama Mohan**  
Member

**Sd/-**  
**Dr. P. Raghu**  
Member

**Sd/-**  
**Justice G. Bhavani Prasad**  
Chairman