

**In the Appellate Tribunal for Electricity,**  
**New Delhi**  
**(Appellate Jurisdiction)**

**Appeal No. 238 of 2016, Appeal No. 246 of 2016**  
**Appeal No. 247 of 2016, Appeal No. 248 of 2016**  
**Appeal No. 343 of 2017 & IA No. 285 of 2017**

**Dated: 7<sup>th</sup> December, 2018**

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

**Appeal No. 238 of 2016**

**In the matter of :-**

**M/s. PMC Power Private Limited**  
**10-3-152/B 203,**  
**East Marredpally, Secunderabad – 500026**                      **...Appellant(s)**

**Versus**

- 1. Andhra Pradesh Electricity Regulatory Commission**  
**4th & 5th Floor, Singareni Bhavan,**  
**Red Hills, Lakadi-ka-pul,**  
**Hyderabad - 500 004**    **...Respondent no. 1**
  
- 2. Southern Power Distribution Company of Andhra Pradesh Ltd.**  
**Behind Srinivasakalyana Mandapam,**  
**Tiruchanoor Road,**  
**Tirupati, Andhra Pradesh-517501.**    **...Respondent No.2**

**Counsel for the Appellant(s) :**                      **Mr. Anand K. Ganesan**  
**Ms. Swapna Seshadri**  
**Ms. Neha Garg**  
**Ms. Parichita Chowdhury**

**Counsel for the Respondent(s) :** Mr. K. V. Mohan  
Mr. K.V. Balakrishan for R-1  
  
Ms. Prerna Singh for R-2

**Appeal No. 246 of 2016**

**In the matter of :-**

**Southern Power Distribution Company of  
Andhra Pradesh Ltd.  
Behind Srinivasakalyana Mandapam,  
Tiruchanoor Road,  
Tirupati, Andhra Pradesh-517501.** ...Appellant(s)

**Versus**

1. **Andhra Pradesh Electricity Regulatory  
Commission  
4th & 5th Floor, Singareni Bhavan,  
Red Hills, Lakadi-ka-pul,  
Hyderabad - 500 004** ...Respondent no. 1
  
2. **M/s. Bhavanihydro power Projects  
Private Limited  
6-3-34 7/17/5, Dwarakapuri Colony,  
Panjagutta, Hyderabad-500082.** ...Respondent no. 2

**Counsel for the Appellant(s) :** Ms. Prerna Singh  
  
**Counsel for the Respondent(s) :** Mr. K. V. Mohan  
Mr. K.V. Balakrishan for R-1  
  
Ms. Swapna Seshadri  
Ms. Neha Garg  
Ms. Parichita Chowdhury for R-2

**Appeal No. 247 of 2016**

**In the matter of :-**

**Southern Power Distribution Company of  
Andhra Pradesh Ltd.**

**Behind Srinivasakalyana Mandapam,  
Tiruchanoor Road,  
Tirupati, Andhra Pradesh-517501.**

**... Appellant(s)**

**Versus**

- 1. Andhra Pradesh Electricity Regulatory  
Commission  
4th & 5th Floor, Singareni Bhavan,  
Red Hills, Lakadi-ka-pul,  
Hyderabad - 500 004** **...Respondent no. 1**
  
- 2. NCL Industries Ltd.  
4th Floor, Vaishnavi's Cynosure,  
Near Gachibowli Flyover,  
Gachibowli, Hyderabad-500032.** **...Respondent no. 2**

**Counsel for the Appellant(s) : Ms. Prerna Singh**

**Counsel for the Respondent(s) : Mr. K. V. Mohan  
Mr. K.V. Balakrishan for R-1**

**Ms. Swapna Seshadri  
Ms. Neha Garg  
Ms. Parichita Chowdhury for R-2**

**Appeal No. 248 of 2016**

**In the matter of :-**

**Southern Power Distribution Company of  
Andhra Pradesh Ltd.  
Behind Srinivasakalyana Mandapam,  
Tiruchanoor Road,  
Tirupati, Andhra Pradesh-517501.**

**... Appellant(s)**

**Versus**

- 1. Andhra Pradesh Electricity Regulatory  
Commission  
4th & 5th Floor, Singareni Bhavan,  
Red Hills, Lakadi-ka-pul,  
Hyderabad - 500 004** **...Respondent no. 1**

2. **M/s. PMC Power Private Limited**  
**10-3-152/B 203,**  
**East Marredpally, Secunderabad – 500026 ...Respondent no. 2**

**Counsel for the Appellant(s) : Ms. Prerna Singh**

**Counsel for the Respondent(s) : Mr. K. V. Mohan**  
**Mr. K.V. Balakrishan for R-1**

**Ms. Swapna Seshadri**  
**Ms. Neha Garg**  
**Ms. Parichita Chowdhury for R-2**

**Appeal No. 343 of 2017 & IA No. 285 of 2017**

**NCL Industries Ltd.**  
**4th Floor, Vaishnavi's Cynosure,**  
**Near Gachibowli Flyover,**  
**Gachibowli, Hyderabad-500032.**

**...Appellant(s)**

**Versus**

1. **Andhra Pradesh Electricity Regulatory**  
**Commission**  
**4th & 5th Floor, Singareni Bhavan,**  
**Red Hills, Lakadi-ka-pul,**  
**Hyderabad - 500 004**

**...Respondent no.1**

2. **Southern Power Distribution Company of**  
**Andhra Pradesh Ltd.**  
**Behind Srinivasakalyana Mandapam,**  
**Tiruchanoor Road,**  
**Tirupati, Andhra Pradesh-517501.**

**...Respondent No.2**

**Counsel for the Appellant(s) : Ms. Swapna Seshadri**  
**Ms. Neha Garg**  
**Ms. Parichita Chowdhury**

**Counsel for the Respondent(s) : Mr. K. V. Mohan**  
**Mr. K.V. Balakrishan for R-1**

**Ms. Prerna Singh for R-2**

## JUDGMENT

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

1. **The Appeal No. 238 of 2016** has been filed by PMC Power Private Limited (hereinafter referred to as the “**PMCPPL**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 18.6.2016 passed by Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No. 08 of 2016 determining the tariff of PMC Power Private Limited- a Mini Hydel Power Project for the 11<sup>th</sup> - 20<sup>th</sup> year of operation in compliance with the Judgment dated 20.01.2016 of this Tribunal passed in Appeal No. 268 of 2014
  - a) The Appellant, PMC Power Private Limited, is an electricity generating company in new and renewable energy sector who has established 0.65 MW Mini Hydro Power Plant in the State of Andhra Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh.
  - b). The Respondent No. 1 is the Andhra Pradesh Electricity Regulatory Commission exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
  - c) The Respondent No. 2, Southern Power Distribution Company of Andhra Pradesh Ltd., is a distribution licensee under the provision of Electricity Act 2003 having a license to distribute and supply electricity in the southern area of the State of Andhra Pradesh.

2. **The Appeal No. 246 of 2016** has been preferred by Southern Power Distribution Company of Andhra Pradesh Ltd. (hereinafter referred to as the “**SPDCAPL**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “Act”) against the order dated 18.6.2016 passed by Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as the “State Commission”) where in the State Commission allowed O.P. No. 9 of 2016, *inter alia* holding that a review of the tariff for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be done with reference to each mini hydel power project developer, and also fixing the said tariff.
- a) The Appellant, Southern Power Distribution Company of Andhra Pradesh Ltd., is a distribution licensee under the provision of Electricity Act 2003 having a license to distribute and supply electricity in the southern area of the State of Andhra Pradesh.
  - b). The Respondent No. 1 is the Andhra Pradesh Electricity Regulatory Commission exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
  - c) The Respondent No. 2, Bhavani Hydro Power Projects Private Limited, is an electricity generating company in new and renewable energy sector who has established 0.55 MW Mini Hydro Power Plant in the State of Andhra Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh.
3. **The Appeal No. 247 of 2016** is filed by Southern Power Distribution Company of Andhra Pradesh Ltd. (hereinafter referred to as the “**SPDCAPL**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “Act”) against

the order dated 18.6.2016 passed by Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as the “State Commission”) where in the State Commission allowed O.P. No. 01 of 2016, *inter alia* holding that a review of the tariff for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be done with reference to each mini hydel power project developer, and also fixing the said tariff.

- a) The Appellant, Southern Power Distribution Company of Andhra Pradesh Ltd., is a distribution licensee under the provision of Electricity Act 2003 having a license to distribute and supply electricity in the southern area of the State of Andhra Pradesh.
  - b). The Respondent No. 1 is the Andhra Pradesh Electricity Regulatory Commission exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
  - c) The respondent No. 2, NCL Industries Limited is an electricity generating company in new and renewable energy sector who has established 7.5 MW Mini Hydro Power Plant in the State of Andhra Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh.
4. **The Appeal No. 248 of 2016** is filed by Southern Power Distribution Company of Andhra Pradesh Ltd. (hereinafter referred to as the “**SPDCAPL**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “Act”) against the order dated 18.6.2016 passed by Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as the “State Commission”) where in the State Commission allowed O.P. No. 8 of 2016, *inter alia* holding that a review of the tariff for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be done with

reference to each mini hydel power project developer, and also fixing the said tariff.

- a) The Appellant, Southern Power Distribution Company of Andhra Pradesh Ltd., is a distribution licensee under the provision of Electricity Act 2003 having a license to distribute and supply electricity in the southern area of the State of Andhra Pradesh.
- b) The Respondent No. 1 is the Andhra Pradesh Electricity Regulatory Commission exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
- c) The Respondent No. 2, PMC Power Private Limited, is an electricity generating company in new and renewable energy sector who has established 0.65 MW Mini Hydro Power Plant in the State of Andhra Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh.

5. **The Appeal No. 343 of 2017** is filed by NCL Industries Ltd. (hereinafter referred to as the “**NCL**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “Act”) against the order dated 18.6.2016 and 26.11.2016 passed by Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as the “State Commission”) in Petition No. 10 of 2016 whereby the State Commission has determined the tariff for Mini Hydel project of the Appellant for the 11<sup>th</sup> and 20<sup>th</sup> year of operation as directed by this Tribunal in Appeal No. 268 of 2014 dated 20.01.2016.

