



Chhattisgarh State Electricity Regulatory Commission
Vidhyut Niyamak Bhawan
Irrigation Colony, Shanti Nagar, Raipur - 492 001 (C.G.)
Ph.0771-4048788, Fax: 4073553
www.cserc.gov.in, e-mail: cserc.sec.cg@nic.in



Petition No. 23 of 2017(D)

In the Matter of

**“Petition under Section 86(1)(f) of the Electricity Act, 2003
with regard to payment of generic tariff.”**

M/s Indra Powergen Pvt. Ltd.,
Hotel Golden Tulip,
VIP Road, Raipur (C.G.)

Petitioner

V/S

Chhattisgarh State Power Distribution
Company Limited (CSPDCL)
Daganiya, Raipur – (C.G.)

Respondent

PRESENT : **Narayan Singh, Chairman**
: **Arun Kumar Sharma, Member**

APPEARANCE : Shri Abhinave Kardekar, Advocate for
petitioner.
: Shri Saurabh Jain, Advocate along with Shri
Arvind Banerjee, EE for respondent.

ORDER
(Passed on 20.11.2017)

The petitioner M/s Indra Powergen Pvt. Ltd. is a Company registered under the Companies Act, 1956 having its office at Narayanpur, Girvarganj, Distt. Surguja (C.G.). The Company has established a biomass based power generating plant with an installed capacity of 10 MW at it's premises and has executed power purchase agreement (PPA) with CSPDCL for supply of power for 20 years.

2. The respondent, in the present petition, is Chhattisgarh State Power Distribution Co. Ltd. (CSPDCL).

3. Subject matter in brief as per petitioner's submission and relief sought by the petitioner are as follows:-

(a) The petitioner is operating a biomass based power generating unit and sells the electricity so generated to CSPDCL in terms of PPA dated 31.03.2012 executed with them. The PPA prescribes that the rate of sale of electricity generated by the above plant shall be applicable as per the tariff orders dated 11.11.2005, 15.01.2008 and 15.04.2010, with amendments from time to time. Relevant paragraph of PPA dated 31.03.2012 is as under:

"4(a) The power purchase rate, other charges and conditions shall be applicable as incorporated in the Commission's aforesaid order dated 11.11.2005 read with order dated 15.01.2008 and 15.04.2010 and amended from time to time. In addition, reactive energy charges as decided by the Commission from time to time shall also be payable by the Company."

The tariff order also provides that the same shall be operative for a period of 10 years till 2014-15 and will be reviewed after 5 years. Thus, the same tariff orders were reviewed through P. No. 22 of 2011 (T), whereby an order was passed on dated 28.12.2011, wherein the fixed charge has been revised by giving preferential tariff to the plants who achieved COD from FY 2005-06 to FY 2008-09. Here, the petitioner case is different because the petitioner's plant achieved COD in the year 2009-10 and remained alienated from the preferential tariff. Above order dated 28.12.2011 also provides that the revised preferential tariff will be given from 2011 onwards.

- (b) The technical difficulty, which remains unresolved so far in case of petitioner is that the preferential tariff was made applicable to the biomass based generating plants who achieved COD from 2005-06 to 2008-09, but petitioner's case remained in abeyance and whatsoever electricity was supplied to the licensee was given at the rate applicable as per tariff order of the year 2008. The petitioner's submission is that, due to above anomaly, there is discrimination by the respondent in comparison to those plants who achieved COD up to 2008-09. The petitioner has made correspondences with the respondent to resolve the above difficulties, but has not received any response. Therefore, this petition has been filed by the petitioner.
- (c) The instant petition has been filed under section 86(1)(f) of the Electricity Act, 2003.
- (d) Petitioner, in his detailed submission, has made submission that the tariff for biomass generation units was determined for the year 2005-06 to 2014-15 by the Commission in P.No. 07 of 2005, vide order dated 11.11.2005 and 15.01.2008. The Commission passed order dated 11.11.2005, whereby the Commission decided that the biomass based projects shall be entitled to a tariff with a component of fixed charge and variable charge corresponding to financial year, as per tariff rate determined in the order. The Commission also added that this tariff shall be applicable only to the new biomass based projects, which may commence electricity on or after 01.04.2005 and will be operative for a period of 10 years till 2014-15 and shall be reviewed after 5 years.

