

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

Appeal No. 114 of 2012

Dated: 9th October, 2012

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

- 1. Jaipur Vidyut Vitran Nigam Ltd.Appellant (s)
Vidyut Bhawan, Jyoti Nagar
Jaipur – 302 005**
- 2. Jodhpur Vidyut Vitran Nigam Ltd.
New Power House, Basni,
Jodhpur – 34003**
- 3. Ajmer Vidyut Vitran Nigam Ltd.
Old Power House, Hathi Bhata
Ajmer – 302 005**
- 4. Rajasthan Discoms Power Procurement Centre
Room No. 223, Vidyut Bhawan
Janpath, Jyoti Nagar
Jaipur – 302 005**

Vs

- 1. Kalpataru Power Transmission Ltd ...Respondent(s)
101 Part – III, G.I.D.C. Estate, Sector 28
Gandhinagar – 382 028, Gujarat**

**2. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan
New State Motor Garage
Sahakar Marg, Jaipur – 302 005**

**Counsel for the Appellant (s) : Mr. Pradeep Misra
Mr. Daleep Kumar Dhayani
Mr. Suraj Singh**

Counsel for the Respondents (s): Mr. P.N. Bhandari for R.1

JUDGMENT

MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Jaipur Vidyut Vitran Nigam Ltd. & Others against the order passed by the Rajasthan Electricity Regulatory Commission (“State Commission”) on 29.3.2012 in respect of tariff to be applicable for biomass based generating unit of M/s. Kalpataru Power Transmission Ltd. after completion of 10 years of signing of the Power Purchase Agreement.

2. The Appellants 1 to 3 are the distribution licensees. The Appellant no. 4 is Power Procurement Centre of the distribution licensees.

3. The Kalpataru Power Transmission Ltd., a generating company is the Respondent no. 1. The State Commission is the Respondent no. 2.

4. The brief facts of the case are as under:-
 - 4.1 The Respondent no. 1 has set up two biomass based generating stations, one at Padampura and another at Uniara in the State of Rajasthan in pursuance of the Government of Rajasthan policy dated 11.3.1999 for promotion of power generation through non-conventional energy sources. The plant at Padampura was commissioned in July, 2003 and that at Uniara in November, 2006.

4.2 Two identical Power Purchase Agreements were signed between the Respondent no.1 and Rajasthan Vidyut Prasaran Nigam Ltd., a holding company of the Appellants on 16.2.2002 and revised on 19.3.2003. The term of the PPA was for 20 years from Commercial Operation Date (COD). As per clause 5.2 of the PPA the tariff payable to the Respondent for supply of power for the first 10 years from the date of signing of PPA was Rs.3.1834 per unit upto 31.3.2002 and thereafter it has to be increased by 5% per annum for 10 years upto 15.2.2012. It was further provided that after the said period the tariff will be mutually decided between the parties at least 6 months prior to expiry of 10 years from the date of signing the agreement.

4.3 Subsequent to the enforcement of the Electricity Act, 2003, vide notification dated 28.2.2004, the functions of power purchase were transferred to the respective distribution licensees by the State Government. Thus the

- rights and obligations of Rajasthan Vidyut Prasaran Nigam have vested with the Appellants 1 to 3.
- 4.4 The State Commission notified Tariff Regulations, 2004 *inter alia*, fixing the tariff for electricity supply to the distribution licensee by renewable energy sources power plants including biomass based plants such as that of the Respondent no. 1 which were executed under the State Government policy.
- 4.5 On 23.1.2009 new Tariff Regulations, 2009 were notified by the State Commission applicable for the Multi Year Tariff (MYT) period from FY 2009-10 to FY 2013-14 which also specified the tariff applicable for the existing biomass based power plants installed under the State Government policy.
- 4.6 As the period of 10 years term prescribed in the PPA was going to expire, the Appellants made an offer to the Respondent no. 1 of the rate of supply to be made

- applicable after completion of 10 years from the date of the PPA.
- 4.7 The Respondent no. 1 did not accept the said offer and filed a petition before the State Commission for quashing of the offer made by the Appellants and for direction to the Appellants to continue to purchase power at the rates notified by the State Commission in its Regulations.
- 4.8 The State Commission passed the impugned order dated 29.3.2012 allowing the petition and holding that the rates specified in the Tariff Regulations, 2009 will be applicable for the years 2011-12, 2012-13 and 2013-14.
- 4.9 Aggrieved by the impugned order dated 29.3.2012 passed by the State Commission the Appellants have filed this Appeal.
5. The Appellants have made the following submissions in the Appeal.

