

**Before the Appellate Tribunal for Electricity**

**(Appellate Jurisdiction)**

**Appeal No. 190 of 2010**

Dated : 31<sup>st</sup> May , 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson.  
Hon'ble Mr. V.J. Talwar, Technical Member**

**In the matter of:**

Paschim Gujarat Vij Company Ltd.  
Laxmi Nagar, Nana Mava Main Road  
Rajkot, Gujarat – 360004

..... Appellant

Versus

- 1 Gujarat Electricity Regulatory Commission  
1<sup>st</sup> floor, Neptune Tower, Ashram Road  
Ahmedabad 380009
- 2 The Kutch salt & allied Industries Ltd  
Maitri Bhawan, Plot No. 18, sector 8,  
Gandhidham, Kutch 370201

3 Gujarat Energy Transmission Corporation Ltd  
Sardar Patel Vidyut Bhawan  
Race Course, Vadodra 390007 ..... Respondents

Counsel for Appellant: Mr. M.G. Ramachandran

Counsel for Respondents: Mr C K Rai for R-2

## **J u d g m e n t**

### **Per Hon'ble Shri V.J. Talwar, Technical Member**

- 1 Paschim Gujarat Vij Company Limited, a distribution licensee in Western Gujarat is the Appellant.
- 2 Gujarat Electricity Regulatory Commission (State Commission) is the 1<sup>st</sup> Respondent. The Kutch Salt & Allied Industries Ltd (the Generating Company), is the 2<sup>nd</sup> Respondent. Gujarat Energy Transmission Corporation Ltd (GETCO), the Transmission Licensee in Gujarat is the 3<sup>rd</sup> Respondent.

3 State Commission has passed impugned Order dated  
10.8.2010 directing the Appellant to procure excess energy  
generated by 2<sup>nd</sup> Respondent's Wind Turbine Generator at  
tariff fixed by the Commission and to refund to the 2<sup>nd</sup>  
Respondent the amount deducted by Appellant @ 15% from  
the tariff rate determined by the Commission for the surplus  
energy available after captive use. Aggrieved by this order of  
the State Commission, the Appellant has filed this Appeal  
before us.

4 Brief facts of the case are as under:

5 2<sup>nd</sup> Respondent, the Generating Company has setup a Wind  
Turbine Generator (WTG) of 1.5 MW in Kutch District of  
Gujarat. The Generating Company had entered in to  
transmission agreement with the Transmission Corporation (R-  
3) on 25.5.2008 and wheeling agreement with the Appellant on  
3.6.2008 for wheeling power generated from its Wind Turbine  
Generator to captive location.

- 6 The wheeling agreement between the Appellant and 2<sup>nd</sup> Respondent had a provision of sale of excess energy to the Appellant. Clause 3.4 of wheeling agreement provides that any excess energy produced by Wind Turbine Generator shall be treated as sale to the Appellant at the rate determined by the State Commission. However, in case the licensee had already met the minimum Renewable Purchase Obligation set by the State Commission, the purchase of excess energy shall be at the rate determined through competitive bidding. Admittedly there was no competitive bidding process implemented for procurement of such surplus energy by the Appellant. Therefore, the Appellant purchased excess energy from the 2<sup>nd</sup> Respondent at applicable tariff as determined by the State Commission through its Order no 2 dated 11.08.2006.
- 7 On 7.1.2009, the Government of Gujarat amended the Wind Power Policy, 2007. As per this amendment to the Policy the

Distribution Licensees were allowed to purchase surplus power from Wind Turbine Generators wheeling power for their captive use at the rate of 85% of tariff applicable to Wind Turbine Generators.

- 8 In accordance with the Policy decision of the Government of Gujarat as amended on 7.1.2009, the Appellant vide letter dated 24.2.2009 informed the 2<sup>nd</sup> Respondent that it would purchase the excess energy available after set off at 85% of the tariff determined by the State Commission in the Order dated 11.08.2006. The Appellant paid the amount in terms of the above communication to the 2<sup>nd</sup> Respondent.
- 9 Aggrieved by the act of the Appellant, the 2<sup>nd</sup> Respondent filed petition before the State Commission seeking for its directions to the Appellant to make payment for excess energy sold to him as per the rate fixed by the Commission's order dated 11.8.2006.

10 Accordingly, the State Commission passed the impugned order dated 10.8.2010 directing the Appellant to make payment to 2<sup>nd</sup> Respondent in accordance with its Order dated 11.8.2006 and to refund to the 2<sup>nd</sup> Respondent, the amount deducted by the Appellant @ 15% from the tariff rate determined by the Commission for the surplus energy available after captive use.