- (e) The CBEDA (association of biomass power generating plants in the State) filed an appeal before the Hon'ble Appellate Tribunal for Electricity, challenging the Commission's order in respect of wheeling and other charges. The Hon'ble Tribunal by their order dated 07.09.2006 passed in appeal No. 20 of 2006, set aside some parts of the order of this Commission and remanded back to this Commission. Aggrieved by the order of the Hon'ble Tribunal, the erstwhile Chhattisgarh State Electricity Board filed an appeal before the Hon'ble Supreme Court (No. 12 of 2007). The Hon'ble Supreme Court passed an order on 15.01.2007, which reads as under:-

"As the matter has been remitted to the Commission, we are not inclined to interfere with the impugned order. Accordingly, the civil appeal is dismissed. However, we make it dear that the State would be at liberty to raise all the contentions before the Commission and the Commission shall decide the same, untrammelled by any observations made in this impugned judgment."

- (f) Based on the above judgments of the Hon'ble Supreme Court and the Hon'ble Tribunal, the Commission re-determined the fixed charges and variable charges vide order dated 15.01.2008, considering financial and technical parameters into account for biomass based power plants. The revised tariff order was issued with following directions:-

"This tariff shall be operative for ten years till 2014-15, but may be reviewed after 5 years on the request of any biomass based generating unit or a licensee."

Therefore, as per the directions of the Commission in their tariff order dated 15.01.2008, the same will be applicable to petitioner also.

- (g) A petition was filed in the year 2011 for the review of tariff order passed dated 15.01.2008 for power purchase by the distribution licensee in the State. The Commission disposed off the petition vide order dated 28.12.2011 whereby the fixed charge was reviewed and revised. This was made applicable to such biomass based power plants who achieved COD during the year 2005-06, 2006-07, 2007-08 and 2008-09 and were entitled to receive tariff as per the revised order. However, the above entitlement was applicable w.e.f. FY 2011-12 for tariff (fixed charge). The above order was silent for the plants who achieved COD during FY 2009-10 and 2010-11.
- (h) The petitioner further submitted that as per clause 4(A) of the PPA executed with CSPDCL, the rate shall be applicable as per Commission's order dated 15.01.2008 and any amendments thereof from time to time.
- (i) Reliefs sought by the petitioner:-
 - (1) To determine the revised fixed charges in the petitioner's case also who achieved COD in the year 2009-10.
 - (2) Direct the respondent to pay revised fixed charge to the petitioner who achieved COD in the year 2009-10.
 - (3) Direct the respondent to pay cost of the present litigation.

(4) Pass any other order as this Commission may deem fit in the interest of justice.

4. Respondent CSPDCL has made following submissions to the petition:

(a) Respondent, in its reply, submitted that the instant petition has been filed under section 86(1)(f) of the Electricity Act, 2003 to determine the revised fixed charges in petitioner's case. The reliefs sought by the petitioner are (i) to determine the revised fixed charges in the petitioners case also who has achieved COD in the year 2009-10 and (ii) direct the respondent to pay the revised fixed charge to the petitioner's plant who has achieved COD in the year 2009-10.