- “5.1 According to the terms of the PPA entered into between the parties, the tariff for the Respondent no. 1 after 10 years is to be determined by the State Commission and the tariff as provided for in the 2009 Regulations is not applicable.
- 5.2 Cheaper power for biomass based projects commissioned recently is available to the Appellants and, therefore, they can not be directed to purchase costlier power from the Respondent no. 1. Further, the Appellants are not bound to take power from the Respondent no.1 after 10 years.
- 5.3 The provisions of the PPA are binding on the parties unless it is held that any clause of the said agreement is repugnant to the statutory provisions of the Act, Rules and Regulations. In the absence of any such observation by the State Commission, the PPA remained operative and binding on the parties and the State Commission

- has to determine the tariff of the Respondent no.1 taking into account its revenue and expenses.
- 5.4 The Respondent no. 1 has the benefit for 10 years of higher rate. The tariff of the power plants commissioned subsequently is lower than the tariff of the power plant of the Respondent no.1. In any event the tariff of the older plant should be lower than the new plant. Thus, the State Commission should have determined the tariff of the Respondent no.1.
- 5.5 The State Commission has not interpreted the Tariff Regulations correctly.”
6. The Respondent no.1 has made submissions supporting the impugned order which we will be discussing when we refer to the issues raised in the Appeal.
7. We have heard Shri Pradeep Misra, Ld. Counsel for the Appellants and Shri P.N. Bhandari, Ld. Counsel for the

Respondent no.1. The State Commission through a communication through its Secretary informed that the Commission was not intending to contest the Appeal.

8. After considering the oral and written submissions made by the parties, the following questions are required to be answered by us in this Appeal.

i) Has the State Commission erred in deciding that the tariff as notified in Tariff Regulations, 2009 would be applicable to the power plant of the Respondent no. 1 instead of determining the tariff to be made applicable after 10 years of the signing of the PPA as per the terms and conditions of the PPA entered into between the parties?

ii) Can the State Commission legally direct the Appellants to purchase electricity from the Respondent no.1 when the Appellants are not bound to do so as per the terms and conditions of the PPA

and considering that cheaper power is available to the Appellants from new biomass plants?

9. As both the questions are interconnected we shall be dealing with them together.

10. According to Shri Pradeep Misra, Ld. Counsel for the Appellants, the PPA clearly provides that the tariff after 10 years is to be mutually settled. Since the power to determine the tariff has been transferred to the State Commission after the enforcement of the 2003 Act, the tariff should have been determined by the State Commission under Section 62 of the Act. The State Commission should not have nullified the provisions of the PPA. The State Commission has also not interpreted its Regulations correctly.

11. According to Shri Bhandari, Ld. Counsel for the Respondent no.1 the State Commission has fixed the generic tariff through its Regulations after conducting public hearing. Further, it is well established that the

agreements have to be aligned to the Regulations. He also argued at length to emphasize that the State Commission has interpreted the Regulations correctly.

12. Let us first examine the relevant provisions of the Tariff Regulations, 2009 applicable to the existing biomass based generators which are reproduced below.

“82 Tariff for existing Renewable Energy Generating Stations:

(1) As per Government of Rajasthan Policies.

(a) Tariff for electricity supply to the distribution licensee by renewable energy sources power plants, for which Power Purchase Agreements (PPA) have been executed under GOR policy of 1999 and 2000 and power plants which are commissioned by 31.03.2007 (for wind power plants) and 30.09.2008 (for biomass power plants), shall be as hereunder for a period of 10 years from the date of signing of Power Purchase Agreements beyond which, tariff shall be specified by the Commission.

