

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 61, 62, 86(1)(b) of the Electricity Act 2003 read with MPERC (Terms and Conditions for tariff determination of renewable energy sources) Regulations. 2017 and Hon'ble APTEL's order dated 26.08.2019 passed in Appeal No. 396/2018 and Hon'ble Supreme Court order dated 02.12.2019 passed in CA8860/2019.

Petition No. 08/2020

ORDER

(Date of order: 28th January' 2021)

The Managing Director

M.P. Power Management Co. Ltd.,
Block No. 7, Shakti Bhawan,
Rampur, Jabalpur- 482008

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Petitioner

Vs.

M/s. Arya Energy Limited

Third Floor, E-14, Shyam Plaza,
Pandri, Raipur (Chhattisgarh)

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Respondents

M/s Orient Green Power Co. Limited

Sigappi Achi Building, 4th Floor,
No. 18/3, Rukmani (Marshalls Road),
Egmore, Chennai-600008, Tamil Nadu

Shri Aashish Bernard, Advocate, Shri Aditya Vijay Singh, Advocate, Shri R.K. Thukral, OIC and Shri P.K Kotwal, GM (RE) appeared on behalf of the Petitioner.

Ms. Swapna Sheshadri, Advocate and Ashwani Ramanathan, Advocate appeared on behalf of the Respondents.

The petitioner M.P. Power Management Company Limited filed the subject petition under Section 61, 62, 86(1)(b) of the Electricity Act 2003 read with MPERC (Terms and Conditions for tariff determination of energy from renewable energy sources) Regulations. 2017 and Hon'ble APTEL's order dated 26.08.2019 passed in Appeal No. 396/2018 and Hon'ble Supreme Court order dated 02.12.2019 passed in CA 8860/2019.

Petitioner's submission

2. The petitioner has submitted the following in the subject petition:

"(i) The respondent's no. 1 and 2 are biomass generating companies in the State of Madhya Pradesh. The respondent No.1 M/s Arya Energy Limited is a developer which has set up a 12 MW biomass based plant in District Anuppur in Madhya Pradesh. The respondent no.2, M/s Orient Green Power Limited is a company incorporated under the Companies Act, 1956 which has set up a

10 MW biomass based power plant in District Narsinghpur in the State of Madhya Pradesh.

- (ii) At this stage it is pertinent to mention that the Hon'ble APTEL by virtue of the order and judgement dated 26.08.2019 has in para 9.7 (Table A) of the judgement determined the interim fixed and energy cost component of the Respondent no.1 and 2 and has in the said judgement, inter-alia, directed this Hon'ble Commission to determine the actual fixed cost component of the Respondent no.1 and 2. In other words the Hon'ble APTEL has directed this Hon'ble Commission to determine the project specific tariff of the generators i.e. Respondent no.1 and 2.*
- (iii) It is submitted that it is in this light of the matter that the Petitioner herein is filing the instant petition seeking determination of the two part tariff of the Respondent no.1 and 2 in compliance of the order passed by the Hon'ble APTEL dated 26.8.2019 as affirmed by the Hon'ble Supreme Court vide order dated 2.12.2019. A copy of the order and judgement dated 26.08.2019 is attached as **Annexure-1**.*
- (iv) It is submitted that by virtue of the order dated 26.08.2019 the Hon'ble Appellate Tribunal for Electricity at New Delhi had interalia directed the petitioner to reconcile the two part tariff as determined by the Hon'ble APTEL in Table A of the order dated 26.8.2019, once the two part tariff is determined by this Hon'ble Commission based on actuals as per the MPERC (Terms and Condition for Tariff Determination of Energy from Renewable Energy Sources) Regulations, 2017 (hereinafter referred to as "Tariff Regulations, 2017") for the project of the Respondent no.1 and 2.*
- (v) It is submitted that the final two part tariff as determined by this Hon'ble Commission for the Respondent no.1 and 2 shall be then applicable for parties and shall replace the two part tariff as determined in Table A of the Order dated 26.8.2019.*
- (vi) It is submitted at the outset that the instant petition is not on the merits or interpretation of the order passed by the Hon'ble APTEL on 26.08.2019 and is only limited to the direction passed by the Hon'ble APTEL in its order dated 26.8.2019 with respect to determination of two part tariff for the Respondent no.1 and 2.*
- (vii) Briefly it is submitted for the completion of narration, that the petitioner herein had filed an appeal before the Hon'ble Apex Court challenging the order dated 26.08.2019 passed by the Hon'ble APTEL, through Civil Appeal No.8860/2019, however the Hon'ble Supreme Court vide its order passed on 2.12.2019 in C.A 8860/2019 was pleased to dismiss the C.A No. 8860 of 2019. However at the same time the Hon'ble Apex Court was also pleased to pass*

*certain other directions with respect to the signing of PPA with Respondent no.1 and also passed directions with respect to securitizing by the Respondent no.1 to MPPMCL, the payment of fixed costs to be paid to the Respondent no.1. A copy of the order dated 2.12.2019 passed in CA. No. 8860/2019 is attached as **ANNEXURE-2**.*

- (viii) *For the completion of narration of facts, it is further submitted that the petitioner had also challenged (through SLP 29262/18) the order dated 15.05.2017 passed in W.P. No.3819/2017 by the Hon'ble High Court of M.P. Principal Seat at Jabalpur by virtue of which the Hon'ble High Court of M.P. was pleased to allow the petition filed by M/s Arya Energy Limited against the termination of Letter of Intent undertaken by the petitioner herein.*
- (ix) *It is submitted that the matters (SLP 29262/18 and CA 8860/19) were clubbed and heard together by the Hon'ble Supreme Court on 02.12.2019 and while the Hon'ble Supreme Court was pleased to dismiss Civil Appeal No.8860/2019 it was also pleased pass certain directions in the order with respect securitizing the payment of fixed cost to be made to MPPMCL by the respondent no.1 herein. It is at this stage also pertinent to note that the Hon'ble Supreme Court has been pleased vide the order dated 2.12.2019, to grant leave and admit SLP No.29262/2018 filed by the petitioner herein challenging the High Court's order dated 15.05.2017.*
- (x) *It is submitted herein that the Hon'ble Supreme Court in its order dated 2nd December, 2019 had directed as under with respect to payment of fixed costs:-*
"The payment of fixed costs that is made will be subject to orders that may be passed by the Madhya Pradesh Electricity Regulatory Commission, insofar as security, if any, is to be given."
- (xi) *It is submitted, without prejudice, that the Petitioner is also in the process of filing a separate petition with respect to the issue of securitizing the payment of fixed costs as per the directions given by the Hon'ble Supreme Court in its order dated 2.12.2019 in C.A 8860/2019.*
- (xii) *However, the instant petition is only limited to the project specific determination of two-part tariff of the Respondent no.1 and 2 in compliance with order and judgement dated 26.8.2019 passed by the Hon'ble APTEL.*
- (xiii) *In this connection, the MP Power Management Company Ltd., Jabalpur most respectfully submit that –*
- (a) *Government of Madhya Pradesh vide Notification no 226 dated 31.05.2005 restructured MPSEB into five independent companies namely one Genco, one Transco, three Discoms and Residual MPSEB.*

- (b) *The Residual MPSEB was vested with the functions of bulk purchase of electricity from generating companies and supply of electricity in bulk to the three Discoms (Distribution Licensees) of the State. Subsequently, the State Government has notified M.P. Electricity Reforms Transfer Schemes Rules 2006 vide notification dated 3rd June 06 whereby the functions, properties, interest rights and obligations of the Residual Madhya Pradesh State Electricity Board relating to Bulk Purchase and Bulk Supply of Electricity along with the related agreements and arrangements have been transferred and vested in MP Power Trading Company Limited (TRADECO). Accordingly, TRADECO has started functioning w.e.f. 03/06/2006 and from that date onwards, all three Discoms are buying the power of their requirement from a single source i.e. TRADECO including short term power.*
- (c) *In accordance with GoMP decision the name of MP Power Trading Company Ltd has been changed to MP Power Management Company Ltd. The MP Power Management Company has been made holding companies for all the DISCOMS of MP. The Registrar of Companies MP has issued the Certificate of Incorporation Consequent upon Change of Name on 10.04.2012.*
- (d) *As submitted in above para that the functions relating to Bulk Purchase and Bulk Supply of Electricity along with the related agreements and arrangements have been transferred and vested in MP Power Trading Company Limited (TRADECO) which, afterword, has been renamed as MP Power Management Company Ltd. The MP Power Management Company has been made holding companies for all the DISCOMS of MP.*
- (xiv) *It is submitted that this Hon'ble State Commission initiated suo-moto proceedings being SMP No.77/2011 for determination of tariff for the Biomass based power plants in the State of Madhya Pradesh and issued a tariff order dated 02.03.2012. It was held by this Hon'ble State Commission that scheduling of biomass-based power plants with capacity of 2MW and above shall be subject to "Merit Order Despatch" principle. This tariff order was a two-part tariff order and was subsequently revised by the tariff order dated 3.5.2013 which was a Single Part Tariff order. A copy of the Tariff order dated 2.3.2012 is **Annexure-3**.*
- (xv) *It is submitted that the tariff order dated 02.03.2012 passed by the State Commission was challenged by one Biomass based power plant M/s Harvest Energy Limited by way of an appeal being Appeal No.93 of 2012. The Hon'ble Tribunal allowed the appeal vide its judgment dated 18.02.2013 and remanded the matter to the State Commission to re-determine the tariff in accordance with the given directions. A copy of the judgment dated*

18.02.2013 in Appeal No.93 of 2012 passed by the Hon'ble Tribunal is attached hereto and marked as **Annexure-4**.