11 Aggrieved over this, the Appellant has filed this Appeal.

12 Appellant has raised following grounds assailing the impugned order.

- A. There was no obligation on the part of the Appellant to procure surplus power available from the 2<sup>nd</sup> Respondent in terms of the Order dated 11.08.2006 passed by the State Commission. Since the Appellant had already duly fulfilled the Renewable Purchase Obligation to procure the specified quantum of Non Conventional Energy – Wind

Power, the Appellant could have refused to sign any Agreement. In the circumstances, the Agreement entered into between the parties cannot be considered for the purpose of tariff in terms of the Order dated 11.08.2006 passed by the State Commission.

- B. The State Commission's Order dated 11.08.2006 on its terms applies to the procurement of power from Wind Energy Sources to the extent of fulfillment of the specified Renewable Purchase Obligation on the part of the Appellant. It does not apply to procurement of power over and above such specified quantum to fulfill its obligation. Since the Appellant had already fulfilled the specified Renewable Purchase Obligation; the Order dated 11.08.2006 passed by the State Commission specifying the applicable tariff for procurement of power from the non-conventional energy sources – wind power developers at

the rate Rs. 3.37 per KWh would not be applicable to the purchase of power by the Appellant from 2<sup>nd</sup> Respondent.

C. Under the Wheeling Agreement dated 3.6.2008, the 2<sup>nd</sup> Respondent had specifically agreed to the tariff being determined otherwise than as provided in the Order dated 11.08.2006 passed by the State Commission. In view of the above, the parties had specifically agreed that the rate of Rs. 3.37 per kWh stipulated in the Order dated 11.08.2006 would not be applicable to the purchase of power by the Appellant from 2<sup>nd</sup> Respondent. Accordingly, the price was to be appropriately determined for such purchase as per the Agreement.

D. The Agreement between the Appellant and 2<sup>nd</sup> Respondent specifically envisages that the price at which the power was procured by the Appellant from 2<sup>nd</sup> Respondent was to be determined based on the Competitive Bidding to be



undertaken. In the absence of any Competitive Bidding and in view of the specific Policy decision made by the Government of Gujarat, for purchase of surplus power by the distribution licensees from the Wind Power Developers who are essentially using power for captive purposes, the tariff determined as per the Policy would become the applicable tariff.

- E. Further, the Agreement entered into between the Appellant and 2<sup>nd</sup> Respondent itself specifically envisages that changes made to the Policy amongst other things would be applicable to the Power Purchase Agreement and accordingly the Policy decision of the Government of Gujarat dated 7.1.2009 determining the price for the purchase of surplus power by the Appellant from 2<sup>nd</sup> Respondent would become the applicable tariff.

- F. Policy decision dated 7.1.2009 does not supersede the statutory order passed by the State Commission. As stated above, the Order dated 11.08.2006 determining the price of power does not apply to the purchase of power by the Appellant under Agreement dated 3.6.2008. The Policy determines the appropriate tariff for sale of surplus electricity which has been validly adopted by Appellant instead of going through competitive bidding process for price discovery as per stipulation contained in the Agreement. The adoption of the price mentioned in the amended Policy dated 7.1.2009 which is applicable uniformly for all in substitution of competitive bidding process to be implemented is beneficial to 2<sup>nd</sup> Respondent.
- G. 2<sup>nd</sup> Respondent cannot enforce the Agreement unilaterally demanding the price as per the Order passed by the State Commission on 11.08.2006 which Order is applicable only

to purchase of power to the extent of meeting the minimum specified obligation under the Electricity Act, 2003.

13 In reply to the above contention, the Learned Counsel for 2<sup>nd</sup> Respondent vehemently submitted that the State Commission's Order dated 11<sup>th</sup> Aug 2006 fixing tariff for energy generated by Wind Turbine Generators is applicable to the Appellant irrespective of whether the Appellant has fulfilled specified Renewable Purchase Obligation or not. In support of this plea he made the following submissions:

- I. Wind Power Policy (First Amendment) – 2007 dated 7<sup>th</sup> Jan 2009 cannot alter the statutory tariff order dated 11<sup>th</sup> Aug 2006 passed by the State Commission while discharging its statutory function under section 62 and 86 of the Electricity Act 2003.