S.No.	Renewable Energy Generation during the year	Tariff in Rs. Per kwh under GOR Policy of
	11.03.99 (wind & biomass)	4.02.2000 (for wind power plant only)
1.	1998-99	2.7500
2.	1999-00	2.8875
3.	2000-01	3.0319
4.	2001-02	3.1835

5.	2002-03	3.3426	3.3406
6.	2003-04	3.5098	3.5076
7.	2004-05	3.6853	3.6830
8.	2005-06	3.8695	3.8671
9.	2006-07	4.0630	4.0605
10.	2007-08	4.2662	4.2635
11.	2008-09	4.4795	4.4767
12.	2009-10	4.7034	4.7005
13.	2010-11	4.9386	4.9356
14.	2011-12	5.1855	5.1823
15.	2012-13	5.4448	5.4414
16.	2013-14	5.7171	5.7135

(b) The tariff for electricity supply to the distribution licensee by renewal energy power plants other than those covered by sub regulation (1) and which are commissioned upto 31.03.2007 (for wind power plant) and 30.09.2008 (for biomass power plants) under GOR policies of 2003 & 2004 (original as well as revised) shall be as follows:-

S.No.	Renewable Energy generation during the year	Tariff in (Rs. Per kwh) as per policy dated			
		30.04.03 For wind power plant	25.10.2004 For wind power plant	25.10.2004 For biomass power plant	25.10.2004 For wind power plant(amended on 24.02.2006)
1.	2003-04	3.3200	-	-	-
2.	2004-05	3.3864	2.91	3.32	-
3.	2005-06	3.4528	2.96	3.39	3.25
4.	2006-07	3.5192	3.01	3.45	3.31
5.	2007-08	3.5856	3.06	3.52	3.37
6.	2008-09	3.6520	3.11	3.59	3.43
7.	2009-10	3.7184	3.16	3.65	3.49
8.	2010-11	3.7848	3.21	3.72	3.55

9.	2011-12	3.8512	3.26	3.78	3.61
10.	2012-13	3.9176	3.31	3.85	3.67
11.	2013-14	3.9200	3.36	3.92	3.73
12.	2014-15	3.9200	3.36	3.92	3.79
13.	2015-16	3.9200	3.36	3.92	3.79
14.	2016-17	3.9200	3.36	3.92	3.79
15.	2017-18	3.9200	3.36	3.92	3.79
16.	2018-19	3.9200	3.36	3.92	3.79
17.	2019-20	3.9200	3.36	3.92	3.79
18.	2020-21	3.9200	3.36	3.92	3.79
19.	2021-22	3.9200	3.36	3.92	3.79
20.	2022-23	3.9200	3.36	3.92	3.79
21.	2023-24	3.9200	3.36	3.92	3.79

(c) After first ten operational years, renewable energy power station, mentioned at (a) & (b) above, shall have the option to terminate the Power Purchase Agreement and supply the energy generated to open access consumers, captive power station or other licensees or traders within or outside the State.

Provided that in case the electricity is continued to be sold to the distribution licensee after 10 years, the tariff for corresponding year of the Policy shall continue.”

13. The State Commission through the above Regulations has specified as under.

- i) Tariff for biomass based power plants which have been executed under the State Government policy of 1999 and commissioned by 30.9.2008 shall be as per the table given under sub-clause (a) of clause 82(1) for a period of 10 years from the date of

signing of PPA, beyond which the tariff shall be specified by the Commission.

- ii) The tariff for biomass power plants commissioned upto 30.9.2008 under the State Government policy of 2004 shall be as per table given under sub-clause(b) of clause 82(1).
- iii) After first 10 operational years, the renewable energy power stations shall have option to terminate the PPA and supply energy to open access consumers and other persons. However, in case the electricity is continued to be sold to the distribution licensee after 10 years, the tariff for corresponding year of the Policy shall continue.