- (xvi) It is submitted that this Hon'ble Commission pursuant to the remand by the Hon'ble APTEL, passed the Order dated 03.05.2013 in SMP No.8/2013, a copy of which is attached hereto and marked as **Annexure-5**.
- (xvii) The aforesaid order dated 03.05.2013 passed by this Hon'ble State Commission was a Single Part Tariff order and it did not provide for payment of Fixed Charges. This tariff order was again challenged by way of an Appeal No.144 of 2013 before the Hon'ble Tribunal. The Hon'ble Tribunal decided the said appeal vide an order dated 29.05.2014 wherein the appeal was partly allowed and the matter was remanded to the Hon'ble State Commission. A copy of the judgment dated 29.05.2014 in Appeal No.144 of 2013 passed by Hon'ble Tribunal is attached hereto and marked as **Annexure-6**.
- (xviii) It is submitted that this Hon'ble State Commission in remand passed the order dated 13.08.2015, a copy of which is attached hereto and marked as **Annexure-7**.
- (xix) The remand order dated 13.08.2015 passed by the Ld' State Commission was also challenged by filing Appeal No.211 of 2015 before the Hon'ble Tribunal. The Hon'ble Tribunal vide judgment dated 04.05.2016 set aside the remand order dated 13.08.2015. A copy of the judgment dated 04.05.2016 in Appeal No.211 of 2015 passed by the Hon'ble Tribunal is attached hereto and marked as **Annexure-8**.
- (xx) It is respectfully submitted that MPPMCL (Appellant herein) challenged the order dated 4.5.2016 before this Hon'ble Apex Court vide Civil Appeal No.6547 of 2016. However the Hon'ble Apex Court vide order dated 25.07.2016 dismissed the civil appeal no. 6547 of 2015. A copy of the order dated 25.07.2016 in Civil Appeal No.6547 of 2016 passed by the Hon'ble Supreme Court is attached hereto and marked as **Annexure-9**.
- (xxi) That subsequent to the order dated 25.7.2016, this Hon'ble State Commission re-determined the tariff vide an order dated 30.11.2016. A copy of the order dated 30.11.2016 in SMP-8/2013 passed by the State Commission is attached and marked as **Annexure-10**.
- (xxii) It is submitted that this order dated 30.11.2016 passed by the Ld' State Commission was challenged by, the Respondents no.1 and 2 and their association being Madhya Pradesh Biomass Developers Association by way of an appeal being Appeal No.338 of 2016 before the Ld' Tribunal.

- (xxiii) *It is submitted that the Hon'ble Tribunal decided the aforementioned Appeal No.338 of 2016 by the judgment dated 20.03.2017. A copy of the judgment dated 20.03.2017 in Appeal No.338 of 2016 passed by the Hon'ble Tribunal is attached hereto and marked as **Annexure-11**.*
- (xxiv) *It is submitted that, the Petitioner (MPPMCL) filed a SLP before the Hon'ble Supreme Court against the judgment dated 20.03.2017 in Appeal No.338 of 2016 and the order dated 02.08.2017 in Review Petition No. 4 & 5 of 2017 which later got converted into an appeal, C.A. No.4550-4551 of 2018 on leave being granted and the Hon'ble Apex Court disposed-off the matter by order dated 26.4.2018. A copy of the order and judgement dated 26.4.2018 of this Hon'ble Supreme Court passed in C.A 4550-4551 of 2017 is attached hereto and marked as **Annexure-12**.*
- (xxv) *It is submitted that thereafter the respondents no.1 and 2 approached this Hon'ble State Commission for directions by filing Petition No.32 of 2018. That this Hon'ble Commission vide its order dated 16.11.2018, dismissed the Petition No.32 of 2018 filed by the respondents no.1 and 2 for the reasons as mentioned in the order dated 16.11.2018. A copy of the order dated 16.11.2018 is attached as **Annexure-13**.*
- (xxvi) *The respondent no.1 and 2 aggrieved by the order dated 16.11.2018, preferred the appeal before the Hon'ble Tribunal being appeal no. 396/2018 wherein the Hon'ble APTEL has passed the order dated 26.8.2019 setting aside the order dated 16.11.2018.*
- (xxvii) *It is submitted that as mentioned hereinabove, the instant petition has been occasioned in compliance to the directions passed inter-alia in para 9.7, 9.10 and 12.3 of the order dated 26.8.2019 of the Hon'ble APTEL.*
- (xxviii) *It is submitted that it is therefore in these special factual circumstances that the occasion has arisen to determine the two part tariff of the Respondent no.1 and 2 in compliance of the order dated 26.8.2019 passed in Appeal no. 396/2018 of the Hon'ble APTEL.*
- (xxix) *It is submitted that as mentioned hereinabove the Petitioner is the holding company of the three State Discoms and is therefore filing the instant petition for determination of the two-part tariff of the Respondent no.1 and 2 in accordance with section 61, 62, 86(1)(b) and the MPERC (Terms and Condition for Tariff Determination of Energy from Renewable Energy Sources) Regulations, 2017 notified on 7.7.2017. A copy of the MPERC (Terms and Condition for Tariff Determination of Energy from Renewable Energy Sources) Regulations, 2017 is attached as **Annexure-14**.*

- (xxx) *It is submitted that the Petitioner being the Holding company and the bulk procurer of the power for the three DISCOMs in the State of MP is filing the instant petition also in compliance of the order dated 26.8.2019 of the Hon'ble APTEL.*
- (xxxii) *It is submitted that as per regulation 6 of the MPERC (Terms and Condition for Tariff Determination of Energy from Renewable Energy Sources) Regulations, 2017 ("hereinafter referred to as Tariff Regulations, 2017") the Hon'ble Commission can determine the project specific tariff as and when the occasion arises.*
- (xxxiii) *It is submitted that the instant case being a special matter/circumstance it is requested that this Hon'ble Commission may exercise its power under regulation 6 (a) of the Tariff Regulations, 2017 and determine the two part tariff for the Biomass power plant of the Respondent no.1 and 2.*
- (xxxiiii) *It is submitted that as per Regulation 7 of the Tariff Regulations 2017, the Petitioner is to also provide the details as mentioned in sub-regulation 3 of regulation 7, such as the Detailed Project Report of the project, a statement of all applicable terms and conditions and expected expenditure for the tariff period etc.*
- (xxxv) *However as mentioned hereinabove the Petitioner is the holding company of the three State Discoms and is not the generating company which established the project of Respondent no.1 and 2 for which the tariff is being determined.*
- (xxxvi) *It is therefore submitted that the Petitioner does not have the relevant, financial, technical, operational and other details as per the requirement of the Tariff Regulations, 2017, which are necessarily required for determination and fixation of two part tariff and therefore the Petitioner requests this Hon'ble Commission to call from the Respondents the relevant financial, technical and operational and other details as per the requirement of the Tariff Regulations, 2017 for the determination of two part tariff of Respondent no.1 and 2 biomass based power plant in accordance with the provisions of section 61, 62 and 86(1)(b) of the Electricity Act, 2003 and the Tariff Regulations, 2017. It is reiterated that as mentioned hereinabove the Petitioner is filing the instant petition in view of the special facts and circumstances of the instant matter which are mentioned in detail hereinabove.*
- (xxxvii) *It is further submitted that once the regulatory process for determination of two part tariff is commenced by this Hon'ble Commission for the biomass based power plants of the Respondent no.1 and 2, and the relevant financial, technical, operational and other details required for determination of two part tariff are provided by the Respondent no.1 and 2, the Petitioner shall*

crave leave of this Hon'ble Commission to make additional submissions on the same in the interest of justice and consumer interest of the State of MP."

3. With the aforementioned submissions, the petitioner prayed the following:
 - (i) *Direct the respondents herein to provide financial, technical, operational and other details as per the MPERC (Terms and Conditions for tariff determination of energy from Renewable Energy Sources) Regulations, 2017 or any other any applicable regulations, for the determination of project specific two-part tariff (fixed and energy) of the power plant of the Respondent No. 1 and 2.*
 - (ii) *Determine the two-part tariff (fixed and energy costs) of the Respondent No. 1 and 2 in accordance with the provisions of Section 61, 62 of the Electricity Act, 2003 read along with Section 86(1)(b) of the Electricity Act, 2003 and the MPERC (Terms and Conditions for tariff determination of Renewable Energy Sources) Regulations, 2017.*
4. The petition was admitted on 21st January' 2020 and the petitioner was directed to serve copies of the petition on all the Respondents in the matter and report its compliance to the Commission. The Respondents were directed to file their response on the petition by 6th February' 2020. They were also directed to serve a copy of their response on the petitioner simultaneously. The petitioner was asked to file its rejoinder by 10th February' 2020 thereafter.
5. At the hearing held on 06.10.2020, the following status of submissions was observed:
 - (i) By affidavit dated 09.02.2020, the Respondent No.1 filed reply to the subject petition.
 - (ii) The Respondent No.2 filed reply to the subject petition on 10.02.2020.
 - (iii) The petitioner sought ten days' time to file rejoinder on the replies filed by the Respondents.
 - (iv) Considering the request, the petitioner was allowed to file rejoinder by the 20.10.2020.
6. At the hearing held on 09.11.2020, the Commission observed the following:
 - (i) The petitioner filed rejoinder on 12th October' 2020.
 - (ii) Ld. Counsels of the petitioner and the Respondents concluded their arguments. The parties were directed to file their written submissions within 10 days. The case was closed for order on filing of written submissions by both the parties within the stipulated time as above.
7. The Respondent No.1 submitted the following in its reply filed on 09.02.2020:

- (i) *At the outset, it is stated that the present Petition purported to be filed by the Petitioner – M.P. Power Management Company Limited (hereinafter referred as the “**Petitioner**”)a under Section 61, 62 and 86(1)(b) of the Electricity Act, 2003, read with the MPERC (Terms and Conditions for tariff determination of energy from Renewable Energy Sources) Regulations 2017 (hereinafter referred as “**RE Tariff Regulations, 2017**”), is an abuse of the process of the court and such a Petition should be dismissed by the Hon’ble Commission with heavy cost imposed on the Petitioner. Save as otherwise expressly admitted in the present reply, the contentions and averments of the Petitioner to the contrary are stated to be wrong and are denied.*
- (ii) *The Petitioner has sought to contend that in terms of the Judgment dated 26.08.2019 passed by the Hon’ble Appellate Tribunal in Appeal No. 396 of 2018, as confirmed by the Hon’ble Supreme Courts’ order dated 02.12.2019 in Civil Appeal No. 8860 of 2019 calls for this Hon’ble Commission to determine the tariff of the Respondent No.1 – Arya Energy Limited (herein after referred as “**Arya Energy**”). This is a perverse and misleading submission which follows the long list of litigation between the parties. The entire attempt on the part of the Petitioner is to somehow shutdown the plant of Arya Energy (12MW biomass based plant in district Anuppur).*
- (iii) *It is preposterous on the part of the Petitioner to contend that the Hon’ble Appellate Tribunal in its judgment dated 26.08.2019 as affirmed by the Hon’ble Supreme Court on 02.12.2019, requires this Hon’ble Commission to carry out a determination exercise of tariff as per actuals and based on the RE Tariff Regulations, 2017. It is respectfully submitted that the intention of the Hon’ble Appellate Tribunal can be gathered by the simple language of the judgment dated 26.08.2019 itself which is extracted below for ready reference:*

“9. ISSUE NO.3: -

9.1 *The tariff provided in LOI / PPA and subsequent Tariff Order 2016 which is applicable to the Appellants is a single part tariff. The single part tariff consist of two components Fixed Cost Component and Variable Cost component and both the components are payable to the generators for the electricity supplied by them. As per the tariff order of MPERC dated 02/03/2012, the fixed cost component is determined for a period of 20 years at a normative PLF of 80%,which means that if a plant operates at an annual PLF of 80% for 20 years, only then can it recover the entire fixed cost*

component reflected in tariff. In so far as variable cost component is concerned, the same is recoverable based on actual generation in the relevant year.

9.2 *We note that in the Order dated 02.03.2012, the State Commission has depicted the tariff as a two-part tariff. In the subsequent Orders dated 03.05.2013, 13.08.2015 and 30.11.2016, the tariff design/structure followed by the State Commission was of Order dated 02.03.2012. However, in the computation, the State Commission clubbed the fixed charge component and variable charge component and gave a single part tariff. This tariff design followed by the State Commission is as per the Central Electricity Regulatory Commission's yearly Renewable Energy Tariff Orders.*

9.3 *Here, we note that the Central Electricity Regulatory Commission has been passing yearly Tariff Orders fixing generic tariff for all Renewable Sources of Energy including biomass from the year 2012 onwards. It is relevant to note that even though single part tariff is fixed in these Orders, the single part tariff is nothing but a summation of the fixed charge component and variable charge component. We quote hereinbelow the relevant extracts from the CERC Order dated 01.03.2018 with regard to determination of generic tariff which has settled the position that single part tariff has two components*

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"TARIFF STRUCTURE

4. Clause (1) of Regulation 9 of the RE Regulations stipulates that the tariff for RE projects shall be single part tariff consisting of the following fixed cost components:

a. Return on equity; b. Interest on loan capital; c. Depreciation; d. Interest on working capital; e. Operation and maintenance expenses;

For renewable energy technologies having fuel cost component, such as biomass power projects and non-fossil fuel based cogeneration, single part tariff with two components i.e. fixed cost component and fuel cost component, is to be determined."

9.4 *The above is also true for all the Renewable Energy Tariff Orders passed by the CERC from the year 2012 onwards. Further, the State Commission itself has passed two earlier Orders dated 20.11.2013 and 08.02.2016 for other biomass plants in the State of Madhya Pradesh, by culling out the fixed cost component and the variable cost component from the single part tariff.*

9.5 *MPPMCL has also not produced the details of any other plant in M.P. or elsewhere from which it is purchasing power, applying the MOD and not paying the fixed charge*

component. The State Commission itself has recognized the principle of MOD in the Balancing and Settlement Code which is binding on all the parties including MPPMCL.

9.6 From all of the above, we can clearly conclude that the two part tariff as well as the single part tariff have the very same components, i.e. the fixed charge component and variable charge component. While in the Order dated 02.03.2012, the tariff was depicted as a two-part tariff, in the subsequent Orders dated 03.05.2013, 13.08.2015 and 30.11.2016, the fixed cost component and the variable cost component has been clubbed and depicted as a single part tariff. Therefore, there is no embargo or difficulty in finding and paying the fixed cost component to the Appellants while MOD is applied on them even with a single part tariff.

9.7 Having held as above, we now have to answer the question as to what fixed cost component must be paid to the Appellants when MOD is applied to them. We note that the State Commission has culled out the Variable Cost Component out of the single part tariff in Order dated 03.5.2013 to the other biomass-based power plants within the state in its other Orders as under –

ORDER DATED 20.11.2013 IN CASE OF ASN INDUSTRIES

“The fuel cost, being a variable factor depends on prevailing biomass price. Therefore, the biomass price shall be applicable as considered in the Commission’s order dated 03.05.2013 for the FY 2013-14 and onwards. Accordingly, the yearwise tariff w.e.f. FY2013-14 for the balance period of project life works out to as under:

(Amount in Rs./unit)	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	
Year									
F.C.	1.91	1.87	1.83	1.79	1.75	1.72	1.68	1.65	
V.C.	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38	
Total	5.02	5.14	5.26	5.39	5.53	5.69	5.85	6.03	
	2021-22	2022-23	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	2029-30
	1.62	1.58	1.19	1.22	1.26	1.29	1.33	1.37	1.41
	4.60	4.83	5.07	5.32	5.59	5.87	6.16	6.47	6.79
	6.22	6.41	6.26	6.54	6.85	7.16	7.49	7.84	8.20
									2030-31
									1.46
									7.13
									8.59

ORDER DATED 08.02.2016 IN CASE OF SHALIVANA GREEN ENERGY PVT. LTD

“...Also, as the Commission already decided vide order dated 13.08.2015 to continue the same tariff for the projects commissioned during FY 2014-15 & 2015-16 as determined for the projects commissioned during the FY 2013-14, the variable charges may be allowed based on the order dated 03.05.2013 as determined for FY 2013-14 as follows:

Fixed tariff (Tariff @Rs. /unit)

Year	1	2	3	4	5	6	7	8	9	10
Tariff	1.91	1.87	1.83	1.79	1.75	1.72	1.68	1.65	1.62	1.58
Year	11	12	13	14	15	16	17	18	19	20
Tariff	1.19	1.22	1.26	1.29	1.33	1.37	1.41	1.46	1.50	1.55

Variable tariff

Year	1	2	3	4	5	6	7	8	9	10
Tariff	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38	4.60	4.83
Year	11	12	13	14	15	16	17	18	19	20
Tariff	5.07	5.32	5.59	5.87	6.16	6.47	6.79	7.13	7.49	7.86

Total tariff

Year	1	2	3	4	5	6	7	8	9	10
Tariff	5.02	5.14	5.26	5.39	5.53	5.69	5.85	6.03	6.22	6.41
Year	11	12	13	14	15	16	17	18	19	20
Tariff	6.26	6.54	6.85	7.16	7.49	7.84	8.20	8.59	8.99	9.41

The above two Orders clearly reflect the variable cost component of the tariff determined in the Order dated 03.05.2013. Therefore, the Fixed Cost component can be arrived for the Appellant by deducting Variable Cost component (being same for all plants) from single part tariff determined in the Order dated 03.05.2013 and is as under –

Table A (Tariff @Rs./unit)

Year	201	201	2015-	2016-	2017-	201	2019-	2020-	2021-	2022-
	3-14	4-15	16	17	18	8-19	20	21	22	23
Single Part Tariff as per 3.05.2013 Order	5.64	5.32	5.45	5.59	5.74	5.90	6.08	6.26	6.46	6.67

Variable Component as per order 8/2/2016 and 20/11/2013	3.11	3.27	3.43	3.60	3.78	3.97	4.17	4.38	4.60	4.83
Fixed Cost Component Year	2.53	2.05	2.02	1.99	1.96	1.93	1.91	1.88	1.86	1.84
	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	2029-30	2030-31	2031-32	2032-33
Single Part Tariff as per 3.05.2013 Order	6.55	6.85	7.16	7.50	7.84	8.21	8.60	9.00	9.43	9.88
Variable Component as per order 8/2/2016 and 20/11/2013	5.07	5.32	5.59	5.87	6.16	6.47	6.79	7.13	7.49	7.86
Fixed Cost Component	1.48	1.53	1.57	1.63	1.68	1.74	1.81	1.87	1.94	2.02

9.8 We observe that the order 03.05.2013 was revised by Commission on 30.11.2016, wherein the tariff was increased due to increase in variable cost component which in turn marginally increased the fixed cost component due to increase in interest cost on working capital. At the very least, the Appellants are entitled to the above fixed costs component when kept under MOD (from 17.01.2017) by MPPMCL and power not scheduled, on the normative PLF of 80% determined by the State Commission in all its Tariff Orders.