- II. The generation tariff determined by the State Commission was equally applicable for excess generation, over and above set off, which was to be treated as sale to the Appellant. The tariff was applicable to all kinds of sale of wind energy without any reference to renewable purchase obligation etc.
- III. On 13<sup>th</sup> June 2007 the Government of Gujarat came out with the Wind Power Policy 2007. This policy in fact was in consonance with the provisions of the Electricity Act 2003, and the State Commission's order dated 11.8.2006. The policy itself contemplated that Electricity Act 2003 and the State Commission's order shall prevail for the purpose of implementation of the Policy.
- IV. Wind Power Policy (First Amendment) 2007, dated 7.1.2009 amended the tariff determined by the State Commission. The said amendment is against the

provisions of the Electricity Act 2003 and the State Commission's statutory orders and regulations.

V. After enactment of Electricity Act 2003, the State Commissions are entrusted with the exclusive jurisdiction to determine tariff under section 62 read with section 86 of the Act. Any intrusion into the said authority of the State Commission, except provided under the Act, is not permissible. This principle has been laid down in the following decisions of the Tribunal.

i. Kerala State Electricity Board v. Kerala State Electricity Regulatory Commission being Appeal no. 5 of 2010.

ii. Oil and Natural Gas Corporation Ltd V Gujarat State Electricity Regulatory Commission being Appeal No. 52 of 2009.

VI. The investment made by the 2<sup>nd</sup> Respondent was based on the ensured guarantee given in the State

Commission's Order dated 11.8.2006 as well as Government Policy of 2007 to the extent the policy was in consonance with the Electricity Act 2003 and Regulation made thereunder. The ensured benefits of full tariff cannot be withdrawn by the Appellant on the basis of subsequent amendment to the policy. Any such attempt shall hit by doctrine of '*Promissory Estoppel and Legitimate Expectation*'. This principle has been laid down by Hon'ble Supreme Court in Pawan alloys & Castings v. UP State Electricity Board and Others (1997) 7 SCC 251.

VII. The Wind Power Policy (First Amendment) 2007 dated 7.1.2009 itself provided as follows:-

*"19 Notwithstanding anything contained in this resolution, the provisions of the Electricity Act 2003 and GERC regulations, as issued from time to time, shall prevail, for the purpose of implementation of this policy".*

Thus the submission made on behalf of the Appellant that the Amendment to the Policy is applicable is not tenable for the reason that aforesaid amendment policy specifically clarifies that, if there is any inconsistency in the policy with the provisions of the Electricity Act 2003 and the State Commission's regulations then later will prevail over the policy.

14. We have heard the Learned Counsel for the parties who argued at length and carefully considered the submissions made by the rival parties.
15. In view of the rival contentions referred to above urged by the learned counsel for parties, following questions would arise for our consideration:
  - I. Whether the State Commission's Order No. 2 dated 11<sup>th</sup> Aug 2006 is applicable to excess energy procured by the Appellant over and above specified Renewable Purchase Obligation?

II. Whether Government's Amendment to 2007 policy dated 7.1.2009 fixing tariff for procurement of power from Wind Turbine Generators by modifying the tariff determined by the State Commission is legally tenable in terms of the Electricity Act 2003?

17. We shall now deal with each of the above questions one by one.
18. First question to be decided as to Whether the State Commission's Order dated 11<sup>th</sup> Aug 2006 is applicable to excess energy procured by the Appellant over and above specified Renewable Purchase Obligation.
19. Appellant's main contention is that clause 16 of State Commission's Order dated 11.08.2006 elucidates that the order applies only to the procurement of power from Wind Energy Sources to the extent of fulfillment of the specified Renewable Purchase Obligation on the part of the Appellant and it does not apply to procurement of power



over and above such specified quantum to fulfill its obligation. Clause 16 of Commission's order dated 11.6.2006 read as under:

***“16. Tariff Rate***

*The Commission in its discussion paper proposed levelised cost as tariff during the project life of 20 years.*

*....*

*Strict application of cost plus approach would lead to high tariff in the initial years and result in extra burden on the consumers. Therefore, the Commission has considered levelised cost and opted for a fixed tariff for 20 years. The Commission also believes that such a tariff will provide reasonable incentive to developers as it gives stable tariff over a longer period.*

***Tariff for wind energy projects***

**(i) For new projects**

*Based on the various parameters as discussed above, the levelised cost of generation including RoE using discounting rate at weighted average cost of capital i.e. 11.38%, works out to Rs. 3.37 per KWh. The Commission has determined the tariff for generation from wind energy project at Rs.3.37 (constant) for its entire project life of 20 years i.e. from the first year to the twentieth year. **This tariff rate shall be applicable for purchase of wind energy by GUVNL/Distribution Licensees for complying with the purchase obligation that may be specified by the Commission from time to time. This tariff will be applicable to wind energy generators who commission brand new wind energy plants and equipments after the date of this order. Old/second hand equipment will not qualify for this tariff.***

... *{Emphasis added}*

20. The Learned Counsel for 2<sup>nd</sup> Respondent countered the above contention of the Appellant and submitted that the State Commission's Order dated 11.8.2006 is applicable to procurement of power from all Wind Turbine Generators irrespective of whether distribution licensee has fulfilled Renewable Purchase Obligation or not. He quoted various other observations of the order in support of his arguments.

