

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

APPEAL NO. 186 OF 2010

Dated: 30.05.2011

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

In the matter of:

1. M/s. Enercon (India) Limited
(Jaipur Office),
605-608, 5th Floor, Apex Mall,
Lal Kothi Scheme, Jaipur- 302005.

2. Indian Wind Power Association
(Rajasthan State Council),
27/13, Kanti Chabra Road, Bani Park,
Jaipur-302 016.
Appellants

Versus

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan, Sahkar Marg,
Near State Motor Garage,
Jaipur-302 005.

2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur-302 005.

3. Ajmer Vidyut Vitran Nigam Limited
Old Power House,
Hathi Bhata, Ajmer- 305 001.

4. Jodhpur Vidyut Vitran Nigam Limited
New Power House,
Industrial Estate,
Jodhpur-342 003.

5. Rajasthan Renewable Energy Corporation

E-166, Yudhishtir Marg, C- Scheme,
Jaipur-302 005.
Respondents

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Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganeshan
Ms. Swapna Seshadri

Counsel for the Respondent(s) : Mr. K.L. Dhayani
Mr. K.L. Nandwani for R-2 to 4
Mr. R.K. Mehta
Mr. Antaryami Upadhyay &
Mr. Lakhi Singh

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. How is tariff for the Wind Energy Projects to be commissioned during the FY 2010-11 in the State of Rajasthan to be determined? Whether Regulation 85 of the Rajasthan Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations, 2009 (for short, 'the Regulations, 2009') which provides an indexation formula shall be the sole determining factor for determination of tariff for the Wind Energy Projects to be commissioned during the FY 2010-11? Whether Part III of the Regulations, 2009 will have no relevance for determination of tariff for the projects to be commissioned during FY 2010-11? Whether the doctrine of harmonious construction of different provisions of the Regulations should be invoked for the purpose of determination of tariff for the FY 2010-11 in the case of renewable energy projects? Whether harmonious construction of the different provisions of the Regulations is capable of providing complete relief to the case of the appellant? Whether the appellant really seeks for amendment of the Regulations, 2009 in the present appeal? Whether the Commission has misconstrued the relevant provisions of the Regulations in determining the tariff through indexation mechanism as per

Regulation 85? What is the scope and purpose of removal of difficulty clause as we find in Regulation 134 of the Regulations? These and these questions come up in roundabout way as we proceed to hear the appeal.

2. This appeal is preferred by the two appellants, the first being M/s. Enercon (India) Ltd., a Company engaged in the business of establishing and operating wind based power generation projects, and the second, namely, Indian Wind Power Association (Rajasthan State Council), an association of wind energy developers operating as a federal organization, against the order dated 6th August, 2010 passed by the Rajasthan Electricity Regulatory Commission, the respondent No. 1 herein whereby the said Commission revised and determined the tariff applicable to wind energy projects during the tariff year 2010-11. The respondent No. 2, 3 and 4 are the distribution companies, while the respondent No.5 is a State owned corporation established for the purpose of promoting non-conventional and renewable energy generation in the State of Rajasthan.

3. On 23.01.2009 the Rajasthan Electricity Regulatory Commission in its legislative jurisdiction enacted and notified the aforesaid Regulations, 2009. The said Regulations, 2009 are intended for determination of tariff in all cases covered under the said regulations for a period of five financial years commencing from FY 2009-10 and ending with FY 2013-14. These regulations cover also determination of tariff for new renewable energy generating stations to be commissioned during the control period as said above. In terms of the said Regulations, 2009 the Commission passed an order dated 16th July, 2009 determining the tariff for wind and biomass based power plants to be commissioned during the FY 2009-10. Thus, the said order which is Annexure 'B' to the Memo of Appeal is a tariff determination order for the projects to come up during FY 2009-10. In due course of the treatment of the appeal, we will have on record certain

relevant observations of the Commission in respect of the said order dated 16th July, 2009.

4. Then the Commission passed *suo motu* another order, a very short one, being order dated 31.03.2010 dealing with determination of tariff for sale of electricity from Wind Power Plants in the State of Rajasthan to Distribution Licensees during FY 2010-11 of the control period 2009-14. In this order the Commission refers to its earlier order dated 16th July, 2009 whereby the generic tariff for sale of electricity from Wind Power Plants for the first year of the control period i.e FY 2009-10 was determined at Rs. 4.28 / kwh for Jaisalmer, Barmer and Jodhpur districts and Rs. 4.50 Kwh for the other districts of the State of Rajasthan. In the order dated 31.03.2010, the Commission observes that the tariff for FY 2009-10 is linked to the indexation mechanism specified under Regulation 85 of the said Regulations, 2009 and accordingly the tariff for the Wind Energy Projects for the FY 2010-11 shall be Rs. 3.83 kwh for Jaiselmer, Barmer and Jodhpur districts and Rs. 4.03 kwh for other districts of the State. How the two figures were arrived at through the indexation formula in terms of Regulation 85 is to be seen in the Annexure –I to this order dated 31.03.2010

5. According to the appellants, the order dated 16th July, 2009 did not specify the financial norms as applicable or the calculation sheet for the tariff determination dealing with rate of depreciation, rate of income tax etc. and thus one of the members upon application obtained from the Commission the calculation sheet for the calculation of the tariff by the Commission in the order dated 16th July, 2009. According to the appellants, the order dated 31.03.2010 did not apply the principles enshrined in Part III of the Tariff Regulations particularly with regard to the calculation on the return on equity by applying the applicable tax rate, the

calculation of repayment of loan equal to the applicable rate of depreciation in terms of the Tariff Regulations and also the operating and maintenance expenditure by applying the escalation factor as provided in the Tariff Regulations.

6. For the purpose of appreciation of the appeal the appellants placed reliance on regulation 21 (Return on Equity), regulation 22(Interest and Finance Charges on loan capital), regulation 25 (Operation & Maintenance Expenses), regulation 27 (Applicability rate on return on equity after grossing up the applicable rate of income tax), regulation 80 (Applicability), regulation 83 (Tariff Determination for new renewable energy generating stations), and regulation 85 (Tariff Indexing Mechanism for Wind Energy Projects) which we shall discuss at the appropriate place of the judgment.

7. On 29th April, 2010 the two appellants filed two petitions being number 220 and 221 of 2010 before the State Commission for revision and modification of the tariff determined by the earlier order dated 31st March, 2010 by applying the relevant provisions of the Tariff Regulations.

8. Upon receipt of the aforesaid two petitions, the Commission passed an order which is dated 6th July, 2010. The said order reflects the submissions of the appellants as are found in this memo of appeal and we desist from repeating the same but one of the submissions of the appellants was that this was a fit case where the Commission might be pleased to clarify, amend and modify the Tariff Regulations, 2009 insofar as it is applicable to the wind power plants particularly on the aspects mentioned in those two petitions and as a consequence thereof to amend the order dated 31.03.2010 by incorporating the revised levelised tariff applicable to the wind power projects. We reproduce the relevant paragraphs of the order

dated 6th July, 2010 which can be said to be an order admitting the petitions for hearing on a limited point.

“11. We have heard the learned counsels and carefully looked at the referred regulations and also perused both the citations referred by the Counsel. The Commission observes that Regulation 83(6) amply clarifies that the financial parameters as stipulated in Part III of the Regulations and other normative parameters are applicable for determination of generic tariff for the base year FY 2009-10 of MYT control period and Regulation 85 provides that the base year generic tariff shall be automatically revised for subsequent years of the control period by the indexing mechanism. In the indexing mechanism revision of capital cost of wind power plants is envisaged based on its main constituents viz. steel and cement and the impact of change in interest rate. Capital cost is the main cost ingredient of a wind energy project and tariff is strongly related to capital cost and interest cost of loan. The indexation formula has been devised to capture these two major parameters of tariff.

12. The indexation formula clearly visualises that the base rate tariff would have to be adjusted for subsequent years in accordance with the formula irrespective of changes in individual parameters of tariff. As mentioned earlier, the formula has been devised to take into account the changes in two major parameters i.e. capital cost and interest on loan. Considering the clear stipulation in the Regulation as regards indexation, the Commission is of the considered view that there is no case for removal of difficulty as far as the capital cost, depreciation or O&M escalation is concerned for the tariff determined for this year (FY 10-11)

13. However, the Commission agrees that a material conflict has emerged in the current year's tariff on account of change in taxation rate in what is envisaged to be admissible return under Regulation 21 vis-à-vis the position that emerges by applying indexation formula of Regulation 85. The problem has arisen because indexation formula doesn't factor in changes in tax rate, which could make material difference in a project's viability. Changes in tax/duty rates are of statutory nature and are beyond the control of developers. Such a change could impact the tariff and returns either way. In case the tax rate goes down the indexation formula would result in undue higher benefit and converse would be true when the tax rate goes up. This would make a material difference either way and therefore, needs to be appropriately addressed for ensuring harmony between Regulation 21 and Regulation 85. It may be mentioned that Regulation 21 stipulates that a project developers would be entitled to get 16% returns on equity,

which has to be computed by grossing up with the rate equivalent to MAT rate.