9.9 Even though the Appellants have placed the calculation of fixed cost component as per the Order dated 30.11.2016 before us and the same has not been disputed by MPPMCL and MPERC. **However, the State Commission would need to verify the said figures based on its prevailing orders. As an interim measure, the MPPMCL should pay to the Appellants fixed cost component as indicated in the table A hereinabove on the normative PLF of 80% of contracted capacity along with interest subject to final reconciliation of fixed cost component of 30.11.2016 order, to be duly verified by the State Commission.**

9.10 Further, since the fixed cost component will be paid to the Appellants after substantial delay, the interest @ 1.25% per month which is provided both in the PPA and the LOI will also be required to be paid on the fixed charges component to the Appellants. **As held herein before, the final reconciliation is required to be done by the parties after the verification of the charges by the State Commission.**

9.11 We also note the financial hardship of the two Appellants on whom MOD has been applied and power has not been scheduled from 17.01.2017 till date, without paying the fixed cost component to them. This was also noted by this Appellate Tribunal in its Order dated 02.08.2017 in RP 4 & 5 of 2017, para 10 as

“We have also noticed that the Review Petitioner in Review Petition No.4 of 2017 is not even paying the fixed costs.”

which finding has not been disturbed by the Hon’ble Supreme Court and has attained finality. For the last 2 & ½ years, the MPPMCL has simply applied the MOD erroneously and kept the plants shut without paying even fixed cost component. We are therefore of the considered opinion that with the application of MOD, the Appellants are entitled for fixed charges even in single part tariff scenario.”

- (iv) Arya Energy respectfully submits that after holding that it is entitled for payment of fixed charge component, the Hon’ble Appellate Tribunal at Table A (pg.53 of the judgment), has arrived at the fixed charge component from the single part tariff determined by this Hon’ble Commission in the order dated 03.05.2013. Further, in para 9.8, the Hon’ble Appellate Tribunal has clearly held that Arya Energy is at the very least entitled to the fixed charge component arrived at in Table A, from 17.01.2017 onwards on the normative PLF of 80%. Thereafter, in Para 9.9, the Hon’ble Appellate Tribunal has noted the calculation of fixed charge component given by Arya Energy as per the order dated 30.11.2016 of this Hon’ble Commission (the final tariff order). This Hon’ble Commission has only been directed to “verify” the fixed charge component from the order dated 30.11.2016, and as an interim measure MPPMCL has been directed to pay the fixed charge component as indicated in Table A on normative PLF of 80% along with interest. This is again reiterated in Para 9.10 and the term used by the Hon’ble Appellate Tribunal is “verification” of fixed charge component by this Hon’ble Commission.
- (v) There is no confusion at all even in the operative directions – summary of findings at Para 12 of the Judgment which is as under:

12. SUMMARY OF FINDINGS:-

Based on our detailed analysis and findings on all the issues hereinabove, we summarize the same as under –

12.1 *We hold that the generating plants of the Appellants shall be regulated by applying merit order dispatch as per Madhya Pradesh Balancing and Settlement Code, 2015 and the Appellants shall be entitled to receive fixed charges component from the date (17.01.2017) from which merit order dispatch has been applied and power not scheduled by MPPMCL.*

12.2 *We direct MPPMCL that for the period when the MOD has been applied on the Appellants and power not scheduled i.e. from 17.01.2017, the Appellants be paid fixed cost component as mentioned above in table (A) at Para 9.7 considering base year 2103-14 (Rs.2.53 per unit and so on as per the year of operation) at the normative PLF of 80% of contracted capacity, determined by the State Commission in its Tariff Orders. This payment along with interest shall be made within 30 days from the date of this Judgment and Order;*

12.3 *The State Commission is directed to verify the actual fixed cost component for which the Appellants are entitled to based on its order dated 30.11.2016. The MPPCL shall reconcile the payments after such verification and pay the arrears, if any, to the Appellants within a period of three months.*

12.4 *MPPMCL is also directed to release the signed PPA to Appellant No. 1 – Arya Energy Limited without any further delay.*

- (vi) *This being the position, it is not understood how the Petitioner can even contend that any determination has to be done by this Hon'ble Commission and that too as per the RE Tariff Regulations 2017 which is a subsequent notification, and has nothing to do with the tariff order dated 30.11.2016. The tariff to be applied to Arya Energy already stands determined for a period of 20 years in the order dated 30.11.2016. The RE Tariff Regulations 2017 were not even notified at this stage and there is no basis for the Petitioner to now seek two-part tariff determination.*
- (vii) *The Hon'ble Appellate Tribunal has undertaken a detailed exercise by going through the tariff design adopted by this Hon'ble Commission in the order dated 03.05.2013, 13.08.2015, and 30.11.2016 respectively. The Hon'ble Appellate Tribunal in Paras 9.2 and 9.3 has clearly held that even the single part tariff has two components and is nothing but a summation of the fixed charge component and the variable charge component.*

- (viii) *Under the circumstances, the present Petition by the Petitioner is perverse and is an attempt to overreach the judgment dated 26.08.2019 passed by the Hon'ble Appellate Tribunal after having lost its second appeal before the Hon'ble Supreme Court vide order dated 02.12.2019.*
- (ix) *The conduct of the Petitioner in once again trying to re-open settled issues is borne out by filing of another Petition being Petition No. 7 of 2020, which was filed by it praying for an approval of a new PPA qua Arya Energy. Fortunately, this Hon'ble Commission have vide order dated 27.01.2020 dismissed the said Petition holding as under:*

"6. Having heard Ld. Counsel of the petitioner, the Commission has observed the following:

.....

(j) In such circumstances, filing of any new PPA other than the PPA dated 18.01.2017 by the petitioner for approval of this Commission does not hold any merit in the eyes of law because the petitioner cannot present any new PPA before this Commission for approval till the decision of Hon'ble Supreme Court on the issue of signing and handing over of PPA. Such action of the petitioner for filing a new PPA for approval of this Commission would not only be a contempt of Hon'ble Superior Courts, which is actionable under the Section 12 of Contempt of Courts Act, 1971, but shall also be deemed to bypass the orders of aforesaid superior courts. In fact, the petitioner is himself estopped also to file New PPA before this Commission.

7. The findings of the Hon'ble APTEL in its order dated 26.08.2019 have been upheld by the Hon'ble Supreme Court however, the signing and handing over of the PPA is subject to the result of the decision in SLP No. 29262 of 2018. Therefore, any new PPA other than the draft PPA dated 18.01.2017 cannot be considered by this Commission for approval as this will be against the provisions under Section 10 of CPC 1908 and would fall in, as an impliedly contempt of the orders, passed by the Hon'ble APTEL and Hon'ble Supreme Court. The scheduling of power from the power plant of respondent is not barred by any of the orders passed by the superior courts, therefore the parties may act accordingly in this matter in terms of the orders passed by Hon'ble APTEL on 26.08.2019 in Appeal No. 396 of 2018 and as per order of Hon'ble Supreme Court passed in Civil Appeal No. 8860 of 2019 dated 02.12.2019.

8. In view of all aforesaid, the subject petition and the IA is not maintainable hence rejected in the motion hearing. However, the petitioner shall be at liberty to approach this Commission after the decision of the Hon'ble Supreme Court in SLP 29262 of 2018."

*A copy of the order dated 27.01.2020 is attached hererto and marked as **Annexure A**.*

- (x) Further, the issue of Security which is mentioned in the order dated 02.12.2019 of the Hon'ble Supreme Court is being raised by the Petitioner separately by filing substantive Petition No. 5 of 2020 and will be taken up by this Hon'ble Commission in accordance with law. Therefore, there is no purpose in raising the very same aspect in the present Petition.
- (xi) The present Petition can be disposed off by this Hon'ble Commission by strictly complying with the direction of the Hon'ble Appellate Tribunal in its judgment dated 26.08.2019 as affirmed by the Hon'ble Supreme Court on 02.12.2019, by verifying the fixed charge component in the order dated 30.11.2016. For the purposes of convenience, Arya Energy is placing a computation worked out by it applying the very parameters assumed by this Hon'ble Commission in the order dated 30.11.2016. The computation is attached hereto and marked as **Annexure B**.
- (xii) It is being respectfully prayed that the Hon'ble Appellate Tribunal in Para 10.6 of the Judgment dated 26.08.2019 has already made certain observations against this Hon'ble Commission for denying the legitimate rights to Arya Energy. In the circumstances, it would not be proper for this Hon'ble Commission to be misled by the contentions made by the Petitioner in the present Petition. As a public Utility, it is unfair on the part of the Petitioner to invite this Hon'ble Commission to violate the Judgments of superior courts. Accepting any of the contentions of the Petitioner in the present Petition would amount to a clear contempt of the judgment dated 26.08.2019 as affirmed by the Hon'ble Supreme Court on 02.12.2019.
- (xiii) In the circumstances, it is stated that there is no merit in the Petition. Arya Energy is not filing a para wise reply since the Petition can be disposed off on the short point of verification of fixed charge component and by imposing heavy cost on the Petitioner. All contentions and averments of the Petitioner to the contrary are stated to be wrong and are denied.

