

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 16 & 117 of 2010**

**Dated 01<sup>st</sup> March, 2011**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson**

**Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

**Appeal No.16 of 2010**

**In the matter of:**

1. Starwire (India) Limited,  
35, Link Road, (2<sup>nd</sup> Floor),  
Lajpat Nagar,  
New Delhi-110 024.
2. Star Wire (India) Biomass Pvt. Ltd.,  
Y-4 AC, Loha Mandi,  
Naraina, Delhi-110028
3. Star Wire (India) Electricity Pvt. Ltd.,  
Y-4 AC, Loha Mandi,  
Naraina, Delhi-110028
4. Star Wire (India) Vidyut Pvt. Ltd.,  
Y-4 AC, Loha Mandi,  
Naraina, Delhi-110028
5. Tecpro Energy Limited,  
106, Vishwadeep Tower,  
District Centre, Janak Puri,  
Delhi-110 058.

6. Sri Jyoti Renewable Energy Pvt. Limited,  
4-304, Geetanjali Compound,  
Official Colony, Srikakulam-532 001  
Andhra Pradesh. ... Appellants

Versus

1. Haryana Electricity Regulatory Commission,  
Bay No. 33-36, Sector-4,  
Panchkula-134112
2. Uttar Haryana Bijlee Vitran Nigam Limited,  
Shakti Bhawan, Sector-6,  
Panchkula-134 109.
3. Dakshin Haryana Bijlee Vitran Nigam Limited,  
Vidyut Nagar, Hissar-125 005,  
Haryana
4. Haryana Vidyut Prasaran Nigam Limited,  
Shakti Bhawan, Sector-6,  
Panchkula-134 109.
5. Haryana Renewable Energy Development Agency,  
SCO No. 48, Sector-26,  
Madhya Marg, Chandigarh-160 019. ... Respondents

Counsel for Appellant(s)

Mr. Anand K. Ganesan &  
Ms. Swapna Seshadri  
Ms. Rekha Sharma(Rep.)

Counsel for the Respondent(s):

Mr. Neeraj Kr. Jain, Sr. Adv.  
with Mr. Pratham Kant for R-2 & R-3  
Ms. Shikha Ohri &  
Mr. Rajesh Monga for R-1  
Mr. P.C. Sharma (Rep.) for R-5

**Appeal No.117 of 2010**

**In the matter of:**

1. Uttar Haryana Bijlee Vitran Nigam Limited,  
Shakti Bhawan, Sector-6,  
Panchkula-134 109.
2. Dakshin Haryana Bijlee Vitran Nigam Limited,  
Vidyut Sadan, Vidyut Nagar,  
Hissar-125 005,  
Haryana

Versus

1. Haryana Electricity Regulatory Commission,  
SCO 180, Sector-5,  
Panchkula, Haryana-134112
2. Chemicals International Ltd.,  
VIPPS Centre, 2, Local Shopping Centre,  
Block-EFGH, Masjid Moth,  
Greater Kailash-II,  
New Delhi-110 048.
3. Tecpro Systems Limited,  
202-204, Pacific, Square,  
Sector-15, Part-II,  
Gurgaon-122 001(Haryana).
4. Gammon-Bermaco Consortium,  
(Gammon India Ltd. & Bermaco Energy System Ltd.)  
D-73/1, TTC Industrial Area/MIDC Trubhe,  
Navi Mumbai-400 705.
5. Starwire (India) Limited,  
35, Link Road, (2<sup>nd</sup> Floor),  
Lajpat Nagar,  
New Delhi-110 024.

6. Haryana Renewable Energy Development Agency,  
SCO No. 48, Sector-26,  
Madhya Marg, Chandigarh-160 019. ... Respondents

Counsel for Appellant(s)

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with Mr. Pratham Kant

Counsel for the Respondent(s):

Ms. Shikha Ohri for R-1  
Mr. Anand K. Ganesan for R-5

## **JUDGMENT**

### **PER HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

Appeal No. 16 of 2010 has been filed by Starwire (India) Limited and other generating companies engaged in the business of setting up biomass based generating stations. The Appellants have challenged State Commission's order dated 6.11.2009 determining the tariff for sale of electricity by biomass based energy developers to the distribution licensees in the State of Haryana.

