



**TELANGANA STATE ELECTRICITY REGULATORY COMMISSION**  
**5<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Hyderabad-500 004**

O. P. No. 11 of 2015

Dated: 27.01.2016

**Present**

Sri. Ismail Ali Khan, Chairman  
Sri. H. Srinivasulu, Member  
Sri. L. Manohar Reddy, Member

Between

M/s SLT Power & Infrastructure Projects Pvt. Ltd.  
Flat No. 501, Soundarya Residency,  
Street No. 8, Himayatnagar, Hyderabad – 500 029

.... Petitioner

AND

- (1) The Government of Telangana,  
Energy Department, Secretariat, Hyderabad – 500 022.
- (2) The Transmission Corporation of Telangana,  
Vidyut Soudha, Khairatabad, Hyderabad – 500 049
- (3) The Telangana State Southern Power Distribution Company Ltd.(TSSPDCL),  
Mint Compound, Hyderabad – 500 004
- (4) The Non – Conventional Energy Development Corporation of A.P. Ltd.  
(NEDCAP), 5/8-207/2, Paigah Complex,  
Nampally, Hyderabad – 500 001.

.... Respondents

This petition had come up for hearing on 28.02.2015, 13.04.2015, 30.04.2015, 22.06.2015, 16.07.2015, 11.08.2015, 25.08.2015, 08.09.2015, and 23.11.2015. Sri. M. V. Pratap, Advocate for the petitioner along with Sri. G.Vijaya Bhaskar Reddy, Managing Director of the petitioner and Sri. Y. Rama Rao, Standing Counsel for the Respondent along with Sri. J.Ashwini Kumar and Sri. P.Venkatesh, Advocates were present on all the days. The petition having stood over for consideration to the date, the Commission passed the following:

## ORDER

This petition is before us pursuant to an order dated 31.07.2014 passed by the Hon'ble Appellate Tribunal for Electricity (ATE) in appeal No. 247 of 2013 duly remanding the matter to the Commission for a fresh determination of tariff prospective.

2. M/s. SLT Power & Infrastructure Projects Private Limited (petitioner) had filed a petition in the matter of applicability of the generic tariff order dated 22.06.2013 issued by the erstwhile Andhra Pradesh Electricity Regulatory Commission (APERC) and to re-fix the tariff as per the normative parameters given in the ATE order dated 20.12.2012 and to pay the difference of the amounts in excess of the unit price of Rs. 2.99 for the electricity generated and supplied to the respondents and following the ruling reported in 2012 ELR (APTEL) 0429 in the matter of M/s. Konark Power Projects Limited, Karnataka v. Bangalore Electric Supply Company Limited and another stating that the state Commission has the power to modify the tariff stipulated in the concluded Power Purchase Agreement (PPA) and it would not be desirable to keep any generating unit out of production for want of a just tariff. It entered into a PPA with the DISCOM providing for a negotiated tariff on 02-02-2007. The project is a 3.5 MW Industrial Waste (Poultry Litter) power plant situated at Bhudhan Pochampally Village and Mandal, Nalgonda District.

3. The petitioner had originally prayed as herein below

(a) To direct the respondents to implement the tariff order issued by the Commission on 22.06.2013 which is applicable to Industrial waste power plant of the petitioner.

(b) To direct the respondents to pay the difference of amounts for the power generated and supplied by the petitioner to APCPDCL along with interest.

(c) To consider the issue whether the respondents are entitled to seek supply of power generated from the Petitioner Company without extending the tariff fixed by the Commission dated 22-06-2013 and the payment of arrears due to the Petitioner Company as per the said orders of the Commission.

4. The other averments, briefly, mentioned in the original petition are hereunder:

- i) The petitioner took it as a challenge to develop the combustion technology on its own and to show to the other countries that India has also the proven technology of poultry waste power plants which can generate green energy and contribute to the good environment to the society.
- ii) It had made an application dated 20.01.2004 to the Non-conventional Energy Development Corporation of A.P (NEDCAP) to set-up an industrial waste based power project (poultry litter) with a capacity of 2.0 MW power generation and for sale of power to then APTRANSCO. After examining the application, the NEDCAP had accorded permission to set-up 2.0 MW industrial wastes based power project (poultry litter). An Agreement dated 06.05.2004 was entered between the NEDCAP and the petitioner. It had also entered into a PPA with the APTRANSCO for the 2.0 MW on 28.07.2004 with the prevailing APERC tariff at that time. The erstwhile APERC had revised the tariff for purchase of power from Non-conventional Energy (NCE) projects, as per the order dated 20.03.004 and the Industrial Waste projects were given the tariff rate on par with the Biomass Power Plants.
- iii) Subsequently through a letter dated 12.04.2004, it had requested the NEDCAP for enhancing the capacity by 1.0 MW to have economically viable project. The request was considered and the capacity was scaled up to 3.00 MW from the original capacity of 2.00 MW, and a fresh proceedings was issued on 16.11.2004 and a fresh agreement dated 17.11.2004 was executed by amending the agreement.
- iv) The petitioner had entered into an amended PPA for 3.0 MW on 02.03.2005 with APTRANSCO and a PPA copy was sent to the erstwhile APERC for its consent, but such consent was not given by the erstwhile APERC.
- v) The petitioner approached the term loan lender, The Andhra Pradesh Industrial Development Corporation (APIDC) for sanction of a term loan for 3.0 MW Industrial waste (Poultry) power plant. The financial projections were submitted to the APIDC based on the erstwhile APERC

tariff order dated 20.03.2004. The APIDC had projected the 3.0 MW Project cost at Rs.1155.00 lakh and sanctioned the term loan of Rs.693.00 Lakh and the promoters' contribution was Rs.462.00 lakh. It had approached the SE, Nalgonda, APCPDCL for sanction of laying of an independent 33 KV overhead line from its plant to Pochampally substation. There upon on 29.12.2005 SE, APCPDCL, Nalgonda had sent his proposals for taking further action to CGM, Commercial, APCPDCL. In 1<sup>st</sup> week of January 2006 it took a copy of letter from APCPDCL stating that it had to re-enter the PPA with the APCPDCL as per G.O.Ms.No.58, dated 07.06.2005. It had submitted a representation dated 07.01.2006 to CMD, APCPDCL, stating that any revision in the tariff would adversely effect the functioning of the project and offered its willingness to re-enter the PPA for 3 MW as per the tariff order given by the erstwhile APERC. The CGM, Commercial, APCPDCL had invited the petitioner for discussion on 30.01.2006 at their office. The APCPDCL had forced it to re-enter the PPA again with them with a negotiated tariff. It requested the APCPDCL that they had already projected the APERC tariff prices and took the bank loans, now any revisal of the rates are not at viable for running the plant and the bankers may immediately stop the loans for a non-viable plant. The APCPDCL had offered it a price of Rs. 2.651 unit based on the ROE of 14%, effective interest rate 7.5%, fuel escalation of 4% and no basis was explained to arrive at the rate of Rs. 2.65 despite asking for the basis.

- vi) In the meanwhile, it had approached the Chief General Manager-Commercial, CPDCL, for knowing the status of the 33 KV OH line. On that it was informed that they did not receive any information from the Superintendent Engineer, Nalgonda. Thereafter, it pursued the matter after 15 days but there was no information regarding sanction of 33 KV OH Line to the petitioner.
- vii) It had submitted a representation dated 25.03.2006 to the then Chairman, APERC, requesting to consider the project for its consent. In pursuance thereof, the Secretary, APERC addressed a letter dated 12.04.2006 to

the Chairman and Managing Director, APTRANCSO, for information and necessary action at their end with copies to the CMD, APCPDCL and the petitioner.