8. In its rejoinder dated 12.10.2020, the petitioner has submitted the following:

- (i) It is most respectfully submitted that the petitioner has filed the instant petition seeking the relief as prayed for in the relief clause.
- (ii) It is submitted that the contents of the petition are reiterated herein and are not reproduced for the sake of brevity.

- (iii) *It is most respectfully submitted that the averment of respondents that the instant petition is without any merit is denied as the same is incorrect and misconceived.*
- (iv) *It is submitted at the outset that the Hon'ble Appellate Tribunal for Electricity in the Judgment passed in Appeal No. 396/2018 dated 26.08.2019 as in para 9.1 to 9.9 dealt with the issue of fixed cost component. It is submitted that the said order is now confirmed by the Hon'ble Apex Court and the petitioner has filed the instant petition seeking compliance of the order passed by the Hon'ble Appellate Tribunal in appeal No. 396/2018 wherein the Hon'ble Appellate Tribunal in para 9.3 mentions that the single part tariff is nothing but a summation of the fixed charge component and variable charge component.*
- (v) *It is submitted that the Hon'ble Appellate Tribunal mentions the CERC order dated 01.03.2018 wherein it quotes the fixed cost components as per CERC are criteria such as return on equity, interest on loan capital, depreciation etc. It is submitted that further, in para 9.6 the Hon'ble Appellate Tribunal concludes that the two part tariff as well as the single part tariff have two components namely fixed charge and variable charge and therefore while giving an interim fixed cost and variable cost component in "Table A" based on the order dated 03.05.2013, the Hon'ble Tribunal, however in para 9.9 directs this Hon'ble Commission to verify the figures of calculations of fixed cost component as per the prevailing orders.*
- (vi) *It is submitted that after the order dated 30.11.2016, this Hon'ble Commission also issued Renewable Energy Tariff Determination Regulations, 2017 and a perusal of regulation 8 signifies the parameters or norms taken for fixed cost component for renewable energy plant. It is undisputed that the plants of the respondent are renewable energy plant and the parameters or norms as mentioned in the RE Regulations shall go into verifying or determining the fixed cost component as mentioned in regulation 8 of the RE Regulations, 2017.*
- (vii) *It is further submitted that as per the regulation 6, it has been mentioned that the Hon'ble Commission may determine project specific tariff on case to case basis as and when situation arises. It is further submitted that the determination of the project specific tariff is based on the norms as specified in the chapter 2 of the regulation. In other words as per the direction given by the Hon'ble Appellate Tribunal in para 9.9 regarding verification of the figures, the same is being undertaken for the instant project of the Respondent, which are the only 2*

biomass projects with which the petitioner has the PPA and therefore the verification which has to be undertaken on the basis of some criteria, norms and principles as mentioned in the RE Regulations, 2017 on the basis of which the fixed cost component can be verified and can be aligned with the prevailing orders and Tariff Regulations. In other words the verification has to be undertaken as per law and in accordance with law and the exercise is not an empty formality. It is in this light that the instant petition has been filed to seek compliance with the directions of the Hon'ble Tribunal judgement.

(viii) It is submitted that the Hon'ble Appellate Tribunal has very clearly held that the verification exercise has to be undertaken by this Hon'ble Commission and the same therefore is a part of regulatory function of this Hon'ble Commission under section 86(1)(b) of the Act read along-with section 61, wherein the fixed cost component which is a part of tariff has to be verified or determined in accordance with the norms and principles as mentioned in the tariff orders as also the Renewable Energy Tariff Regulation, 2017.

(ix) It is therefore submitted that the reply of respondents is without any merit and the instant petition be allowed in the interest of justice. It is further submitted that public interest demands that the verification exercise be done on the basis of normative principles and by applying prudence checks on the basis of applicable norms, in public interest.

9. The petitioner filed written submission on 19.11.2020. The Respondent No.1 filed written submission dated 21.11. 2020 received in the office of Commission on 18.12.2020. The petitioner submitted the following in its written submission:

(i) It is submitted that the instant petition has been filed in view of the directions given by the Hon'ble Appellate Tribunal for Electricity in its judgment dated 26.08.2019 in Appeal No.396/2018, as confirmed by the Hon'ble Supreme Court in Civil Appeal No.8860/2019 vide its order dated 02.12.2019.

(ii) It is submitted that the directions given by the Hon'ble APTEL, which have attained finality, relevant to the adjudication of the instant petition, are as mentioned in para 9.1 to 9.9 of the judgment in Appeal No.396/2018. The relevant portion at para 9.9 is quoted as under: -

“9.9 Even though the Appellants have placed the calculation of fixed cost component as per the Order dated 30.11.2016 before us and the same has not been disputed by MPPMCL and MPERC. However, the State Commission would need to verify the said figures based

on its prevailing orders. As an interim measure, the MPPMCL should pay to the Appellants fixed cost component as indicated in the table A hereinabove on the normative PLF of 80% of contracted capacity with interest subject to final reconciliation of fixed cost component of 30.11.2016 order to be duly verified by the State Commission.”

- (iii) *A perusal of para 9.9 (as also 9.1 to 9.8) of the judgment dated 26.08.2019 of the judgment of Hon’ble APTEL highlights the following:*
- (a) *That two-part tariff as well as single part tariff have the same very component i.e. fixed charge component and variable charge component.*
 - (b) *The State Commission has in its tariff order of 02.03.2012 given a two-part tariff, however, in the subsequent tariff orders dated 03.05.2013, 13.08.2015 and 30.11.2016 the tariff design/structure was of the order dated 02.03.2012, however, in the computation, the State Commission clubbed the fixed charge component and variable charge component and gave a single part tariff.*
 - (c) *The tariff structure of single part tariff is nothing but a summation of the fixed charge component and variable charge component which has items such as return on equity, interest on loan capital, depreciation, O & M expenses etc.*
 - (d) *The State Commission in its earlier order dated 20.11.2013 in the case of ASN Industries and 08.02.2016 in the case of Shalivana Green Energy has culled out the fixed charge component and variable charge component from the single part tariff.*
 - (e) *In the tariff order dated 30.11.2016 there was an increase in variable cost component which in turn has led to an increase in the fixed cost component due to the increase in the interest cost on the working capital.*
 - (f) *It was, therefore, directed by the Hon’ble APTEL in para 9.9 and para 12.3 of its judgement, that the actual fixed cost payable to the respondents needs to be verified by this Hon’ble Commission in accordance with its prevailing orders.*
- (iv) *In this regard, it is most respectfully submitted that the interim tariff given by the Hon’ble APTEL in Table-A of para 9.7 of its judgement is based on the variable tariff as given by this Hon’ble Commission, in the case of Shalivana Green Energy order dated 08.12.2016 and of ASN Industries case order dated 20.11.2013 and the Hon’ble APTEL, subtracted the variable cost from the single part tariff as given in the order dated 03.05.2013 to arrive at the fixed cost component. However, as noted by the Hon’ble APTEL in para 9.8 and 9.9 the fixed cost component payable to the*

respondents has to be arrived/verified at, on the basis of order dated 30.11.2016 and the calculation given by the respondents in Annexure-B (appellants before the APTEL) and this Annexure-B, needs to be verified by this Hon'ble State Commission on the basis of its prevailing orders. Further, the direction of the Hon'ble APTEL in para 12.3 is crystal clear wherein it directs this Hon'ble Commission to verify the actual fixed cost component for which the respondents (appellants before the APTEL) are entitled to, based on the order dated 30.11.2016 of this Hon'ble Commission. The relevant para 12.3 of the judgment in Appeal No.396/2018 is quoted as under: -

"12.3The State Commission is directed to verify the actual fixed cost component for which the Appellants are entitled to based on its order dated 30.11.2016. The MPPCL shall reconcile the payments after such verification and pay the arrears, if any, to the Appellants within a period three months."

It was, therefore, in this regard that the petitioner has filed the instant petition praying interalia that this Hon'ble Commission determine the two part tariff (fixed and energy charges) by verifying the actual fixed cost component of the respondents No.1 and 2 in accordance with the applicable law, orders and regulations. At this juncture, it is pertinent to note that this Hon'ble Commission has notified the terms and conditions of Tariff Determination of Energy from Renewable Energy Sources Regulations, 2017 on 07.07.2017 wherein the tariff structure for renewable energy technology which shall comprise their fixed cost is given in Regulation 8. Further, it is admitted that the respondents-Power Plants being biomass based are the Renewable Energy Plants. It was, therefore, prayed in the instant petition that the two-part tariff (fixed and energy charges) be verified/determined for the respondents in compliance of the directions by the Hon'ble APTEL in its judgment. In this regard, it is further submitted that there has been a checkered litigation history between the parties wherein the various tariff orders passed by this Hon'ble Commission have been challenged to APTEL and the Hon'ble Supreme Court and the APTEL has remanded the matter back to this Hon'ble Commission on several occasions. Suffice it to say and admittedly, two issues as decided by this Hon'ble Commission in its order dated 03.05.2013 pertaining to capital cost and fuel price have attained finality by the judgment of the Hon'ble APTEL in Appeal No.144/2013 passed on 29.05.2014.