21. In order to answer this question, we are required to carry out in depth analysis to the relevant provisions of Electricity Act 2003 and State Commission's Order dated 11.8.2006.

Subsection (1) of Section 62 of the Electricity Act 2003 mandates the Appropriate Commission to determine the tariff in accordance with the provisions of the Act for

supply of energy by a generating company to distribution licensee. Section 86 of the Act deals with functions of State Commission. Sub-section (1) of Section 86 read as under:

***“Functions of State Commission.—(1) The State Commission shall discharge the following functions, namely:—***

*(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:...”*

22. Thus it is the statutory duty of the State Commission to determine the tariff for energy produced by any generator (including Wind Turbine Generators) and supplied to a distribution licensee within its jurisdiction.

23. Accordingly the State Commission issued an order determining the tariff for procurement of power by

Distribution Licensee from Wind Turbine Generators. The title and opening paragraph of the State Commission's Order No 2 dated 11.8.2006 read as under:

***"In the matter of: Determination of price for procurement of power by the Distribution Licensees in Gujarat from Wind Energy Projects.***

*In exercise of the powers conferred under section 181 read with sections 61(h), 62(a) and 86(1)(e) of the Electricity Act, 2003 (Act 36 of 2003) and all other powers enabling it in this behalf, the Gujarat Electricity Regulatory Commission (the Commission) has determined the price for procurement of power by Distribution Licensees in Gujarat from wind energy projects".*

24. Perusal of the title and opening paragraph of the Order would reveal that the tariff so determined is for procurement of power by distribution licensee from Wind

Turbine Generators. These provisions do not suggest that its application would be restricted to procurement power from Wind Turbine Generators up to fulfillment of Renewable Purchase Obligation of distribution licensee only.

25. Further, during discussions on the issue whether tariff should be project specific or generalized, the State Commission has observed that

***“1. Tariff- Project Specific or generalized***

*The Commission’s Regulations on procurement of power from renewable sources provide that, the PPAs entered into by GEB, prior to the notification of these regulations shall continue to be in force for such period as mentioned in those PPAs. The said Regulations also indicate that while determining the tariff, the Commission will adopt*

*normative parameters for financing cost, O&M and other expenses.*

*As regards normative parameters, the Indian Wind Energy Association (InWEA) submitted that for wind energy projects normative/generalized tariff, rather than project specific tariff, is the preferable approach as this will incentivise efficiency in selection of site, technology, financing package, etc. However project specific tariff design may be considered, in case a wind energy developer approaches the Commission, with a specific petition providing rationale and justification for such project specific tariff.*

*The Commission considers that a general tariff for wind energy projects is desirable since it will provide an incentive to the investors for selecting the most efficient*

*machines and the most suitable project locations (besides being non-discriminatory).”*

26. Thus, the State Commission had adopted generalized tariff in preference to project specific to avoid discrimination.
27. Further examination of the said Order revealed that the tariff was determined on well established *cost plus principles* of tariff fixation. The tariff determined through this order was based on normative parameters such as Capital Cost, Return on Equity, Depreciation, Operation and Maintenance Charges, Capacity Utilisation Factor, Debt – Equity ratio, Loan term and interest of loan etc. These parameters were fixed after taking in to account the comments of various stake holders and practices followed by other states. After fixing various normative parameters, the State Commission determined the tariff



for procurement of power by distribution licensee from Wind Turbine Generators. While discussing the fixation of various normative parameters, the State Commission has nowhere mentioned that the tariff so determined would have restrictive application as suggested by the Appellant.

28. The main issue now to decide is whether provisions of clause 16 of order dated 11.8.2006 would prevail over all other provisions.
29. It is the cardinal principle of interpretation of a statute that a statute has to be read as a whole. When question arises as to meaning of a certain provision in a statute it is only legitimate that proper to read that provision in its context. The context means the statute as whole. Every clause of a statute should be construed with reference to the context and the other clauses of the Act so as to make out a harmonious interpretation. The rule of

construction is well settled that when there are two provisions in an enactment which cannot be reconciled with each other, they should be so interpreted so that possible effect should be given to both. This is what is known as harmonious construction.