- a) The Appellant, NCL Industries Limited is an electricity generating company in new and renewable energy sector who has established 7.5 MW Mini Hydro Power Plant in the State of Andhra



Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh.

- b) The Respondent No. 1 is the Andhra Pradesh Electricity Regulatory Commission exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
- c) The Respondent No. 2, Southern Power Distribution Company of Andhra Pradesh Ltd., is a distribution licensee under the provision of Electricity Act 2003 having a license to distribute and supply electricity in the southern area of the State of Andhra Pradesh

**6. As the issues raised in all the five Appeals are similar and inter-related, a common judgment is being rendered. However, for the sake of brevity we shall be considering the facts relating to Appeal no. 238 of 2016.**

7. The brief facts of the case in Appeal no. 238 of 2016 in nutshell are as follows:-

A. The Appellant- PMC Power Private Limited is an electricity generating company in new and renewable energy sector who has established 0.65 MW Mini Hydro Power Plant in the State of Andhra Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh.

B. The Government of Andhra Pradesh (GoAP) vide G.O.Ms.No.93 dated 18-11-1997 issued guidelines for promotion of Non Conventional Energy projects in Andhra Pradesh (as amended vide G.O.Ms No 112 dated 22-12-1998), inter-alia, specifying the

power purchase price of Rs.2.25/kWh, to be escalated at 5%, with base year being 1997-98 and to be reviewed after 3 years . In pursuance of such guidelines, several Mini Hydel power projects were set up at different places in the then State of Andhra Pradesh after obtaining necessary approvals. The project developers have entered into Power Wheeling & Purchase Agreements (“**PW&PA**”) for sale of electricity generated by them to the then Andhra Pradesh Transmission Corporation Limited (hereinafter referred to as "**APTRANSCO**")/ 3rd Party H.T Consumers in the State of Andhra Pradesh which are valid for twenty years from their respective dates of commercial operation (“**COD**”).

- C. The Appellant herein signed Memorandum of Understanding (“**MOU**”) to set up Mini Hydel Plant, with the then Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (“**NEDCAP**”) as detailed below and thereafter entered into Power Wheeling and Purchase Agreement (“**PW&PA**”) with APTRANSCO, the predecessor of the Respondent No.2 to sell Power to 3rd Party H.T. Consumers on the date indicated below-

Appellant Developer /	Date of signing MOU with NEDCAP	Date of PW&PA with APTRANSCO
M/s PMC Power Private Limited	08.04.1999	19.05.1999

- D. The above Memorandum of Understanding and Power Wheeling and Purchase Agreement was entered into by the Appellant in terms of the incentives given by the Government of Andhra

Pradesh in the G.O.Ms No. 93 dated 18.11.1997 and G.O.Ms.No.112 dated 22.12.1998, which inter-alia included the following:

i.	Power Purchase Price	Rs. 2.25 per Unit
ii.	Escalation	5% per annum with 1997-98 as base year and to be revised on 1st April of every year upto the year 2000 A.D.
iii.	Wheeling Charges	2%
iv.	Third Party Sales	Allowed at a tariff not lower than High Tension tariff of Andhra Pradesh State Electricity Board
v.	Banking	Allowed upto 12 months
(a)	Captive consumption	Allowed throughout the year on 2% banking charges
(b)	Third Party Sales	Allowed on 2% banking charges from August to March "~

E. The State Commission by order dated 20.6.2001 in a suo moto exercise determined the purchase price for purchase of electricity by APTRANSCO, the predecessor of Respondent No. 2 from the non-conventional energy developers in the State of Andhra Pradesh. In the said order, the State Commission, inter-alia, held as under:

*29. The existing incentives under G.O Ms No. 93, dated: 18-11-1997, which are continued under the orders of the Commission from time to time till 24-06-2001 under our letter No. 2473, Dated: 24-04-2001 are extended for the time being till 24-07-2001. (The temporary extension has been given to enable the developers to finalise agreements/arrangements relating to supply of power to APTRANSCO prior to 24-07-2001). With effect from the billing month of August 2001, all generators of non-conventional energy*

*shall supply power to APTRANSCO only as per the following terms:*

*(i) Power generated by non-conventional energy developers is not permitted for sale to third parties.*

*(ii) Developers of non-conventional energy shall supply power generated to APTRANSCO/DISCOMS of A.P. only.*

*(iii) Price applicable for purchase by the supply licensee should be Rs. 2.25 per unit with 5% escalation per annum with 1994-95 as the base year.*

*30. A suo moto review of the incentives to take effect from 1 April, 2004, will be undertaken by the Commission after discussions with all the concerned parties. There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price will be reworked on the basis of return on equity, O&M expenses and variable cost."*

F. Thus, in the above order, the State Commission prohibited any third party sales by the non-conventional energy developers and directed to supply power only to the APTRANSCO/Respondent No. 2. The State Commission further held that the tariff would be reworked only after the period of 10 years for the projects based on the loan repayment, O&M Expenses and variable cost of each individual project. The above order of the State Commission has attained finality on the issues of tariff as held by the State Commission. The Appellant acted on the basis of the above order passed by the State Commission and had altered their position on the said basis.

G. Pursuant to the above, the Appellant herein signed Power Purchase Agreement dated 22.10.2001 (**"PPA"**) with

APTRANSCO (predecessor of the Respondent No. 2) for sale of electricity. The PPA was entered into by the Appellant on the standard draft format, with the Respondent No.2.

- H. Subsequent to the execution of the PPA and the vesting of the power purchase functions of the APTRANSCO to the distribution licensees - Respondents No. 2 has succeeded the rights and obligations of APTRANSCO under the PPA with effect from 09.06.2005.
  
- I. Thereafter, the State Commission initiated suo-moto proceedings for determination of purchase price of power from nonconventional energy projects effective from 01.04.2004 onwards. The above order proceedings were initiated by the State Commission despite the fact that the MNES guidelines were adopted by the Government and also the State Commission in the order dated 20.06.2001. The projects were set up by the various developers including the Appellant on the above basis and they had altered their position based on the MNES guidelines tariff and incentives to be available. The proceedings of the State Commission culminated in the passing of the order dated 20.03.2004 by the State Commission, whereby the State Commission altered and reduced the tariff applicable by the Respondent No. 2 to the non-conventional energy developers in the State of Andhra Pradesh.
  
- J. By the order dated 20.03.2004, the State Commission determined the power purchase price for the mini hydel projects as a single part tariff of Rs. 2.60 per unit for the first year of operation and gradually reducing the same to Rs. 1.88 per unit for the 10th year

of operation. The State Commission determined the above tariff for the Plant Load Factor (“PLF”) up to 35%, beyond which the project developer was entitled to a tariff of only 21.5 paisa per unit.

- K.** Aggrieved by the order dated 20.03.2004 of the State Commission re-determining the tariff, the association of Small Hydro Power Developers in the State filed a writ petition before the Hon'ble High Court of Andhra Pradesh. By Order dated 27.4.2004, the Hon'ble High Court disposed of the above writ petition and directed the project developers to approach the State Commission for a review of the order dated 20.03.2004.
- L.** Pursuant to the above, a review petition being Review Petition No. 5 of 2004 was filed before the State Commission. The State Commission, by order dated 07.07.2004 disposed of the said review petition after considering minor modifications of the Capital cost and certain other aspects. The State Commission, inter-alia, determined the following tariff as the power purchase price-

Year of operation (nth year)	Tariff (Rs/unit)
1 <sup>st</sup>	2.69
2 <sup>nd</sup>	2.60
3 <sup>rd</sup>	2.52
4 <sup>th</sup>	2.43
5 <sup>th</sup>	2.34
6 <sup>th</sup>	2.26
7 <sup>th</sup>	2.17
8 <sup>th</sup>	2.09
9 <sup>th</sup>	2.00
10 <sup>th</sup>	1.92

Further, the above tariff was determined by the State Commission only for the PLF up to 35%. For generation of electricity above

35%, the price for power purchased above 35% PLF was determined as 25 paise per unit. Further, this Order was made applicable with retrospective effect based on the year of the operation for the projects even commissioned prior to 31.03.2004.

- M. Aggrieved by the above order dated 07.07.2004 passed by the State Commission, the Small Hydro Power Developers Association filed a Writ Petition No. 16621 of 2004 in the Hon'ble High Court of Andhra Pradesh. The Hon'ble High Court by an interim order dated 16.09.2004 directed the APTRANSCO/Respondent No.2 to pay 50% of difference amount between the existing tariff and revised tariff in addition to the rates payable under revised tariff with effect from 16.09.2004. Subsequently, upon the constitution of Appellate Tribunal for Electricity in the year 2005, the Hon'ble High Court by an order dated 15.06.2005 disposed of the Writ Petition with a direction to the Appellants to approach this Tribunal by way of appeal.
- N. In pursuance thereof the project developers filed various Appeals being Appeal Nos. 6,7,8,9,10,18,19 and 58 of 2005 and batch before this Tribunal against the order dated 07.07.2004 passed by the State Commission. This Tribunal also passed interim order dated 28.07.2005 similar to Orders of Hon'ble High Court, namely, that the Appellants shall be paid 50% differential amounts between the existing and revised tariff in addition to the rates payable under the revised tariff.
- O. This Tribunal allowed the above Appeals of the project developers by a Judgment dated 2.6.2006 and set aside the Orders of the

State Commission revising the tariff applicable to the nonconventional project developers. This Tribunal, inter-alia, directed as under-

*"In the result on the point 'K', we hold that the appeals preferred by the NCE Developers - Appellants in appeal Nos. 1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 52, 58, 67 & 80 of 2005 are allowed and the impugned proceedings of the Regulatory Commission are set aside and there will be a direction to the APTRANSCO, the Transmission Corporation of AP, the Central Power Distributing Company of AP Ltd., the Southern Power Distributing Company of AP Ltd., the Northern Power Distributing Company of AP Ltd. and the Eastern Power Distributing Company Limited of AP Ltd. to continue the Power Purchase and at the same rate at which the power generated by NCE Developers supplied to them are being paid before passing of the impugned order of the Commission dated 20.03.2004 and 07.07.2004 made in R.P.No. 84/2003 and O.P. No. 1075/2000 with all differences and arrears thereof, up to date and continue to pay at the same rate, until a new PPA is entered by agreement between them in terms of State Government Policy direction, that may be made hereafter and approved by the Regulatory Commission. This judgment shall be given effect from the date of communication. For payment of tariff difference and arrears, the respondents shall have six weeks from the date of this judgment, failing which the respondents shall be liable to pay interest at 9% per annum with effect from the month on which the difference in tariff rate remains to be paid and till date of payment".*

- P. Aggrieved by the above order of this Tribunal, the APTRANSCO filed an appeal being Civil Appeal 2926 of 2006 before the Hon'ble Supreme Court of India. During the pendency of the appeal before the Hon'ble Supreme Court and even in the absence of any interim order passed by the Hon'ble Supreme Court, the Respondent No. 2 did not pay the tariff as was applicable, namely, Rs. 3.48 per unit and continued to pay only the tariff as per the interim order dated 28.07.2005 of this Tribunal. The above was arbitrarily paid by the



Respondent No.2, which resulted in severe cash flow problems to the Appellant.