(b) It was agreed by the respondent that PPA was executed with the petitioner, according to which the rate of sale of power will be as per the biomass tariff order dated 11.11.2005, 15.01.2008 and 15.04.2010 and amendments from time to time. The Commission vide above order had determined tariff of biomass based power plants which have achieved COD after 01.04.2005 thereby determined the tariff of biomass plants who achieved COD up to FY 2008-09. The petitioner has achieved COD in FY 2009-10, for which neither the Commission has determined any tariff nor had the petitioner approached Commission for determination of tariff for its plant. For the first time, the petitioner has requested the respondent on 23.05.2017 for payment of higher tariff. The Commission has revised the tariff vide its order dated 28.12.2011 but even under this order the petitioner's plant was not covered. It is further to

add that earlier vide letter dated 04.01.2016 (wrongly written as 04.04.2017) the petitioner had requested the Commission to direct the respondent for making payment as per order dated 28.12.2011. The Secretary, CSERC vide letter dated 12.01.2017 sought report from the respondent on the matter and the same was made available to him vide letter dated 07.03.2017.

- (c) From the bare perusal of the reliefs claimed by the petitioner, it is amply clear that the petitioner seeks for determination of tariff by the Commission in respect of fixed charges. Whereas, the petition has been filed under section 86(1)(f) of the Act improperly creating the instant subject matter as the dispute between licensee and generating company. The relevant part of the Section 86(1)(f) are as under:-

Section 86. (Functions of State Commission):-----

(1) The State Commission shall discharge the following functions, namely: -

.....

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;"

Thus determination of tariff is not a dispute between licensee and the petitioner, generating company, which could be adjudicated by the Commission under Section 86(1)(f) of the Act. However, the present petition otherwise ought to have been filed under section 62 of the Act, which specifically provides for determination of tariff by the Commission.

- (d) The Commission while issuing order dated 28.11.2012 did not determine tariff for biomass based plants commissioned in the year 2009-10. Therefore, the petitioner is being paid tariff as per the order dated 15.01.2008. Considering the years of operation and the fact that the petitioner had never objected to the same, this petition has been taken for adjudication.
- (e) The Commission, vide order dated 28.12.2011, revised the tariff of biomass based plants, who achieved COD during 2005-06 to 2008-09. However, revised tariff was made applicable from 01.04.2011 for all power plants who achieved COD during the period FY 2005-06 to FY 2008-09 and no retrospective effect was given. The petitioner's plant achieved COD during 2009-10. Therefore, the above order is not applicable for petitioner's plant. In this regard, it is further to add here that the order dated 28.12.2011 specifically mentioned that the revised order will be applicable for power plants who had achieved COD during the period FY 2005-06 to FY 2008-09 and accordingly fixed charges were revised for plants who achieved COD during the period specified above. As already mentioned, that petitioner's plant achieved COD during the FY 2009-10, therefore, was not covered under this order and thus he cannot claim as per revised order dated 28.12.2011 on the interpretation of its own.
- (f) It is further submitted that petitioner did not approach the Commission for determination of tariff / revised tariff for its plant. Petitioner signed PPA on 31.03.2012, whereas Commission's order dated 28.12.2011, which is an amendment to its earlier

order dated 15.01.2008, was issued even before signing of this PPA. Entire matter was in the knowledge of the petitioner. After accepting tariff determined vide order dated 15.01.2008 and after lapse of more than 5 and half years period, the petitioner states that amendment to orders dated 15.01.2008 and 15.04.2010 should also be made applicable in petitioner's case, which is not justified.

- (g) Further, petitioner has filed this petition under Section 86(1)(f) for determination of tariff for its plant. This is contrary to the submission that when orders dated 15.01.2008 and 15.04.2010 has been made applicable in petitioner's case then any amendment in this order should also be made applicable in petitioner's case. Thus, it appears that the petitioner himself is not clear about the reliefs it wants from the Commission.
- (h) It is also submitted by the respondent that it is wrongly stated by the petitioner that preferential tariff is not being paid to him. The petitioner is being paid preferential tariff as per tariff determined by the Commission for plants achieving COD in FY 2008-09 vide order dated 15.01.2008. This is the last tariff determined by the Commission. As the Commission did not determine tariff for biomass based plants which achieved COD during FY 2009-10, hence, this respondent is paying tariff applicable for plants which achieved COD during 2008-09 for which the petitioner did not raised any objection and also accepted payment. Therefore, no discrimination is being done by the respondent against the petitioner.