2. Respondent No. 1 is Haryana Electricity Regulatory Commission (State Commission). Respondent No. 2 and 3 are Uttar Haryana Bijlee Vitran Nigam Limited and Dakshin Haryana Bijlee Vitran Nigam Ltd. respectively, the distribution licensees. Respondent No. 4 is Haryana Vidyut Prasaran Nigam Limited, the State transmission licensee and STU. Haryana Renewable Energy Development Agency (HAREDA), a State Government agency for promoting renewable energy sources, is Respondent No.5.

3. Appeal No. 117 of 2010 has been filed by Uttar Haryana Bijlee Vitran Nigam Ltd. and Dakshin Haryana Bijlee Vitran Nigam, the distribution licensees against the same order of the State Commission dated 6.11.2009. The State Commission is Respondent No.1. Respondents 2 to 5 are the generating

companies engaged in setting up biomass based generating stations. HAREDA is Respondent No. 6. Since most of the issues and the impugned order are common, a common Judgment is being rendered.

### **Facts of the Case**

4. The short facts of the case are as under:-
  - i) The State Commission passed an order dated 15.5.2007 determining the tariff applicable to the biomass based power stations in the State of Haryana at Rs. 4.00 per unit with an escalation of 2% per annum after inviting comments/suggestions from the various stakeholders.
  - ii) The Generating Companies, Appellants herein in Appeal No. 16 of 2010, preferred an Appeal No. 113 of 2007 before the Tribunal against the order dated 15.5.2007 of the

State Commission. The distribution licensees, the Appellants herein in Appeal No. 117 of 2010 also filed an Appeal No. 24 of 2008 against the same order of the State Commission.

- iii) The Tribunal by its Judgment dated 25.3.2009 set aside the State Commission's order dated 15.5.2007 and remanded the matter to the State Commission for fresh determination of tariff.
- iv) The State Commission has disposed of the remand proceedings and determined the tariff of biomass based energy power projects by its order dated 6.11.2009. In the said order, the State Commission has applied specified norms and parameters for determining the

tariff and by applying the same, arrived at a tariff of Rs. 4.00 per kWh, same as determined earlier in its order dated 15.5.2007. However, the annual escalation has been increased from 2% to 3% in the impugned order.

- v) Aggrieved by the order dated 6.11.2009 the Appellants have filed the present Appeal.

**Appellants (Generating Companies)**

5. The learned counsel for the Appellant generating companies (Appeal No. 16 of 2010) challenging the tariff determined by the State Commission has submitted the following:-

- i) The State Commission has applied the fuel cost of Rs. 1600 per tonne of biomass fuel at the same level as determined in the year 2007 without considering the present cost of



biomass fuel in the State. The reason given by the State Commission for not revising the rate is lack of data regarding fuel cost. The Appellants and HAREDA had provided sufficient data regarding the present cost of biomass fuel in Haryana. The Central Commission in its Tariff Regulations of 2009 for Renewable Energy Sources had determined biomass fuel cost of Rs. 2039/- per tonne for the State of Haryana but the same was also not considered.

- ii) The State Commission has allowed a rate of return on equity at 16%. However, income tax has not been allowed as a pass through in the tariff, whereas the thermal generating companies using conventional fuel have been allowed income tax as pass through by the

State Commission. Thus the renewable energy generating sources in the State have been placed in a worse position compared to the conventional energy generating stations.

- iii) The State Commission has retained the Project cost of Rs. 4.29 crores per MW determined in the year 2007 without considering the present day project cost. Against this the Central Commission in its Tariff Regulations has prescribed a capital cost of Rs. 4.5 crores per MW for Haryana.
- iv) The State Commission has not allowed Operation & Maintenance Expenditure at the rate of 7% of the capital cost as decided by this Tribunal in the case of Chattisgarh Biomass Energy Developers and Association & others vs. Chattisgarh State Electricity

Regulatory Commission & others, 2007 APTEL 711 and South Indian Sugar Mills Association Vs. KERC & Others, 2007, APTEL 126. Similarly, the State Commission has not allowed depreciation @ 7.84 % of the capital cost as decided by this Tribunal in the above Judgments.

- v) The State Commission should have considered higher rate of interest for term loans and working capital considering small size of project and difficulty in raising loan by new project developers.
- vi) The State Commission has prohibited any sale of electricity by the project developer to third parties. This is against the provisions of the Electricity Act, 2003 wherein generation is delicensed and the generating

company has full freedom to sell electricity to any person.