14. Since indexing formula is neutral to tax rate, the implication of determining tariff based on indexation formula would be that net ROE would be different than 16% specified in Regulation 21 in case of changes in MAT rate. There is an obvious conflict, which may have material difference on project viability and margin. If a proper treatment in tariff determination is not given to tax incidence in accordance with the statutory changes, a project developer may get penalized or rewarded as the case may be for no act of his own. Therefore, both Regulation No. 21 and 85 need to be considered pari-passu.”

9. Then came the impugned order dated 6th August, 2010 disposing of the aforesaid two petitions finally. This order also reflects the submissions of the appellants. One individual Mr. G.L. Sharma represented before the Commission in this order that the order dated 31.03.2010 did not require any change while on behalf of the Indian Wind Power Association one Mr. V.K. Gupta and another Mr. D.S. Agarwal on behalf of Rudraksh Energy submitted that indexation formula under Regulation 85 should be changed so as to bring return on equity in conformity with what is stipulated in Regulation 21 of Regulations, 2009 and also Regulation 22 (3) of the said Tariff Regulation. Upon hearing, the Commission made some observations and passed an order on 06.08.2010, the relevant paragraphs of which require reproduction which we do.

“23. As regards the points raised by the petitioners regarding capital cost, depreciation or O&M escalation, the Commission has come to the conclusion that keeping in view the Regulation 85 regarding indexation; it is not a fit case to invoke the provision of removal of difficulty in respect of the said parameters. The Regulations under reference were notified by the Commission on 23/01/2009 and thereafter tariff for the financial year 9-10 was finalised in the month of July, 2009, which has attained finality. The parameters discussed in this paragraph stand settled since the last year’s tariff has attained finality and cannot be re-opened at this stage under removal of difficulty provision and same holds good for other issues raised by petitioners like interest rate and accelerated depreciation.

24. However, the position is different as regards the issue of change in MAT rate is concerned on account of the following reasons:

- (i) The Regulation 21 (4) clearly stipulates the rate of return on equity shall be computed by grossing up with tax rate equivalent to MAT;*
- (ii) The MAT rate has changed in the current year from what was the level which the tariff was determined for the base year FY 9-10 and this is a new extraneous factor beyond control of a developer;*

(iii) Application of indexation formula of Regulation 85 in case of change in MAT rate from that of base year FY 9-10 would impact ROE and result in a different ROE than what is clearly stipulated in the Regulation 21.

25. The Commission is of the considered view that both Regulations No. 21 and 85 need to be given due weightage. It is a settled law that the provisions of a statute need to be interpreted in a manner so as to give full effect to all its provisions and not to make any particular provision redundant or non applicable. Every provision in a statute needs to be harmoniously construed with the other provisions and in the manner so as to remove any inconsistencies.

26. The Commission, therefore, reiterates its earlier view discussed in paras 7 and 8 of this order. A material conflict has emerged in the current year's tariff on account of change in taxation rate in what is envisaged to be admissible return under Regulation 21 vis-à-vis the position that emerges by applying indexation formula of Regulation 85. Changes in tax/duty rates are of statutory nature and are beyond the control of developers. The issue needs to be appropriately addressed for ensuring harmony between Regulation 21 and Regulation 85.

27. The electricity Act, 2003 casts a clear responsibility on the State Regulatory Commissions to promote growth of renewable energy and the State Commission in cognizance of this responsibility and also for energy security as well as ecological security has issued various orders to support and promote Renewable Energy growth in the State. Considering this and the difficulty as has arisen in the light of afore discussed situation, the Commission is of the considered view that difficulty on account of changes in taxation rate need to be removed.

28. There is a clear provision in the Regulation 134 of Tariff Regulations, 2009 for removal of difficulty, which reads as under, and therefore, invoking of this provision would not be violative of Regulations: "If any difficulty arises in giving effect to the provisions of these Regulations, the Commission may, by general or specific order, make such provisions not inconsistent with the provisions of the Act, as may appear to be necessary for removing the difficulty."

29. Now, therefore, in exercise of the powers conferred under Regulation 134 of Tariff Regulations, 2009 for removal of difficulty, the Commission reviews the tariff determined vide order dated 31.3.2010 for the wind energy generating plants commissioned/to be commissioned during FY 2010-11 incorporating the changes due to variation in the rate of MAT and, accordingly, the Revised Tariff for Wind Energy Projects for the plants commissioned in FY 2010-11 shall be as under:

Particulars	Jaisalmer, Barmer &	Other Districts
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	<i>Jodhpur Districts</i>	
<i>Levelised tariff as determined earlier vide Commissions order dated 31.3.2010</i>	<i>Rs. 3.83/kWh</i>	<i>Rs. 4.03/kWh</i>
<i>Revised Levelised tariff</i>	<i>Rs. 3.87/kWh</i>	<i>Rs. 4.08/kWh</i>

The detailed calculations in this regard are shown at Annexure.

30. *Considering that similar difficulty may arise in future also as and when MAT/tax rate gets changed and therefore, Commission is also of the view that necessary changes in the Regulation may be made to obviate the necessity of invoking powers of Regulation 134 for removal of difficulty in every such situation.*”

10. The State Commission by the order dated 6th August, 2010 thus partly accepted the petition and the findings over which the appellants came to be aggrieved against the order of the Commission have been challenged in this appeal. The grounds of appeal are as follows:

- a) The Commission has not applied the financial norms and correctly calculated the tariff for the projects to be established in the year 2010-11 particularly with regard to the rate of income tax for the calculation of the return on equity, the calculation with regard to loan repayment equivalent to the rate of depreciation and the applicability of the O&M expenses escalation.
- b) The Commission has failed to apply the correct rate of income tax by not calculating the applicable rate of return on equity after taking into account the surcharge on the income tax.
- c) The Commission has committed error in not fully giving effect to the principle laid down of grossing up of the return on equity by not taking into account (i) the surcharge on MAT for the 2nd to 10th year as reflected by effective rate of MAT at 19.931% for first year, and 18.54% for the 2nd to 10th year, (ii) the surcharge on income/corporate tax at 30.9% for 11th year to 20th year, (iii)

the impact of effective rate of corporate tax calculating accelerated depreciation benefit with surcharge and cess from 1st year to 20th year and (iv) the impact of effective rate of MAT and corporate tax rates on interest on working capital as the same is to be determined on 1.5 months receivable (which includes return on equity grossed up considering effective rate of MAT/corporate tax).

- d) The Commission committed error in not determining the repayment of loan for every year equivalent to the depreciation allowed for the year as per regulation 22. The Commission has considered the debt repayment for every year at Rs.37.75 lakhs per annum while allowing the depreciation every year at Rs.27.72 lakh which is said to be contrary to regulation 22 (3) of the Tariff Regulations.
- e) The Commission failed to appreciate that regulation 25 also provides for escalation of O&M expenses for the first year to be escalated @ 5.72% from the base O&M expenses of 2009-10 and to provide an annual escalation year or year linked to the Wholesale Price Index subject to true up .
- f) The State Commission ignored the well settled principle of law that every provision in a statute needs to be harmoniously construed with the other provisions, as such the provisions of part III and Part VII of the Regulation need to be given full effect to in their respective areas of operation. While regulation 85 deals with the normative capital cost adjustment on account of changes in certain input costs, regulations 21, 22 and 25 as also other regulations of Part III of the Tariff Regulations dealing with return on equity, interest on finance charges and operation and maintenance expenses need to be given full effect to in relation to the respective aspects.

- g) The Commission failed to appreciate that regulation 85 of the Tariff Regulations, 2009 that provides for Tariff Indexation Mechanism for wind energy projects is only related to automatic tariff revision through the mechanism provided therein.

11. Respondent No. 2 to 4 in their joint counter affidavit contend as follows:-

- a) The appeal is not maintainable for the reason that the two petitions No;. 220 of 2010 and 221 of 2010 were filed by the appellants before the respondent No. 1 for removal of difficulties in terms of the Tariff Regulations so as to rectify the order dated 31st March, 2010. By the order dated 6th July, 2010 the Commission discarded all other pleas of the appellants save one and the said order dated 6th July, 2010 has not been challenged.
- b) The impugned order dated 6th August, 2010 reveals that the Commission discussed only taxes and duties and the issues now raised in this appeal were raised in the course of arguments before the Commission following which the impugned order dated 6th August, 2010 was passed. The main three issues as outlined above have been dealt with by the Commission in the impugned order as also the base tariff order dated 16th July, 2009. The order dated 31.03.2010 was *suo motu* passed by the Commission by way of revision under regulation 85 which does not permit taking into consideration of any other head.
- c) The Commission by the impugned order considered applicable rate of income tax and for surcharge and correctly observed that any rate higher than what has been worked out in this order would lead to undue additional burden on the

consumer and would not be appropriate in the larger interest of the parties. The Commission followed cost plus approach in working out tariff and return on equity has been increased from 14% to 16% and that too would be pre-tax and grossed up to tax rate. The tariff worked out even after accounting for accelerated depreciation amounts to an increase of 15% over the last tariff and thus would jump by unreasonably higher level of around 34% without such accounting. Any increase in the feed in tariff over and above 15% would be highly unreasonable.