- viii) The petitioner had made representations to the then Government of Andhra Pradesh regarding the tariff related issues and sanction of 33 kV OH line on 05.02.2006, 18.04.2006 & 15.07.2006 and it had been called for the discussion on 24.04.2006 with the Finance Director of APCPDCL along with their financial consultants, M/s. Feed Back Ventures. It was offered again Rs. 2.65 per unit despite Government's instruction to consider a favourable tariff.
- ix) It had submitted a representation to the Chairman & Managing Director for 33 KV OH Line permission and bay extension work. It had given proof of delivery challan of the equipment's like transformers, breakers etc. and requested to give immediate permission. The Managing Director of the petitioner was called to attend for the discussion on 22.07.2006 at the CMD office, APTRANSCO along with CMD, APCPDCL and Director of the petitioner. The petitioner was again offered Rs. 2.87 per unit. But it requested the CMD APTRANSCO for the APERC tariff.
- x) Considering the investment of Rs. 1100.00 lakh and the APIDC repayment of the term loan and the pressures from the bankers, machinery suppliers and the mounting interests due to the delay in execution of the project, it was thought over that if they did not accept the proposed price of CMD, APTRANSCO it would not be given 33 KV OH line permission and the total project may collapse. Under these circumstances, it was made to accept the price that was decided by the CMD of APTRANSCO of Rs. 2.99 per unit for the 1<sup>st</sup> year, instead of the APERC tariff.
- xi) It was given a draft PPA containing the Tariff of Rs.2.99 per unit and found that there was no increase in the unit price every year. As per the APERC tariff it ought to have to got Rs.3.08/- per unit in FY 2007-08 and Rs. 3.11/-

per unit in FY 2008-09, but it was getting only Rs.2.99 / unit. Finally, it had entered into a PPA on 02.02.2007 with the APCPDCL for 3.5 MW.

- xii) The Secretary, APERC communicated the consent of the Commission to the PPA dtd 02.02.2007. The administrative approval and technical sanction had been given on 07.02.2007 for erection of 33 KV OH line and bay extension works.
- xiii) It had started running the power plant in January 2008 (CoD was in December 2007) and it had generated power in January 2008 and February 2008. It calculated the cost of raw material consumption, operation and maintenance costs, interests etc., and found that running the plant with Rs. 2.99 per unit was a huge loss for it and for generating one unit, the raw material cost was Rs. 2.48/- only. The operation and maintenance costs were Rs. 0.35 ps per unit. The other costs like spares, water, chemicals, oils, Diesel, bed material, etc., were of Rs. 0.18 Ps per unit. Thus, the total costs were coming to Rs. 3.01 per unit at 80% PLF, apart from that the petitioner had term loan and interest repayments, staff salaries, yearly maintenance etc.
- xiv) On knowing about the new tariff order by the erstwhile APERC for the period 01.04.2009 to 31.03.2014, it represented to the APERC on 20.02.2009. It had clearly explained to the Commission with the existing PPA's schedule IA, the plant cannot be run and along with petitioner, another company i.e., M/s. RAUS power a 3.66 MW poultry waste power plant, had also attended the meeting in the court hall of APERC on 28.02.2009. It represented on behalf of poultry waste power plants before the APERC.
- xv) The Commission passed the revised tariff order on 31.03.2009 in which the variable part of tariff for various types of projects covering the period from 2009-10 to 2013-14 was decided and the same should have been applied to the petitioner.

- xvi) A petition was filed before the APERC with O. P. No. 69 of 2012 requesting for the applicability of the APERC tariff instead of negotiated tariff by the APCPDCL. On 24.11.2012, the APERC had dismissed the appeal of the petitioner.
- xvii) Basing on the ATE order dated 20.12.2012, the then APERC had issued an order on dated 22.06.2012 inviting the aggrieved parties to approach it for application of the generic tariff order.
- xviii) It is the duty of the state government to ensure that the distribution companies agree to pay the uniform rates per unit to all the similarly situated NCE projects (Biomass/Industrial waste). The APCPDCL's action is completely discriminatory, arbitrary, malafide in not treating it on par with the other NCE projects in the State and thereby violated the provisions of the Indian Constitution.

5. Originally, the matter had been heard by the then APERC and the same was disposed of by an order dated 08.08.2013. Aggrieved by the said order, the petitioner had filed an appeal before the Hon'ble ATE challenging the said order in Appeal No. 247 of 2013. The said appeal came to be disposed of by an order dated 31.07.2013 by the Hon'ble ATE.

6. Consequently, the original petition which was in (SR) stage when the matter was disposed of had been restored to the file by the erstwhile APERC and numbered as O P No. 45 of 2014. However, by the time the matter was taken up for hearing pursuant to the remand order made by the Hon'ble ATE, the Government of India had passed the A.P.Reorganisation Act, 2014 creating a new state of Telangana. Upon coming into force the new enactment, the state of Telangana came into existence from 02.06.2014 and the government of Telangana established a separate Regulatory Commission which became functional with taking over by us on 03.11.2014. Thereafter, since the instant matter falls within the territorial jurisdiction of the Telangana over which this Commission has jurisdiction, the new APERC transferred the petition to this Commission. Pursuant to such a transfer, the instant petition was taken on file by the Commission for numbering, the same as above O P and posted the same for hearing.

7. In view of the directions of this Commission, the 3<sup>rd</sup> respondent had filed a detailed counter affidavit and briefly, they are as under:

- i) The petitioner is trying to impose the term loans along with its accumulated interest payable to the funding agencies on DISCOM (TSSPDCL) as if there was a fault or commitment for payment for non-generation. During the hearing held on 24.06.2015, the petitioner furnished a tariff calculation sheet duly considering the financial parameters while taking the loans along with its interest taken from the financial institutions. However, the power plant didn't generate power, except during the months of January, 2008 and February 2008. The amount as per the agreed tariff for the energy supplied during these two (2) months was paid to the petitioner.
- ii) The petitioner's power plant was categorised under renewable energy and RE power plants are must run stations as per the erstwhile APERC orders dated 20.03.2004. Hence, there can't be any payment for non-generation period. The petitioner's power plant was not subject to merit order dispatch as no backing down instructions were applicable, being RE based power plant.
- iii) The ATE directed to determine a viable tariff afresh after hearing both the parties prospectively, whereas, the contention of the petitioner is to determine the tariff with consideration of previous loans and also to cover the losses incurred by the developer for which DISCOM is not responsible. The financial components in tariff working sheet furnished by the petitioner on 24.06.2015 are against the orders of ATE as the petitioner has added the loan repayment in arriving the price per unit, which is even higher than the APERC tariff orders for RE plants dated 22.06.2013 read with 06.08.2013. The petitioner is seeking the first year tariff of Rs. 6.90/- per unit instead of negotiated levelized tariff of Rs. 2.99/- per unit, which is even much higher than the APERC preferential tariff. Hence, there is no sanctity on the tariff calculation sheet furnished by the petitioner, which in fact is in derogation of the negotiated levelised tariff of Rs. 2.99/- per unit. The tariff comparison between the APERC orders dated 22.06.2013 read with 06.08.2013 and the petitioner's calculation which is shown in the table below:

Year of Operation	Tariff proposal of petitioner			Tariff for industrial waste plant as per the then APERC orders dated 22.06.2013 (*), 06.08.2013 & 16.05.2014				
	FC (Rs. / unit)	VC (Rs. /unit)	Total tariff (Rs. / unit)	FC (Rs. / unit)	VC (Rs. /unit)	Financial Year (VC)	Total preferential tariff (Rs. / unit)	APERC orders dated
1 <sup>st</sup> year	2.36	4.54	6.90	1.77	2.35	2007-08	4.12	22.06.2013
2 <sup>nd</sup> year	2.33	4.81	7.14	1.74	2.49	2008-09	4.23	
3 <sup>rd</sup> year	2.31	5.10	7.40	1.72	3.03	2009-10	4.75	06.08.2013
4 <sup>th</sup> year	2.28	5.40	7.69	1.69	3.18	2010-11	4.87	
5 <sup>th</sup> year	2.26	5.73	7.99	1.67	3.34	2011-12	5.01	
6 <sup>th</sup> year	2.24	6.07	8.31	1.67	3.51	2012-13	5.18	
7 <sup>th</sup> year	2.23	6.44	8.66	1.65	3.68	2013-14	5.33	
8 <sup>th</sup> year	2.21	6.82	9.04	1.64	4.28	2014-15	5.92	16.05.2014 (OP No. 32 of 2014)
9 <sup>th</sup> year	2.16	7.23	9.39	1.59	4.54	2015-16	6.13	
10 <sup>th</sup> year	1.70	7.67	9.36	1.23	4.81	2016-17	6.04	

FC – Fixed Cost      VC – Variable Cost

*\*The order is under challenge before Apex Court.*

- iv) The above tariff comparison table depicts as to the much higher tariff sought by the petitioner duly passing over the previous loans rather than rescheduling loan amount with the funding institutions, which is against the provisions of the concluded PPA and also the ATE orders passed in Appeal No. 247 of 2013. The tariff computation sheet furnished by appellant is having no sanctity as it is not maintainable. Due to stoppage of plant operations, the DISCOM had lost the assured power to the extent 3.5 MW @ Rs. 2.99/- unit and, purchased the same quantity of power from open market at higher rates under short term route. As a result, the loss incurred for non-generation / non supply by the petitioner for the agreed capacity in terms of PPA, may be also be taken into consideration, in case the Commission proceeds with determination of the fresh tariff prospectively.
- v) Now coming to the petition of the developer to decide the tariff as the order of Hon'ble ATE in Appeal No. 247 of 2013 & I. A. No. 333 of 2013, dated 31.07.2014, the following queries are to be addressed:
- a) Whether or not the state commission can re-open the PPA, though the other party, DISCOM is unwilling?

- b) Whether or not public hearing in this case is required as per section 61 of the Act as any increase in appellant's plant tariff would cause burden on DISCOM and at last on to the end consumer?
  - c) Whether or not the PPA comes under jurisdiction of the Civil Court as per the Contract Act (Civil Disputes)?
  - d) Whether or not the cost incurred towards purchase of energy under short term basis at higher costs in open market due to non-availability of assured power from the petitioner's power plant can be recovered from monthly generation bills or by other means?
- vi) If the petitioner's PPA is reopened for escalation of tariff would lead to opening legal and financial implications as certain other negotiated PPA's were entered in to by the DISCOM with the RE developers. Any consideration in re-opening the PPA would lead other negotiated generators, which have been supplying power to the DISCOMs, to ask for more tariff and it may be a precedence for all such future cases.
- vii) The negotiation of tariff for the petitioner's power plant was carried out as per the directions of the APERC in its RPPO orders in O. P. No. 9 of 2005 and the provisions contained therein. While returning the PPA entered into by the petitioner with the then APTRANSCO, the then APERC had observed that:
  - a) All PPAs in respect of NCE not yet consented to by the Commission may be re-examined in the light of the Order dated 27.09.2005 of the Commission on the renewable power purchase obligation (RPPO) of DISCOMS in O.P. No. 9 of 2005 and also keeping in view the provision of the APERC (Terms & Conditions of Open Access) Regulation, 2005 (No. 2 of 2005).
  - b) It is only the DISCOMs concerned that can enter into PPA and not the APTRANSCO.
  - c) The DISCOMs concerned shall while submitting any PPA for purchase of NCE inform the Commission about the procedure adopted in selecting the particular NCE project for entering into the PPA.

- viii) The petitioner had generated the power for just 2 months only, i.e., during the months of January, 2008 and February, 2008 and stopped the plant operations with no intimation to either DISCOM or APTRANSCO or APERC, which led to the DISCOM to purchase the same quantity of power at higher rates in open market under short term route.
- ix) They are not responsible either proximately or remotely for the under generation or for the non-generation of power by the petitioner. If the averments in respect of the computation of tariff made by the petitioner are accepted, it would cause irreparable damage to the 3<sup>rd</sup> respondent and that the public interest would be in a jeopardy.
- x) The Commission may consider the subsequent judgments / orders passed by the Hon'ble Supreme Court of India in Civil Appeal No. 5612 of 2012 on the appeal filed by M/s Bengaluru Electricity Supply Company Limited against M/s Konark Power Projects Limited and another, in favour of the 3<sup>rd</sup> respondent holding that tariff cannot be amended by the Commission. Apart from the above, the PSERC in Petition No. 58 of 2014 dated 25.06.2015 filed by Punjab Biomass Private Limited against Punjab State Power Corporation Limited and others, has followed the principle enunciated by the Hon'ble Supreme Court. Moreover, it is also stated that the Hon'ble ATE in Appeal Nos. 198, 199, 200, 291 of 2014 dated 20.05.2015 in the matter of Gujarat Urja Vikas Nigam Limited vs Green Infra Corporate Wind Power Ltd. and others issued orders following the Supreme Court judgment and de-reserved the matters which were awaiting judgment. (The said appeals were subsequently dismissed by an order dated 28.09.2015)
- xi) The parameters considered by the petitioner in tariff calculation sheet and arriving at the tariff for the petitioner's power plant is much higher than the rate agreed at Rs. 2.99/- per unit for the entire period of 20 years from declaring the said power plant as commercially operational i.e., viable, it is stated that though the Hon'ble ATE remanded the case of re-determination of viable tariff for the petitioner's power plant, it is a known fact that the negotiated PPA was concluded based on the stipulations in the RPPO Order in O. P. No. 9 of 2005, dated 27.09.2005 issued by the then APERC. Accordingly, negotiated the PPA, which

was concluded at mutually agreed terms and tariff, had got the consent from the then APERC on 19.01.2007 under Section 21 (4) (b) of APER Act, 1998.