- vii) The State Commission has decided sharing of Clean Development Mechanism (CDM) benefits with the distribution licensees. This is wrong. The entire CDM benefit should be allowed to be retained by the project developer.

**Appellant (Distribution Companies)**

6. The learned counsel for the distribution licensees, Appellants in Appeal No. 117 of 2010, have contested the impugned order on the following points:

- i) The State Transmission Utility/Distribution Licensee has to bear cost of Extra High voltage/High voltage transmission line upto a distance of 10 Kms. from the point of metering of Biomass generator and beyond

10 Kms. distance, the balance cost of the transmission line has to be shared equally between the Biomass generator and the State Transmission Utility/Distribution Licensee. This is not correct. The entire cost of grid connectivity should be borne by the Biomass Generation Project developer according to the Policy of Government of Haryana for promotion of generation of electricity through renewable energy sources.

- ii) The State Commission has wrongly determined the tariff as Rs. 4.00 per kWh even though the consultation paper had suggested a tariff of Rs. 3.32 per kWh. The annual escalation of tariff has also been wrongly enhanced from 2% to 3%.

iii) The State Commission has allowed only 25% sharing of CDM benefits with the distribution company whereas CERC Regulations allowed graded sharing with 10% increase every year upto a maximum of 50% after 6 years.

The learned counsel for the distribution licensees supported the State Commission's order on other issue including prohibition on sale to third party. Though the issue of wheeling charges was raised in the Appeal, he did not want to press it.

### **State Commission (Respondent-1)**

7. The learned counsel for the State Commission argued at length supporting the findings of the State Commission in the impugned order.

**Issues**

8. On the basis of the contentions of the parties, the following questions would arise:

- i) Whether the State Commission was correct in determining the cost of biomass fuel at Rs. 1600/- per MT ignoring the recommendations of HAREDA, the state renewable energy agency and the Regulations of the Central Commission?
- ii) Whether the State Commission was right in deciding a rate of return of 16% on equity without allowing Income Tax as pass through, without regard to the ROE allowed for conventional power generation resources and CERC Regulations thus putting biomass based projects to a disadvantageous position

compared to conventional fuel based projects?

- iii) Whether the State Commission was correct in retaining the project cost of Rs. 4.29 crores/MW determined in the year 2007 without considering the present cost and the cost determined by the Central Commission in its Regulations?
- iv) Whether the State Commission was right in allowing a lower rate of Operation & Maintenance expenditure and depreciation as against the directions of the Tribunal for Biomass generation in other Judgments?
- v) Whether the higher rate of interest for term loans and working capital as claimed by the Appellant project developer justified?



- vi) Whether the State Commission has erred in determining the tariff at Rs. 4.00 per kWh with 3% escalation as against its consultation paper where the tariff of Rs. 3.32 per kWh was proposed?
- vii) Whether the State Commission was right in prohibiting sale of power to third party by the bio-mass project against the provisions of the Electricity Act 2003 which provided full freedom to a generating company to sell electricity to any person?
- viii) Whether the State Commission is correct in deciding 25% sharing of CDM benefit with the distribution licensee?
- ix) Whether the State Commission is correct in deciding that cost of transmission line for connectivity upto 10 Km. has to be at the

cost of the State Transmission Utility/Distribution Licensee and beyond 10 Km the cost is to be shared equally with the Bio-mass project developer against the policy of Government of Haryana?

### **Discussion & findings**

#### **9. Cost of Biomass fuel**

- (i) The learned counsel for the Appellant generating companies has argued that the State Commission has allowed fuel cost of Rs. 1600/- per tonne at the same level as determined in its order dated 15.5.2007 without considering the present cost of bio-mass fuel in the State.
- (ii) The State Commission in the impugned order has indicated the price range of different types of bio-mass fuels as submitted by

HAREDA, the State Government Agency, ranging from Rs. 988/- to Rs. 3467/- per tonne. The average of minimum price of different types of biomass fuels is Rs. 1504/- and the average of maximum price of various biomass fuel is Rs. 2173/- per tonne as recorded in the impugned order. Even though the State Commission has recorded that there is bound to be fluctuation in the market and bio-mass prices might vary from time to time, it has decided to adopt the same price as determined in its order dated 15.5.2007 which has been set aside by this Tribunal by its Judgment dated 25.03.2009. The reason given by the State Commission for maintaining the price at the same level is that hardly any project has been set up so far in

the State and there is no organized market for bio-mass fuel and since the Commission's order is valid only till 2012-13, it would be too pre-mature to consider revising the cost of bio-mass mix.