30. Now let us apply these principles to the present case. The Appellant's main argument is that the State Commission has not determined the tariff for purchase of energy from Wind Turbine Generators by a distribution licensee over and above fulfillment of Renewable Purchase Obligation. Such an argument, if accepted, would conclude that the State Commission has failed in performing its functions vested under sections 62 & 86 of the Electricity Act 2003. Such an interpretation cannot be accepted.
31. On the other hand, considering the recommendations of Tariff Policy regarding preferential tariff for non-

conventional sources of power, the State Commission thought it prudent to clarify that the tariff rate determined in the order shall also be applicable for purchase of wind energy by GUVNL/Distribution Licensees for complying with the purchase obligation under Renewable Purchase Obligation. Such a provision in the order would avoid disputes in regard to preferential tariff vis-à-vis merit order purchase of power. Such an interpretation augers well with the principles of harmonious construction as well as in furtherance of objects of the Electricity Act 2003 and Tariff Policy.

32. Before arriving at any conclusion, it would be relevant to consider the findings of the State Commission in this regard. The relevant findings of the State Commission are as under:

*“9.1 The petitioner and respondent no. 1 had executed an agreement on 3.6.2008 regarding wheeling of energy from WTGs installed by the petitioner to the place of consumption of the petitioner. Clause 3.4 of the said agreement reads as under:*

***“3.4 Purchase of Surplus Energy***

*In accordance with the GERC’s Order No. 2 of 2006 dated 11.8.2006 , any excess energy (Net of wheeling/Transmission loss/charges approved by GERC for wind farms and after subtracting the set off against monthly consumption) shall be treated as sale to the DISCOM. However, the above deemed sale provision at the tariff rate determined by the Commission is applicable only for the purchase of energy from renewable sources upto the minimum requirement of the power from such sources. The*

*DISCOM has already tied up the purchase of power from renewable sources more than the minimum requirement of power purchase from such sources. Now, DISCOM may purchase power from company's wind farms at the rates determined through competitive bidding process. ..."*

*9.2 According to above clause of the wheeling agreement, the petitioner and respondent no. 1 agreed to treat excess energy available after captive use as sale of energy by WTGs to the respondent No. 1. The respondent No. 1 agreed to pay the charges for the same at the rate determined by the Commission in order No. 2/2006 dated 11.8.2006 upto fulfillment of Renewable Power Purchase Obligation (Renewable Purchase Obligation) by them. After fulfillment of the Renewable Purchase Obligation, it was agreed to pay for excess*

*energy at the rate determined through competitive bidding., i.e. the rate at which DISCOM will agree/sign an agreement with any other WEG. Thus, the agreement provides for payment for excess energy as under:*

*(i) For purchase upto Renewable Purchase Obligation, at the rate determined by the Commission, and*

*(ii) For purchase beyond Renewable Purchase Obligation, at the rate determined by the Commission or the rate determined through competitive bidding process.*

*9.3 Prior to applying the rates under category (ii) above it is essential to establish/ascertain that the respondent no. 1 has fulfilled the Renewable Purchase Obligation. The Renewable Purchase Obligation is decided at the end of the Financial Year based on the renewable energy purchased by the distribution licensee and actual energy consumed in the distribution licensee area. The purchase*

*price for the excess energy available after set-off from WTGs is paid by the distribution licensee on monthly basis. Hence there is no relationship between the fulfillment of Renewable Purchase Obligation and purchase of excess energy by the distribution licensee from WTGs on a monthly basis.*

*9.4 Presuming that the respondent no.1 is somehow able to demonstrate that it has fulfilled its Renewable Purchase Obligation, the next question is whether the payment for excess energy is to be made at the rate determined by the Commission under its order dt.11.08.2006 or at the rate determined through competitive bidding process. The respondent No. 1 has admitted that they had not gone for competitive bidding for procurement of wind energy generation. As such there is no rate determined through competitive bidding process*

*and the only alternative available to the respondent no.1 is to pay for the excess energy at the rate determined by the Commission in its order no. 2/2006 dated 11.08.2006.*

*9.5 ... The Commission had in para 23 of the Order No. 2 of 2006 dated 11th August, 2006 decided as under:*

***“Any developer/investor opting for sale to distribution licensee, will be covered by this order from the date of its issue. Further, after 19.6.2007, new WEGs either for captive use or for sale to distribution licensee will be governed by this order.***

***Any excess generation (over and above the set off against monthly consumption) will be treated as sale to the concerned distribution licensee at the tariff rate determined by the Commission under this order. The Distribution Licensee shall***