- Q. The State Commission initiated proceedings for determination of tariff for sale of electricity by the non-conventional energy developers in the State to the distribution licensees for the period from 1.4.2009 to 31.3.2014. By order dated 31.3.2009, the State Commission determined the applicable tariff for various types of non-conventional energy projects in the State of Andhra Pradesh. However, the State Commission did not determine any tariff for the period from 1.4.2009 onwards for mini hydel projects, on the alleged ground that tariff for mini hydel projects had been determined in the year 2004 for 10 years of operation of the project and no tariff was presently necessary to be determined. The State Commission, inter-alia, held as under:

*"14. MINI HYDEL PROIECTS: Since the tariff for Mini Hydel Projects has been fixed in the 20-03-2004 Order from 1<sup>st</sup> year of operation to 10<sup>th</sup> year of operation there is no need to make a determination w.e.f 01-04-2009. The issues raised regarding this sector will be addressed separately by the Commission in due course."*

- R. The Hon'ble Supreme Court by judgment and order dated 8.7.2010 disposed of the appeals filed against the order dated 2.6.2006 passed by this Tribunal. The Hon'ble Supreme Court, inter alia, held as under:

*"52 (a) The order of the Tribunal dated 02.06.2006 is hereby set aside."*

- (b) *We hold that the Andhra Pradesh Electricity Regulatory Commission has the jurisdiction to determine tariff which takes within its ambit the purchase price for procurement of the electricity generated by the Non-conventional energy developers/generators, in the facts and circumstances of these cases.*
- (c) *We hereby remand the matters to the Andhra Pradesh Electricity Regulatory Commission with a direction that it shall hear the Non-conventional energy generators afresh and fix/determine the tariff for purchase of electricity in accordance with law, expeditiously.*
- (d) *It shall also re-examine that in addition to the above or in the alternative, whether it would be in the large interest of the public and the State, to permit sale of generated electricity to third parties, if otherwise feasible.*
- (e) *The Andhra Pradesh Electricity Regulatory Commission shall consider and pronounce upon all the objection that may be raised by the parties appearing before it, except objections in relation to its jurisdiction, plea of estoppel and legitimate expectancy against the State and /or APTRANSCO and the plea in regard to PPAs being result of duress as these issues stand concluded by this judgment.*
- f) *We make it clear that the order dated 20.06.2001 passed by the Andhra Pradesh Electricity Regulatory Commission has attained finality and was not challenged in any proceedings so far. This judgment shall not, therefore, be in detriment to that order which will operate independently and in accordance with law.*
- (g) *We also hereby direct that State of Andhra Pradesh shall be added as party respondent in the proceedings and the Andhra Pradesh Electricity Regulatory Commission shall grant hearing to the State during pendency of proceeding before it. In the facts and circumstances of the case parties are left to bear their own costs."*

S. The Hon'ble Supreme Court also emphasized the need for encouraging investments and private sector participation in the

sector and also the fact that the projects were set up based on certain policies and incentives granted and subsequently removing such incentives and policies would be unfair to the project developers.

- T. Pursuant to the above, the State Commission was required to determine afresh the tariff for the non-conventional energy projects in the State of Andhra Pradesh keeping in view the recommendations of the Hon'ble Supreme Court, the policies of the Government of India and the need to ensure that the nonconventional energy projects are protected and promoted.
- U. By Order dated 12.9.2011, the State Commission determined the tariff for the Non-conventional Energy in pursuance of the Remand Order dated 8.7.2010 passed by the Hon'ble Supreme Court of India in Civil Appeal Nos. 2926 and batch. The matter has been decided by three separate Orders given by each Member of the State Commission. These Orders are also dated differently, namely, the decision of the Technical Member Mr. Radha Kishen was on 13.6.2011, the decision of the Chairman Mr. Raghotham Rao is dated 19.8.2011 and the decision of the Finance Member Mr C.R Sekhar Reddy is dated 2.9.2011. Thereafter, by Order dated 12.9.2011 the State Commission pronounced the judgement comprising of all the three independent Orders.
- V. While, by the Order dated 12.9.2011, the Technical Member (Mr. Radha Kishen) had decided that the tariff should be as per the MNES Guidelines upto 10 years from COD, the other two Members, namely, the Chairman (Mr Raghotham Rao) and

Finance Member (Mr. C.R Sekhar Reddy) have not accepted the above. The Order of the Technical Member is in accordance with finality given by the Hon'ble Supreme Court to the Order dated 20.06.2001 of State Commission. However, the Order of the Chairman dated 19.08.2011 and the Order of the Finance Member Sri C.R. Shekar Reddy dated 02.09.2011 are based on revised technical and financial parameters, with different values of the parameters, which resulted in different set of power purchase prices and these two orders were not as per para 52 (f) of the judgment of Hon'ble Supreme Court.

- W. Due to divergence in views, there was no clarity to the Appellant as to what is the applicable tariff. The Respondents were paying a highly reduced, ad hoc and arbitrary tariff to the Appellant. Further, even in the Order dated 31.3.2009, the State Commission had refrained from determining any tariff for Mini Hydel Projects for the period from 31.3.2009. Apart from the order of the Technical Member, there is no tariff whatsoever that is applicable for the period from 31.3.2009 leaving the Appellant in deep crisis as they were unable to repay the loans extended by IREDA who had sanctioned loans on project viability determined by them based on the power purchase prices as per MNES guidelines / HT Tariffs available to 3<sup>rd</sup> Party sellers.
- X. The Appellants filed Appeals No. 150, 166, 172 and 173 of 2011 challenging the Order dated 12.9.2012 of the State Commission. On 1.2.2012, this Tribunal passed interim orders in Appeal No. 150, 166, 172 and 173 of 2011 on 1.2.2012 and held that the tariffs determined by the Chairman of the State Commission in order

dated 19.08.2011 shall be made effective in the interim period till the final disposal of the aforementioned appeals. The Respondent No. 2 was directed to make payment of arrears to the Appellant on the basis of difference in tariff as determined by the Chairman of the State Commission, and the tariff already paid, within 30 days of the date of his order. However, Respondents No. 2 did not pay the arrears as per interim order dated 1.2.2012 and instead filed Civil Appeal No. 2650-2654 of 2012 against order of this Tribunal dated 1.2.2012. The Hon'ble Supreme Court disposed off the civil appeals on 1.4.2012 and held as follows:

*"These appeals have been preferred against the impugned interim order dated 1.2.2012 passed by the Appellate Tribunal for Electricity, New Delhi, in application I.A. No. 235 of 2011 in Appeal No. 150 of 2011 and other connected I.As, issuing direction to the present appellant to make payment to the respondents during the pendency of the appeal.*

*Heard learned counsel for the parties. We are not inclined to interfere in the matter. However, in the facts and circumstances of the case, we request the learned Appellate Authority to decide the appeals at the earliest. In the meanwhile, the orders impugned passed by the Appellate Authority are directed to be executed and the appellants shall deposit the money, out of which 50% of the said amount shall be withdrawn by the respondents without furnishing any security and 50% with security to the satisfaction of the Appellate Authority.*

*With these observations, the civil appeals are disposed off"*

- Y. While the main appeals including Appeal No. 173 of 2011 preferred by the Appellants were pending, several of the Mini Hydel Developers had completed 10 years of operation and as per the Order dated 20.6.2001 as well as the PPAs entered into between the parties, the State Commission ought to have

determined the tariff for such plants. However, due to the pendency of the appeals, the State Commission did not undertake the above process. The Respondent No.2 started paying a highly reduced and arbitrary rate of Rs.1.92 per unit for the period after the 10th year of operation as per 2004 Order of the State Commission and continuing the same rate of Rs.1.92 per unit in the 11th year and 12th year despite the Interim order dated 1.2.2012 of this Tribunal and the statements given by the Respondents No.2.