(iii) We are not convinced with the reasoning given by the State Commission. The State Commission while agreeing that bio-mass prices might vary from time to time has adopted the same price as decided in its order dated 15.5.2007 which has been set aside by this Tribunal on the ground that no reason for the findings was recorded in the impugned order. The matter was remanded to the State Commission to decide the issues after giving opportunity to the parties with reasons to be recorded in the order.

However, the impugned order regarding biomass price lacks proper reasoning. Learned counsel for the State Commission has submitted that the fuel cost determined in its earlier order dated 31.1.2007 was based on weighted average method. It is not clear how the weighted average price has been determined and how much weightage has been given to different types of fuels as nothing in this regard has been recorded in the impugned order.

- (iv) According to Section 61(a) of 2003 Act the State Commission while specifying terms and conditions for determination of tariff shall be guided by the Regulations of the Central Commission applicable to generating companies. The State Commission has also

not considered the Central Commission's Regulations of 2009 for Terms and Conditions for Tariff Determination for Renewable Energy Source. The Central Commission's Regulations indicate bio-mass price for Haryana as Rs. 2168/- per M.T. with fuel price escalation. The Central Commission Regulations also provide for Indexation Formula for price escalation or alternatively the normative escalation factor has also been indicated which could be applied at the option of the bio-mass project developer.

- (v) The reasoning given by the State Commission for adopting the price of biomass fuel at 2007 Level is that hardly any Biomass projects have come up in the State and there is no

organized market for biomass in the State is misconceived. According to Section 86(e) of the 2003 Act, the State Commission has to promote generation of electricity from renewable sources. According to Tariff Policy clause 5.2.20 the State Commission has to take promotional measures to encourage development of renewable energy power projects in private sector. The feed in tariff and Renewable Purchase Obligations specified by the State Commission will only give the commercial signal for development of Biomass based power projects and market for biomass fuel. It would not be prudent for the State Commission to wait for the projects and market for biomass fuel to be developed

before deciding a reasonable price for biomass fuel.

- (vi) In view of above, we direct the State Commission to re-determine the price of biomass fuel after detailed analysis and considering the Regulations of the Central Commission and give a reasoned order in this regard.

10. **Return on Equity**

- (i) The second issue is relating to rate of return on equity. The State Commission has allowed 16% return on equity but income tax has not been allowed as a pass through. The State Commission in its impugned order has after considering the 14% return on equity with current rate of MAT @ 15% worked out pre tax return on



equity as 16% for biomass generation projects. The learned counsel for the Appellants (Appeal 16 of 2010) has argued that the renewable energy generation sources in the State have been placed in a worse position compared to conventional energy generating station and Central Commission's Regulations have not been considered.

- (ii) The Central Commission's Regulations provide for normative pre-tax Return on Equity (ROE) as 19% per annum for first 10 years and 24% per annum from 11<sup>th</sup> year onwards. The pre-tax ROE has been based on 16% ROE post tax with Income Tax allowed as pass through. For first 10 year

MAT has been considered and from 11<sup>th</sup> year onwards normal rate of tax has been taken into account.

- (iii) The State Commission in its order dated 6.11.2009 has noted that its Tariff Regulations for conventional fuel provide for 14% ROE and it found no reason to allow any higher ROE for biomass project developer. Accordingly, the State Commission allowed 16% ROE pre-tax considering MAT @ 15% for Bio-mass based projects. We do not find any fault in the principle laid down by the State Commission to allow same ROE as for conventional fuel. However, the State Commission has erred in working out the

pre-tax ROE for Bio-mass power projects on account of following:

- a) Pre-tax ROE calculated on 14% post tax ROE with tax as pass through will work out to be more than 16% with MAT @ 15%. Conversely 16% pre-tax ROE without Income tax as pass through will result in post tax ROE of less than 14% with MAT @ 15%. This would place the biomass projects in disadvantageous position compared to conventional fuel based projects.
  - b) From 11<sup>th</sup> year onwards normal income tax rates will be applicable so Pre-tax ROE will have to be enhanced.
- (iv) We, therefore, direct the State Commission to re-determine the ROE accordingly.