14. Thus, the State Commission for the period for which the Regulations, 2009 are effective i.e. Multi Year Tariff (MYT) period from FY 2009-10 to FY 2013-14, has specified the

tariff for the existing renewable energy generators commissioned under the State Government policies of 1999 & 2000 and 2003 & 2004. The tariff during the control period of Tariff Regulations, 2009 for biomass power plants commissioned under the State Governments policy of 2004 is lower than those plants set up under the State Government policy of 1999.

15. We also find that Regulation 83 specifies the generic tariff determination for new Biomass Power Projects commissioned after 31.3.2009 by the State Commission as per the performance parameters specified in the sub-Regulations to be applicable during the MYT control period 2009-14. Thus, the Regulations provide for different tariffs for biomass power projects commissioned at different times under the State Government Policies of 1999, 2004 and the projects commissioned after 31.3.2009 during the MYT control period.

16. Let us now examine the findings of the State Commission in the impugned order.

“12. We find that as per Article 2.1 of PPA signed between the parties, agreement is for a period of 20 years from COD. As per Article 5.2 of PPA, the tariff was agreed for ten years thereafter the tariff was to be mutually settled. The relevant Article 5.2 of PPA reads as under:

“5.2 RVPN shall purchase Contracted Energy offered by the Company at Company’ s Tariff of Rs. 3.1834 per Energy Unit worked out as per GOR policy applicable for the Tariff Year 2001-02 upto the period 31st March 2002 with no restriction on time or quantum of electricity supplied for sale. Thereafter for every following Tariff year the company’ s tariff shall be increased by 5% per annum over the Company’ s Tariff at the end of the previous Tariff year. This tariff mechanism shall be applicable for a period of ten (10) years from the date of signing of Agreement with M/s. Kalpataru Energy Ventures Pvt. Ltd. on 16.2.2002 i.e. upto 15th February 2012. Thereafter the Company’ s Tariff from the project shall be mutually settled between RVPN & the Company at least 6 months before the expiry of 10th year from the date of signing of agreement with M/s. Kalpataru Energy Ventures Pvt. Ltd. on 16.2.2002.”

13. We are in agreement with the contention of the petitioner that for issues under consideration Tariff Regulations 2009 are relevant, as the dispute pertains to FY 2011-12 onwards for which tariff regulation of 2004 are not applicable. The provisions of Regulation 82 (1) (a) 82 (1)(b) and 82(1) (c) of Tariff Regulations 2009 which are relevant in the matter are as under:-

.....

14. It may be noted that while the draft tariff Regulations, 2009 were under finalization, M/s Kalpataru raised the issue of applicable tariff after 10 years period of operation. Relevant portion of the Commission's ruling on the issue at para no. 69 of SOR dated 23.01.2009 is as under:

“.....The Commission is of the view that existing Renewable Projects set up under a particular Policy regime needs to be safeguarded by way of ensuring regulatory certainty and regulatory clarity for applicable tariff regime as may have been notified earlier. Accordingly, the Commission has continued to stipulate the applicable tariffs under various regimes viz GoR policy 1999, 2000, 2003, 2004 as well as continued with tariff notified under Commission's earlier notifications RERC (Terms & Conditions for determination of Tariff) (Third Amendment) Regulations, 2006 notified on Nov 21, 2006 and Tariff orders of dated March 9, 2007 and March 14, 2007. Under the present MYT Regulations viz. RERC (Terms & Conditions of Tariff) Regulations 2009, the Commission has continued with the same approach.

....As regards the matter raised by Kalpataru, the Commission is of the opinion that this matter should be settled in accordance with the procedure specified in the Power Purchase Agreement. Tariff of Government of Rajasthan (GoR) Policy 1999 & 2000 will continue for MYT Period i.e. upto 2013-14, thereafter the tariff will be as determined by the Commission for next control period. A proviso to this effect has been added in the clause 82(1)(c)”

“17. The Tariff Regulations, 2009 were notified by the Commission in exercise of powers conferred under section 61, 62 & 181 of the Act. Determination of tariff was well within jurisdiction of the Commission. Commission while exercising the legislative powers under Act, for regulatory

certainty & clarity, have extended the tariff mechanism of increasing tariff by 5% per annum over the tariff at the end of previous tariff year for MYT period. Tariff Regulations, 2009 were never subject matter of any challenge and are in force.