- Z. In the circumstances, the Appellants moved IA 234 of 2012 before this Tribunal seeking certain directions to the Respondents No.2 - 4. Vide Order dated 20.7.2012, the Tribunal disposed off IA 234 of 2012 directing as under-

*"The appellant in Appeal no.173 of 2011 representing mini hydro power generators has filed IA No.234 of 2012 seeking directions to the Respondent to pay the tariff as per the interim order dated 1.2.2012 passed by this Tribunal for the period from the end of the 10<sup>th</sup> year of operation i.e. for the 11<sup>th</sup> year also till the determination of the tariff by the State Commission from 31.3.2009 onwards. The PPAs of the mini hydro generating companies are for a period of 20 years. However, the tariff for the mini hydro projects have been determined for the 10 years of operation. In the interim order dated 1.2.2012, we had decided that the tariff as determined by the Chairman in his order dated 19.8.2012 shall be made effective in the interim period till the final disposal of the appeals. However, Chairman's order has not determined the tariff of hydro projects from 11<sup>th</sup> year onward. In the meantime some mini hydro projects have completed 10 years of operation. These hydro projects are being paid ad-hoc tariff by the distribution licensees at an arbitrary rate of Rs.1.92 per unit as per the 2004 order of the State Commission.*

*The Ld. Counsel for the distribution companies stated that the present Appeal is limited to the period for the control period 2004-*

2009 for these projects and as per the provisions of the PPA the tariff has to be determined by the State Commission after completion of the 10<sup>th</sup> year of operation. Thus, the said issue should be agitated before the State Commission and the Tribunal should not pass any interim order indicating the interim tariff for 11<sup>th</sup> year onward.

*In the Appeals filed by the Appellant we find that they have made pleadings relating to determination of tariff from 11<sup>th</sup> year onwards, indicating that the State Commission in the impugned orders has not determined the tariff from 11th year onwards.*

*We feel that the interim tariff of the mini hydro generators from 11<sup>th</sup> year onward should be decided by the State Commission as it would not be appropriate for the Tribunal to usurp the powers of the State Commission to determine tariff. However, we feel there is difficulty for the State Commission to give an interim order without specific directions from this Tribunal in view of the pendency of the appeal before the Tribunal as the tariff for the 11<sup>th</sup> year onwards will depend on the final outcome of this appeal.*

*Keeping in view the financial difficulties being experienced by the mini hydro generators and the distribution licensees continuing to off-take power from these generators even after completion of 10<sup>th</sup> year of operation, we feel there is urgent need for the State Commission to determine an interim tariff for period from 11<sup>th</sup> year onward. Accordingly, we direct the State Commission to determine the interim tariff for the mini hydro projects who have already completed 10 years of operation for sale to the distribution licensees from 11th year onwards, keeping in view the interim order dated 1.2.2012 passed by this Tribunal. We direct the State Commission to determine the interim tariff within one month of the date of commencement of this order. The appellant is given liberty to serve copy of this order to the State Commission by dasti.*

*The State Commission should pass the order after giving liberty of hearing to the appellant and the distribution licensees."*

- AA. Pursuant to the above, the State Commission by Order dated 16.11.2012 in OP No. 63 of 2012 determined an interim adhoc tariff for the Appellants holding as under-

"As can be seen from the above and in terms of the Hon'ble ATE Orders dated 20-07-2012, the direction to the Commission to determine the interim tariff for the mini hydel power projects who have already completed 10 years of operation for sale to the distribution licensee from 11th year onwards, is keeping in view, the interim order dated 01-02-2012. That being the case, the contention of the respondents to continue Rs.1.92 per unit beyond the 10th year based on the Commission order 20-03-2004 is not sustainable.

Further, any determination of interim tariff from 11th year onwards has to be in terms of interim order dated 01-02-2012 only. However, the said order does not contain the tariff for the 11th year. In view of this fact, determination of interim tariff for the 11th year onwards has to be derived from the tariff stream determined in Chairman's order dated 19-08-2011. For this purpose and before going any further on the matter, it is necessary to extract the tariff stream determined by Chairman's order dated 19-08-2011 as hereunder:

Year of operation (nth year)	Tariff (Rs/unit)
1 <sup>st</sup>	3.49
2 <sup>nd</sup>	3.39
3 <sup>rd</sup>	3.29
4 <sup>th</sup>	3.20
5 <sup>th</sup>	3.10
6 <sup>th</sup>	3.01
7 <sup>th</sup>	2.92
8 <sup>th</sup>	2.83
9 <sup>th</sup>	2.74
10 <sup>th</sup>	2.66

As can be seen from the above table, the tariff reduction year-on-year is in the range of 10 paise to 8 paise and the average works out to 9 paise per unit. That being the case and in as much as the fixed tariffs get reduced with aging of project, the tariff for 11th year can be safely fixed at Rs.2.57 per unit i.e., {Rs.2.66 - paise 0.09} and the tariffs for subsequent years can be safely arrived at by reducing the previous year tariff by an amount of 9 paise per unit.



*In view of the above, the respondents are directed to make payments in accordance with the above fixation."*

BB. On 20.12.2012, this Tribunal disposed off Appeal Nos. 150, 166, 172 and 173 of 2011. While disposing the said batch of appeals, this Tribunal formulated the parameters required to be adopted for determining the single part tariff for Mini Hydel Plants for the first 10 years from COD and directed the State Commission to finalise the tariff accordingly. This Tribunal broadly decided as follows:

- (i) The tariff payable by the Respondent Nos. 2 will not be based on the MNES Guidelines beyond 1.4.2004;
- (ii) Laid down the norms for determination of tariff by the State Commission for bio-mass units, bagasse based co-generation units and mini-hydel units;
- (iii) The subsidy amount received by the Appellant from Government of India after adjusting the prepayment penalty, if any, may be adjusted against the arrears due to the developers as a result of determination of tariff as per the above normative parameters or against payment of electricity supplied;
- (iv) Interest on arrears due to the Appellant as a consequence of determination of tariff on the basis of above norms to be allowed at the rate of 12% to be compounded on quarterly basis;
- (v) The State Commission to also specify the time within which the payment of arrears and interest is paid to the developers;
- (vi) Applicability of tariff with specific reference to particular PPAs

entered into between the developers and the distribution licensees to be decided by the State Commission after hearing the concerned appellants separately;

- (vii) Till the passing of the final order by the State Commission, the tariff as per the order of the Chairman dated 19.8.2011 to be continued subject to adjustment, after determination of the tariff by the State Commission; The relevant parameters decided for the Mini-Hydel plants is as under-

### **Mini Hyde/ Power Plants**

- |  |  |
|--|--|
| a) Capital cost :  | Rs 4.5 Crore /MW   |
| b) Capacity utilisation factor(PLF)<br>for determination of tariff | 32%  |
| c) Auxiliary Consumption:  | 1%   |
| d) O & M expenses :  | 3.5% of capital cost   |
| e) Annual escalation for O & M :                                   | As per actual CAGR of CPI & WPI<br>indices for the period 2004-09 with<br>40% weightage to CPI and 60% to<br>WPI |
| f) Computation of Working Capital:                                 | i) one month's O & M expenses<br>ii) 2 month's receivables<br>iii) 1% project cost towards<br>maintenance spares |
| g) Interest on Working Capital :                                   | 12 %   |
| h) ROE :   | 16% with MAT/income tax as<br>pass through   |
| i) Debt equity ratio:  | 70: 30   |
| j) Interest on Debt:   | 12%  |
| k) Incentive :   | For energy generation above<br>45% PLF, Incentive @ 35<br>paise/KWH shall be payable                             |
| l) Depreciation:   | 7% p.a. for first 10 years and<br>20% spread over uniformly over<br>next 15 years                                |

- m) *Electricity duty :* To be allowed as pass through  
n) *Water Royalty :* To be reimbursed as pass through

CC. Some of the mini-hydel developers filed Review Petitions No.3 of 2013 before this Tribunal seeking review of order dated 20.12.2012. This Tribunal disposed off the review petitions on 30.04.2013. This Tribunal held as under at Para 15:

*"The normative parameters as decided by the Tribunal are applicable to the Biomass, Bagasse and Mini Hydro Power Plants which were existing as on 31.03.2004 and those commissioned between 1.4.2004 and 31.3.2009 for sale of electricity to the Distribution Licensees. The fixed charges for Biomass and Bagasse plants and tariff for hydro plants for ten year period has to be determined by the State Commission as per the directions of the Tribunal in the same way as decided in their respective impugned orders."*

DD. The Respondent No. 2 filed Civil Appeal No. 1376-1385 of 2013 challenging order of this Tribunal dated 20.12.2012. In the Civil Appeal No. 1376-1385 the Hon'ble Supreme Court. The Respondents No. 2 sought stay of the judgment dated 20.12.2012 passed by this Tribunal.

EE. In the meantime, the State Commission in accordance with the judgment of this Tribunal dated 20.12.2012 initiated proceedings for re-computation of purchase prices as per the parameters determined by this Tribunal in the judgment dated 20.12.2012. The Respondent No.2 filed an interim application being IA No. 22 of 2013 before the State Commission seeking a stay in the tariff determination proceedings as their appeal was pending before the Hon'ble Supreme Court.

FF. The State Commission dismissed the I.A. No.22 of 2013 in R.P. No.84 of 2003 vide Order dated 21.6.2013. The State Commission held that the state needs power and the Respondent No. 2 is obligated to provide power under the Electricity Act. The tariff paid to the Appellant is not burden to licensees. The resultant additional tariff will be allowed as pass through in Annual Tariff to recover the expenditure incurred for obtaining for such power. Therefore, any further attempt on the part of the Respondent No.2 to delay the final determination of tariff as per this Tribunals' Order dated 20.12.2012 and delay the payments to the Appellant would only be an attempt to frustrate the order and directions of Hon'ble Supreme Court.

GG. Vide Order dated 22.6.2013, the State Commission determined the Single Part tariff / purchase price for the period 1<sup>st</sup> - 10<sup>th</sup> year for the Mini Hydel Plants from the date of the commercial operations of the respective Appellant. A part of the order dated 22.06.2013 determined the fixed cost for the Appellant for the 1st - 10th year of operation. The State Commission also accommodated the Respondent No.2 to pay the arrears arising due to revised tariff and also the interest in 6 monthly installments starting from July 2013.