11. **Capital Cost**

- (i) The third issue is regarding the capital cost of bio-mass project. The State Commission has retained the same capital cost as was determined in its earlier order dated 15.5.2007.
- (ii) The Tariff Regulations of Central Commission for Biomass based generating stations allow normative capital cost for Biomass power projects as Rs. 4.5 crores/MW for 2009-10 i.e. the first year of the control period. The Regulations also provide for capital cost Indexation Mechanism linked to Wholesale Price Index for Steel and Electrical Machinery for subsequent years of the control period. On the other hand the capital cost determined by the State Commission is fixed

till 2011-12 that too at the same level as determined in its order dated 15<sup>th</sup> May 2007, which has already been set aside by the Tribunal for not giving a reasoned order. The reason given by the State Commission in the impugned order for retaining the same cost is that no actual data of bio-mass project in Haryana is made available.

- (iii) In our view this conclusion is not correct. The State Commission has not considered the capital cost determined in the Central Commission's Tariff Regulations for Renewable Energy Sources of 2009 and cost of comparable projects in other states. In our opinion, the State Commission has erred in adopting its finding on its earlier order dated 15.5.2007 which has been set aside by this

Tribunal and where proper reasoning for the tariff determination had not been given. Accordingly, the State Commission is directed to re-determine the capital cost.

12. **Operation & Maintenance expenses and Depreciation:**

- (i) According to the learned counsel for the Appellant the State Commission has not allowed Operation and Maintenance expenses at the rate of 7% of the capital cost as decided by the Tribunal in its Judgments (2007) APTEL 711, and (2007) APTEL 126. Further the depreciation of 7.84% should have been allowed following the decision of the Tribunal in the above Judgments. We do not find any explanation in the impugned order regarding determination of O&M

charges and depreciation which are important element of the tariff. However, the learned counsel for the State Commission submitted that O&M charges of 6% and depreciation of 7.5% as decided in the review order dated 3.10.2007 have been adopted and also explained the reasoning for adopting those figures. We fail to understand why these important elements of the tariff have not been included in the impugned order by the State Commission.

- (ii) The Judgments of the Tribunal in (2007) APTEL 711 and (2007) APTEL 126 quoted by the Appellants Generating Companies will not be of any help as these Judgments were based on a CEA report of September 2005. Since then the Regulations of the Central

Commission have been notified and more experience has been gained in biomass projects. The Central Commission's Regulation provide for O&M expenses of 20.25 lakhs per MW (which work out to about 4.5% of the capital cost of Rs. 4.5 crores/MW as approved by the Central Commission) with escalation @ 5.72% per annum and depreciation @ 7% for first 10 years and balance depreciation to be spread over the remaining useful life of the project.

- iii) However, since the impugned order does not indicate these important elements of the tariff and we direct the State Commission to determine the O&M and depreciation keeping in view the Central Commission's Regulations.



13. **Rate of interest for term loan and working capital:**

- (i) Learned counsel for the Appellant in Appeal No. 16/2010 has argued that higher rate of interest on term loan and working capital should be considered in view of the small size of project and difficulty in raising loan by new project developers. Here again we do not find any discussion in the impugned order regarding the rate of interest on the term loan and working capital adopted in determining the tariff. It is not understood how this important element of tariff has not been included in the Tariff Order of the State Commission. However, the learned counsel for the State Commission has submitted that the Commission in the review order dated 3.10.2007 had fixed an interest @

11.5% keeping in view the Prime Lending Rate of SBI.

- (ii) The Central Commission's Regulations provide for interest rate for term loan and working capital linked to average long term prime lending rate and short term prime lending rate of SBI respectively.
- (iii) As the impugned order does not give any findings on this important element of the tariff, we accordingly direct the State Commission to determine the interest rate keeping in view the Central Commission's Regulations.

14. **Determination of tariff contrary to consultation paper:**

- (i) The sixth issue is determination of tariff at Rs. 4.00 per kWh with 3% escalation as against consultation paper of the State

Commission where tariff of Rs. 3.32/- per kWh was proposed. This issue has been raised by the learned counsel for the Appellants in Appeal No. 117 of 2010.

- (ii) The consultation paper is only a concept paper which is prepared to seek the comments and suggestions of various stakeholders. The Commission has to decide the matter after considering all the comments, suggestions and objections obtained from various stakeholders. Accordingly, the State Commission has decided the tariff of Rs. 4.00 per kWh with 3% escalation. The findings of the State Commission can not be challenged on the ground that some other figure was indicated in the consultation paper. Thus, we decide

this issue against the Appellant-distribution licensees in Appeal No. 117 of 2010.