- xii) It is very evident that there is no fault on the respondents either in entering preferential tariff PPA by the APTRANSCO or concluding a negotiated PPA by the APCPDCL at that time, but on the directions of the then APERC only.
- xiii) The filing of the initial petition by the petitioner in O. P. No. 69 of 2012 and O. P. (SR) No. 84 of 2013 before the erstwhile APERC as well as appeal before the Hon'ble ATE, were dismissed. All the proceedings have been contested praying against the reopening of the PPA to revise the tariff as the provisions contained in Article No. 2.2 of PPA read with Schedule - 1A which do not provide for any further escalation, revision towards downwards or upwards tariff than that is agreed. Conversely, the tariff for the energy supplied / to be supplied is frozen at Rs. 2.99/- till the duration of PPA.
- xiv) There was a difference in the judgments passed by the Hon'ble ATE in the case of petitioner's tariff when compared to similarly placed developer, viz., M/s. Velagapudi Power Generation Limited (VPGL), a 4 MW biomass based power plant located in Guntur District, which concluded a negotiated PPA. In the case of M/s VPGL, the Hon'ble ATE in Appeal No. 47 of 2009 dismissed the petitioner's plea to revise the tariff on par with other biomass developers duly stating that the PPA is concluded based on the mutually agreed terms and tariff.
- xv) It is not ready for revision of the parameters to arrive at the higher tariff, since any hike in tariff shall be passed on to the consumer. The PPA was concluded after arriving at the mutually agreed terms and tariff indicated in the Articles of PPA. Additionally, it has got consent from the then APERC.

8. Sri M. V. Pratap, Advocate, learned counsel for the petitioner made various submissions during the course of hearings before us and briefly, they are as under:

- (i) The learned counsel at length explained the events that had led to the closure of the power plant and submitted that the plant was closed down as the tariff offered was too low and the petitioner was not in a position to recover the cost

of operations. The petitioner was incurring a huge loss per each unit of power generated.

- (ii) The matter has been remanded in the month of July, 2014. The respondents have not preferred any review or appeal before the Hon'ble ATE or the Hon'ble Supreme Court of India. The summary of findings by the Hon'ble ATE have become final, binding on the parties here to as well as on this Commission. As the project is under shut down owing to unviable tariff, it has become difficult for the petitioner to service the loans received from banks and financial institution. In fact, the A P Industrial Development Corporation has served RCS notice on 14.11.2014 for not regularizing the dues on the term loan and they are taking steps to seize the assets of the Company. The petitioner is willing and ready to re-start the project, provided the tariff is viable.
- (iii) The Hon'ble ATE had considered the issue at length vide orders dated 31.7.2014 for revision of tariff. The revised tariff calculations by considering the CERC order dt.15.5.2014 and the then APERC order based on the parameters of the order of the Hon'ble ATE dated 20.12.2012 and O. P. 32 / 2014 in the matter of determination of variable cost from FY 2014-2019 in which the Commission had issued tariff for industrial waste power plants on par with the bio-mass power plants. The learned counsel submitted that in first year a minimum tariff of Rs. 6.90 should be given and in 10<sup>th</sup> year tariff should be Rs. 9.36 per unit. Further, he also submitted that as per APERC generic tariff order in the 8<sup>th</sup> year tariff works out to Rs. 6.18, 9<sup>th</sup> year Rs.6.40 and 10<sup>th</sup> year 6.33 per unit. He made a detailed submissions on the tariff calculation sheets file by him before the Commission.
- (iv) The Hon'ble ATE order is binding on the Commission as the respondents did not file any appeal before the Supreme court as required under section 125 of the Electricity Act, 2003.
- (v) The Commission has to consider the accumulated interest on loans and past losses while determining the reasonable tariff as the petitioner is willing to restart the power plant.

(vi) The Commission has to allow atleast a minimum tariff that has been stipulated in the generic tariff order of the then APERC to run the plant and revive the business operations.

9. Sri Y. Rama Rao, Advocate, learned counsel for the 3<sup>rd</sup> Respondent made the following submissions during the course of hearings before the Commission:

- (i) No material is placed before the Commission to establish that the DISCOM had forced or coerced the petitioner to enter into a PPA, which is binding on the petitioner.
- (ii) More than 6 years had lapsed after closure of the plant and averments made are not believable.
- (iii) The Tariff was negotiated with the petitioner and the DISCOMs. Other stakeholders will encounter problems in disregarding the concluded PPA.
- (iv) The petitioner had shut down the plant within two months from the CoD without any notice to the 3<sup>rd</sup> Respondent. Thereby, it had intentionally avoided the legally binding contract and there is no certainty that petitioner shall honour the concluded PPA in future.
- (v) The Petitioner claimed the interest as a part of tariff which is not acceptable as the Respondents were willing to buy the power at the agreed price of Rs.2.99 per unit.
- (vi) The Petitioner could have opted for open access, if it was interested in promoting the NREs and the technology it had adopted.
- (vii) The Fixed cost cannot be altered retrospectively and the fixed cost for biomass is different and the PPA is valid and the Hon'ble ATE has not cancelled the PPA.
- (viii) The petitioner is seeking to determine the tariff with due consideration for non-generation period, starting from 2008 to till date. The petitioner is trying to impose the term loans along with interest payable to the funding agencies

on the 3<sup>rd</sup> respondent, even though there is no fault on the part of the distribution licensee.

- (ix) The Hon'ble Commission may in the interest of DISCOM and end consumer, issue orders directing the petitioner to generate the energy duly putting a clause of penalty for non-generation of energy to that extent possible at forbearance price fixed by CERC-REC regulations dated 01.06.2010 in suo motu petition No. 99 / 2010 for non – solar RECs (i.e., Rs. 3.90/-)
- (x) Declare that the tariff computation sheet furnished by the petitioner as impractical, not maintainable and disallow the same. Issue orders not to re-open the negotiated PPA already entered by the petitioner as it got the consent of the then APERC, which would result in a higher tariff payable to the petitioner's energy and also to avoid burden on DISCOM. Any consideration in revising tariff, would lead a chance for other negotiated PPAs of RE power plants (precedence) to seek for a higher tariff.
- (xi) The Commission shall have to review the entire case of the petitioner in proper perspective by taking into consideration the settled proposition of law that Commission cannot alter the contractual terms and obligations entered into by the parties through a contract. The Hon'ble Supreme Court of India in Civil Appeal No.5612 / 2012 between M/s. **Bangalore Electricity Supply Company Limited. Vs. M/s. Konark Power Projects Limited and another** has categorically held that there is no scope for the Commission to vary the tariff agreed between the parties under the approved PPA. Further, the said Judgment has been followed by the PSERC in its order dated 25.06.2015 in O. P. No. 58 / 2014. The Judgment of the Hon'ble Supreme Court is binding on the Commission and the powers u/s. 61 and 62 of the Act, 2003 cannot be exercised for re-determination of the tariff.
- (xii) There is absolutely no difference in the judgments passed by the Hon'ble ATE in the case of the petitioner when compared to similarly placed developer vis-à-vis M/s. VPGL, a 4 MW bio-mass based power plant located in Guntur District of present Andhra Pradesh which concluded a

negotiated PPA. In that case, the Hon'ble ATE, in Appeal No. 47 / 2009 dismissed the plea to revise the tariff on par with other bio-mass developers stating that the PPA was concluded based on the mutually agreed terms and tariff. This Commission shall have to non-suit the petitioner keeping in view the Judgment of the Hon'ble Supreme Court in M/s. Bangalore Electricity Supply Company Limited (Supra) and O.P.No.58/2014 dated 25.06.2015 decided by the PSERC and Appeal No.47/2009 in the case of VPGL.