HH. In the Civil appeals filed by the Respondent No. 2, on 16.12.2013, the Hon'ble Supreme Court passed the following Order in the Interim Application filed by the Respondent No.2-

*"We have heard learned counsel for the parties on the prayer for interim relief. We are not inclined to grant any interim relief at this stage. However, in view of the statement made by Mr. P.S.*

*Patwalia, learned Senior Counsel on instructions from Ms. Liz Mathew, Advocate that even if the orders of the Regulatory Commission are fully implemented, the appellants would only have to pay tariff at the rate of less than Rs.5/- per unit, the appellants are directed that they will continue to make the payment on the basis of the tariff now fixed by the Regulatory Commission. This payment, however, will be subject to the final decision of the appeals. In case the appeals are ultimately allowed, the necessary adjustment will be made in accordance with law.*

*In the meantime, there shall be stay of further proceedings in Contempt Case No.1673 of 2013 initiated by M/s Clarion Power Corporation Limited pending on the file of the High Court of Andhra Pradesh at Hyderabad.*

*List the appeals for final disposal on 5th February, 2014"*

- II. Despite the above orders, the Respondent No. 2 did not pay the arrears and interest as per the State Commission's order dated 22.6.2013 choosing instead to file SLP(C) Nos 30416-30428 of 2013 before the Hon'ble Supreme Court against the order dated 22.6.2013. The SLPs were dismissed by the Hon'ble Supreme Court on 13.9.2013.
- JJ. The Respondent No. 2 also filed Appeal No. 83 of 2014 before this Tribunal against State Commission's orders dated 22.6.2013 and 6.8.2013 which were passed pursuant to this Tribunal's orders dated 20.12.2012 and 30.4.2013. The Respondents No. 2 contended that the State Commission ought not have passed the aforementioned orders as the Respondent had already filed Civil Appeals before the Hon'ble Supreme Court against the judgment of this Tribunal dated 20.12.2012 and the Review Order dated 30.4.2013 which have been admitted. This Tribunal noted that the Hon'ble Supreme Court had refrained from staying the

proceedings before the State Commission. Further, the Hon'ble Supreme Court had also dismissed SLP(C) Nos 30416-30428 of 2013 preferred against State Commission's order dated 22.6.2013. Accordingly, this Tribunal by the Order dated 21.7.2014 dismissed Appeal No.83 of 2014 as not maintainable.

KK. The Respondent No. 2 did not comply with the orders of the Hon'ble Supreme Court in full and failed to pay the arrears and interest from 2001 onwards to the Appellants who have already completed first 10 years of operation long ago. The delaying tactics of the Respondent No. 2 affected the Appellants in a grievous manner as the Appellants were unable to service the loans advanced by IREDA, who financed the projects. Some of the Appellants are facing criminal cases filed by IREDA U/S 138 of Negotiable Instruments Act, in Delhi Courts, as the cheques issued by the developers were dishonoured due to non receipt of arrears and interest from the Respondent No.2.

LL. In the circumstances, the Appellant was constrained to move another Interim Application before the Hon'ble Supreme Court for payment of arrears. The Hon'ble Supreme Court vide Orders dated 11.3.2014 and 13.3.2014 disposed off the IAs directing as under:

*"We have considered the submissions made by the learned Senior Counsel appearing for the respondents and Mr. A. Subba Rao, learned counsel appearing for the appellants. We are inclined to accept the submission of Mr. A. Subba Rao to the extent, for the time being, an amount equivalent to 50% of the amount due to the respondents. Let the amount be released to the Respondents by 28th March, 2014."*

*Let it also further be recorded that Mr. A. Subba Rao, learned counsel for the appellants, has filed in Court a tabulated statement, indicating the exact 50% of the amount due to each of the developers, including the respondents. Let the list be handed over to the respondents so that the same can be verified by the respondents. In case it is found that the list is in any manner incomplete or incorrect, the respondents shall be at liberty to bring the same to the notice of the appellants. In case the appellants ultimately succeed in the present appeals, the aforesaid amount, which has been directed to be released to the respondents, can be adjusted against the future bills"*

- MM. Therefore, as at present even the Judgments dated 20.12.2012 passed by this Tribunal and the consequential Order dated 22.6.2013 passed by the State Commission have not been fully complied with.
- NN. When the matters stood thus and after most of the developers had completed 10 years of operation, the APEPDCL filed separate applications under Section 62 and 86 (1) (b) of the Electricity Act for determination of tariff (fixed cost / single part tariff) from 11th - 20<sup>th</sup> year of operation for Manihamsa Power Projects Pvt Ltd. The State Commission issued notice to the Mini Hydel Developers of Plants who have completed 10 years of operation and called for several details in prescribed formats. These included Operational, Financial, Commercial and Generation details, supported by the relevant Balance Sheets & Profit and Loss Accounts from date of commercial operations till 31.03.2013 as well as projections into the future.
00. The Appellant filed the above information before the State Commission on 19-04-2014 along with copies of Annual reports for 2001-02 to 2010-11 for the initial 10 years of operation.

**PP.** The State Commission heard the Petition of APEPDCL in O.P.No 10 of 2012 and counter/reply filed by M/s Manihamsa Power Projects Pvt Ltd. The State Commission did not conduct any hearing in case of Appellant. Based on the data available with the State Commission on those Mini Hydel Plants that completed 10 years from COD, the State Commission has issued a common order on 23.8.2014 in respect of all Mini Hydel Power Projects which have completed 10 years of operation irrespective of whether they approached the State Commission or not for such determination. The State Commission has adopted a common approach for the determination of Fixed Costs norms for renewable energy sources.

**QQ.** In the Order dated 23.08.2014, the State Commission had decided the tariff for 11th to 20th year and determined generic tariff for Mini Hydel Plants for 11th year to 20th year from the year of operation. The State Commission did not consider individual cases of the Appellants as specified in the PPA and the Order dated 20.6.2001 and decided common tariff for all mini-hydel units as follows:

Year	Tariff
11	2.15
12	2.22
13	2.30
14	2.39
15	2.48
16	2.58
17	2.68,
18	2.79
19	2.91
20	3.03



- RR.** The Order dated 23.08.2014 was contrary to the Order dated 20.6.2011 of the State Commission, the judgment of the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Limited & another v. Sai Renewable Power Private Limited and others (2011) 11 SCC 34 and the judgment of this Tribunal dated 20.12.2012 inasmuch the State Commission has delivered a common order without hearing the developers and without taking into account the individual costs and expenses of the Appellants as had been contemplated all along.
- SS.** Aggrieved by the Order dated 23.08.2014, the Appellants filed Appeal No. 268 of 2014 before this Tribunal. In the said Appeal, this Tribunal had set aside the Order of the State Commission dated 23.08.2014 vide the judgment dated 20.01.2016.
- TT.** In pursuance to the aforementioned Order passed by this Tribunal, a petition (O.P. No.8 of 2016) for determination of tariff for mini hydel project of Appellant for the 11th to 20th year of operation was filed by the Appellant before the State Commission on 18.02.2016.
- W.** After perusing the submissions made by the Appellant and the Respondent No. 2 herein, the State Commission passed the Impugned Order dated 18.06.2016, inter-alia, holding as under:

*"With due regard to the parameters on which there is no dispute and the findings of the Commission on some of the parameters requested by the petitioner as discussed in the above paragraphs, the tariff to be paid from 11th year to 20th year stands fixed as hereunder:*

Year of Operation	Tariff (Rs./Unit)
11th	5.57
12th	5.31
13th	5.06
14th	4.81
15th	4.56
16th	4.33
17th	4.10
18th	3.87
19th	3.66
20th	3.45

*The Commission also agrees with the view of the respondent that the entire cost need not be passed on to them and to the end consumers in as much as the agreement is going to be terminated on completion of 20 years whereas the plant life as per APTEL extends at least up to a period of 25 years. The broad approach taken by the Commission in this order has been to go for a specific tariff determination wherever justified in order to provide required reasonable relief to the petitioner, however without changing the tariffs for the first 10 years in as much as the same have been finalized and the mandate is to determine the subsequent tariff in accordance with the law. Any outstanding issues as relates to under recovery remaining unaddressed, the same can be addressed at the end of 20th year, if the party so desires to extend the agreement thereafter.*

*21. The tariff {Fixed Cost} per unit mentioned in the above para is exclusive of Income Tax and Minimum Alternate Tax. Further, the above mentioned tariff is to be paid up to 45% PLF. As mentioned earlier, Commission directs the DISCOM concerned to pay an incentive of Rs. 0.50 Ps. Per unit generation of electricity above 45% PLF. The Commission also directs that Electricity duty and Water Royalty charges paid by the Mini Hyde/ project developers during this period shall be reimbursed.*

*22. There shall be no interest payable as the obligation to pay devolves on the respondent only from the date of this order when the tariff is determined.*

*23. The petitioner shall submit the details of his claim to the respondent towards the difference between the earlier tariff and*

*the tariff now determined by this order for the period from 11th year of operation of the generating unit of the petitioner up to 30th June 2016. On submission of such claim, within 15 days from the date of this order, the respondent shall cause verification of the same and inform the petitioner its acceptance of the claim or any objection for the same. On finalization of the quantum payable between the parties, the amount so arrived shall be paid in six equal installments by 20th of each month commencing from July 2016. In default, the respondents shall be liable to pay interest @ 6% per annum from the date of default, till the date of payment. The petition is ordered accordingly.*

*24. If there is revision of outstanding loans for reasons specified in this order necessitating revision of tariff, the respondent is at liberty to approach the Commission by filing an appropriate petition under Section 62 read with Section 64 of the Electricity Act, 2003."*

WW. Aggrieved by the Impugned Order, the present Appeal has been filed by the Appellant on the limited issue of determination of capital cost. The State Commission has failed to consider the individual capital cost as sought for by the Appellant which was contemplated both in the PPA and in the remand order of this Tribunal. Instead, the State Commission has fixed the normative general capital cost.