15. **Prohibition of sale of power to third party**

- (i) In the impugned order to meet the renewable purchases obligation of the distribution licensees, the State Commission has made signing of PPA with distribution licensees mandatory for the bio-mass projects approved by HAREDA. However, in the event of distribution licensee refusing to take power at the tariff determined by the Commission, the third party sale could be considered.
- (ii) According to Section 7 of the Act, no license is required by a generating company for establishment, operation and maintenance of a generating station. The generating company may also supply electricity to any

licensee or to a consumer subject to the Regulations made under Section 42(2). The relevant clause 10(2) of the 2003 Act is reproduced below:-

*“ 10(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer”.*

- (iii) The above provisions of the Act give complete freedom to a generating company to sell power to any licensee, the Government or a person. Restriction imposed by the State Commission on a generating company to sell only to the State distribution licensees will not be in consonance with the scheme and provisions of the Act.

- (iv) The directions of the State Commission are also contrary to the dictum laid down by Hon'ble Supreme Court in 16 SCC 659(2009) Tata Power Co. Ltd. Vs. Reilance Energy Ltd. The relevant extracts of the Judgment are reproduced below:

*“82. In terms of Section 7 of the 2003 Act, all persons are permitted to establish, operate and maintain a generating station. It can, in terms of Section 62(1)(a) of the 2003 Act, supply electricity to any licensee i.e. distribution licensee or trading licensee. The 2003 Act permits the generating company to supply the electricity directly to a trader or a consumer. In terms of Section 42(2) of the 2003 Act even for the said purpose no tariff is required to be determined.*

*83. The primary object, therefore, was to free the generating companies from the shackles of licensing regime. The 2003 Act encourages*

*free generation and more and more competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.*

*84. If de-licensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side-door of regulations”.*

- (v) In view of the above, we direct the State Commission to allow sale to third party

according to the scheme and provisions of the Act.

16. **Sharing of CDM benefit**

The State Commission has decided that 75% of the CDM benefit shall be retained by the project developers and balance 25% be passed on to the distribution licensees. The learned counsel for the Appellant in Appeal No. 16 of 2010 argued that the entire benefit on account of CDM should be retained by the project developers. On the other hand the learned counsel for the distribution licensees has argued that larger share of the CDM benefit has been passed on to the project developer against the 50:50 sharing in the Central Commission's Regulations. The Central Commission Tariff Regulations of 2009 for Renewable Sources also provide for sharing of CDM



benefit even though a different formula has been used for the sharing. According to the Central Commission's Regulations 100% of gross proceeds on account of CDM benefits are retained by the project developers in the first year after the date of commercial operation of the generating station. In the second year, the share of the beneficiaries is 10% which is progressively increased by 10% every year till it reaches 50% where after the proceeds are shared in equal proportion by the generating company and the beneficiaries. The State Commission has followed the principle of sharing of CDM benefit but in its wisdom has applied a different formula and quantum for sharing of CDM benefit. Thus, we do not find any infirmity in the findings of the State Commission regarding sharing of the CDM benefit.

17. **Sharing of the cost of transmission line between the project developers and the State Transmission Utility/Distribution Licensee:**

- (i) The learned counsel for the Appellant/Distribution Licensee (Appeal No. 117 of 2010) has argued that the entire cost of grid connectivity should be borne by the project developers in accordance with the policy of the Government of Haryana for promotion of generation of electricity through energy sources. According to the learned counsel for the Appellant the issuance of Policy dated 23.11.2005 was in the nature of giving directions to the State Commission in public interest as envisaged under Section 108 of the Act in the matter of determination of tariff for electricity generated from renewable energy sources.

- (ii) The State Commission has given a detailed reasoning on this issue which is reproduced as under:

**“ 4. Grid Connectivity**

*The Commission observes that Haryana has a fairly elaborate transmission/distribution network in the State and is amongst the first few States in India to achieve 100% electrification. Resultantly, the likelihood of any project being further than 10 K.M. away from the power utilities network is negligible. The Commission feels that apprehension of the developers in this regard is not based on sound reason. The arguments put forward by them are not convincing either. The very objective of promoting small distributed generation projects at the load centre itself is to facilitate local consumption thereby avoiding the need for wheeling power over long distances and thereby saving the resulting line losses. Hence the Commission is not inclined*