(xiii) The parameters considered by the petitioner in the tariff calculation sheet arriving at the tariff for its power plant is much higher than the rate agreed at Rs. 2.99 per unit for the entire period of twenty years from declaring the COD. The Hon'ble ATE has remanded the case for re-determination of viable tariff for petitioner's power plant, it is a known fact that the negotiated PPA was concluded based on the stipulations in RPPO Order No. 9 / 2005 dated 27.09.2005 issued by the erstwhile APERC. The negotiated PPA which was concluded at mutually agreed terms and tariff had got the consent from the then APERC. This Commission cannot re-open the PPA even though the respondent DISCOM is unwilling. Right from day one of the institution of the case, the respondents have contested against the re-opening of PPA to revise the tariff as the provisions contained in Article No. 2.2 of the PPA r/w Schedule I-A which do not provide for any further escalation, revision towards downwards or upwards tariff than the agreed. Conversely, the tariff for the energy supplied/to be supplied is frozen at Rs. 2.99 per unit till the duration of PPA.

10. In reply, Sri. M. V. Pratap, Advocate, for the petitioner made the following submissions:

- (i) Several representations were made to the DISCOM for revision of tariff and the petitions were not considered and they were rejected without any basis.
- (ii) It is a fact that no notice of closure of plant was given but the petitioner was left with no option as it was incurring a huge loss and there was no response to its request for revision of tariff.

- (iii) Interest burden is heavy and the petitioner has to pay the accumulated interest to the financial institutions otherwise the generic tariff will not make the power unit viable. The Commission has to consider accumulated Interest expense for determination of tariff of the petitioner.
- (iv) The Hon'ble ATE order is binding on the Commission as the DISCOM had not preferred any appeal to the Supreme Court. The decision of the Supreme Court in the case of Bangalore Electricity Supply Company (supra) relied upon by the 3<sup>rd</sup> Respondent is not applicable to the facts of the case as there are no regulations stipulated either by the then APERC or by the TSERC. The Judgment of the Hon'ble Supreme Court, the orders of PSERC and the Hon'ble ATE have been rendered subsequent to the order of remand passed in the matter of the petitioner. By no stretch of imagination, the said orders be made applicable as they are not applicable and later to the decision of the case of the petitioner, which was decided in the month of July, 2014. As per the direction of this Commission, the petitioner has placed before this Commission, the tariff calculation sheet. It is the duty of the 3<sup>rd</sup> respondent to examine the calculation sheet and take appropriate steps.
- (v) The petitioner could operate the plant only for two months after commissioning, owing to low and unviable tariff which Transco and distribution licensee had forced on it to agree. As a result of which, the petitioner's plant has been lying idle. The tariff of Rs. 2.99 per unit which is incorporated in the PPA does not even cover the variable cost of the petitioner and even servicing of loan is not possible. The Hon'ble ATE has consciously taken into consideration the factual backdrop resulting in the negotiated PPA and catena of decisions and set aside the order passed by the erstwhile APERC duly remanding the matter for re-determination of tariff in accordance with the findings recorded by the Hon'ble ATE.

11. We have perused the entire record as is available to us. Heard the counsel for the petitioner and the counsel for the respondent on several dates as noted above in the preamble to this order and have detailed consideration to the submissions of the rival parties including the tariff calculation sheets furnished by the petitioner.

12. The Hon'ble ATE has remanded back the matter to the Commission for determination of tariff prospectively and it would be appropriate for us to refer to the observations made by the Hon'ble ATE which are as under:

*“22. In view of the facts and circumstances of the case and the analysis made by us, as narrated above, we feel that this is a fit case for intervention by the State Commission to ensure that a reasonable tariff is allowed to the Appellant to enable them to revive their waste to energy generating plant which has been shut down since February, 2008 to resume power supplies to the Distribution Licensee which has been facing power shortage due to which it has to procure expensive power from different sources. However, we are not inclined to pass the order that the tariff as determined by the State Commission by its order dt. 22.6.2013 should be made applicable for the past period i.e., January and February, 2008 when the Appellant supplied energy to the Distribution Licensee as per the terms of the PPA. But, there is a case made out for revising the tariff of the Appellant by the State Commission prospectively. We, therefore, direct the State Commission to pass consequential orders revising the tariff for power supply by the Appellant to the Distribution Licensee, after hearing the parties.*

23. Summary of our findings:

*(i) The findings of the Tribunal in the various cases clearly establish that the State Commission has a duty to encourage development of renewable sources of energy. The State Commission has powers to modify a concluded PPA 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 of a renewable project agreed to between the parties is unviable resulting in closure of the power plant. However, the Commission has to keep in view the guiding principles laid down in Section 61 of the Electricity Act, 2003 while determining the tariff.*

*(ii) The sequence of events in the present case would indicate that the Distribution Licensee had used its dominant position to enter into a PPA with the Appellant at a tariff which was less than the generic tariff determined by the State Commission. As a result of the unviable tariff, the Appellant's Non-Conventional Energy Power Plant has been shut down since February, 2008 as they have not been able to recover their operating expenses for the tariff. The upward revision of tariff by the State Commission for NCE generators by the State Commission by order dated 22.6.2013 has vindicated the claim of the Appellant that their tariff was unviable.*

*(iii) According to Section 61 (h) and 86(1) (f) of the Electricity Act, 2003, the State Commission has to promote generation of electricity from renewable sources of energy. In view of the facts and circumstances of the case and the analysis made by us, we feel that it is a fit case for intervention by the State Commission to ensure that a reasonable tariff is allowed to the Appellant to enable it to revive its waste to energy project which has been under shut down since February, 2008. However, we are not inclined to pass the order that the tariff as determined by the State Commission by its order dated 22.6.2013 should be made applicable for the past period i.e., January and February, 2008 when the Appellant supplied energy to the Distribution Licensee as per the terms of the PPA. But, there is a case made out for revising the tariff of the Appellant by the State Commission prospectively. We, therefore, direct the State Commission to pass consequential order after hearing the parties.*

*24. In view of the above, the Appeal is allowed and the impugned order is set aside. Accordingly, the matter is remanded back to the State Commission for passing the consequential order in terms of the directions given above. However, there is no order as to costs.”*

13. We have perused the order of the Hon'ble ATE wherein it is observed that under Sec 61 (h) and 86 (1) (e) of the Act, 2003, the State Commission has to promote the generation of electricity from the renewable sources of energy. The 3<sup>rd</sup> respondent has not carried the matter by way of appeal to the Hon'ble Supreme Court under section 125 of the Act, 2003. Thus, the order of remand has become final and as such is binding on the parties to the appeal as well as this Commission. The Hon'ble ATE has directed the Commission to revise the tariff prospectively. We are unable to appreciate the contention of the 3<sup>rd</sup> respondent that the tariff cannot be allowed in the case of the petitioner in the light of the Judgment of the Hon'ble Supreme Court rendered in Civil Appeal No.5612/2012 dated 28.04.2015. The Hon'ble ATE has allowed Appeal No. 247 / 2013 along with I. A. No. 333 / 2013 by order dated 31.07.2014. Thus, the Hon'ble ATE order has become final and the Judgment of the Hon'ble Supreme Court referred to herein above, cannot be made applicable to the case of the petitioner, it being posterior to the remand order passed by the Hon'ble ATE. Further, we have carefully perused the Judgment of the Hon'ble Supreme Court rendered in Civil Appeal No.5612 / 2012 between M/s. **Bangalore Electricity Supply Company Limited Vs. M/s. Konark Power Projects Limited and another**. The respondents have strenuously relied on this Judgment and on the Clauses 5.2, 5.3 and 5.4 of the 2004 Regulations framed by the Karnataka State Commission. We are afraid that we cannot apply the Karnataka Commission regulations to the case of the petitioner. We are bound by our own regulations framed by us, if there are any in this regard. Further, the

PSERC has applied the ratio of the judgment of the Hon'ble Supreme Court in M/s. **Bangalore Electricity Supply Company Limited (supra)** which has been decided after passing of the Hon'ble ATE order in the petitioner's case. Having regard to the peculiar facts and circumstances in the case on hand, the order of the Hon'ble ATE having become final, we cannot be persuaded to apply the judgment of the Hon'ble Supreme Court rendered in M/s. **Bangalore Electricity Supply Company Limited** to the case of the petitioner. We are bound by the order of the Hon'ble ATE.