XX. Even though the Appellant has been heard in compliance to the directions of this Tribunal in Order dated 20.01.2016, the State Commission has only reiterated and upheld its previous findings made in the Order dated 23.08.2014 instead of determining a project specific cost, as was the essence of the direction made by this Tribunal in its Order dated 20.01.2016 passed in Appeal No. 268 of 2014

**7. The brief facts of the case in Appeal No. 246 of 2018, Appeal No. 247 of 2018 and Appeal No. 248 of 2018 are as follows:**

- a) The instant appeals have been filed by the Appellant against the Impugned Order dated 18.06.2016 passed by the State Commission in O.P. No.9 of 2016, where in the State Commission allowed O.P. No. 9 of 2016, O.P. No. 10 of 2016 and O.P. No. 8 of 2016 *inter alia* holding that a review of the tariff for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be done with reference to each mini hydel Power project developer, and also fixing the said tariff.
- b) A review of tariff must be done individually for each project based on an earlier order of the State Commission dated 20.06.2001, which provided for such review of tariff on an individual basis after 10 years of completion. However, CERC Regulations of 2009 as well as 2012 make it clear that such tariff re-fixation would be generic and not on an individual basis. The State Commission ought to have seen that these CERC Regulations did not exist at the time of passing of the earlier order, but must be followed now.
- c) The impugned order *has* reviewed the earlier order of the State Commission dated 23.08.2014 fixing a generic tariff for the 11<sup>th</sup> to 20<sup>th</sup> years of operation, which had been passed after taking into account all the relevant factors and materials including the abovementioned CERC Regulations and a Report sought from a reputed independent agency, M/s. KPMG, which is accepted by the State Commission and ought not to have been interfered with. Further, the common tariff re-fixation had been done since most of

the mini hydel power project developers were in the same situation.

- d) The implication of re-assessing the tariff for each individual mini hydel power project in this manner would be that the developers of the other Non Renewable Energy projects will also seek such individual re-assessment in a manner contrary to the CERC Regulations and due to the large number of such projects, this will lead to various complications and further litigations, thereby placing a great 'burden on the APDISCOMs.
- e) The re-fixation of tariff was sought to be done as per the earlier order of the State Commission dated 20.06.2001, however the said earlier order clearly limited the parameters for such review of tariff to three factors being return on equity, O & M expenses and variable cost and the same had also been incorporated as the guiding parameters for such review of tariff in the Power Purchase Agreement entered into between the Appellant and Respondent No. 2. However, despite the Appellant pointing out the same, the State Commission went ahead and considered all other parameters mentioned by Respondent No. 2 which would be impermissible in law.
- f) The order of the State Commission dated 20.06.2001 stipulates that after the completion of 10 years of operation, the tariff will be reviewed, by which time the loans from the financial institution would have been repaid and this view was reiterated by the State Commission, vide order dated 20.03.2004, which stated that review of the individual projects will be undertaken on completion

of 10 years from the date of commissioning of the project, by which time the loan is expected to have been substantially repaid. However, in contravention of these orders, by way of the impugned order, the outstanding loan as well as the reduction in PLF have been factored in by the State Commission, which is impermissible in the eyes of the law. In this regard, it is also submitted that in the study report of M/s. KPMG, accepted by the State Commission, it was concluded that some parameters like Capital cost, Interest on term loans and return on equity had already been incurred by the Mini Hydel developers in the past and these parameters need not be changed in case of tariff redetermination. It is thus humbly submitted that the State Commission ought not to have factored in the parameters being Outstanding Loan and Reduction in PLF while re-determining the tariff vide the impugned order.

- g) The State Commission ought not to have fixed the O&M escalation at 6.69 %, in violation of the CERC Regulations, which clearly state that the O&M Escalation ought to be 5.72%.
- h) The State Commission ought to have seen that the average life of a mini hydel power project is 35 years, whereas the PPA between the Appellant and developer is only for a period of 20 years and thus, it was erroneous to fix the tariff based on the total cost incurred in setting up the project.

## **7. Questions of Law**

The following questions of law arise for our consideration:

- a) Whether the State Commission has erred by determining the tariff of PMC Power Private Limited, NCL Industries Ltd. and M/s. Bhavanihydro Power Projects Private Limited, Mini Hydel Power Projects for the 11<sup>th</sup> - 20<sup>th</sup> year of operation in compliance with the Judgment dated 20.01.2016 of this Tribunal passed in Appeal No. 268 of 2014.
  - b) Whether the State Commission has erred by *inter alia* holding that a review of the tariff for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be done with reference to each mini hydel power project developer, and also fixing the said tariff.
9. Ms. Swapna Seshadri, learned counsel appearing for the PMCPPL, and NCLIL in Appeal No. 238 of 2016 and Appeal No. 343 of 2017 has filed her written submissions as follows:-
- a) PMC Power Private Limited is aggrieved by the Order dated 18.06.2016 passed by the State Commission in Petition No. 08 of 2016 determining the tariff of PMC Power Private Limited (PMC) - a Mini Hydel Power Project for the 11<sup>th</sup> – 20<sup>th</sup> year of operation.
  - b) NCL Industries Limited is aggrieved by the Orders dated 18.06.2016 and 26.11.2016 passed by the State Commission in Petition No. 10 of 2016 determining the tariff of NCL Industries Limited (NCL) - a Mini Hydel Power Project for the 11<sup>th</sup> – 20<sup>th</sup> year of operation.
  - c) Both PMC & NCL are electricity generating companies in new and renewable energy sector who have established Mini/Small Hydro

Power Plants in the State of Andhra Pradesh in terms of the incentives granted from time to time by the Government of India and Government of Andhra Pradesh. The project developers have entered into Power Purchase Agreements (PPAs) for sale of electricity generated by them to the Respondent No. 2 which are valid for twenty years from their respective dates of commercial operation.

- d) The State Commission had held in its Order dated 20.06.2001 that the tariff would be reworked only after the period of 10 year for the projects. Vide Order dated 23.08.2014, the State Commission had determined the tariff for 11-20<sup>th</sup> year of operation, which was set aside by this Tribunal vide Order dated 20.01.2016, remanding the matter back to State Commission, which then passed the Impugned Order on 18.06.2016.
- e) Despite the same, in the Impugned Orders dated 18.06.2016, the State Commission has erred in not following the directions of this Tribunal in the remand order dated 20.01.2016 which required the State Commission to go into individual norms and parameters. The State Commission has merely reiterated its earlier order dated 23.08.2014 on some of the parameters.
- f) While PMC has challenged the issue of determination of capital cost and Plant Load Factor (PLF), NCL has only raised the issue of PLF. The additional issue of capital cost has arisen in the case of PMC due to the fact that the size of the project is extremely small (0.65 MW). The capacity of NCL project is 7.5 MW.



**RE: CAPITAL COST**

- g) The finding of the State Commission in the Order dated 18.06.2016 is as under

*“a) Project Cost: The developer is asking for a capital cost of Rs. 6.72 Cr./MW. The respondent has stated that the APTEL having gone through all the records and averments made in the appeals, fixed a capital cost of Rs. 4.5 Cr./MW (while giving liberty to M/s Sardar Power Limited for filing petition before the Commission for re-determination of the capital cost). They further stated that the capital cost, thus fixed has not been contested by any of the mini hydel developers including the petitioner except for M/s Sardar Power Limited and hence the same has attained finality and is not permitted to be reopened.*

*The impugned order dated 23rd August, 2014 adopted a project cost of Rs. 4.5 Cr./MW based on APTEL order dated 20th December, 2012, which order has now become final not having been challenged. The developer is now asking for a capital cost of Rs. 6.72 Cr./MW at this distance in time which he claims to have incurred way back prior to and in the year 2001 when the project got commissioned and later. The balance sheets for 2001-02 to 2010- 11 have been filed in support of the claim but not for the years in which the generating plant was constructed. No proof of the actual expenditure towards capital cost during the relevant period has been furnished through any documents or otherwise in respect of any item that is a component of the project cost. Verification of the claims on capital cost physically at this distance of time may not be practically feasible. While the APTEL’s determination of capital cost on verifiable and dependable criteria for the relevant period has become final, the petitioner did not produce any specific material or give any specific reasons as to why this project costed much higher than normal. Any change in the project cost would result in the change in tariff for the first 10 years, which have become final after much litigation and with upward revision*

*as alluded to earlier while tracing the history of the case, creating further complications. Under the circumstances, it is unsafe to accept the claim of higher capital cost and hence the time tested capital cost as assessed by APTEL is followed herein also.”*

- h) The State Commission has reiterated its findings in the Order dated 23.08.2014 in respect of capital cost. The State Commission has retained the capital cost of Rs. 4.5 crores per MW which is generic and was applicable for the first 10 years even for the 11<sup>th</sup> to 20<sup>th</sup> year of operation.
- i) The State Commission erred in observing that since the Appellant did not challenge the normative capital cost of Rs. 4.5 crores per MW for the first 10 years, the Appellant cannot seek an enhancement from the 11<sup>th</sup> to the 20<sup>th</sup> year onwards. The State Commission had failed to appreciate that if a project specific tariff is being fixed based on outstanding loan, all parameters would have to be reworked including the capital cost.
- j) The Impugned Order is contrary to the Order dated 20.01.2016 of this Tribunal in as much the State Commission has passed a repetitive Order without taking into account the individual costs and expenses of the Appellant as had been contemplated all along in the numerous litigations over the past decade.
- k) The State Commission failed to appreciate that the Appellant had incurred substantial additional capital expenditure of Rs 437.27 Lakhs for the 0.65 MW project which is reflected in its balance sheets duly placed before the State Commission by the Appellant in the remand proceedings.

- l) The State Commission failed to appreciate that the Appellant is not claiming any parity with Sardar Power who has requested for capital cost determination for the initial 10 years but only seeking project specific capital cost from 11<sup>th</sup> year onwards.
- m) The State Commission has erred in not complying with the letter and spirit of the remand order dated 20.01.2016 of this Tribunal which required the State Commission to go into individual norms and parameters and instead reiterating its earlier order dated 23.08.2014 with regard to the capital cost.
- n) The State Commission erred in observing that the Appellant has not produced any proof of actual capital expenditure. The Appellant had produced all the balance sheets which clearly indicated the project cost and its financial tie up i.e. loan and equity.
- o) The State Commission failed to appreciate that no power project can function without additional capitalization and the Appellant has incurred the additional amounts towards additional capitalization in the years of operation such as canal lining works, etc.
- p) The State Commission ignored that the Appellant in its rejoinder had clearly stated the project costs as under –

As per Annual Report 2001-02	: Rs 424.76 Lakhs
As per Annual Report 2002-03	: Rs 431.84 Lakhs (including canal lining)
As per Annual Report 2003-04	: Rs 437.27 Lakhs (including canal lining)

The Appellant had accordingly prayed for the Project cost of Rs 437.27 lakhs and the Equity Capital of Rs 100 lakhs to be adopted for Tariff determination for 11<sup>th</sup> to 20<sup>th</sup> years.