*to accept the arguments of the parties as no data was provided regarding the exact location of the proposed project by biomass project developer seeking to pass on the entire cost should be borne by the project developers.*

***Consequently the Commission decides that in accordance with Section 40 & 42 of the Electricity Act, 2003 the transmission/distribution licensee, as the case may be, shall build, maintain and operate the transmission lines from the point of energy metering upto a distance of 10 KMs depending upon the location of the project. As ordered earlier, beyond 10 Kms. distance the balance cost of transmission lines shall be equally shared between the developers and the STU/Distribution licensee”.***

- iii) The State Commission has only directed the State Transmission Utility/Distribution Licensee to build, maintain and operate the

transmission line from the point of energy meter upto a distance of 10 kilometers and thereafter the cost is to be shared equally between the licensee and the project developers. The transmission charges for the investment made by the transmission/distribution licensee has to be recovered through their ARR. If the project developer chooses to sell power to a third party than the appropriate transmission/wheeling charges have to be borne by the actual user of the transmission/distribution system.

- (iv) Section 86(e) of the 2003 Act regarding function of the State Commission stipulates as under:

*“(e) promote cogeneration and generation of electricity from renewable sources of energy*

*by providing suitable measures for connectivity with the grid and sale of electricity to any person.....”*

The State Commission in the impugned order has accordingly worked out suitable measures for providing connectivity to the Biomass based generating projects.

- (v) Thus, we do not find any infirmity in the findings of the State Commission on this issue.
- (vi) We do not find that any directions have been given by the State Government in this regard under Section 108 of the Act. The policy paper of the Government of Haryana dated 23.11.2005 is not binding on the State Commission. Section 108(1) of the Act is

reproduced below:

**“108. Directions by State Government.-**

*(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing”.*

No such direction was given to the State Commission in writing. Even if such direction is given under Section 108 by the State Government, it will be for guidance of the State Commission and not binding.

**18. Summary of findings:**

**18.1. Cost of Bio-mass fuel**

**The State Commission has maintained same cost for bio-mass fuel as approved in its earlier order dated 15.05.2007 which**

**has been set aside by this Tribunal by its Judgment dated 25.3.2009. We are not convinced with the reasoning given by the State Commission for maintaining the same price that hardly any project has been set up so far in the State and there is no organized market for bio-mass and therefore, it would be too pre-mature to consider revising the cost of bio-mass fuel. The State Commission has also not considered Central Commission's Regulations of 2009 for tariff determination for renewable energy. According to Section 86(e) of the 2003 Act, the State Commission has to promote generation of electricity from renewable sources. The Tariff Policy also envisages**



**the State Commission to take promotional measures to encourage development of renewable energy power projects in private sector. The feed in tariff and Renewable Purchase Obligations specified by the State Commission will only give the commercial signal to development of renewable power projects and market for biomass fuel. It would not be prudent to wait for the projects and market for biomass fuel to be developed before deciding a reasonable rate for biomass fuel. In view of the above, we direct the State Commission to re-determine the price of bio-mass fuel after detailed analysis and after considering the Central**

**Commission's Regulations and give a reasoned order in this regard.**

**18.2. Return on equity:**

**The State Commission has allowed 16% return on equity without income tax as pass through as against 14% return on equity post tax for conventional fuel based projects on the ground that 16% ROE pre-tax considering MAT @ 15% to bio-mass based project would amount to 14% ROE post tax. We do not find any fault in the principle laid down by the State Commission to allow same return on equity as for conventional power project. However, the State Commission has erred in working out the pre-tax ROE for biomass projects on the following**

**accounts:**

**a) 16% ROE without income tax as pass through will work out to be less than 14% ROE post tax with MAT @ 15%. Thus Biomass Projects will be at disadvantageous position compared to conventional fuel based projects.**

**b) From 11<sup>th</sup> year onwards normal tax rates will be applicable and therefore, pre-tax ROE will have to be enhanced.**

**Accordingly, we direct the State Commission to re-determine the ROE.**

**18.3. Capital cost:**

**The State Commission has determined the capital cost at the same level as determined in its order dated 15<sup>th</sup> May,**

**2007 on the ground that no actual data of bio-mass in Haryana is made available. On the other hand, the Central Commission's Regulations provide for capital cost of Rs. 4.5 crores/MW for the first year of the control period i.e. 2009-10 and Indexation Mechanism for subsequent years of the control period. The State Commission has erred in adopting the capital cost based on its earlier order dated 15.5.2007 which was set aside by this Tribunal on the ground that proper reasoning for the tariff determination have not been given. Accordingly, we direct the State Commission to re-determine the capital cost considering the Central Commission's Regulations and capital cost data of**