- (i) It is submitted that the grounds for relief as sought by the petitioner are not correct and ought to have approached the Commission for determination of tariff under the correct provisions of law. The petitioner cannot blame respondent for non compliance of the tariff order passed by the Commission. Therefore, the petition is liable to be dismissed.

5. Petitioner in its rejoinder made the following submission:

- (a) The present dispute is that the petitioner had been giving verbal reminders and making request to the respondent for providing fixed cost, which was not processed by the respondent. It is further submitted that even if the said provision as alleged by the respondent is wrongly quoted, it would be open to the Commission to hear the matter and give appropriate direction to the respondent.
- (b) In this regard, the petitioner further added that it is also a settled position in law that merely quoting wrong provisions of law does not render the pleadings wrong and if the Court has jurisdiction it can still hear the pleadings of the parties. In this regard, the petitioner has quoted various cases decided by the Hon'ble Supreme Court, which are as under:

In Roche Products Limited V. Collector of Customs and Another 1989 Supp. (2) SCC 532 (vide para 24), Hon'ble Supreme Court observed:

"When an authority has the power to do a certain Act and in exercise of such power he does the same, but refers to a wrong provision of the law that would be a mere irregularity and would not vitiate such act."

In Union of India & Another Vs. Tuisi Ram Patel 1985 3 SCC 398 (vide para 126), the Supreme Court observed:-

"Further, even the mention of a wrong provision or the omission to mention the provision which contains the source of power will not invalidate an order where the source of such power exists."

On perusal of the above judgments, it would be very clear that even if the said provision is wrongly quoted, it would be open to the Commission to hear the matter and give appropriate direction to the respondent.

Findings & Conclusion of the Commission:-

- 6.** From the above submissions made by the petitioner and the respondent and the arguments advanced during proceedings, it is clear that the petitioner M/s Indra Powergen Pvt. Ltd. established a 10 MW biomass based power plant in Surguja Distt of the Chhattisgarh State. The plant achieved COD in the FY 2009-10. The petitioner and the respondent entered into PPA on 31.03.2012, whereby the respondent agreed to purchase power on RTC basis from the petitioner's plant. As per terms of the PPA, the applicable tariff was based on the Commission's order dated 11.11.2005, 15.01.2008 and 15.04.2010 with amendments from time to time. The applicable tariff (fixed charges and variable charges) was payable according to the year of COD of respective biomass based generating plants.
- 7.** Based on the petition filed by the biomass generating plant, the Commission has issued tariff order dated 28.12.2011, revising for all the biomass based generating plants who achieved COD between FY 2004-05 to 2008-09. Here, we are surprised to note that PPA

was entered between petitioner and respondent on 31.03.2012 i.e. after the Commission's order dated 28.12.2011, but the petitioner was deprived from the tariff which was made applicable for those biomass based power plants who achieved COD between FY 2005-06 to FY 2008-09. If there was any confusion or any clarification was required, either of the parties i.e. petitioner or respondent should have approached this Commission seeking clarification/direction on applicability of tariff for such plants who achieved COD after FY 2008-09, which was not done. The tariff order, which was issued on 28.12.2011 is amendment to the tariff order issued earlier. Therefore, as per the terms and conditions of the PPA, the petitioner is also liable for the same tariff as applicable for biomass based power plants who achieved COD prior to him.

- 8.** We have reached to the conclusion that the petitioner should be dealt at par with power plants who have achieved COD during FY 2008-09 from COD of its power plant till the entire period of present agreement.

We order accordingly.

Sd/-
(Arun Kumar Sharma)
MEMBER

Sd/-
(Narayan Singh)
CHAIRMAN