- d) As regards repayment of loan the rate has been specified at par with the conventional generation projects.
- e) As regards the escalation charges of O&M parameters for tariff determination for wind energy have been specified under regulation 83(6) and the provision towards contingency reserve as claimed by the appellants has not been envisaged in the case of wind energy projects.

12. The respondent No.1, the State Commission contends in its separate counter affidavit as follows:-

- a) While determining the tariff for the wind energy projects, the Commission considered the financial parameters as stipulated in Part III of the Regulations. The tariff for the year 2009-10 is the base tariff which is to be indexed as per the formula contained in regulation 85 for the purpose of determining tariff for wind power plants to be commissioned in the subsequent period of the control period. The indexation formula does not provide for inclusion of any changes in other parameters like escalation in O&M expenses, interest on long term loan etc.

- b) With regard to not applying escalation in O&M expenses and not calculating the repayment of loan equivalent to depreciation the Commission clearly stated in the impugned order dated 6th August, 2010 that these parameters stood settled since the tariff for the base year 2009-10 received finality and could not be reopened. The determination of tariff for the subsequent period of the control period is only through indexation as per formula prescribed in the Tariff Regulations, and the indexation formula clearly visualizes that the base rate tariff would have to be adjusted for the subsequent years in accordance with the formula which was devised to incorporate changes as might be considered necessary.
- c) The impugned order was passed in terms of the Tariff Regulations, 2009 framed by the Commission, which cannot be challenged in this Tribunal.
- d) Since the indexation formula does not take into account the changes in the tax rate, it could make a material difference in the viability of the project and if appropriate treatment for tax incidence was not given in the tariff determination, the project developer may get penalized in the event of increase in tax rate or benefited if the rate goes down. The Commission appreciated that the indexation formula neutral to tax rate would lead to return on equity being different from 16% as prescribed in the regulations, whereas the regulation 21 (4) clearly stipulates that return on equity shall be computed by grossing up the base rate with tax rate equivalent to MAT for the first ten years from the date of commercial operation. The Commission accordingly in view of emergence of conflict in the regulations as a result of change in the MAT rate exercised its inherent power under regulation 134 and

incorporated the impact of change in the MAT rate in the year 2010-11 and revised the tariff for the wind energy projects to be commissioned in the year 2010-11.

- e) As regards surcharge on MAT from 2nd to 20th year, the MAT along with surcharge was considered for the first year as per the prevailing rates and surcharge was not considered from 2nd year onwards. The Government of India has taken a move to phase out surcharge on direct taxes and reduced the surcharge from 10% in the year 2009-10 to 7.5% in the year 2010-11.

13. Upon the pleadings of the parties as aforesaid the following issues arise for consideration:-

- a. Whether the appeal is maintainable?
- b. Whether the Commission did not follow the provisions of the Tariff Regulations for calculation of the repayment of loan amount which according to the appellants is equivalent to the depreciation allowable annually?
- c. Whether the Commission did not apply the correct rate of MAT including surcharge for the purpose of grossing up the rate of return on equity.
- d. Whether the Commission was justified in not allowing escalation of other aspects such as O&M expenses in terms of the Tariff Regulations for determination of tariff?
- e. Whether the Commission failed to implement the various provisions of the Tariff Regulations, 2009 by the principle of harmonious construction of the different provisions thereof.

14. Since the appeal relates to interpretation of certain provisions of the Regulations, 2009 it is proper that we place on record the provisions thereof as would be applicable for purpose of the disposal of the appeal.

"21. Return on Equity

(1) *Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 17.*

(2) *Return on equity shall be computed on pre-tax basis at the base rate of 15.5% for conventional generating stations and transmission licensee, and 16% for distribution licensee and renewable energy generating stations, to be grossed up as per sub-regulation (3) of this regulation:*

(3) *The rate of return on equity shall be computed by grossing up the base rate with the normal tax rate for the year 2008-09 applicable to the concerned conventional generating station, transmission licensee, distribution licensee, as the case may be:*

Provided that return on equity with respect to the actual tax rate applicable to the concerned conventional generating station, transmission licensee, distribution licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up for each year of the Control period during the Annual Performance Review.

(4) ***In case of renewable energy generating stations, the rate of return on equity shall be computed by grossing up the base rate with the tax rate equivalent to Minimum Alternative Tax (MAT) for first 10 years from COD and normal tax rate for remaining years of project life.***

(5) *Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:*

Rate of pre-tax return on equity = Base rate / (1-t)

Where t is the applicable tax rate in accordance with clause (3) of this regulation.

Illustration:

i. In case of the generating company or the transmission licensee paying Minimum Alternate Tax (MAT) @ 11.33% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.1133) = 17.481%

ii. In case of generating company or the transmission licensee paying normal corporate tax @ 33.99% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.3399) = 23.481%

22. Interest and finance charges on loan capital

- (1) *The loans arrived at in the manner indicated in Regulation 17 shall be considered as gross normative loan for calculation of interest on loan.*
- (2) *The normative loan outstanding as on 1.4.2009 shall be worked out by deducting the cumulative repayment as admitted by the Commission up to 31.3.2009 from the gross normative loan.*
- (3) ***The repayment for each year of the Control period shall be deemed to be equal to the depreciation allowed for that year:***
- (4) *Notwithstanding any moratorium period availed by the generating company or the transmission licensee or by the distribution licensee, as the case may be the repayment of loan shall be considered from the first year of commercial operation of the project and shall be equal to the annual depreciation allowed.*
- (5) *The rate of interest shall be the weighted average rate of interest calculated on the basis of the actual loan portfolio at the beginning of each year applicable to the project:
Provided that if there is no actual loan for a particular year but normative loan is still outstanding, the last available weighted average rate of interest shall be considered:

Provided further that if the generating station or the transmission system or the distribution system, as the case may be, does not have actual loan, then the weighted average rate of interest of the generating company or the transmission licensee or the distribution licensee as a whole shall be considered.*
- (6) *The interest on loan shall be calculated on the normative average loan of the year by applying the weighted average rate of interest.*
- (7) *The generating company or the transmission licensee or the distribution licensee, as the case may be, shall make every effort to re-finance the loan as long as it results in net savings on interest and in that event the costs associated with such re-financing shall be borne by the beneficiaries and the net savings on interest shall be shared between the beneficiaries and the generating company or the transmission licensee or the distribution licensee, as the case may be, in the ratio of 2:1*
- (8) *The changes to the terms and conditions of the loans shall be reflected from the date of such re-financing.*
- (9) *In case of dispute, any of the parties may make an application in accordance with the Rajasthan Electricity Regulatory Commission (Transaction of Business) Regulations, 2005, as amended from*

time to time, including statutory re-enactment thereof for settlement of the dispute:

Provided that the beneficiary or the transmission and distribution customers shall not withhold any payment, on account of the interest claimed by the generating company or the transmission licensee or distribution licensee, during the pendency of any dispute arising out of re-financing of loan.

23. Depreciation

- (1) *The value base for the purpose of depreciation shall be the capital cost of the asset admitted by the Commission.*
- (2) *The salvage value of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the capital cost of the asset:*

Provided that in case of hydro generating stations, the salvage value shall be as

provided in the agreement signed by the developers with the State Government for creation of the site:

Provided further that the capital cost of the assets of the hydro generating station for the purpose of computation of depreciable value shall correspond to the percentage of sale of electricity under long-term power purchase agreement at regulated tariff.