14. We have perused the order passed by the Hon'ble ATE in the matter of Velagapudi Power Generation Limited Vs. SPDCL of AP and others dated 19.04.2010. We are afraid that we cannot appreciate the contention of the respondents for the reason that the judgment of the Hon'ble ATE rendered in Appeal No.247 / 2013 and I. A. No.333 / 2013 has become final in the eye of law. The respondents have not chosen to file a review petition or an appeal before the Hon'ble Supreme Court under the provisions of Electricity Act. Once the Judgment has become final, this Commission has no other alternative except to obey the remand order passed by the Hon'ble ATE. In view of this, the order of Hon'ble ATE in the matter of VPGL does not come to the aid of the respondents. Thus contentions based on the above judgment are rejected.

15. The petitioner had entered into a Power Purchase Agreement (PPA) with the Central Power Distribution Company of Andhra Pradesh Limited (APCPDCL) on 02-02-2007 (APCPDCL name has been changed to TSSPDCL). The Hon'ble ATE had directed the Commission to **"modify"** the PPA entered into by the petitioner for the promotion of the renewable energy and did not direct to **'ignore'** or **'dis-regard'** the PPA and follow the generic tariff order of the erstwhile APERC dated 22-06-2013. We are of the view that certain clauses of the PPA dated 02-02-2007, which are relevant for the purpose of giving effect to the directions of the Hon'ble ATE, are quoted or reproduced as hereunder:

*"2.2 The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to DISCOM at the rates specified in Schedule – IA or the tariff as determined by the Commission for Industrial Waste based power projects from time to time, or whichever is less shall be applicable. Notwithstanding the tariff indicated above, there will be a special review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O & M Expenses and the Variable Cost."*

.....

“12.2 No oral or written modifications of this Agreement either before or after its execution shall be of any force or effect unless such modifications is in writing and signed by the duly authorized representatives of the Company and the APCPDCL, subject to the condition that any further modification of the Agreement shall be done only with the prior approval of Andhra Pradesh Electricity Regulatory Commission. However, the amendments to the Agreement as per the respective orders of APERC from time to time shall be carried out. All the conditions mentioned in the Agreement are with the consent of APERC.”

.....

**“Schedule - IA**

**Two Tier Tariff**

<b>Year of operation</b>	<b>Fixed cost Rs. Per unit</b>
1 <sup>st</sup>	1.61
2 <sup>nd</sup>	1.57
3 <sup>rd</sup>	1.53
4 <sup>th</sup>	1.49
5 <sup>th</sup>	1.45
6 <sup>th</sup>	1.41
7 <sup>th</sup>	1.37
8 <sup>th</sup>	1.33
9 <sup>th</sup>	1.26
10 <sup>th</sup>	0.87

<b>Financial year</b>	<b>Variable cost Rs. Per unit</b>
2006-07	1.40
2007-08	1.47
2008-09	1.54

The project shall be entitled to a tariff with the component of fixed charge based on the year of operation (nth year) and variable charge corresponding to the financial year of the operation. The fixed charges from the 11<sup>th</sup> year onwards shall be as determined by the Commission for such power projects from time to time for the corresponding years.

The variable charges for the period from 2009-2010 onwards will be considered as fixed by Commission for such projects from time to time.

*In any year, if total cost exceeds Rs. 2.99 per unit, the fixed cost is reduced accordingly, such that the total cost is limited to Rs. 2.99 per unit.*

*Settlement period is one year from the date of commercial operation for calculation of fixed charges.*

*Fixed charges are payable for a PLF of 80% of energy for export to grid for sale to APCPDCL as indicated in Schedule – I.*

*Where PLF during a settlement period exceeds 80%, only variable cost as indicated above and an incentive as fixed by Commission from time to time shall be paid for every unit delivered in excess of the above PLF.”*

16. The Power Plant of the Petitioner was commissioned in December 2007 and it had generated power in the months of January and February 2008 and the plant was shut-down thereafter. The Power Purchase Agreement at Article 2.2 stipulates that the tariff of power shall be at the rates specified in Schedule – IA or the tariffs as determined by the Commission for Industrial Waste based power projects from time to time, whichever is lower. The Power Purchase Agreement entered into by the petitioner shall be reviewed on completion of ten years from the commissioning of the power project. Article 12.2 of the PPA, stipulates that the PPA cannot be modified without the consent of both the parties viz., the petitioner and the respondent. During the course of hearings before the Commission, the 3<sup>rd</sup> Respondent expressed its unwillingness to modify the terms and conditions of the PPA.

17. The Hon'ble ATE relied on the following decisions in its order from paras 11 to 14:

- i) Tarini Infrastructure Limited Vs. Gujarat Urja Vikas Nigam Limited [2012 Indlaw APTEL 158]
- ii) Uttar Haryana Bijili Vitran Nigam Ltd Vs. Haryana Electricity Regulatory Commission & Ors. [2012 ELR (APTEL) 1085]
- iii) Konark Power Projects Limited, Karnataka Vs. Bangalore Electric Supply Company Limited, Bangalore & Anr. [2012 ELR (APTEL) 0429]
- iv) Junagadh Power Projects Private Ltd Vs. GUVNL & Ors. In Judgment dated 02-12-2003 in Appeals 132 & 133 of 2012.

18. In the above decided cases and relied on by the Hon'ble ATE in the present case, briefly, the following propositions were laid down:

- (i) A PPA is a binding contract, unless it is against the provisions of law.
- (ii) The State Commission has the power to **“modify”** a PPA and it has to maintain a balance between the consumers and the Distribution companies.

- (iii) A Change in clauses of a PPA can be made only in respect of “uncontrollable factors” and power plants facing closure need to be incentivised.
- (iv) The PPA can be revisited to take care of the increase in the fuel price.

19. In our view, the Hon’ble ATE has relied upon and followed the ratio laid down in Tarini Infrastructure Ltd (supra) wherein it was held that a contract entered into between the parties is definitely binding on the parties unless the conditions contained in the PPA are against the provisions of the Electricity Act. Accordingly, we rely upon the ratio laid down in Tarini Infrastructure Ltd (supra) while deciding the issue before us.