**comparable projects from the bio-mass projects in other States.**

**18.4. Operation & Maintenance Expenses and Depreciation:**

**The Judgments referred to by the Appellant generating companies for claiming higher O&M expenses and Depreciation in this regard are of no avail in the present appeal. However, we do not find any explanation in the impugned order regarding determination of O&M charges and depreciation which are important elements of tariff determination. Accordingly, we direct the State Commission to determine depreciation and O&M expenses keeping in view the Central Commission's Regulations.**

**18.5. Rate of interest for term loan and working capital:**

**The Appellant-Generating Companies have requested for higher rate of interest for term loan and working capital in view of the small size of project and difficulty in raising loan by new project developers. We do not find any discussion in the impugned order regarding the rate of interest on the term loan and working capital which are important elements of tariff. It is not understood how these important elements of tariff have not been included in the order of the State Commission. We accordingly direct the State Commission to determine the**

**interest rate keeping in view the Central Commission's Regulations.**

**18.6. Determination of Tariff contrary to consultation paper:**

**This issue has been raised by the learned counsel for the Appellant-Distribution Licensees in Appeal No. 117 of 2010. The Appellants have contended that tariff of Rs. 4.00 per kWh with 3% escalation has been determined by the State Commission as against Rs. 3.32 per kWh proposed in the consultation paper of the State Commission. The consultation paper is only a concept paper to seek comments and suggestions of various stakeholders. The State Commission has to decide the matter after considering all the comments, suggestions and objections of**

**the various stakeholders. The findings of the State Commission can not be challenged on the ground that some other figure was indicated in the consultation paper. Thus, we decide this issue against the Appellants-distribution licensees in Appeal No. 117 of 2010.**

**18.7. Prohibition of sale of power to third party**

**The State Commission in the impugned order has put a restriction on sale of power by the generating companies. The provisions of the Act give complete freedom to a generating company to sell power to any licensee, the Government or a person. Restriction imposed by the State Commission on the Appellants-Distribution Companies to sell only to the**



**State distribution licensees is not in consonance with the scheme and provisions of the Act and the dictum laid down by Hon'ble Supreme Court in 16 SCC 659(2009) Tata Power Co. Ltd. Vs. Reilance Energy Ltd. Accordingly, the State Commission's order on this issue is set aside. The State Commission is directed to pass an order to allow third party sale as per the scheme and provisions of the Act.**

**18.8. Sharing of CDM benefit**

**The State Commission has decided that 75% of the CDM benefit shall be retained by the project developers and balance 25% could be passed on to the distribution licensees. The formula and quantum of**

**CDM benefit sharing decided by the State Commission is different from that provided in the Central Commission's Regulations. Whereas the distribution licensees want sharing as per Central Commission's Regulations, the Generating Companies want entire CDM benefit to be retained by them. The State Commission has followed the principle of sharing of CDM benefit but in its wisdom has applied a different formula and quantum for sharing of CDM benefit. Thus, we do not find any infirmity in the findings of the State Commission regarding sharing of the CDM benefit.**

**18.9. Sharing of the cost of transmission line**

**We find that the State Commission has given a reasoned order in deciding the sharing of the transmission line between the Project Developers and the State Transmission Utility/Distribution Licensee. The transmission charges for the investment made by the transmission/distribution licensee has to be recovered through their ARR. Therefore, we do not find any infirmity in the findings of the State Commission on this issue.**

**Conclusion**

19. In view of above, in Appeal No. 16 of 2010, we allow the appeal partly and set aside the impugned order to the extent indicated above. We remand the

matter on the issues at Sl. Nos. 18.1 to 18.5 and 18.7 as given in our summary of findings and direct the State Commission to re-determine the tariff after giving a reasoned order covering all elements of tariff. We also dismiss Appeal No. 117 of 2010. No order as to cost.

20. Pronounced in the open court on this **1<sup>st</sup> day of March, 2011.**

**(Justice P.S. Datta) ( Rakesh Nath) (Justice M. Karpaga Vinayagam)**  
**Judicial Member Technical Member Chairperson**

REPORTABLE / NON-REPORTABLE  
VS