- (v) It is submitted that while the checkered litigation history between the parties is not an issue before this Hon'ble Commission, however, the detailed narration of the litigation history has been mentioned in the petition for the purposes of completion of narration of facts.*

- (vi) *It is submitted that with respect to the instant petition the sole ground raised by the respondents in its reply is that this Hon'ble Commission is simply required to approve the Annexure-B (computation chart) filed by the respondents showing fixed cost calculated by it and as presented by it before the Hon'ble Tribunal for the purpose of "verification" as directed by the Hon'ble APTEL. It is the sole ground of the respondents that this Hon'ble Commission is required to do in the name of verification is to simply approve the calculation sheet (Annexure-B) as submitted by the respondents and this shall be the compliance of the judgment of the Hon'ble APTEL. Therefore, the submission of the Respondent is to the effect that this Hon'ble Commission is to mechanically approve the calculation chart in the name without due application of norms, principles and prudence check. The submission of the Respondent is mentioned in para 11 of the reply of the respondents.*
- (vii) *It is most respectfully submitted that the Hon'ble Commission is a "Regulatory Commission" and the power to "regulate" under Section 86(1)(b) lies solely with the State Commission which regulates the price of purchase of electricity from a generator by a licensee on various parameters and in particular the Regulatory Commission seeks to uphold the public interest. It is submitted that it is immaterial that the generator and the licensee may have agreed to a particular rate or that the licensee may not have disputed the rate offered by the generator as it is only for this Hon'ble State Commission while exercising its powers under Section 86(1)(b) or other provisions of the Electricity Act, 2003, to see if the purchase of electricity and the price being paid is being undertaken on prudent terms and conditions in accordance with norms and principles, irrespective of any agreement between the generator and the licensee. It is, therefore, submitted that it is immaterial for the respondents to submit that the calculation sheet (Annexure-B) has not been disputed by the licensee (petitioner) or the Regulatory Commission which was a party respondent in a judicial claim before the Hon'ble APTEL. It is submitted that, when the State Commission exercises its regulatory powers it can look into each and every aspect of the pricing of electricity being purchased by the licensee under Section 86(1)(b) of the Electricity Act.*
- (viii) *It is submitted that the judgment of the Hon'ble Supreme Court in the case of "PTC India Limited" clearly highlights that the Regulatory Commission performs several functions such as they act as regulatory bodies and adjudicatory bodies and, therefore, it is completely incorrect on the part of the respondents to aver or allege that as the calculation-sheet has not been disputed before the Hon'ble APTEL, therefore, the State Commission is barred or prohibited from examining/verifying or looking into the various fixed cost components as mentioned by it in its calculation sheet while undertaking the exercise of verification. In PTC India Ltd. v. Central Electricity Regulatory Commission, reported in (2010) 4 SCC 603, a Constitutional Bench of the*

Hon'ble Supreme while interpreting the jurisdiction of Central Commission (which Commission is not vested with powers envisaged for State Commission's in Section 86(1)(b)) held as follows:

"53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories — mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

... ..

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

... ..

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j).

... ..

65. *The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of “general application”, a regulation stands on a higher pedestal vis-à-vis an order (decision) of CERC in the sense that an order has to be in conformity with the regulation. However, that would not mean that a regulation is a precondition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in*

Section 178(2). In our view, apart from Section 178(1) which deals with “generality” even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of the 2003 Act. Trading is an activity recognised under the said 2003 Act.

66. *While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word “order” in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.”*

(ix) *In PTC the Court, inter alia, held that:*

- (a) *The powers of the Commission can be exercised either through a decision-making process or by making regulations.*
- (b) *When there are regulations, the Commission’s decision-making powers has to be exercised in line with the regulations.*
- (c) *Making regulations is not a pre-condition to exercise of regulatory powers.*
- (d) *If contracts “across the board” needs to be modified, the same has to be done only through a regulation.*

(x) *In this regard, it is submitted that a perusal of Section 86(1)(b), at this stage, is extremely important as it is the submission of the Petitioner that the direction to “verify” the actual fixed cost is a direction to regulate the price of electricity under Section 86(1)(b) as the word “regulation” is very wide in its import and meaning and includes the exercise of verification. Section 86(1)(b) is reproduced as under: -*

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

- (a) xxx xxx xxx
- (b) *regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*
- (c) xxx xxx xxx”

- (xi) *It is submitted that the term “regulate” is very wide in its import and meaning and subsumes the active action of verification of fixed cost component of the respondents biomass plants and, therefore, it is incorrect on the part of the respondents to aver or allege that this Hon’ble Commission should simply approve the calculation-sheet (Annexure-B) as per the judgment dated 26.08.2019 in Appeal No.396/2018. In this regard, it is further submitted that the word “regulate” has been interpreted widely by the Hon’ble Apex Court in several judgments and the Hon’ble Supreme Court has also discussed the powers of Regulatory Commission under Section 86(1)(b) in the case of **Tata Power judgment** reported in **(2009) 16 SCC 659** (paragraphs 75 to 83) and has also highlighted in the same judgment the purpose of regulating from paragraphs 105 to 114.*
- (xii) *Further, the word “regulate” has been interpreted by the Hon’ble Supreme Court in various judgments such as the NTPC Judgement reported in **(2009) 6 SCC 235** (paragraphs 47 and 48) wherein the Hon’ble Supreme Court in para 47 and 48 has held as under:-*

“47. There cannot be any doubt whatsoever that the word “regulation” in some quarters is considered to be an unruly horse. In Bank of New South Wales v. Commonwealth Dixon, J. observed that the word “control” is an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than “restraint”, something equivalent to “regulation”. But, indisputably, the regulatory provisions are required to be applied having regard to the nature, textual context and situational context of each statute and case concerned.”

48. The power to regulate may include the power to grant or refuse to grant the licence or to require taking out a licence and may also include the power to tax or exempt from taxation. It implies a power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a

proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or may be conducted. (See Deepak Theatre v. State of Punjab, SCC at p.688, para 3.)”

A perusal of para 47 and 48 of the aforesaid judgment highlights that the term “regulate” implies a power to enforce all such powers, rules and regulations as such necessary to conduct the business in a proper manner. It is thus submitted that the exercise of verification to be undertaken by the Hon’ble Commission of the fixed cost component is not an empty formality but has to be based on certain norms, principles and criteria on the basis of which the fixed cost component has to be verified.

- (xiii) *As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. Further the Hon’ble Apex Court in V.S. Rice & Oil Mills v. State of A.P. [V.S. Rice & Oil Mills v. State of A. P., AIR 1964 SC 1781], K. Ramanathan v. State of T. N. [K. Ramanathan v. State of T.N., (1985) 2 SCC 116 : 1985 SCC (Cri) 162] and D.K. Trivedi & Sons v. State of Gujarat [D.K. Trivedi & Sons v. State of Gujarat, 1986 Supp SCC 20] has held that the power of regulation is indeed of wide import. The following extracts from the reports in the above cases would illuminate the issue:*

V.S. Rice & Oil Mills v. State of A.P. [V.S. Rice & Oil Mills v. State of A.P., AIR 1964 SC 1781] : (AIR p. 1787, para 20)

‘20. Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices.’

K. Ramanathan v. State of T. N. [K. Ramanathan v. State of T.N., (1985) 2 SCC 116 : 1985 SCC (Cri) 162] : (SCC pp. 130-31, paras 18-19)

'18. The word "regulation" cannot have any rigid or inflexible meaning as to exclude "prohibition". The word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p. 611:

"Regulate" is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.

"Regulate" is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.'

See also: Webster's Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784.

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to

exclude “prohibition”. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.’

D.K. Trivedi & Sons v. State of Gujarat [D.K. Trivedi & Sons v. State of Gujarat, 1986 Supp SCC 20] : (SCC p. 48, para 30)

‘30. Bearing this in mind, we now turn to examine the nature of the rule-making power conferred upon the State Governments by Section 15(1). Although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in pari materia with the language of Section 15(1). Each of these provisions confers the power to make rules for “regulating”. The Shorter Oxford English Dictionary, 3rd Edn., defines the word “regulate” as meaning “to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings”. Thus, the power to regulate by rules given by Sections 13(1) and 15(1) is a power to control, govern and direct by rules the grant of prospecting licences and mining leases in respect of minerals other than minor minerals and for purposes connected therewith in the case of Section 13(1) and the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith in the case of Section 15(1) and to subject such grant to restrictions and to adapt them to the circumstances of the case and the surroundings with reference to which such power is exercised. It is pertinent to bear in mind that the power to regulate conferred by Sections 13(1) and 15(1) is not only with respect to the grant of licences and leases mentioned in those sub-sections but is also with respect to “purposes connected therewith”, that is, purposes connected with such grant.’

- (xiv) *It is, therefore further, submitted that the State when it exercises the power of fixation of price with respect to commodities the same has to be done in a fair and reasonable manner as the ultimate goal of such price fixation is to see that the ultimate consumers obtain the commodity at a fair price and the profit margin for the purchaser is kept as a bare minimum. In this regard, it is submitted that the tariff regime under the Electricity Act follows a cost plus*

approach as the ultimate goal is that the pricing of electricity available to the ultimate consumer is at a fair and affordable cost and it is this function which is the utmost primary function of the Regulatory Commission as the Regulatory Commission under Section 86(1)(b) regulate the price of electricity and, therefore, it is of utmost importance for this Hon'ble Commission to verify the fixed cost component of the respondents biomass plants on prudent terms and conditions in consonance with the tariff policy and the applicable rules, orders and regulations. It is submitted that the Hon'ble Supreme Court in the case of **Ashoka Smokeless Coal India (P) Ltd. v. Union of India, (2007) 2 SCC 640** has held as under: -

“111. The State when it exercises its power of price fixation in relation to an essential commodity, has a different role to play. Object of such price fixation is to see that the ultimate consumers obtain the essential commodity at a fair price and for achieving the said purpose the profit margin of the manufacturer/producer may be kept at a bare minimum. The question as to how such fair price is to be determined strict sensu does not arise in this case, as would appear from the discussions made hereinafter, as here the Central Government has not fixed any price. It left the matter to the coal companies. The coal companies in taking recourse to e-auction also did not fix a price. They only took recourse to a methodology by which the price of coal became variable. Its only object was to see that maximum possible price of coal is obtained. The appellants do not question the right of the coal companies to fix the price of coal. Such prices had been fixed on earlier occasions also wherefor legally or otherwise the Central Government used to give its nod of approval. The process of price fixation by the Central Government in exercise of its powers under the 1945 Order continued from 1996 to 2004.”