20. The Hon’ble ATE has directed the Commission, to revise the tariff of the petitioner **“prospectively”**. We are of the view that it is in the interest of all the stakeholders of the power sector not to **“disregard”** or totally **“ignore”** the PPA, in particular for the promotion & encouragement of renewable energy segment. We are of the view that overall ceiling of Rs.2.99 per unit as agreed in the PPA is not desirable and such a ceiling shall not promote the renewable energy generation because the total fixed cost and variable cost may exceed a sum of Rs. 2.99 per unit over a period of time and the same is removed. Hereafter, the tariff per unit shall comprise of fixed charges and variable charges per unit without any overall ceiling limit per unit. The PPA contains a provision for revision of variable cost/charges and it is a business necessity to revise the variable cost from time to time to take care of **“uncontrollable factors”**.

21. The Hon’ble ATE, has directed to ensure that a reasonable tariff is allowed to the petitioner to enable it to revive its waste-to-energy project, which has been shut-down after generation of power in February 2008. The Hon’ble ATE has referred to the generic tariff order of the then APERC dated 22-06-2013 and observed that it should not be made applicable to the past period. We have perused the generic tariff order dated 22-06-2013 of the erstwhile APERC, which stipulates that the generic tariff order shall be applicable for the units existing as on 31-03-2004 and those commissioned between 01-04-2004 and 31-03-2009. This generic order of erstwhile APERC dated 22-06-2013, clearly stipulates that it shall not be applicable to the projects covered by the negotiated Power Purchase Agreements. Thus, we are of the

view of that on a strict interpretation of the erstwhile APERC order, the cases covered by the negotiated PPA are outside the purview of the generic tariff order dated 22-06-2013. Further, the power plant of the petitioner did not produce any power after February 2008 and the Hon'ble ATE further observed that the generic tariff order dated 22-06-2013 of erstwhile APERC should not be made applicable for the past period i.e., January and February 2008. After February 2008, the plant has been shut-down and no useful purpose will be served by determining the tariff from FY 2007-08 to FY 2014-15. However, a generic tariff order was passed by the then APERC on 16-05-2014, fixing the variable cost for the industrial waste based power projects for the period from FY 2014-15 to FY 2018-19 and the relevant portion from this order of erstwhile APERC is reproduced as hereunder:

**“Indicative Variable Cost for Industrial Waste based power projects for the period FY 2014-15 to FY 2018-19 (Rs./Unit)\***

<i>Financial year</i>	<i>Variable cost Rs. Per unit</i>
<i>FY 2014-15 **</i>	<i>4.28</i>
<i>FY 2015-16</i>	<i>4.54</i>
<i>FY 2016-17</i>	<i>4.81</i>
<i>FY 2017-18</i>	<i>5.10</i>
<i>FY 2018-19</i>	<i>5.40</i>

\* The fuel price escalation is indicative (6%). Actual fuel price escalation would be notified by the Commission before the start of each Financial Year starting from FY 2015-16.

\*\* This is the rate APDISCOMs have to pay.”

22. Generally, the Commission follows two-part tariff system comprising of Fixed Cost and Variable Cost in all the cases for determination of tariff. The Fixed Cost declines over a period of time but the variable cost changes from time to time either moves upward or downward. We have considered the serious implications of **‘ignoring’** or **‘disregarding’** the binding and the concluded PPA entered into by the petitioner under the Indian Contract Act, 1872. The Hon'ble ATE observed that the Commission has the power to ‘modify’ a concluded long-term PPA to give impetus to

the companies generating electricity using the renewable energy. At the same time, the Hon'ble ATE also relied on the decision in Tarini Infrastructure (supra) wherein it was held that the PPA is a binding commercial contract between the petitioner and the respondents. The 'consideration' in a contract is an important element and without which an agreement cannot be called a valid contract under the provisions of the Indian Contract Act, 1872. During the course of hearings before us, the learned counsel for the 3<sup>rd</sup> Respondent submitted that the PPA entered into by the Petitioner is binding and its terms and conditions cannot be altered unilaterally. We appreciate the importance of 'consideration' in a contract and the 3<sup>rd</sup> Respondent has entered into the PPAs with various renewable energy generators and the contents of various PPAs are more or less identical and totally ignoring the PPAs will have serious implications in the long run for the entire electricity industry. Thus, we are of the view that a concluded contract should not be **'ignored'** totally and such a step shall not be conducive for the development of the renewable energy sector in the long run. Preservation of sanctity of a PPA, atleast partly, needs a serious consideration otherwise new investment in the renewable energy sector may not be forthcoming and total disregarding of the PPA may turn out to be an impediment for the healthy growth of the Renewable energy sector. Thus, we are of the view that the Fixed Cost as reflected in the PPA needs to be adopted for determination of the tariff and the variable cost is adopted from the generic tariff order of the then APERC dated 16-05-2014 for the determination of viable tariff for the petitioner for two years. This approach also meets the ends of justice and at the same time sanctity of a commercial contract is preserved. As observed by us earlier, that ceiling of Rs.2.99 per unit as agreed in the PPA is not desirable and such a ceiling of Rs.2.99 per unit requires to be ignored as it does not promote the renewable energy generation. We have considered the interests of the consumer and also the generators while coming to the conclusion that the PPA should be **'modified'** so that a closed power unit can be revived and the PPA should not be ignored totally. A peculiar problem arises in the facts and circumstances of this case because the power plant was commissioned in December 2007 and the plant did not produce any significant power after the FY 2007-08 and the learned counsel for the petitioner contended that accumulated the interest should be considered by the Commission while determining the tariff. To counter the argument of the petitioner, the counsel for the respondent submitted that the plant was shut-down without any notice to the respondent and they were forced to buy power from the open market at a higher

price. We agree with the submission of the learned counsel for the 3<sup>rd</sup> respondent that the accumulated interest shall not be considered for determination of the tariff. Thus, as per the power purchase agreement the petitioner is entitled to the fixed cost as applicable to 9<sup>th</sup> year of operation. As observed by us earlier, we are determining the tariff for two years only and the PPA stipulates that from 11<sup>th</sup> year onwards, the petitioner is at liberty to make a petition for determination of the tariff and the relevant portion from the PPA is reproduced hereunder:

*“The fixed charges from the 11<sup>th</sup> year onwards shall be as determined by the Commission for such power projects from time to time for the corresponding years.”*

23. As observed earlier, the power plant had been shut down and no significant power had been produced after FY 2007-08, therefore, in the peculiar facts and circumstances of the case before us, we deem it proper to encourage the renewable energy production by allowing the working capital requirement equivalent to two months of receivables as an incentive for one year i.e., from 01.04.2016 to 31.03.2017 by increasing the rate of tariff. This incentive is one time measure and is applicable for one year tariff i.e., tariff from 01.04.2016 to 31.03.2017. The working sheet is enclosed as annexure ‘A’ to this order. The working capital incentive works out to 0.0210 paise per unit and the same is rounded off to paise 3 per unit which shall be allowed for one year and thereafter the regular tariff as determined by the Commission in accordance with the terms of the PPA shall be applicable.