- (3) *Land other than the land held under lease and the land for reservoir in case of hydro generating station shall not be a depreciable asset and its cost shall be excluded from the capital cost while computing depreciable value of the asset.*
- (4) *Depreciation shall be calculated annually based on Straight Line Method (SLM) and at rates specified in Appendix-I to these regulations for the assets of the generating station, transmission system and distribution system:*
Provided that, the remaining depreciable value as on 31st March of the year closing
after a period of 12 years from date of commercial operation shall be spread over the balance useful life of the assets.
- (5) *In case of the existing projects, the balance depreciable value as on 1.4.2009 shall be worked out by deducting the cumulative depreciation as admitted by the Commission upto 31.3.2009 from the gross depreciable value of the assets.*
- (6) *Depreciation shall be chargeable from the first year of commercial operation. In case of commercial operation of the asset for part of the year, depreciation shall be charged on pro rata basis.*

(7) *Depreciation against assets relating to environmental protection shall be allowed on case to case basis at the time of fixation of tariff subject to the condition that the environmental standards as prescribed have been complied with during the previous tariff period.*

25. Operation & Maintenance expenses

(1) *'Operation and Maintenance or O&M expenses' shall mean repair and maintenance (R&M), establishment, and administrative and general expenses.*

(2) *Operation and maintenance expenses shall be determined for the tariff period based on normative O&M expenses specified by the Commission subsequently in these Regulations for the base year, that is, the year immediately preceding the tariff period.*

(3) *O&M expenses of assets taken on lease and those created out of consumer's contributions shall be considered, if the transmission or distribution licensee or the generating company has the responsibility for its O&M and bears O&M expenses.*

(4) ***Normative O&M expenses allowed at the commencement of the Control Period (i.e. FY 2009-10) under these Regulations shall be escalated at the rate of 5.72% per annum. Further, the same shall be subject to revision on account of annual escalation linked to WPI in the subsequent years for the purpose of true-up.***

(5) *In case of considerable variance between the normative expenses and the actual expenses in the base year, the Commission may allow the transmission or distribution licensee or the generating company to achieve the normative level over a period of time.*

(6) *Annual O&M expenses for gross fixed assets added during the year shall be considered from the date of commissioning.*

(7) *Increase in O&M charges on account of war, insurgency, change in laws, or like eventualities may be considered by the Commission for a specified period.*

(8) *Any saving achieved by generating company or a transmission or distribution licensee in any year shall be shared with the distribution licensee or user, as applicable, in the ratio specified in Regulation 10. The loss to the generating company or the transmission or distribution licensee if he exceeds the targeted O&M expenses for*

that year be shared with the distribution licensee or user, as applicable, in the ratio in Regulation 10.

80. Applicability

Part VII

Tariff for Renewable Energy Generating Stations

- (1) *The Regulations specified in this Part VII shall apply for determining the tariff for procurement of power by distribution licensees within Rajasthan from Renewable Energy (RE) based Generating Stations located within Rajasthan.*
- (2) *The Commission shall be guided by the terms and conditions contained in this Part in determining the tariff for supply of electricity by a Renewable Energy based Generating Company to a Distribution Licensee in the following cases:*
 - (a) *where such tariff is pursuant to a power purchase agreement or arrangement entered into subsequent to the date of notification of these Regulations; or*
 - (b) *where such tariff is pursuant to a power purchase agreement or arrangement entered into prior to the date of notification of these Regulations and the Commission has not previously approved such agreement/ arrangement or adopted the tariff contained therein; or*
 - (c) *where such tariff is pursuant to a power purchase agreement or arrangement which is the subject of a review by the Commission:*

Provided that the Commission may deviate from the norms contained in this Part or specify alternative norms for particular cases, where it so deems appropriate, having regard to the circumstances of the case:

Provided that the reasons for such deviation(s) shall be recorded in writing.

81. Petition for Tariff determination for Renewable Energy Generating Station(s)

*The provisions of **Part II** shall apply mutatis mutandis, to a petition for Tariff determination for Renewable Energy (RE) Generating Stations. Further, the Commission may initiate process for determination of Generic Tariff for Renewable Energy generating stations on suo-motu basis or on the basis of Petition filed by Nodal Agency.*

83. Tariff determination for New renewable energy generating stations to be commissioned

during Control Period under these Regulations

Generic Tariff determination for Wind Energy Projects and Biomass Power Projects

- (1) *The preferential feed-in tariff for all wind power plants and biomass power plants, whose tariff is not fixed by the competitive bidding and are commissioned after 31.3.09, shall be determined by the Commission with the performance parameters specified in sub-regulation (6) and (7) below for each tariff period, and tariff so fixed shall be applicable for the power plants commissioned during this Control Period*

'Project Specific' Tariff determination for Wind Energy Projects

- (2) *A wind energy generating company shall file Petition for determination of 'Project Specific' tariff for a particular wind energy project of Project size more than 50 MW. The Commission shall determine 'Project Specific' tariff in such cases, provided generating company proposes a 'Specific Wind Farm Scheme' (say, under IPP mode), which represents optimal utilisation of Wind resource at a specified Site location.*

Provided that the norms specified for determining the generic feed-in tariff, except the norms for interest rate, capacity utilisation factor, energy losses, and new turbine technology shall be the ceiling parameters while determining the parameters for project specific tariff.

Generic Tariff determination for Solar Power Projects

- (3) *In case of solar power plants to be established in the State, not covered under generation based incentive scheme of Government of India, the Commission shall specify the normative cost parameters and determine generic tariff as may be necessary, through a separate Order.*

- (4) *Once the solar generation capacity of 10 MW envisaged under the MNRE Policy and as per RERC Solar Tariff Order dated April 2, 2008 comes up in the State of Rajasthan, and operational data becomes available, the Commission revisit the tariff applicable for solar generation projects on the basis of such operational data, capital cost data obtained by solar manufacturers' and expert opinion. Accordingly, the Commission may determine generic tariff, as may be necessary, through separate Order.*

Project Specific Tariff determination for Solar Power Projects

- (5) *The Solar Energy generator or investor would have the option to adopt either 'Generic Tariff' or 'Project Specific route' for determination of*

applicable tariff for Solar Power Project. In case of 'Project Specific' tariff determination, the Commission shall take into consideration the manufacturer's recommendations and shall invite expert opinion. The developers/investors have to submit 'detailed project report' for the proposed project scheme along with the Application for tariff determination. The Commission shall scrutinise case specific parameters for prudent check before determining tariff through regulatory process

Norms for Generic Tariff determination for Wind Energy Projects

(6) The performance parameters for tariff determination of wind power plants for the base year of MYT Control Period FY 2009-10 shall be as under:-

- (a) **For the purpose of tariff determination for Wind Energy projects under Control Period, the financial principles as stipulated under Part III of these Regulations, such as norms for debt: equity, interest on loan capital, return on equity capital and escalation factors for O&M expenses etc. shall be applicable**
- (b) **Other normative parameters for generic tariff determination of wind energy projects under Control Period shall be as under:**

(i) Base Capital Cost: Base Capital cost at the beginning of Control Period (i.e. as on 01-04-2009) shall be Rs. 525 lakh/MW towards power plant, of which Rs. 2 lakh per MW is for connectivity charges payable to Rajasthan Rajya Vidyut Prasaran Nigam Ltd. Base Capital Cost shall include Rs 15 lakh/MW towards cost of wind energy evacuation upto and including pooling station and Rs 2 lakh/MW payable to RVPN for interconnection. Wind Energy Developer shall be responsible for development of evacuation and dedicated transmission arrangement upto pooling station. RVPN/transmission licensee be responsible for development of evacuation system beyond pooling stations till the nearest Grid sub-station. Alternatively if Wind Energy Developer wants to develop the evacuation system beyond Pooling Station upto Grid Substation, the Commission separately determine the transmission tariff for the same on case-to-case basis. Indexation formula as outlined under Regulation 85 shall be applicable for determining tariff for the plants commissioned in each subsequent year during the Control Period.

(ii) CUF : 21% (for Jaisalmer, Jodhpur and Barmer districts) and; 20% for other districts

(iii) Deration in CUF: De-ration in plant load factor/capacity utilization factor shall be

1.25% of CUF from 6th, 10th, 14th & 18th year

(iv) O&M Expenses:

For Power Plant: 1.25% of Base Capital Cost For transmission lines: 3% of cost of transmission line

(v) Project Life: As defined under 'Useful Life'

(vi) Depreciation: As per Regulation 23 and Appendix-1

(vii) Working Capital:

(a) Operation & Maintenance expense for one month,

(b) Receivables equivalent to 1½ (one and a half) months of fixed and variable charges for sale of electricity calculated on the target CUF.

(c) Maintenance spare @ 15% of operation and maintenance expenses specified in Regulation 83(6)(iv).

Further, Interest on Working Capital shall be at interest rate equivalent to State Bank of India short term PLR prevalent as on January 31, 2009.

(viii) Interest on Long term loan: 100 basis points higher than State Bank of India long term PLR prevalent as on January 31, 2009.

Note:

i. For metering at the premises of licensee, following line losses be considered
o 1% for metering at 33 kV system.

o 4% for metering at 132 kV or 220 kV system.

ii. On the basis of above parameters, the tariff corresponding to the levellised tariff for twenty years shall be determined. Such levellised tariff shall be effective for the wind power projects commissioned during First year of the Control Period i.e. FY 2009-10.

(i) During stabilization, 60%

(ii) During the first year after stabilization and 70%

(iii) From Year-2 onwards 75%

Norms for Generic Tariff determination for Biomass Power Projects

(7) The performance parameters for tariff determination of biomass power plants for the base year of MYT Control Period FY 2010-11 shall be as under ,the fixed charges of which be the same for FY 2009-10:-

(a) For the purpose of tariff determination for Biomass Power projects under Control Period, the financial principles as stipulated under **Part III** of these Regulations, such as norms for

debt: equity, interest on loan capital, return on equity capital and escalation factors for O&M expenses etc. shall be applicable with the stabilisation period of six (6) months.