18. *Regulation 82(1)(a) provides for specifying tariff by Commission and 82(1)(c) specifies the tariff accordingly. Thus the provisions of regulations are quite clear.*
19. *The comparison of tariff of the generating plants commissioned under the GOR Policy of 1999 which were first to be commissioned in the state with newly commissioned plants in FY 11-12 is not appropriate in the facts and circumstances of the present case. The Commission consciously decided to continue with the tariff mechanism as per GoR policy for the MYT period. It may be seen from tables under Regulations 82(1)(a) and 82(1)(b) at para 13 above that as per GOR policies tariff allowed to the bio-mass plants commissioned under GoR policy of 1999 is higher than the tariff allowed to such plants commissioned under the subsequent policy of 2004.*
20. *Regulations carry the status of subordinate legislation and these were notified after following due process, even the Discoms were party to the proceedings. Hon^{ble} Supreme Court in civil appeal No.3902 of 2006 in case of PTC Ltd. V/s CERC has observed that “---a regulation under section 178 is in the nature of subordinate legislation. Such subordinate legislation can over ride the existing contracts including power purchase agreement which have got to be aligned with the regulations....”*
17. The findings of State Commission are summarized as under:-

- i) Regulation 82(1)(a), 82(1)(b) and 82(1)(c) of the Tariff Regulations 2009 are relevant in the present dispute.
- ii) In the Statement of Reasons order dated 23.1.2009 on the Tariff Regulations, 2009, the State Commission had clarified that for ensuring regulatory certainty and regulatory clarity the State Commission in respect of the existing Renewable Projects had decided to continue the applicable tariffs under various regimes as per the State Government Policy of 1999, 2000, 2003, 2004 etc., under Regulations, 2009.
- iii) The tariff as per the State Government policy of 1999 & 2000 will continue for MYT period upto FY 2013-14 and thereafter the tariff will be as determined by the Commission for next control period. Accordingly, a provision under clause 89(1)(c) had been added to this effect in the Regulations.

- iv) Regulations are in the nature of subordinate legislation which can override the existing contracts.
18. We are in agreement with the findings of the State Commission. The Regulation 82(1)(a) specifies the tariff for the biomass based generators commissioned by 30.9.2008 under the State Government policy of 1999 upto the end of the MYT control period i.e. FY 2013-14 as per the State Government Policy.
19. Clause 82(1)(c) deals with the condition after first ten operational years of the biomass generator. The generating company has option to terminate the PPA and supply energy to third parties. However, if the electricity is continued to be sold to the distribution licensee after 10 years, the tariff for corresponding year of policy shall continue. Thus, the tariff for FYs 2011-12, 2012-13 and 2013-14 shall be the tariff for corresponding year of the policy. The State Commission has also indicated the same

in the Statement of Reasons Order dated 23.1.2009 on the Tariff Regulations, 2009. The purpose of MYT tariff is to provide regulatory certainty to both the project developer and the distribution licensee. Thus, if the Respondent no. 1 has opted to continue to supply electricity even after 10 years of the date of signing of the PPA, the tariff as specified by the State Commission under Regulation 82(1)(a) and (c) will be applicable for the control period 2009-14.

20. We feel that the State Commission has passed the impugned order after taking note of the Regulations.

21. Ld. Counsel for the Appellant has argued that the Appellant had offered the tariff of Rs. 4.68 per kWh as determined by the State Commission for the newly commissioned plants in FY 2011-12 vide order no. 14 dated 9.12.2011 and so the Appellants could not be directed to purchase electricity at rates higher than applicable to the recently commissioned power plants.