24. While determining the viable tariff in the facts and circumstances of the petitioner, it would be appropriate to recall our findings rendered in M/s. Gayatri Sugars Limited VS. M/s. TSNPDCL in O. P. No. 4 / 2015 dated 18.09.2005, which are as follows:

“We have considered the implications of the above Clauses of the PPA entered into with the petitioner by the 2<sup>nd</sup> Respondent. Normally, a commercial contract entered into by a Company is binding under the Contract Act, 1872. In the normal course, it is not possible to change the terms relating to ‘consideration’ unilaterally. The Hon’ble ATE has directed the Commission to ‘modify’ the contract for the promotion of the Renewable Energy but not to ignore or disregard the PPA and follow the general tariff order of the erstwhile APERC. The Hon’ble Supreme Court in Joshi Technologies International Inc Vs. Union of India & Ors. (2015) 374 ITR 322 has at length dealt with the commercial contracts entered into by a public sector undertaking and by various

Government departments. The 2<sup>nd</sup> respondent is a state public sector undertaking and we have considered the ratio of the Hon'ble Supreme Court in the above case while deciding the issue before us. We are not able to appreciate the contention of the learned counsel for the 2<sup>nd</sup> respondent that the order of the Hon'ble ATE is contrary to the ratio laid down by the Hon'ble Supreme Court in Bangalore Electricity Supply (supra) as it did not prefer an appeal in accordance with the provisions of Section 125 of the Act, 2003 to the Hon'ble Supreme Court. Thereby the order of the Hon'ble ATE is binding on the Commission. Further, nowhere in the order, the Hon'ble ATE has directed the Commission to totally ignore the contract and award the fixed cost to the Petitioner along with the variable cost. It is in the interest of all the stakeholders of the power sector not to disregard or totally ignore the PPA, despite the fact that the renewable energy requires encouragement. We are of the view that overall ceiling of Rs. 2.63 ps per unit as agreed in the PPA is not desirable and such a ceiling shall not promote the renewable energy generation because the total of fixed cost and variable cost may exceed a sum of Rs.2.63 ps per unit over a period of time. The PPA between the Petitioner and the 2<sup>nd</sup> respondent has a provision for revision of the variable cost and it is a business necessity to revise the variable cost from time to time. The Hon'ble ATE at para-16 of its order had referred to two generic tariff orders dt.31.3.2009 and 16.5.2014 passed by the erstwhile APERC for the purpose of application of generic tariff rate to the petitioner. We are of the view that the generic tariff orders to which the Hon'ble ATE had referred to deal with the variable costs and not with the fixed cost. Therefore, we are of the view that fixed cost as agreed by the petitioner and the 2<sup>nd</sup> respondent in the PPA requires to be adopted for the purpose of determination of the tariff. Be that as it may, the PPA entered into by the Petitioner requires to be considered in the interest of the power sector and disregarding it totally is not conducive for the development of renewable energy sector. In a commercial contract, the 'consideration' cannot be changed at the will of one party to the contract. Thus, we are of the view that the fixed cost as reflected in the PPA needs to be adopted for determination of tariff and the variable cost is adopted from the generic tariff orders of the erstwhile APERC. This approach meets the ends of justice and at the same time sanctity of a commercial contract is preserved."

25. We are of the opinion that there is no significant difference between the case on hand and the order passed by the ATE in Appeal No. 310/2013 and consequently the orders passed by this Commission in case of M/s.Gayatri Sugars Ltd., (supra) is equally applicable to the facts of the present case. Thus, we follow the ratio laid down by us in M/s.Gayatri Sugars Ltd., (supra) in the present case also.

26. Finally, we determine the tariff for the financial years 2015-16 and 2016-17 as applicable to the petitioner. Thereafter, as per the PPA, the petitioner has to adopt the fixed charges and variable charges as decided by the Commission from time to time and at the cost of repetition we reproduce the relevant sentences from schedule IA of the PPA dt.02.02.2007 as under:

“The fixed charges from the 11<sup>th</sup> year onwards shall be as determined by the Commission for such power projects from time to time for the corresponding years.

The variable charges for the period from 2009-10 onwards will be considered as fixed by the Commission for such projects from time to time”.

Thus, the tariff for FY 2015-16 & FY 2016-17 are determined as under:

	FY 2015-16 (Rs.)	FY 2016-17 (Rs.)
Fixed charges as applicable to 9 <sup>th</sup> year as per PPA dated 02-02-2007	1.26	0.87
Variable charges as per the then APERC order dtd.16.05.2014	4.54	4.81
Incentive – working capital requirement/ equivalent to two months receivables worked to on a tariff of Rs.5.80 per unit (Details in annexure ‘A’)		0.03
<b>TOTAL Tariff per unit</b>	<b>5.80</b>	<b>5.71</b>

27. We have examined the tariff computation sheets furnished by the counsel for the petitioner during the course of hearing before us and we are not inclined to accept for the reasons stated in the above paragraphs.

28. To sum up, the petitioner had entered into a PPA on 02.02.2007 wherein, the fixed cost and the variable cost were agreed separately subject to a ceiling price of Rs. 2.99 ps per unit. The petitioner requested for a revision of the tariff to the 3<sup>rd</sup> respondent but without any success. A petition was filed before the erstwhile APERC which was rejected by an order dated 24.11.2012. The petitioner filed a fresh petition before the erstwhile APERC after the said Commission had passed a generic tariff order on 22.06.2013 in pursuance of the order of Hon’ble ATE dated 20.12.2012 and the same was rejected by the erstwhile APERC on 08.08.2013. In pursuance thereof, an appeal was filed and the Hon’ble ATE vide order dated 31.07.2014 directed the Commission to determine the tariff afresh for promoting the renewable energy and directed to apply such tariff orders prospectively. We have adopted the fixed cost from the PPA as ‘**consideration**’ is an important element of a contract and it is not the interest of the renewable energy sector to totally “**ignore**” the PPA. The variable cost has been adopted from the generic tariff order of the then APERC dated 16.05.2014. As an incentive we have allowed working capital requirement which is equivalent to

two months receivable as one time measure in the tariff for the FY 2016-17. Thus, the PPA was “**modified**” by adopting the variable cost from the generic tariff order of the erstwhile APERC prospectively. The quantum of power to be supplied shall be governed by the tariff so determined. The petitioner’s claim for the accumulated interest for the past periods and past losses cannot be considered as the DISCOM cannot be held responsible for incurring of accumulated interest for the period from Feb 2008 onwards and for other business losses. From FY 2017-18, the petitioner has to approach the Commission for determination of tariff as stipulated in the PPA by a separate petition if it so desires.

29. Thus the petition is disposed in terms of the observations made above leaving the parties to bear their own costs.

***This order is corrected and signed on this 27<sup>th</sup> day of January 2016.***

**Sd/-  
(L.MANO HAR REDDY)  
MEMBER**

**Sd/-  
(H.SRINIVASULU)  
MEMBER**

**Sd/-  
(ISMAIL ALI KHAN)  
CHAIRMAN**

**CERTIFIED COPY**

## ANNEXURE – ‘A’

### Interest on receivables for 2 months

Energy generated in two months

$$= 8.76 \times 3.5 \text{ MW} \times 0.8 \text{ (80\% PLF)} / 6 = 4.088 \text{ MU}$$

Receivables for two months

$$= 4.088 \times 5.80 \text{ (Rs /kWh)} = \text{Rs.}237.10 \text{ lakhs}$$

Interest on receivables for two months @ 13% per annum

$$= 237.10 \times 0.13 / 6 = \text{Rs.}5.14 \text{ lakhs}$$

The interest amount computed above shall be spread over a period of 12 months on the units generated during the year. Hence, the per unit component of interest to be allowed is given below:

$$\begin{aligned} \Rightarrow 514000 / (3.5 \times 1000 \times 0.8 \times 8760) &= \\ &= \text{Re } 0.0210 \text{ per unit or say 3 paise per unit.} \end{aligned}$$