(xv) *Apart from the aforesaid the Hon'ble Supreme Court in Cellular Operators Association of India and Others v. Union of India and Others, (2003) 3 SCC 186, inter alia, held as follows:*

“33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.

(xvi) Further the Hon'ble Supreme Court in, *Deepak Theatre, Dhuri v. State of Punjab and Others*, 1992 Supp. (1) SCC 684, it was held by the Hon'ble Supreme Court as follows:

"3. It is settled law that the rules validly made under the Act, for all intents and purposes, be deemed to be part of the statute. The conditions of the licence issued under the rules form an integral part of the statute. The question emerges whether the word regulation would encompass the power to fix rates of admission and classification of the seats. The power to regulate may include the power to license or to refuse the licence or to require taking out a licence and may also include the power to tax or exempt from taxation, but not the power to impose a tax for the revenue in rule making power unless there is a valid legislation in that behalf. Therefore, the power to regulate a particular business or calling implies the power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or conducted. A conjoint reading of Section 5, Section 9, Rule 4 and condition 4-A gives, therefore, the power to the licensing authority to classify seats and prescribe rates of admission into the cinema theatre."

(Underline Supplied)

- (xvii) *It is submitted that this fixation of price or the regulation of price of purchase of electricity by a licensee from the generator has been given as a mandatory function by the Parliament under Section 86(1)(b) of the Electricity Act and, therefore, it is submitted that it is for this Hon'ble Commission to verify the actual fixed cost component in accordance with the applicable law based on norms and principles and regulations.*
- (xviii) *It is submitted that as per the 2017 Renewable Energy Tariff Regulations framed by this Hon'ble Commission in Regulation 6 it has been clearly mentioned that a project specific tariff can be determined by the Hon'ble Commission on a case to case basis if the situation arises. It is the humble submission of the petitioner herein that the situation has arisen in view of the judgment passed by the Hon'ble APTEL and, therefore, the fixed cost component may be verified/determined for the respondents' biomass plants.*
- (xix) *In view of the submissions made hereinabove, the relief prayed for by the petitioner may kindly be allowed and the petition be kindly allowed.*

10. The Respondent No.1 while laying emphasis on the same paragraphs of the Judgment dated 26.08.2019 passed by the Hon'ble APTEL in Appeal No. 396/2018 which have been mentioned in its abovementioned reply, broadly submitted the following in its written submission:

- (i) *The limited issue arising in the present Petition is for "verification" of the fixed charge component of tariff, which is to be culled out from the single part tariff decided in the order dated 30.11.2016.*
- (ii) *At the outset it is submitted, that the petition is an abuse of the process of this Hon'ble Commission. The entire attempt of the Petitioner to seek a "determination" of tariff of the Respondent No.1, is inviting the Hon'ble Commission to be in contempt of the orders passed by the Hon'ble Appellate Tribunal and the Hon'ble Supreme Court.*
- (iii) *The issue in so far as the Respondent No.1's entitlement of fixed charges and the applicability of the tariff order dated 30.11.2016 has now been settled up till the Hon'ble Supreme Court. It is extremely unbecoming of MPPMCL, being a state utility to mislead the Hon'ble Commission, and not letting the long history of litigation to come to an end. The entire attempt on part of MPPMCL is to somehow shutdown the plant of Arya Energy which is a small 12MW bio-mass based plant.*
- (iv) *It is relevant to note, that the present petition even as per MPPMCLs own contention has been filed in terms of the Judgment dated 26.08.2019 passed by the Hon'ble Appellate Tribunal in Appeal No. 396 of 2018, as confirmed by the Hon'ble Supreme Courts' order dated 02.12.2019 in Civil Appeal No. 8860 of 2019.*
- (v) *The Hon'ble Commission only needs to read the Judgement dated 26.08.2019 of the Appellate Tribunal. It is respectfully submitted that there is absolutely no direction for this Hon'ble Commission to carry out a "determination" exercise of tariff as per actuals and based on the RE Tariff Regulations, 2017 as sought to be contended by MPPMCL.*
- (vi) *After holding that Arya Energy is entitled for payment of fixed charge component, the Hon'ble Appellate Tribunal at Table A (pg.53 of the judgment), has arrived at the fixed charge component from the single part tariff determined by this Hon'ble Commission in the order dated 03.05.2013. Further, in para 9.8, the Hon'ble Appellate Tribunal has clearly held that Arya Energy is at the very least entitled to the fixed charge component arrived at in Table A, from 17.01.2017 onwards on the*

normative PLF of 80%. Thereafter, in Para 9.9, the Hon'ble Appellate Tribunal has noted the calculation of fixed charge component given by Arya Energy as per the order dated 30.11.2016 of this Hon'ble Commission (the final tariff order). This Hon'ble Commission has only been directed to "verify" the fixed charge component from the order dated 30.11.2016, and as an interim measure MPPMCL has been directed to pay the fixed charge component as indicated in Table A on normative PLF of 80% along with interest. This is again reiterated in Para 9.10 and the term used by the Hon'ble Appellate Tribunal is "verification" of fixed charge component by this Hon'ble Commission.

- (vii) There is no confusion at all even in the operative directions – summary of findings at Para 12 of the Judgment which is as under:

12. SUMMARY OF FINDINGS:-

Based on our detailed analysis and findings on all the issues hereinabove, we summarize the same as under –

12.1 We hold that the generating plants of the Appellants shall be regulated by applying merit order dispatch as per Madhya Pradesh Balancing and Settlement Code, 2015 and the Appellants shall be entitled to receive fixed charges component from the date (17.01.2017) from which merit order dispatch has been applied and power not scheduled by MPPMCL.

12.2 We direct MPPMCL that for the period when the MOD has been applied on the Appellants and power not scheduled i.e. from 17.01.2017, the Appellants be paid fixed cost component as mentioned above in table (A) at Para 9.7 considering base year 2103-14 (Rs.2.53 per unit and so on as per the year of operation) at the normative PLF of 80% of contracted capacity, determined by the State Commission in its Tariff Orders. This payment along with interest shall be made within 30 days from the date of this Judgment and Order;

12.3 The State Commission is directed to verify the actual fixed cost component for which the Appellants are entitled to based on its order dated 30.11.2016. The MPPCL shall reconcile the payments after such verification and pay the arrears, if any, to the Appellants within a period of three months.

12.4 MPPMCL is also directed to release the signed PPA to Appellant No. 1 – Arya Energy Limited without any further delay.

- (viii) *This being the position, it is not understood how the Petitioner can even contend that any determination has to be done by this Hon'ble Commission and that too as per the RE Tariff Regulations 2017 which is a subsequent notification, and has nothing to do with the tariff order dated 30.11.2016. The tariff to be applied to Arya Energy already stands determined for a period of 20 years in the order dated 30.11.2016. The RE Tariff Regulations 2017 were not even notified at this stage and there is no basis for the Petitioner to now seek two-part tariff determination.*
- (ix) *The Hon'ble Appellate Tribunal has undertaken a detailed exercise by going through the tariff design adopted by this Hon'ble Commission in the order dated 03.05.2013, 13.08.2015, and 30.11.2016 respectively. The Hon'ble Appellate Tribunal in Paras 9.2 and 9.3 has clearly held that even the single part tariff has two components and is nothing but a summation of the fixed charge component and the variable charge component. The direction is simply to cull out the fixed charge component from the tariff order dated 30.11.2016.*
- (x) *Moreover, there can be no dispute at this stage to the applicability of the tariff order dated 30.11.2016 to Arya Energy. The tariff in order dated 30.11.2016 has now attained finality. The only challenge to the said order was on the conditions imposed and particularly with regard to the must-run status of biomass based plants. This was ultimately settled by the Hon'ble Supreme Court by its Judgment dated 26.04.2018, wherein the plants were to be subjected to MOD principles.*
- (xi) *Pursuant to the above, the only issue that remained was on payment of arrears for the past period when the supply was actually made (issue in Petition No. 35 of 2018), and the present issue of payment of fixed charges for the period when MOD was applied.*
- (xii) *The issue with regard to fixed charges was initially rejected by the Hon'ble Commission in its order dated 16.11.2018 in Petition No. 32 of 2018 holding that there cannot be payment of fixed charges on a single part tariff in order dated 30.11.2016. Now the Appellate Tribunal in its judgment dated 26.08.2019 in Appeal No. 396 of 2018 as extracted above, has held that the fixed charges has to be culled out from the same single part tariff in order dated 30.11.2016. There is no question of now changing the goal post at this stage and seeking determination of tariff.*
- (xiii) *After this long history of litigation, firstly on the tariff, and thereafter on the conditions imposed (MOD/Fixed charges etc.), MPPMCL is now seeking to contend that the tariff order itself should not be applied on the Respondent, and that the*

tariff needs to be determined by the Hon'ble Commission based on actuals. The contention of MPPMCL in this regard is preposterous, and is an essentially an abuse of process.