22. The State Commission by its Tariff Regulations has specified the tariff for the existing biomass renewable energy generators set up under the State Government policies 1999 & 2000 and 2003 & 2004 commissioned upto 30.9.2008 for the MYT control period 2009-14. The Regulation 83 of the 2009 Regulations also provided for tariff determination for new renewable energy generating stations to be commissioned after 31.3.2009 during the control period. The State Commission by order dated 9.12.2011 has determined the tariff for the biomass based renewable energy projects commissioned during the year 2011-12. Thus, the State Commission has specified different tariff for biomass generators commissioned under the State Government policies of 1999 & 2000, 2003 & 2004 and those commissioned during the control period 2009-14. The tariff determined for the projects commissioned during the control period 2009-13 for the FY 2011-12 can not be applied to the power plant of the Respondent no. 1 which was

- commissioned under the State Government Policy of 1999 and for which the tariff has already been specified in the Tariff Regulations, 2009 under Regulation 82.
23. The Tariff Regulations provide for different tariff for the biomass based generators commissioned at different times. For existing renewable energy sources, in order to ensure regulatory certainty and clarity, the State Commission has through its MYT Regulations decided to continue the tariff regime as per the State Government policies of 1999/2000 & 2003/2004 upto the end of the control period i.e. 2013-14. Therefore, the prayer of the Appellants for the same rate for the Appellant's power plant and the new plants commissioned during the control period 2009-14 can not be accepted, as it would be in contravention to the Regulations.
24. According to Ld. Counsel for the Appellants, the State Commission ought to have determined the tariff for the power plant of the Respondent no. 1. We are not able to

accept this contention. Section 61 of the Act states that the Appropriate Commission, for determining the terms and conditions for determination of tariff, shall be guided inter-alia, by multi-year tariff principles. The Tariff Policy also envisages that the MYT framework should feature a five year control period. Accordingly, the State Commission has specified the Tariff Regulations, 2009 for the MYT control period 2009-14 for regulatory certainty and clarity. The State Commission has already specified the generic tariff for the existing biomass plants for the MYT period 2009-14 through its Regulations. Therefore, the State Commission can not determine the project specific tariff for the existing power plant of the Respondent no. 1 in contravention to its Tariff Regulations.

25. According to the Ld. Counsel for the Appellants, the State Commission has nullified the provisions of the PPA by not determining the project specific tariff. We find that the State Commission has given the findings following its

Tariff Regulations. Regulations are subordinate legislation and their provision will prevail over the provisions of the PPA. When the Regulations specify the tariff in a particular manner, the same will prevail over the provisions of the PPA.

26. The Ld. Counsel for the Appellant has cited the following judgments to highlight the point that where the language of the main enactment is explicit and unambiguous, the provisos or the rules framed under the Act can have no repercussion on the interpretation of the main enactment and in case there is a conflict between a substantial Act and delegated legislation, the former shall prevail.

- 1) **1992 SUPP(1) SCC – 304 in the matter of A.N. Sehgal and Others Vs. Rajeram Sheoren and Others**
- 2) **2004 (3) SCC – 48 in the matter of ITW Signode India Ltd Vs. Collector of Central Excise**

3) (2006) 12 SCC 583 in the matter of Ispat Industries Ltd. Vs. Commissioner of Customs, Mumbai.

27. The above judgments cited by the Ld. Counsel for the Appellants will not be of any help in the present case where the State Commission has given a finding on the basis of the conjoint reading of the sub clauses (a) and (c) of Regulation 82(1) of the Tariff Regulations, 2009.

28. In view of above, we do not find any substance in the contentions of the Appellant.

29. Summary of our findings:

i) The State Commission has correctly decided that the tariff as specified under Regulation 82(1) (a) & (c) will be applicable to the Respondent no. 1 during the MYT control period upto FY 2013-14.

ii) **The State Commission has given the findings according to its Regulations. The Regulations are subordinate legislation and their provision will prevail over the provisions of the existing PPA and the PPA will have to be aligned with the Regulations.**

30. In view of above, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

31. Pronounced in the open court on this 9th day of October, 2012.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

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REPORTABLE/~~NON-REPORTABLE~~

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