*make payment for any such excess generation in a given month, before the last day of the succeeding month". {emphasis added}*

*9.6 According to above stipulation the WEGs are eligible to wheel power for captive use and get set-off against the wheeled unit on monthly basis. Any excess energy after set off available will be treated as sale to the concerned distribution licensee at the tariff rate determined by the Commission in the Order No. 2 of 2006. The respondent no. 1 had deducted 15% from the tariff determined by the Commission for the excess energy available after captive use (set off) on the basis of the amendment made in wind power policy, 2007, without applying the competitive bidding rate or rates determined by the Commission in order no. 2 of 2006. **We further clarify that the order NO. 2 of 2006 passed by the Commission is a***

***statutory order and its provisions cannot be superseded/ substituted by the amendment made in Wind Power Policy, 2007. The above action of the respondent No.1 is, therefore against the stipulations made in the order No. 2 of 2006 and inconsistent with the relevant legal provisions. ...”***

33. From the above findings it is noticed that the State Commission has elaborately dealt with the issue and held that its Order dated 11.8.2006 would be applicable to all Wind Turbine Generators. In the absence of any rate determined through competitive bidding process, the only alternative available to the Appellant is to pay for the excess energy at the rate determined by the Commission in its order dated 11.08.2006. The State Commission has specifically held that the Order NO. 2 of 2006 passed by the Commission is a statutory order and its provisions

cannot be superseded/ substituted by the amendment made in Wind Power Policy, 2007.

34. In view of the above, we do not find any ground to interfere with the findings of the Commission on this issue. The first issue is answered accordingly.
35. Next question to be decided as to Whether Government's Amendment to 2007 policy dated 7.1.2009 fixing tariff for procurement of power from Wind Turbine Generators by modifying the tariff determined by the State Commission is legally tenable in terms of the Electricity Act 2003.
36. Shri M G Ramachandarn, Learned Counsel for the Appellant argued that the Agreement between the Appellant and 2<sup>nd</sup> Respondent specifically envisages that in case the Appellant had fulfilled its Renewable Purchase Obligation, the price at which the power would be procured by the Appellant from 2<sup>nd</sup> Respondent could to

be determined based on the Competitive Bidding to be undertaken by the Appellant. In the absence of any Competitive Bidding and in view of the specific Policy Decision made by the Government of Gujarat, for purchase of surplus power by the distribution licensees from the Wind Power Developers who are essentially using power for captive purposes, the tariff determined as per the Policy would become the applicable tariff.

37. He further argued that the Order dated 11.08.2006 determining the price of power does not apply to the purchase of power by the Appellant under Agreement dated 3.6.2008. The Government of Gujarat's Policy determines the appropriate tariff for sale of surplus electricity which has been validly adopted by Appellant instead of going through competitive bidding process for price discovery as per stipulation contained in the

Agreement. The adoption of the price mentioned in the amended Policy dated 7.1.2009 which is applicable uniformly for all in substitution of competitive bidding process to be implemented is beneficial to the 2<sup>nd</sup> Respondent.

38. Shri C K Rai, Learned Counsel for the Respondent countered the arguments raised by the Appellant and submitted that the generation tariff determined by the State Commission was equally applicable for excess generation, over and above set off, which was to be treated as sale to the Appellant. The tariff was applicable to all kinds of sale of wind energy without any reference to Renewable Purchase Obligation. Similarly the tariff defined by State Government's Wind Power Policy (First Amendment) 2007, dated 7.1.2009 is also uniformly applicable to all kinds of procurement of power by the

Appellant from Wind Turbine Generator without any reference to such purchase obligation.

39. He emphasized that after enactment of Electricity Act 2003 the State Commissions are entrusted with the exclusive jurisdiction to determine tariff under section 62 read with section 86 of the Act. Any intrusion in to the said authority of the State Commission, except provided under the Act, is not permissible.