(b) Other normative parameters for generic tariff determination of biomass power projects based on **Water Cooled Condenser** and **Air Cooled Condenser** under Control Period shall be as under:

Parameters Water Cooled Condenser Air Cooled Condenser

(i) Base Capital Cost* Rs 540 Lakh per MW Rs 585 Lakh per MW

(ii) Station Heat Rate 4300 kCal/kWh (during stabilisation)

4200 kCal/kWh (after stabilisation)

4540 kCal/kWh (during stabilisation)

4440 kCal/kWh (after stabilisation)

(iii) Auxiliary Consumption Factor 10.5% (during stabilisation) 10% (after stabilisation) 12.5% (during stabilisation) 12% (after stabilisation)

*Note: Normative Capital Cost at Sr no (i) is the average cost during calendar year 2008

(1st January,2008 to 31st December,2008) applicable for determining Fixed charges for the base year 2010-11 and the same includes

- Exclusive transmission system cost of Rs. 13 Lakh/MW and;
- Connectivity charges of Rs 2 Lakh/MW.

(iv) **Plant Load Factor (PLF):** Threshold Plant Load Factor for determining fixed charge shall be:

(v) **Biomass Fuel Price:** Biomass Fuel Price shall be Rs 1216/MT for FY 2009-10 as base and linked to index formula as outlined under Regulation 84 for subsequent year of control period alternatively with normative escalation of 5% per annum at the option of producer.

(vi) **Gross Calorific Value (GCV):** Gross Calorific Value for the biomass fuel shall be considered as 3400 kCal/kg

(vii) O&M Expenses:

For Biomass Power Plant: 6.50% of Base Capital Cost

For transmission lines: 3% of cost of transmission lines

(viii) **Project Life:** As defined under 'Useful Life'.

(ix) **Depreciation:** As per Regulation 23 and Appendix-1

(x) **Working Capital:**

(a) Fuel costs for four months equivalent to threshold PLF

(b) Operation & Maintenance expense for one month,

(c) Receivables equivalent to 1½ (one and a half) months of fixed and variable charges for sale of electricity calculated on the target CUF.

(d) Maintenance spare @ 20% of operation and maintenance expenses specified in

regulation 83(7)(vii).

Further, Interest on Working Capital shall be at interest rate equivalent to average State Bank of India short term PLR prevalent for the period 1st Jan 2008 to 31st December 2008.

(xi) **Interest on Long term Loan:** Interest rate for long term loan shall be equivalent to 100 basis points higher than average State Bank of India long term PLR prevalent for the period 1st Jan 2008 to 31st December 2008..

Note:

- i. The tariff for biomass based power plants comprise of fixed charges & variable charges.
- ii. Fixed cost of tariff so worked out shall be levellised for 20 years corresponding to which levellised tariff shall be determined. Such levellised fixed component of tariff shall be effective for the biomass power projects commissioned during First year of the Control Period i.e. FY 2009-10.
- iii. For metering of energy at the premises of distribution licensee at 33 kV 1% line loss be considered iv. Above norms shall be applicable for biomass power projects based on rankine cycle technology. Further, tariff so determined shall also be applicable for biomass gassifier based power projects until separate norms and separate tariff for such biomass gassifier based projects is notified.

85. Tariff Indexing Mechanism for Wind Energy Projects:

- (1) **Under Generic Tariff determination mechanism, automatic tariff revision through Tariff Indexation Mechanism as outlined below, shall be allowed by the Commission for wind energy projects to be commissioned during the Control Period. The parameters for indexation shall be 'normative capital cost' and long term PLR of State Bank of India. Under these Regulations, the Commission has specified 'normative capital cost for the base year of Control Period and corresponding Tariff to be applicable for the projects to be commissioned in Base Year of Control Period. The 'Tariff' for wind Projects for commissioning during each subsequent year of control period shall be indexed as per formula outlined under these Regulations. In case of Wind Energy projects, the following Indexing Mechanism for adjustment of tariff with the change in Wholesale Price Index for Cement and Steel, and change in long term prime lending rate (LTPLR) be applicable as under:**

$$T_n = T_1 * (1 + dn) + [0.08 * [LTPLR_i - LTPLR_0]]$$
$$dn = [a * (SI_n - 1/SI_0 - 1) + b * (CI_n - 1/CI_0 - 1)] / (a+b)$$

Where,

T₁ = Base levellised Tariff determined for the WEG projects commissioned in first

year of the Control Period (i.e. FY 2009-10)(in Rs/kWh).

T_n = Levellised Tariff to be applicable for WEG projects commissioned during the financial year (n) of the Control Period (in Rs/kWh).

d_n = Capital cost escalation factor applicable for year (n) of the Control Period

a = Constant to be determined by Commission from time to time, (in default it is 0.70)

for weightage to Steel Index

S_{In-1} = Average WPI Steel index prevalent for calendar year (n-1) of the Control Period

S_{I0} = Average WPI Steel Index prevalent for Calendar year (0) i.e. Jan-2008 to Dec-2008

b = Constant to be determined by Commission, (in default it is 0.30) for weightage to

Cement Index

C_{In-1} = Average WPI Cement Index prevalent for fiscal year (n-1) of the Control Period

C_{I0} = Average WPI Cement Index prevalent for Calendar year (0) i.e. Jan-2008 to

Dec-2008.

$LTPLR(n)$ = Long term prime lending rate (in %) of State Bank of India as prevalent as

on 31st January of each calendar year prior to nth year of the Control Period.

$LTPLR(0)$ = Long term prime lending rate (in %) of State Bank of India as prevalent as

on 31st January 2009.

Note:

(a) Since there will be a lag of one year within which the power plant can be commissioned,

prices for the calendar year "n-1" is relevant and may be applied to the tariff of year "n".

Thus, for projects commissioned after FY 2009-10 the applicable tariff be indexed on the

price information available for the period 1/1/2008 to 31/12/2008 as base with indexing

mechanism considering FY 2010-11 as Year n and corresponding calendar year n-1 shall be 1.01.2009 to 31.12.2009 for pricing.

(b) The indexation linked to interest rate is 8 paise/kWh per percentage point change in long

term prime lending rate of State Bank of India.

15. Before appreciating the merit of the case of the appellant, it comes to us as of first impression on reading the aforesaid provisions of the Tariff Regulations,

2009 that the basis for providing return on equity is that pre-tax rate of return of 16% for renewable energy generating stations should be grossed up with the base rate of the applicable rate of Minimum Alternate Tax (MAT) for the first 10 years from the date of commercial operation and thereafter at the normal tax rate for the remaining years of the life of the project. In terms of Regulation 22, the repayment of loan to be computed for the purpose of tariff determination shall be deemed to be equal to that of depreciation for each period. In the case of O & M Expenses, Regulation 25 conceives of an escalation for subsequent years after FY 2009-10 at 5.72% per annum and that the same shall be subject to revision on account of annual escalation linked to wholesale price index. The Commission laid down the parameters for applicability of the operational norms as contained in Part (vii) that deals with non-conventional/renewable sources of energy including wind power projects. Regulation 81 which occurs in Part (vii) specifies that the provisions of Part (ii) that deals with tariff determination process would apply to the determination of tariff for renewable energy generating station. Regulations 83 and 85 that fall under Part (vii) relate to determination of tariff for wind power plans. Regulation 85 provides for an automatic tariff adjustments formula that takes into account certain aspects affecting the capital cost of the project, namely, steel and cement price and lending rate of SBI that constitute a part of the capital project. As per the formula prescribed in Regulation 85, the changes in the price of cement and steel and the lending rate during the previous calendar year shall form the basis for adjustment in the subsequent year.

16. According to the appellant, there is no prohibition in the tariff regulations from considering some other factors that may also affect the capital cost of the generating station or such other norms or parameters having implications on the tariff determination for the generating stations. It is the case of the appellant that the only implication would be that for other aspects forming part of the tariff regulations and not covered in the automatic indexation formula specified in Regulation 85, there will be a requirement to file a petition or initiate a proceeding before the State Commission.