- q) The State Commission ignored the various data relating to project cost and expenses, balance sheet, profit and loss accounts etc. placed by the Appellant before the State Commission.
- r) The State Commission also did not appreciate that the project cost of Rs. 4.5 crores per MW was for projects having higher capacity, say 2 MW to 25 MW. However, the Appellant's project is with a single Generating Unit of 0.65 MW unlike 2 or more units for projects of higher capacity. The E & M equipment cost is higher because economy of scale is not available in single unit Project. The E&M equipment is to be designed for specific Head and Discharge available at the specific site. The cost of civil works cannot be reduced drastically or proportionately for a small unit because all components of Mini Hydel plant are needed.

**RE: PLANT LOAD FACTOR (PLF)**

- s) The State Commission has wrongly fixed the PLF as 32 % for the 11<sup>th</sup> to the 20<sup>th</sup> year of operation. The State Commission has fixed such an unachievable PLF knowing fully well that it is impossible for PMC to achieve the said PLF and the actual PLF achieved by PMC for 11<sup>th</sup> to 15<sup>th</sup> year was 19.98% for reasons beyond the control of PMC. The State Commission ought to have fixed the

PLF as per actuals achieved i.e. 20% or atleast at 30% as had been sought by PMC.

- t) In so far as NCL is concerned the average PLF achieved by NCL during the initial 10 years from COD was 18.94% and thereafter, from 11<sup>th</sup> year till 2015-16 was 16.95%.
- u) In view of the above, NCL had prayed for a fixation of a PLF of 16.95% for the 11<sup>th</sup> to the 20<sup>th</sup> year of operation which would have ensured that a proper and cost reflective tariff will be re-fixed for the 11<sup>th</sup> to the 20<sup>th</sup> year of operation. The plant of NCL has achieved only 18.94% PLF during the initial 10 years. The Average PLF achieved during 11<sup>th</sup> to 16<sup>th</sup> years is only 16.95% and therefore, the plant is unlikely to achieve even average PLF of 30% in 11<sup>th</sup> year to 20<sup>th</sup> year.
- v) For the purpose of tariff calculation for 11<sup>th</sup> to 20<sup>th</sup> year, the PLF of 18.94 % should be fixed and the tariff shall be paid for the entire generation without any upper limit, so that the deficit in the years 11 to 16 can be recovered during the years 17 to 20.
- w) The State Commission ought to have fixed the PLF as per actuals achieved i.e. 18.94% as had been sought by NCL and consequently, the State Commission ought to have considered these operating parameters for tariff determination.
- x) The State Commission under Section 86 (1) (e) of the Electricity Act, 2003 has a statutory obligation to promote generation from renewable sources of energy. As a regulator, the State

Commission should fix realistic and achievable parameters so that the projects set up continue to survive and get a viable tariff.

- y) The appeals deserve to be allowed and matter should be remanded to the State Commission for reconsideration and re-fixation of capital cost and PLF.

**10. Ms. Prerna Singh, learned counsel appearing for the SPDCAPL in Appeal No. 246 of 2016, Appeal No. 247 of 2017 and Appeal No. 248 of 2017 has filed her written submissions as follows:-**

- a. The State Commission by way of the impugned *order*, has erroneously held that a review of the tariff for the period from 11th year to 20th year of operation must be done with reference to each mini hydel power project developer, and also fixing the said tariff.
- b. The State Commission by way of its order dated 22.06.2013, had passed an order fixing the generic tariff for all mini hydel power projects in the State of Andhra Pradesh based on the parameters set out in the CERC Regulations of 2009 as well as 2012, which make it clear that such tariff re-fixation would be generic and not on an individual basis. Admittedly, regulations framed by the Central Electricity Regulatory Commission are not strictly binding on the State Commissions, however it has been observed by this Tribunal that the provisions contained in such regulations may serve as guiding principles for the State Commission. It is submitted that this would be especially true in cases, where the concerned State Commission has not framed any regulations,

which occupy the field, as in the present case. It is therefore submitted that the State Commission has correctly determined the generic tariff.

- c. However, the developers i.e. the Respondents herein approached this Tribunal contending that a project-specific review of tariff must be done, as contemplated by the order dated 20.06.2001 passed by the State Commission. By way of its order dated 20.01.2016, it was held by the Tribunal that a review of tariff must be done individually for each project based on the order of the State Commission dated 20.06.2001, which provided for such review of tariff on an individual basis after 10 years of completion. This order of the State Commission has attained finality and the same has also been affirmed by the Hon'ble Supreme Court.
- d. It is most important to bear in mind that the said earlier order dated 20.06.2001 clearly limited the parameters for such review of tariff to three factors being return on equity, O & M expenses and variable cost and the same had also been incorporated as the parameters for such review of tariff in the Power Purchase Agreements entered into between the Appellant and the developers. However, despite the Appellant pointing out the same, State Commission went ahead and considered all other parameters mentioned by PMCPPL, BHPPPL and NCLIL/Respondent No. 2 and therefore the impugned order is prima facie unsustainable in the eyes of the law.
- e. The order of the State Commission dated 20.06.2001 stipulates that after the completion of 10 years of operation, the tariff will be

reviewed, by which time the loans from the financial institution would have been repaid and this view was reiterated by the State Commission, vide order dated 20.03.2004, which stated that review of the individual projects will be undertaken on completion of 10 years from the date of commissioning of the project, by which time the loan is expected, to have been substantially repaid. This clearly shows that the element of loan was considered, and the State Commission came to the correct conclusion that the review of tariff in the eleventh year of operation would be based on the assumption that the loan would have been paid off by the developers. This was also incorporated in the PPAs, which were reached only after consensus ad idem between the parties and are legally binding on all the parties. Therefore, it becomes absolutely clear that a project-specific review of tariff in the 11th year of operation could be done only on the basis of the three parameters laid down by the State Commission and also incorporated in the PPAs.

- f. However, after obtaining a direction from this Tribunal that a project-specific tariff has to be fixed for the eleventh to twentieth years of operation in terms of the order dated 20.06.2001, the developers went ahead and made submissions on not just the three parameters, which they were legally and contractually bound to limit themselves to, but various other parameters.
- g. It was contended by the developers that due to factors beyond their control like flows and weather conditions, they had been unable to repay their loans. In this context, it is relevant to point out that the PPAs specifically stipulated that onus of site-selection of



the setting up of the projects would be on the developer and consequently any risk arising there from would be borne by the developer and not the consumer. The State Commission was also mindful of the same as can be seen from the Impugned Order. However, by way of the Impugned Order the State Commission wrongly held that "*taking a liberal and compassionate view*" of the matter, the element of loan should be factored in while reviewing the tariff.

- h. The State Commission is absolutely erroneous. In light of its order dated 20.06.2001, which has attained finality, and also the legally binding PP As, the State Commission could not have considered the element of outstanding loan. Further, the view taken by the State Commission is not liberal or compassionate because the consideration of loan would drive up that tariff, and the cost for the same would ultimately be borne by the consumers.
- i. The State Commission has also granted a reduction in the Plant Load Factor (PLF) to the developers contrary to its earlier order dated 20.06.2001 as well as the PPAs. In this regard also, it is necessary to reiterate that the onus of site selection was on the developers and if they could not attain the PLF of 35% for any reason, it ought not to have an impact on the re-fixation of tariff.
- j. After hearing various matters related to this issue, this Tribunal, by way of its order dated 20.12.2012, fixed the norms and parameters for the determination of tariff for mini hydel plants. In this order, it has been held by this Tribunal that a normative PLF of 32% would be fair and satisfactory, however the State Commission has further

reduced the PLF to 30%, not only in contravention of the order dated 20.06.2001 and the PPAs, but also disregarding the fact that the ultimate burden will be borne by the consumers.

- k. The State Commission ought not to have fixed the O&M escalation at 6.69%, in violation of the CERC Regulations, which clearly state that the O&M Escalation ought to be 5.72%.
  - l. The State Commission ought to have seen that the average life of a mini hydel power project is 35 years, whereas the PPA between the Andhra Pradesh Distribution Companies and developer is only for a period of 20 years and thus, it was erroneous to fix the tariff based on the total cost incurred in setting up the project.
11. We have heard learned counsel appearing for the Appellants and the learned counsel for the Respondents at considerable length of time and we have gone through the written submissions carefully and also taken into consideration the relevant material available on file. The following main issues emerge in the instant Appeals for our considerations:-

**Issue No. 1:**

**Whether the State Commission has determined the capital cost and plant load factor correctly for the projects of PMC Power Private Limited and NCL Industries Limited?**

**Issue No. 2:**

**Whether the State Commission has erred by *inter alia* holding that review of the tariff for the mini hydel projects for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be for each mini hydel power project?**

**Our findings and analysis:**

**Issue No.1 – Capital Cost:**

11.1 The learned counsel Ms. Swapna Seshadri appearing for the Appellants in Appeal No. 238, 246 and 247 of 2016 submitted that the State Commission has retained the capital cost of Rs. 4.5 crore per MW which is generic and was applicable for the first 10 years only. She further contended that the State Commission has erred in observing that since the Appellant did not challenge the normative capital cost of Rs. 4.5 crore per MW for the first 10 years, the Appellant cannot now seek an enhancement of the same from the 11<sup>th</sup> year onwards.