40. Let us now examine the relevant portion of State Government's Wind Power Policy (First Amendment) 2007 dated 7.1.2009. Clause 5 of the impugned policy read as under:

***“Amendment of Clause No. 8- Sale of Power:***

*The clause shall be substituted as under:*

*The electricity generated from the WTGs commissioned from 1<sup>st</sup> April, 2009, may be sold to GUVNL and / or any Distribution Licensee within the state, at a rate of Rs. 3.50 per unit of electricity for the entire period of PPA. However, Wind Farm Associations or Wind Farm developers/ owners have to file a petition before the GERC and get the approval of GERC for the tariff to be paid by licensee.*

*GUVNL and / or any Distribution Licensee may purchase surplus power from WTGs wheeling power for their captive use after adjustment of energy against consumption at recipient unit (s) at a rate of 85% of tariff applicable to WTGs (commissioned in same tariff block) selling power to GUVNL and / or any Distribution Licensee. This provision will be applicable for WTGs*

*commissioned under Wind Power Policy-2007 also, from the date of issuance of this GR.”*

41. From the above it is clear that the tariff defined by this policy is to be uniformly applied to all procurements of surplus power from captive Wind Turbine Generator irrespective of fulfillment of Renewable Purchase Obligation. Therefore, the argument put forward by Ld Counsel for the Appellant is not convincing. The question before us is to decide whether tariff defined by the State Government's Wind Power Policy dated 7.1.2009 is legally tenable.
42. In this regard we would now like to examine the jurisdiction of State Commission vis-à-vis powers of State Government in regard to fixation of tariff.
43. Prior to enactment of Electricity Act 2003 and Electricity Regulatory Commission Act 1998, the Indian Power



Sector was governed by Indian Electricity Act 1910 and Electricity (supply) Act 1948. State Electricity Boards were created under 1948 Act. Power to set retail tariff was delegated to Boards and Rate Committees setup under Section 57A of 1948 Act. Power to set Tariff for Generating Companies was delegated to Appropriate Government under section 43A of the 1948 Act. Electricity Regulatory Commission Act 1998 was enacted in 1998. State Electricity Regulatory Commissions were set up under this Act. Section 22 of this 1998 Act enumerated the functions of State Electricity Regulatory Commission which read as under:

***“22. Functions of State Commission.—(1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely:—***

*(a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;*

*(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29;*

*(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;*

*.....”*

44. Thus power to determine tariff for procurement of power from generating companies by distribution licensee and retail tariff for sale of energy to consumer was vested with

State Commissions under Section 22 of this Act. Determination of generation tariff, however, remained with the Government.

45. In the year 2002, Government of Gujarat with a view to harness vast potential of wind power in the State issued Wind power Generation Policy 2002. Relevant portion of this policy is given below:

“RESOLUTION

*Gujarat has largest coast line in the country and the potential for wind energy in the State is around 5000 MW on the coast line of Saurashtra and Kutch. The Gujarat Energy Development Agency in collaboration with the Indian Institute of Meteorology, Bangalore has identified several excellent sites for wind power generation in the State. The Government of India has also announced guild lines for Wind Energy. The formulation of a sustainable*

*wind power generation policy was therefore under the active consideration of State Government. After due consideration, the State Government has decided to declare Wind Power Policy 2002...*

....

**5. Sale of Energy:**

*As regards the purchase price of energy generated by wind-farms it is proposed that the case of industrial undertakings at their option and in case of non-industrial units, the Gujarat Electricity Board may purchase electricity generated by such wind energy generating units of Rs. 2.60 per unit. An increase of 5 paise is to be provided every year for 10 years. After the 10<sup>th</sup> year, the rate will be negotiable. In the case of industrial undertakings, the option of wheeling electricity is made*

*available to them instead of selling it to the Gujrat Electricity Board.”*

46. Since prior to enactment of Electricity Act 2003, the power to fix generation tariff was vested with the state Government, provision contained in Government of Gujarat's 2002 Policy had force of law.

47. After enactment of Electricity Act 2003, power to determine generation tariff was also entrusted to the Appropriate Commission. Section 86 of this Act providing the functions of State Commission is reproduced below:

*“86. Functions of State Commission (1) The State Commission shall discharge the following functions namely:-*

*(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*

...;

48. In terms of Section 86 of 2003 Act, State Commission vide its Order no. 2 of 2006 dated 11<sup>th</sup> August 2006 determined tariff for procurement of power from Wind Turbine Generator by distribution licensee. Relevant portion of State Commission's order is reproduced below:

***“16. Tariff Rate***

*The Commission in its discussion paper proposed levelised cost as tariff during the project life of 20 years.*

....