17. Prior to the impugned order dated 06.08.2010, two orders were passed earlier by the Commission which require mention. As already indicated, the order dated 16.07.2009 was passed by the Commission

determining the tariff for wind energy projects in the State of Rajasthan which were to be established and commissioned for commercial operation during the year 2009-10, while the other order is dated 31.03.2010 whereby the Commission determined the tariff for the wind energy projects to be declared for commercial operation in the year 2010-11. On the issue of interest on loan term and loan repayment, the Commission observed in the order dated 16.07.2009 that in the earlier tariff regulation, there was a provision to allow difference between repayment of term loan and admissible depreciation by way of advance against depreciation, but since the advance against depreciation has now been dispensed with and the depreciation rates has been suitably modified, the Regulations 2009 is very specific on this point that no advance against depreciation can be considered. The Commission observed that the depreciation rate for renewable projects has been specified at par with the depreciation rate for conventional generation projects and further the depreciation norm as specified by the Commission is based on the depreciation norms specified by the Central Electricity Regulatory Commission (Terms and Conditions for determination of Tariff, Regulations With regard to O & M expenses the order dated 16.07.2009 specifies that parameters for tariff determination for wind energy projects have been specified under Regulation 83 (6) and no provision is there towards contingency reserve as claimed by the objectors. The Commission observed that it has been following cost plus approach in working out tariff and in these all costs get duly considered and reasonable returns constitute part of norms and parameters worked out by the Commission in determination of tariff. The Commission increased the rate of return on equity from 14% to 16% and the applicable rate would be pre-tax or net of tax. The return on equity for the first time was worked out after grossing up to ensure post-tax return of 16%. The Commission after considering the parameters specified in the Tariff Regulations, 2009 and the amendments to the Income Tax Act announced in the Union Budget 2009-10 fixed the tariff for Wind Power Plans to be commissioned during the FY 2009-10 at Rs. 4.28/kwh in respect of the districts of Jaisalmer, Barmer and Jodhpur and Rs. 4.50/kwh for other districts. The Commission observed that the preferential tariff determined for Wind Power Projects would be applicable for procurement of power by distribution licensees towards fulfilment of their Renewable Purchase Obligation (RPO) as per section 86 (1) (e) of the Electricity Act, 2003. The Commission was of the view that it was fully convinced that any increase in "Feed-in-Tariff" over and above around 15% being allowed in the said order dated 16.07.2009 would be unreasonable. Then came the order dated 31.03.2010. This order refers to the earlier order dated 16.07.2009 and observes that the tariff so fixed in that order is linked to the indexation mechanism specified under Regulation 85 of the Tariff Regulation, 2009, as such the levelised tariff for the Wind Energy Project, for the FY 2010-11 will be Rs. 3.83/kwh for Jaiselmer, Barmer and the district of Jodhpur and Rs. 4.03 / kwh for

other districts. Annexure –I to this order is the detailed computations of indexation mechanism and determination of tariff for FY 2010-11. Under the indexation formula, the average wholesale price index for cement and steel for the years 2008-09 have been taken into consideration as parameters together with capital cost escalation factor for FY 2010-11.

18. Mr. M.G. Ramachandran, learned advocate appearing for the appellants while assailing the impugned order dated 06.08.2010 argued as follows:

- (a) There is no prohibition in the Tariff Regulations from considering other factors as enumerated therein that may affect the capital cost of the generating station or such other norms and parameters having implications on the tariff determined.
- (b) In terms of the Regulations, 2009 the norms and parameters for determination of tariff for the sale of electricity by the Wind Energy Project to the Distribution Licensee would cover Part III and Part VII.
- (c) In the order dated 16.07.2009 the Commission did not provide the details of the calculation of the tariff so determined or the norms applied for in such determination.
- (d) The order dated 16.07.2009 cannot be applicable *mutatis mutandis* in the matter of determination of tariff for the Wind Energy Projects to be commissioned during the FY 2010-11. A full-fledged order has to be passed for determination of tariff for the projects to come up FY 2010-11 in the manner as was done in order dated 16.07.2009 and strictly in terms of the Regulations, 2009.
- (e) The order dated 31.03.2010 which has been reviewed by the order dated 06.08.2010 did not apply the principle enshrined in Part III of the Tariff Regulations, particularly with regard to return on equity by applying the applicable tax rate, repayment of loan equal to applicable rate of depreciation in terms of the Tariff Regulation and also the operating and maintenance expenditure by applying the escalation factor.
- (f) The indexation formula specified in Regulation 85 takes into account steel and cement indices and the interest rate applicable and the tariff is indexed accordingly, but the said Regulation 85 does not deal with any other element of tariff

which are dealt with separately in other parts of the Tariff Regulations.

- (g) The State Commission could not deny that the Regulations dealing with the return on equity, namely Regulation 21 (4) falling under Part III of the Tariff Regulation has not been given effect to.
- (h) Non-challenge to the order dated 16.07.2009 and 06.07.2010 which is the main focus of the reply of respondents is immaterial in view of the fact that what is being challenged is the order dated 06.08.2010 which came by way of review of the order dated 31.03.2010. The order dated 06.08.2010 merged in the order dated 31.03.2010 whereby tariff for the projects to come up during FY 2010-11 was fixed and the said order is challenged and the appellants are not required to challenge the order dated 16.07.2009 which relates to the determination of tariff for the projects to come up by FY 2009-10. Non-challenge to the order dated 06.07.2010 is again of no consequence in view of the said order having partaken the character of an interlocutory order or admission order whereby the two petitions as aforesaid were admitted for hearing though not on all points but on a single element. But the Tribunal is required to examine whether the order dated 31.03.2010 or for that matter the order dated 06.08.2010 satisfies all the requirements of law as laid down in the Tariff Regulations, 2009 and whether the Commission construed harmoniously all the provisions of the Regulations to the exclusion of no one and whether the view of the Commission that for determination of tariff for the succeeding financial years within the control period of 2009 to 2014, it is the mere indexation formula laid down in Regulation 85 is in consonance with the spirit of the law. In this connection reference has been made to the decision Satyadhan Ghosal and Others V. Smt. Deorajin Debi and Anr. reported in AIR 1960 SC 941.
- (i) It is argued that no provision of the statute can be read in isolation to the other provisions of the same statute and the decisions of the Hon'ble Supreme Court in Kailash Chandra & Anr. V. Mukund Lal & Anr (2002) 2 SCC 678 and D. Sanjeevayya V. Election Tribunal, (1967) 2 SCR 489 have been cited in this regard.

- (j) The order dated 16.07.2009 may be taken as a reference but the said order is restricted to the FY 2009-10, not to be extended for FY 2010-11 and cannot be applied as *res judicata*.
- (k) The contention of the Commission if accepted would lead to the result that even a project developer who sets up a generating station, say, in FY 2012-13 would have no remedy since he has not challenged the order dated 16.07.2009.
- (l) The questions being questions of law, the Tribunal which is to examine both the questions of fact and law are to ensure that the tariff determination for wind projects to come up during FY 2010-11 satisfies the requirements of law.
- (m) On the question of return on equity, the Commission has not taken the correct rate of income tax as applicable for the FY 2010-11. The issue is more in the nature of arithmetical calculation to be done and taking the correct rate of tax as applicable from year to year. The appellants have provided for the relevant changes required in the consequent calculations on account of the income tax rate applicable.
- (n) On the question of consideration of the quantum of repayment of loan and depreciation, the Commission has not corrected the mistake in the base tariff while computing the tariff applicable for the projects to be de-commissioned during the FY 2010-11. Regulation 22 (3) mandates that the repayment for each year shall be deemed to be equal to the depreciation allowed for that year. The Commission also made arithmetical mistake in the calculation of repayment of loan and depreciation rate. The depreciation was considered by the Commission at Rs. 27.72 lacs per annum, while calculating the repayment of loan, the amount has been taken at Rs. 36.75 lacs per annum. This error does not only affect the projects commissioned in the year 2009-10 which the order dated 16.07.2009 relates to but also affect the base considered by the Commission in the order dated 31.03.2010. No party ought to suffer on account of any act or error on the part of the Court and reliance has been placed on the decision in Tilak Raj V. Baikunthi Devi, AIR 2009 SC 2136 and S. Satnam Singh And Ors. V. Surender Kaur Anr., reported in 2009 (15) SCALE 626 .

- (o) As regards the escalation factor for operation and maintenance expenses, Regulation 25 (4) provides for escalation at two stages. Escalation @ 5.2% is to be applied over the base operation and maintenance expenses and the same is also subject to revision on account of wholesale price index for subsequent years at the stage of true-up.