11.2 The learned counsel Ms. Swapna Seshadri appearing the Appellants was quick to point out that if a project specific tariff is being fixed based on the outstanding loans, all parameters would have to be reworked including the capital cost. She further submitted that in case of mini hydel project of PMC full details were submitted to the State Commission reflecting capital expenditure of Rs. 437.27 lakhs for the 0.65 MW project. By doing so the State Commission has not truly complied with the letter and spirit of the

remand order dated 20.01.2016 of this Tribunal which required the State Commission to go into individual norms and parameters and instead, it has reiterated its earlier order dated 23.08.2014 with regard to the capital cost.

11.3 The learned counsel further contended that the State Commission has wrongly fixed the PLF as 32 % for the 11<sup>th</sup> to the 20<sup>th</sup> year of operation for PMC project which appears to be unachievable in view of the fact that actual PLF achieved by the project for 11<sup>th</sup> to 15<sup>th</sup> years has been only above 20%. Thus, the State Commission ought to have fixed the PLF for PMC project as per actual that is 20% or a maximum of 30%.

11.4 The learned counsel further Ms. Swapna Seshadri further submitted that in case of NCL project average PLF was achieved as 19% in the first 10 years and thereafter from 11<sup>th</sup> year till 2015-16 the same was about 17%. In view of these facts she contended that the NCL project is unlikely to achieve even average PLF of 30% in 11<sup>th</sup> year onwards. Accordingly, the State Commission ought to have fixed a PLF of above 19% with a condition that the tariff shall be paid for the entire generation without any upper limit, so that the deficit in the years 11<sup>th</sup> to 16<sup>th</sup> can be recovered in coming years.

11.5 **Per contra**, the learned counsel Ms. Prerna Singh appearing for the SPDCAPL in Appeal No. 246 of 2016, 247 of 2017 and 248 of 2017 submitted that the State Commission by way of the Impugned Order has factored the outstanding loans as well as reduction in

plant load factor while determining the tariff for the projects of the referred companies in contravention of previous orders.

- 11.6 The learned counsel further contended that such exercise by the State Commission is impermissible in law which is burdening on general consumers getting supply from these mini-hydel projects. She pointed out that in a 'Study Report' of M/s. KPMG which was accepted by the State Commission, it was concluded that some parameters like Capital cost, Interest on term loans and return on equity etc. had already been incurred by the Mini Hydel developers in the past and these parameters need not be changed while redetermining the tariff.
- 11.7 She also submitted that the State Commission ought not to have fixed the O&M escalation at 6.69% in violation of the CERC Regulations, which clearly state that the O&M Escalation ought to be 5.72%.
- 11.8 It is also the contention of the learned counsel that the average life of a mini-hydel project is 35 years whereas the PPA is only for a period of 20 years. Thus, it was erroneous on the part of the State Commission to fix the tariff based on the total cost incurred in setting up the project.

### **Our findings**

- 11.9 We have considered the submissions of the learned counsel for the Appellants as well as learned counsel appearing for the Respondents besides taking note of the Impugned Order of the

State Commission as well as the remand order of this Tribunal. While the learned counsel for the Appellant submitted that the project cost should be considered on actual basis, the learned counsel for the Respondents stated that this Tribunal having gone through all the records and averments made in the previous Appeals fixed actual cost of 4.5 crores per MW. The State Commission in the Impugned Order dated 23.08.2014 adopted the same project cost of Rs. 4.5 crore per MW based on this Tribunal's orders dated 20.12.2012, which has become final not having been challenged.

11.10 We are of the considered view that the capital cost is nothing but all the expenses upto commissioning of the project, which by and large, remains constant throughout the operation of the project. Accordingly, it does not appear to be logical to vary the capital cost after 10 years of project operation merely because of some repair and overhauling work done during the intervening period. The State Commission has also given sufficient reasoning in the Impugned Order stating that the developers did not produce any specific material or gave any specific reasons as to why their project cost should be considered higher than the normal. Any change in the project could result in the change in tariff even for the first 10 years which has since become final.

11.11 The State Commission has also remarked that any upward revision in tariff could invite much litigations and create further complications. In view of the findings of the State Commission and cost parameters fixed by this Tribunal earlier, we observe that the capital cost considered by the State Commission is just and right.

**Plant Load Factor:**

- 11.12 The learned counsel for the Appellant further contended that the State Commission has fixed very high plant load factor concerning to the projects of PMC as well as NCL. She further submitted that in view of the fact that PLF achieved is very low in the preceding years the State Commission ought to have considered the PLF closer to the average PLF actually so achieved.
- 11.13 **Per Contra**, the learned counsel for the Respondents (AP Discoms) submitted that the State Commission in fact has lowered down the PLF for the reference projects in contrast to the findings of this Tribunal.

**Our Findings:**

- 11.14 It is relevant to note that the PLF of a hydel project depends mainly on two factors that is availability of the machine and availability of the water. While the water availability is beyond the control of the project operator, the availability of the generating machines could be kept at higher levels by the generators on account of less wear and tear problems in hydel projects.
- 11.15 We also note from the deliberations of the State Commission in the Impugned Order that it has arrived at plant load factor based on the specific data submitted by the developers and adopting a balance view between the project developers and the consumers. Keeping these aspects in view, the State Commission has considered 30% PLF as against 32% adopted earlier which would

result in a marginal per unit increase in tariff and also, proportionately increase the share towards the debt repayment and return on equity more so in view of the plant life much beyond the agreement period. We hold the findings of the State Commission on this issue well justified.

### **O&M Escalation:**

11.16 Regarding O&M escalation the State Commission has considered an year after year O&M escalation of 6.69% consistent with the judgment of this Tribunal dated 20.12.2012 and the consequential order dated 22.06.2013. The learned counsel for the Respondent/DISCOMS contested that as per CERC procedures the O&M escalation should be taken as 5.72% It is also noted that earlier in the Impugned Order dated 23.08.2014, the State Commission has adopted the O&M escalation of 6.69% in respect of all NCE developers and accordingly the State Commission has considered just and right to adopt the same escalation factor for working out tariffs from 11<sup>th</sup> years onwards. We thus, find no infirmity or irregularity in the Impugned Order on this issue.

### **Issue No.2:**

11.17 The learned counsel for the State Discoms submitted that the State Commission by way of the Impugned Order has erroneously held that a review of the tariff for the period from 11<sup>th</sup> year to 20<sup>th</sup> year of operation must be done with reference to each mini hydel project developers and also the said period tariff. She further submitted that such exercise would be very voluminous besides being in



contravention of the earlier order of the State Commission dated 20.06.2001 which limited the parameters for such review of tariff to only three factors, being return on equity, O&M expenses and variable cost. She contended that despite the Appellant Discoms pointing out the same, State Commission went ahead and considered all other parameters mentioned by PMC and NCL etc.

11.18 It is relevant to note that based on the appeals filed by the developers, this Tribunal passed the order dated 20.01.2016 holding that the review of tariff must be done individually for each project based on the original order of the State Commission dated 20.06.2001 which provide for such review of tariff on an individual basis after 10 years of completion.

11.19 We have evaluated the contentions of the learned counsel for the Discoms as well as developers/generators and also perused the findings of the State Commission in the Impugned Order. The State Commission vide order dated 20.06.2001 has duly considered the review of purchase price with a specific reference to each developer as under:-

*“30. A suo motu review of the incentives to take effect from 1 April, 2004, will be undertaken by the Commission after discussions with all the concerned parties. There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of the commissioning of the project (by which time the loans from financial institutions would have been repaid) when the*

*purchase price will be reworked on the basis of return on equity, O&M expenses and the variable cost.*

31. *However, if any developer wishes to raise any specific issue with reference to this order, he will be entitled to apply to the Commission in the manner provided in the regulations.”*

11.20 While going through stipulations as above it is relevant to note that the State Commission had in fact presumed that by that time the loans from institutions would have been repaid which actually may or may not happen. As also noticed from the submissions of mini hydel developers, the basic provision in the State Commission's order purported by the order of this Tribunal clearly mandated the State Commission to review the projectwise tariff based on various parameters for arriving at reasonable tariff from 11<sup>th</sup> year onwards in a justifiable manner. In view of these facts we hold that there is no unjustness in the review under taken by the State Commission for individual project based on the associated parameters and judicious consideration.

11.21 Regarding one of the apprehensions putforth by the learned counsel for the State Discoms that the average life of mini hydel project is 35 years whereas PPA is only for a period of 20 years and thus the State Commission has erroneously fixed the tariff based on the total cost incurred in setting up of the projects.

11.22 We note from the Impugned Order that the State Commission has also agreed with the views expressed by the learned counsel for the Respondent/DOSCOMS. The broad approach taken by the

State Commission in its order has been to go for a specific tariff determination wherever justified in order to provide required reasonable relief to the developers, however without changing the tariff for the first 10 years in as much as it has been finalised. The State Commission has however indicated that any outstanding issues as relates to under recovery remaining unaddressed, the same can be addressed at the end of 20<sup>th</sup> year that is after PPA gets matured. Thus, we do not find any ambiguity in the findings of the State Commission in this regard.

### **Summary of our findings.**

12. In view of our deliberations and analysis herein above, we are of the considered view that the issues raised in the present appeals preferred by the project developers and the Discoms are devoid of merits without any specific ground made out for consideration of this Tribunal.
- 12.1 The State Commission has passed the Impugned Order judiciously considering all the relevant material available on record and after applying prudence check on various aspects. Therefore, the Impugned Order dated 18.6.2016 and 26.11.2016 passed by the Andhra Pradesh Electricity Regulatory Commission deserves to be upheld.

### **ORDER**

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present appeals are devoid of merits and hence, dismissed. Accordingly, connected IAs stand disposed of.

The impugned order passed by Andhra Pradesh Electricity Regulatory Commission dated 18.6.2016 and 26.11.2016 are hereby upheld.

No order as to costs.

Pronounced in the Open Court on this 7<sup>th</sup> day of December, 2018.

(S. D. Dubey)  
Technical Member

✓

REPORTABLE/NON-REPORTABLE  
mk

(Justice Manjula Chellur)  
Chairperson