***Tariff for wind energy projects***

***(i) For new projects***

*Based on the various parameters as discussed above, the levelised cost of generation including RoE using discounting rate at weighted average cost of capital i.e.*

*11.38%, works out to Rs. 3.37 per KWh. The Commission has determined the tariff for generation from wind energy project at Rs.3.37 (constant) for its entire project life of 20 years i.e. from the first year to the twentieth year. ...”*

49. Government of Gujarat replaced Wind Power Policy 2002 by Wind Power Policy 2007 on 13.6.2007. New Policy of 2007 also had provision of sale of electricity as under:

*“Sale of Energy*

*The electricity generated from the WTGs may be sold to GUVNL or any distribution licensee within the State, at the rate of Rs. 3.37 per unit of electricity as per GERC order, as amended from time to time. The requisite Power Purchase Agreement (PPA) shall be done between the purchaser of power and the eligible unit.”*

50. Thus, Government of Gujarat, in its Policy of 2007, recognized the power of State Commission to specify the tariff of procurement power from Wind Turbine Generator by distribution licensee by stating “*electricity generated from the WTGs may be sold to GUVNL or any distribution licensee within the State, at the rate of Rs. 3.37 per unit of electricity as per GERC order, as amended from time to time*”.

51. However, while amending the 2007 Policy in January 2009, Government of Gujarat made changes in clause 5 related to Sale of Power in 2007 Policy The modified clause of amendment to 2007 Policy read as under:

***“Amendment of Clause No. 8- Sale of Power:***

*The clause shall be substituted as under:*



*The electricity generated from the WTGs commissioned from 1<sup>st</sup> April, 2009, may be sold to GUVNL and / or any Distribution Licensee within the state, at a rate of Rs. 3.50 per unit of electricity for the entire period of PPA. However, Wind Farm Associations or Wind Farm developers/ owners have to file a petition before the GERC and get the approval of GERC for the tariff to be paid by licensee.*

*GUVNL and / or any Distribution Licensee may purchase surplus power from WTGs wheeling power for their captive use after adjustment of energy against consumption at recipient unit (s) at a rate of 85% of tariff applicable to WTGs (commissioned in same tariff block) selling power to GUVNL and / or any Distribution Licensee. This provision will be applicable for WTGs*

*commissioned under Wind Power Policy-2007 also, from the date of issuance of this GR.”*

52. From the above provision it is noted that while specifying rate for procurement of power from Wind Turbine Generator at Rs 3.50/unit, (against Rs 3.37 specified by the State Commission), Government of Gujarat was cautious and had specifically mentioned that approval of State Commission would be required. However, while reducing the rate for procurement of surplus power from Captive Wind Turbine Generator to 85% of rate specified by the State Commission, the State Government did not acknowledge the requirement of approval of State Commission. Thus the above modification in specifying tariff for surplus generated by captive Wind Turbine Generator were made by the State Government without the approval of the State Commission, which is the sole

authority to specify wheeling charges in terms of 2003 Act.

53. This Tribunal in Appeal no. 5 of 2010; Kerala State Electricity Board V Kerala State Electricity Regulatory Commission has held that *“It is settled law as laid down by this Tribunal as well as by the Hon’ble Supreme Court, that all the policy directions are not binding on the State Commission since the State Government cannot curtail the powers of State Commission in the matter of determination of tariff. ...”*. Similar views have been expressed by this Tribunal in Appeal no. 52 of 2010; Oil and Natural Gas Corporation V Gujarat Electricity Regulatory Commission.

54. From the above, it is clear that so far as fixing tariff for procurement of power from Captive Wind Turbine Generator by distribution licensee is concerned; the

amendment to Wind Power Policy 2007 issued by Government of Gujarat in January 2009 was without authority. In fact Government of Gujarat had also recognized the powers of State Commission in Government Resolution dated 7.1.2009 as given below:

*“Notwithstanding anything contained in this resolution, the provisions of the Electricity Act 2003 and the GERC regulations, as issued from time to time, shall prevail, for the purpose of the implementation of this policy.”*

55. The question is answered accordingly.

56. **Summary of our findings:**

**I. The State Commission’s Order dated 11.8.2006 would be applicable to procurement of power from all Wind Turbine Generators without consideration to whether such purchase was**

**made to meet the Renewable Purchase Obligation or over and above that. In the absence of any rate determined through competitive bidding process the only alternative available to the Appellant is to pay for the excess energy at the rate determined by the Commission in its order dated 11.08.2006.**

**II. So far as fixing of tariff for procurement of power from Captive Wind Turbine Generator by distribution licensee is concerned, the amendment to Wind Power Policy 2007 issued by Government of Gujarat in January 2009 was without authority.**

58. In view of our above findings, we do not find any ground to interfere with the impugned order of Gujarat Electricity Regulatory Commission dated 10.8.2010. Hence, Appeal

being devoid of merit is dismissed. However, there is no order as to cost.

59. Pronounced in the open court today the 31<sup>st</sup> May, 2011.

(V J Talwar)

(Justice M Karpaga Vinayagam)

Technical Member

Chairperson

INDEX : REPORTABLE/NON-REPORTABLE