19. The learned advocate for the respondent nos. 2-4, Mr. K.L. Nandwani submitted as follows:-

- (a) The present appeal is not maintainable because in the two petitions being nos. 220-221 of 2010, the appellants prayed for invocation of removal of difficulties clause in the tariff regulations in the matter of review of the order dated 31.03.2010 and by the order dated 06.07.2010 the Commission discarded all the pleas except the one on taxes/duties.
- (b) The order dated 06.07.2010 has not been challenged in any forum.
- (c) All the three issues regarding the rate of income tax and surcharge in the calculation on return on equity, repayment of loan equivalent to depreciation allowable as per regulation and alleged non-application of the escalation factor in connection with O & M expenditure have all been dealt with in detail by the Commission in its order dated 16.07.2009 which has become final.
- (d) Since Regulation 85 does not permit taking into consideration any other head, the same was not considered by the respondent no.1 and all other factors were considered for a period of 20 years.
- (e) The Commission has already passed the order dated 6.08.2010 considering the applicable rate of income tax and for surcharge and the Commission after evaluating the various aspects of the issue has come to clear conclusion that any rate higher than what has been worked out would lead to undue additional burden on the consumer and would be appropriate in the larger interest of the parties and the consumers. The Commission followed cost plus approach in working out tariff and return on equity has recently been increased from 14% to 16% and that too would be pre-taxed as against tax

liability. This coupled with the incentives built in parameters and norms of regulation would lead to substantial enhancement in incentive for wind energy developers. The tariff worked out even after accounting for accelerated depreciation amounts to an increase of around 15% over the last tariff and thus would jump by unreasonably higher level of around 34% without such accounting. As a feed in tariff would be applicable for 20 years, any increase in the feed in tariff over and above 15% being allowed in this order would be highly unreasonable. The tariff higher than feed in tariff would lead to undue additional burden on the consumer.

- (f) With respect to repayment of loan equivalent to depreciation, rate has been specified at par with the conventional generation projects in Tariff Regulations, 2009.
- (g) With respect to escalation charges, the parameters have been specified in Regulation 83 (6) and provision towards contingency reserve as claimed by the objector has not been envisaged in case of Wind Energy Projects.

20. Mr. R.K. Mehta, learned counsel for the Commission made the following submissions:

- (a) The Commission by the order dated 31.03.2010 reviewed the tariff for the projects to come up during 2010-11 incorporating the changes due to variation in the rate of Minimum Alternate Tax and revised the tariff accordingly and, therefore, nothing survives further in the appeal.
- (b) The generic tariff for wind power plants to be commissioned in the FY 2009-10 was determined by the Commission in the order dated 16.07.2009 and the financial parameters as stipulated Part-III of the Regulations were duly considered by the Commission and the tariff for the year 2009-10 is the base tariff which is to be indexed as per formula contained in Regulation 85 for the purpose of determining tariff for wind power plants to be commissioned in subsequent years of the control period. The indexation formula

- does not provide for any changes like escalation in O & M expenses, interest on long term loan etc.
- (c) The issues relating to escalation in O & M expenditure and repayment of loan equivalent to depreciation could not be reopened since they stood settled in the order dated 16.07.2009 whereby tariff was determined for the power plants to be commissioned during FY 2009-10.
 - (d) The appellant cannot challenge the Regulations before this Tribunal. The Commission in exercise of inherent powers under Tariff Regulations, 2009 incorporated the impact of change in the MAT rate in the year 2010-11.
 - (e) As regards non-consideration of surcharge on MAT, it was considered for the first year and discontinued from the second year onwards because the levelised tariff would remain valid for a period of 20 years.
 - (f) The plea of clerical error is a new plea not raised in the applications filed before the Commission.
 - (g) The order dated 06.07.2010 which was passed under Section 111 of the Electricity Act was not challenged.
 - (h) Regulation 83 (6) clearly provides that for the base year of the MYT control period, the financial principles as stipulated under Part-III of the Regulations shall be applicable and Regulation 85 provides for automatic tariff revision for the projects to be commissioned during the control period. Therefore, there is no scope for once again applying the financial principles in Part-III at that stage.
 - (i) With regard to O & M expenses, escalation has been provided for @ 5.72%.

21. Having heard the submissions of the learned counsel for the parties, it is necessary to dispose of technical points raised by the respondents. The first point that the order dated 16.07.2009 whereby the tariff for the base year during the control period 2009-14 was passed has attained finality and is beyond challenge, even if there be any clerical mistake therein is not impressive and is unsustainable because a wind power project developer commissioning a project within the control period subsequent to the FY 2009-10 will not be in a position to know the deficiencies and mistakes occurring in the tariff determination order dated

16.07.2009 and the door cannot be shut upon him when he raises any mistakes or deficiencies in the base tariff order. It has rightly been submitted by Mr. Ramachandran that the arguments of the respondents would lead to an absurd situation when a developer sets up his generating station in the year 2012-12 or 2013-14. As to non-challenge to the order dated 06.07.2010 whereby the two petitions no. 220 and 221 of 2010 were admitted for hearing only on one point while discarding the other points, the law is very clear in this respect. The order dated 06.07.2010, it has to be remembered, is not the final order disposing of the aforesaid two petitions. It is infact an admission order for hearing on a issue to the exclusion of the others. The decision in Satyadhan Ghosal and Ors. V. Sm. Deorajin Debi & Anr. (ibid) is very eloquent in this respect. Their Lordships of the Supreme Court refers to the decision of the Privy Council in Maharaja Moheshur Singh V. The Bengal Government (1850) 7 M.I.A 283 wherein the Privy Council observed as follows:-

“We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.”

Therefore, even if there has been any clerical mistake or mistake by oversight or inadvertence in the base tariff order dated 16.07.2009 or in the order dated 31.03.2010 or in the order dated 06.07.2010, all are liable to be corrected through appeal against the impugned order dated 06.08.2010 in view of the fact that the pivotal point for consideration is whether tariff determination for the wind power plants to be commissioned in any financial year subsequent to the FY 2009-10 has been correctly determined in terms of the Regulations, 2009.

22. Part-III of the Tariff Regulations, 2009 contains regulations 17-34 of which regulations 21, 22, 23 and 25 have been pressed into service by the learned counsel for the appellant. Part-VII of the Tariff Regulation, 2009 deals with tariff for renewable energy generating stations and regulations 80, 81, 82, 83 and 85 are relevant for consideration vis-à-vis the ones referred to in Part-III. An apparent misgiving should be steered cleared of. The regulations 21, 22, 23 and 25 that occur in Part-III of the Regulations and which we have read above are supposed to have been taken cognizance of while determining the tariff for the wind power project to be commissioned during the FY 2009-10. Irrespective of whether any particular provision of the aforesaid regulations in Part-III have been omitted or not in the base year tariff order dated 16.07.2009 the relevant regulations in Part III are equally applicable for tariff determination in respect of the wind power plants due to be commissioned in the subsequent years within the control period. Therefore, it is not that the financial principles in part III are reserved only for the wind power plants to be commissioned during the FY 2009-10. Therefore, if a certain provision of the financial Regulations is found to have not been applied for in the tariff order 2009-10 then there is no point saying that the tariff order for the subsequent years based on the base tariff order must endure the sufferance ; and this seems to be the argument of the learned Counsel for the Respondent No.1. It is one thing to say that since the base tariff order dated 16th July, 2009 on which the tariff order dated 31st March, 2010 for the projects to come up by 2010-11, since reviewed by the order dated 6th August, 2010 is based on the financial norms duly applied for in the base tariff order need not be repeated in the subsequent tariff order within the control period, while it is another thing to say that the Commission or for that matter the Tribunal need not be conscious of the applicability of the financial principles in the matter of determination of tariff for any subsequent financial year within the control period. It cannot be the position of law that regulations in Part III are totally irrelevant in respect of the tariff order to be passed for the subsequent financial years in respect of the wind power plants. When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context which means the statute as a whole. Every clause of the statute should be construed with reference to the context and other clauses of the Act so as to make a consistent meaning of the whole statute. In the instant case, we do not find any apparent irreconcilability among the different provisions of the Regulations. What is required is harmonious construction of the Regulations as a whole and when we do so we are to observe that the Regulations are applicable for any tariff order in respect of any wind power project to be commissioned within the MYT control period.

23. Regulation 1(2) makes the said regulations applicable for determination of tariff in all cases covered under these regulations for MYT

control period FY 2009-10 to the FY 2013-14. Regulation 83 (6) lays down the performance parameters for tariff determination of wind power plants of the MYT control period FY 2009-10 and all the parameters falling under Part III have been laid down for applications in the matter of determination for the base year of the MYT control period 2009-10. Included under regulation 83 (6) are base capital cost, CUF, O&M expenses, depreciation, working capital and interest on long term loan. With regard to depreciation, it is said to be as per regulation 23 and Appendix 1. Appendix 1 is a depreciation schedule. In respect of O&M expenses, it is 1.25% of the base capital cost and in terms of regulation 25 (4) normative O&M expenses allowed at the commencement of control period i.e. FY 2009-10 is liable to be escalated @ 5.72% per annum. With regard to return on equity we have earlier noted that it will be through grossing up the base rate with the tax rate equivalent to MAT for first ten years. With regard to repayment of loan, such repayment shall be deemed to be equal to depreciation allowed for a particular year.

24. Now, let us see how the tariff has been determined for the base year in the order dated 16th July, 2009. The Commission is found to be conscious of the position that the principles for tariff determination for wind power plants as also bio-mass power plants to be commissioned during the control period of FY 2009-10 to 2013-14 have been outlined in the Part VII of the Regulations. At paragraph 19 of the Order, the Commission observed that any rate higher than what has been worked out in the said order would lead to undue additional burden on the consumer. Paragraph 20 is relevant and we quote below:

“20. The reasons, which have led to the said conclusion have been discussed in detail under heading “**Applicable Tariff: Wind Energy Projects**”. Some of the main points worth consideration are as under:

- i The Commission has been following cost plus approach in working out tariff and the return on equity has been recently increased from 14% to 16% and that too would be pre-tax as against the tax liability earlier accruing on the investor. This coupled with other incentive built in the parameters and norms of Regulations dated 23.01.2009 would lead to substantial enhancement in incentive for wind energy developers than was the position obtaining during earlier tariff determination.*
- ii The tariff worked out even after accounting for accelerated depreciation amounts to an increase of around 15% over the last tariff and this would jump up by unreasonably higher level of around 34% without such accounting. What ultimately*

matters is the rate of sale of energy and increase in rate of around 15% is quite reasonable and adequate in facilitating investment. Commission is of the considered opinion that the distribution licensee should not be obligated to buy power at a rate higher than this on account of adverse implication on consumers.

iii The tariff worked out in this order even after adjustment for Low Capacity Utilisation Factor in Rajasthan is comparable and amongst the best in the country including rate allowed by the State, which have attracted considerable investment in recent past.

iv As a “feed in tariff” would be applicable for 20 years and the rate worked out for the current year would not be subject to review through truing up on annual basis, as is the case in respect of conventional power and therefore, ignoring implication of material gain currently available would be unfair.

v Even independent of adjustment in calculation the Commission fully convinced that any increase in “feed in tariff” over and above of around 15% being allowed in this order would be highly unreasonable, as already mentioned earlier.”

25. With regard to repayment of term loan, the Commission observed that in the earlier tariff regulation there was a provision to allow difference between repayment of term loan and admissible depreciation by way of advance against depreciation which have been dispensed with. The Commission further observed that the depreciation rate for renewable projects have been specified at par with the depreciation rate for conventional generation project and further the depreciation norm as specified by the regulations is based on CERC Regulations, 2009.

26. With respect to O&M expenses, the Commission observed that the tariff determination for the wind energy projects have been specified under regulation 86 and no provision towards contingencies reserve is allowable.

27. Regulation 85 clearly provides that under generic tariff determination mechanism automatic tariff revision through Tariff Indexation Mechanism as outlined in the said regulation 85 shall be allowed by the Commission for wind energy projects to be commissioned during the control period and the parameters for indexation shall be normative capital cost and long term prime lending

rate of the State Bank of India. Accordingly, treating the tariff order dated 16th July, 2009 to be the base tariff order the Commission applied the indexation formula to come to the levelised tariff at Rs.3.83/ kwh for the districts of Jaisalmer, Barmar and Jodhpur and Rs. 4.03 for other districts. The calculation sheet is annexure D which is said to have been obtained by the appellant by making an application dated 28.4.2010. The order dated 31st March, 2010 is the tariff order for FY 2010-11 of the control period 2009-14 and it is based on the base tariff order dated 16th July, 2009. Apparently, the financial principles of Part III of the Regulations 2009 appear to have been taken note of while determining the tariff order for FY 2010-2011 on the basis of indexation formula. It has been rightly said by the learned Counsel for the Commission that application of financial principles in Part III for the second time does not arise. The submissions of Mr. Ramachandran that the other elements of tariff which have been dealt with separately elsewhere in the Tariff Regulations are required to be considered are difficult to accept because the indexation mechanism for tariff determination for the subsequent years is intrinsically linked to the base tariff order dated 16th July, 2009 which followed all the relevant provisions of the Regulations 2009.

28. It is the submission of the appellant that the State Commission while determining the tariff has not taken the correct rate of income tax as applicable for the year 2010-11 and the issue is in the nature of arithmetical calculations to be done and the tariff is to be adjusted taking into account the applicable rate of tax from year to year. The Commission in exercise of power to remove difficulty in regulation 134 modified its order dated 31st March, 2010 with regard to variation in the rate of MAT and revised the order dated 31.03.2010 in terms of the Regulations, 2009 which we have reproduced in paragraph 9 of this judgment and we do not repeat the same once again.

29. Now, what remained with the appellant to agitate is that the Commission has committed error in not taking into account the surcharge on MAT for 2nd to tenth year, on income tax for eleventh to twentieth year, the impact of effective rate of corporate tax on calculating accelerated depreciation benefit where it is to be considered with surcharge and Cess from first year to twentieth year and lastly the impact of effective rate of MAT and corporate tax on interest on working capital. This point was raised before the Commission but has not been decided. According to Mr. Mehta, the Commission did not consider the surcharge on MAT from 2nd to 20th year because the MAT alongwith surcharge was considered for the first year as per prevailing rate and it was expected at that time that the levelised tariff would remain valid for a period of 20 years and the

surcharge may not continue during such period. On critical examination of the Regulations, 2009 vis-à-vis the order dated 16.07.2009 it appears that the order dated 31.03.2010 is a levelised tariff determination order based on the base tariff order dated 16.07.2009. Within the control period during FY 2009-10 to 2013-14 all tariff determination orders that would be passed subsequent to the base tariff order for 2009-10 will have uniformity amongst themselves as also with the base tariff order dated 16.07.2009. Whatever components have been allowed in the base tariff order have necessarily been followed and will be followed in the subsequent tariff orders except the variation in the cost of cement, coal and lending rate of SBI that relate to capital cost of a wind power project. Surcharge on MAT was not considered from 2nd to 20th year alike in the base tariff order. If surcharge on MAT is to be allowed for 2nd to 20th Year in the case of the appellant then the project developers who commissioned wind power plants in FY 2009-10 will be discriminated against. Since the levelised tariff is not subject to true up and the amount of surcharge varies from year to year, noticeably by decrease, it is not possible for the Commission to consider surcharge of MAT from 2nd to 20th year. Mr. Mehta, learned advocate for the Commission argued not unjustifiably that the Government proposes through Direct Tax Code elimination of surcharge and surcharge for the FY 2009-10 has been reduced to for the FY 2010-11.

30. It is brought to our notice that the depreciation was considered by the Commission at Rs. 27.72 lakh the said quantum was required to be considered as a repayment of loan in terms regulation 22(3) of the Tariff Regulations but the calculation sheet shows that quantum has been taken at Rs. 36.75 lakh. (vide page 120 read with 126 of the appeal paper book which are calculation sheets attached to the order dated 16th July, 2009). This anomaly has to be eradicated so as to make the order truly in spirit with the Regulations. These mistakes must be corrected and the decision of Tilak Raj and that of S. Satnam Singh (ibid) are pointers to this.

31. With regard to O&M expenses, the Commission followed regulation 25 (4) to provide escalation @ 5.72% per annum. The grievance of the appellant is that the further provision that the same shall be subject to revision on account of annual escalation linked to WPI in the subsequent years for the purpose of true up has not been followed. The levelised generic tariff is not subject to true-up and in the case of wind power projects this provision cannot be made applicable. In any case, in the levelised base tariff for FY 2009-10 escalation of O & M cost at 5.72% per annum has been provided and therefore the O & M escalation as provided in the base tariff also gets passed on to the tariff for the projects to be commissioned during FY 2010-11. Therefore, the appellants' contention is not tenable.

32. So far we have considered all the issues raised in this appeal and to summarize our findings we hold as follows:-

- a) The Commission did not follow the provisions of the Tariff Regulation for calculation of the repayment of loan amount which would be equal to the amount of depreciation allowable annually and the same has to be corrected by the Commission and we direct accordingly.
- b) Save what is stated in a) the Commission followed the provisions of the Tariff Regulations, 2009 by the principle of harmonious construction of the different provisions thereof.
- c) Commission applied the correct rate of MAT for the purpose of grossing up the rate of return on equity.
- d) Commission duly considered the escalation in O & M expenses as per the Regulations.
- e) Part-III of the Regulations, 2009 have been taken note of for determination of tariff for the projects to be commissioned during FY 2010-11. No consideration does arise in the instant case in respect of regulation 134 which the Commission has already applied in the order dated 06.08.2010 for rectification of the mistake occurred in the order dated 31.03.2010 and the same has not been challenged in the appeal.
- f) For the purpose of determination of tariff for any subsequent year within the control period the base tariff order dated 16.07.2009 has to be made applicable read with indexation mechanism as provided in regulation 85 and while doing so the misconception that the provisions of Part-III of the regulations are not considered is misplaced.
- g) The indexation formula was accordingly devised to incorporate such changes as were considered

necessary in determination of tariff for subsequent years.

33. In the result, the appeal succeeds in part on the point indicated in paragraph 30 of this order and as crystallized in sub-paragraph (a) of paragraph 32 and we direct the Commission to rectify the mistake. No cost.

(Justice P.S.Datta)
Judicial Member

(Rakesh Nath)
Technical Member

PK/RKT