- (xiv) *As stated above, the entire attempt of MPPMCL seems to be to somehow shutdown the plant of Arya Energy, by never letting the litigation end. The Hon'ble Commission may kindly take note of the conduct of MPPMCL in this regard and impose heavy costs while dismissing the petition.*
- (xv) *During the hearing before the Hon'ble Commission, MPPMCL had sought to contend that the Hon'ble Commission is not bound to only verify the fixed charges in order dated 30.11.2016, as directed by the Hon'ble Tribunal but such verification has to be as per certain norms. In this regard, MPPMCL submitted that the Hon'ble Commission in exercise of its Regulatory Jurisdiction under Section 86(1)(b) can undertake the determination of tariff.*
- (xvi) *It is respectfully submitted that the above contention of MPPMCL is not only inviting the Hon'ble Commission to contravene the orders of the Hon'ble Appellate Tribunal and the Hon'ble Supreme Court, but is also completely misconceived on merits.*
- (xvii) *While there is no dispute to the fact that the general regulatory power is the source of power to regulate which includes power to determine tariff under Section 62, however, the Hon'ble Commission in exercise of its Regulatory Jurisdiction has already issued the tariff order dated 30.11.2016. this tariff order has also attained finality.*
- (xviii) *Now essentially what MPPMCL is arguing is that when the Hon'ble Appellate Tribunal in an appeal filed by the Respondent given certain directions on payment of fixed charges as per the said tariff order, MPPMCL is seeking the tariff itself to be redetermined. The argument is absurd in so far as it is seeking misuse of the powers of the Hon'ble Commission.*
- (xix) *The Hon'ble Commission in this regard may kindly consider the following:*
- a. *The Hon'ble Commission has already exercised its Regulatory Jurisdiction in issuing the tariff order dated 30.11.2016, and there can be no dispute to the applicability of the said tariff order;*

- b. *An exercise of redetermination of tariff would be in contravention of the specific orders of the Hon'ble Appellate Tribunal and the Hon'ble Supreme Court.*
- (xx) *It is respectfully submitted that the present Petition can be disposed of by this Hon'ble Commission by strictly complying with the direction of the Hon'ble Appellate Tribunal in its judgment dated 26.08.2019 as affirmed by the Hon'ble Supreme Court on 02.12.2019, by verifying the fixed charge component in the order dated 30.11.2016. Arya Energy has already placed on record a computation worked out by it applying the very parameters assumed by this Hon'ble Commission in the order dated 30.11.2016. (Annexure B of Reply)*
- (xxi) *It is being respectfully prayed that the Hon'ble Appellate Tribunal in Para 10.6 of the Judgment dated 26.08.2019 has already made certain observations against this Hon'ble Commission for denying the legitimate rights to Arya Energy and for ignoring the principles of judicial hierarchy.*
- (xxii) *In the circumstances, it would not be proper for this Hon'ble Commission to be misled by the contentions made by MPPMCL in the present Petition. As a public Utility, it is unfair on the part of the MPPMCL to invite this Hon'ble Commission to violate the Judgments of superior courts. Accepting any of the contentions of MPPMCL in the present Petition would amount to a clear contempt of the judgment dated 26.08.2019 as affirmed by the Hon'ble Supreme Court on 02.12.2019.*

Observations and Findings:

11. On perusal of the contents in the subject petition, the Commission has noted that the petitioner has sought determination of project specific two-part tariff for the 12MW and 10MW Biomass based power plants of the Respondent No. 1 and 2, respectively and the aforesaid prayer is made by the petitioner in compliance with the order passed by the Hon'ble Appellate Tribunal for Electricity on 26th August' 2019 in Appeal No. 396/2018. It is an admitted fact in the subject petition that the aforesaid order passed by the Hon'ble Appellate Tribunal for Electricity has been affirmed by the Hon'ble Supreme Court vide order dated 2nd December' 2019 in Civil appeal No. 8860 of 2019. The petitioner has stated that the subject petition is only limited to the directions passed by the Hon'ble Appellate Tribunal for Electricity in its order dated 26.08.2019 in Appeal No. 396 of 2018. The petitioner has contended in Para 7 of the subject petition that two part tariff for the aforesaid Biomass based power plants of Respondent No. 1 and 2 has to be determined as per the aforesaid order passed by the Hon'ble APTEL. As mentioned in the subject petition, the petitioner filed

an appeal before the Hon'ble Supreme Court challenging the aforesaid order dated 26th August' 2019 passed by the Hon'ble APTEL by way of Civil Appeal No. 8860 of 2019 and the aforesaid Civil Appeal has been dismissed vide order dated 2nd December' 2019 passed by the Hon'ble Supreme Court. In the subject petition, the petitioner has also mentioned about order dated 15th may' 2017 passed by the Hon'ble High Court of MP, Principal Bench at Jabalpur in Writ Petition No. 3819 of 2017 and SLP No. 29262 of 2018 filed by the petitioner before the Hon'ble Supreme Court with regard to other issues which are not to be dealt with by this Commission in the subject petition.

12. In view of the foregoing, the subject petition has to be examined and adjudicated by this Commission solely in terms of the observations and directions by the Hon'ble Appellate Tribunal for Electricity in its order dated 26th August' 2019 in Appeal No. 396 of 2018. In Para 3 to 5 of the written submission filed on 19th November' 2020, the petitioner stated the following:

“(i) The directions given by the Hon'ble APTEL, which have attained finality, relevant to the adjudication of the instant petition, are as mentioned in para 9.1 to 9.9 of the judgment in Appeal No.396/2018. The relevant portion at para 9.9 is quoted as under:

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“9.9 Even though the Appellants have placed the calculation of fixed cost component as per the Order dated 30.11.2016 before us and the same has not been disputed by MPPMCL and MPERC. However, the State Commission would need to verify the said figures based on its prevailing orders. As an interim measure, the MPPMCL should pay to the Appellants fixed cost component as indicated in the table A hereinabove on the normative PLF of 80% of contracted capacity with interest subject to final reconciliation of fixed cost component of 30.11.2016 order to be duly verified by the State Commission.”

(ii) A perusal of para 9.9 (as also 9.1 to 9.8) of the judgment dated 26.08.2019 of the judgment of Hon'ble APTEL highlights the following:

(a) That two-part tariff as well as single part tariff have the same very component i.e. fixed charge component and variable charge component.

(b) The State Commission has in its tariff order of 02.03.2012 given a two-part tariff, however, in the subsequent tariff orders dated 03.05.2013, 13.08.2015 and 30.11.2016 the tariff design/structure was of the order dated 02.03.2012, however, in the computation, the State Commission clubbed the fixed charge component and variable charge component and gave a single part tariff.

- (c) *The tariff structure of single part tariff is nothing but a summation of the fixed charge component and variable charge component which has items such as return on equity, interest on loan capital, depreciation, O & M expenses etc.*
 - (d) *The State Commission in its earlier order dated 20.11.2013 in the case of ASN Industries and 08.02.2016 in the case of Shalivana Green Energy has culled out the fixed charge component and variable charge component from the single part tariff.*
 - (e) *In the tariff order dated 30.11.2016 there was an increase in variable cost component which in turn has led to an increase in the fixed cost component due to the increase in the interest cost on the working capital.*
 - (f) *It was, therefore, directed by the Hon'ble APTEL in para 9.9 and para 12.3 of its judgement, that the actual fixed cost payable to the respondents needs to be verified by this Hon'ble Commission in accordance with its prevailing orders.*
- (iii) *In this regard, it is most respectfully submitted that the interim tariff given by the Hon'ble APTEL in Table-A of para 9.7 of its judgement is based on the variable tariff as given by this Hon'ble Commission, in the case of Shalivana Green Energy order dated 08.12.2016 and of ASN Industries case order dated 20.11.2013 and the Hon'ble APTEL, subtracted the variable cost from the single part tariff as given in the order dated 03.05.2013 to arrive at the fixed cost component. However, as noted by the Hon'ble APTEL in para 9.8 and 9.9 the fixed cost component payable to the respondents has to be arrived/verified at, on the basis of order dated 30.11.2016 and the calculation given by the respondents in Annexure-B (appellants before the APTEL) and this Annexure-B, needs to be verified by this Hon'ble State Commission on the basis of its prevailing orders. Further, the direction of the Hon'ble APTEL in para 12.3 is crystal clear wherein it directs this Hon'ble Commission to verify the actual fixed cost component for which the respondents (appellants before the APTEL) are entitled to, based on the order dated 30.11.2016 of this Hon'ble Commission. The relevant para 12.3 of the judgment in Appeal No.396/2018 is quoted as under: -*

“12.3 The State Commission is directed to verify the actual fixed cost component for which the Appellants are entitled to based on its order dated 30.11.2016. The MPPCL shall reconcile the payments after such verification and pay the arrears, if any, to the Appellants within a period three months.”

13. In Para 5 of the aforesaid written submission, the petitioner has stated that there has been a litigation history between the parties wherein the various tariff orders passed by this

Commission were challenged by Hon'ble APTEL and Hon'ble Supreme Court on several occasions. The petitioner has further stated that the aforesaid checkered litigation history between the parties is not a issue before this Commission, however, the petitioner has mentioned the same for the parties of completion of narration of facts. In its submission, the petitioner has objected the contention of the Respondent No. 1 regarding the calculation sheet filed by Respondent No. 1 as **Annexure B** with its submission for verification of fixed cost out of the tariff determined by the Commission on 30.11.2016. The petitioner stated that the aforesaid calculation sheet placed by the Respondent No.1 should not be mechanically approved by this Commission without due application of norms, principles and prudence check. In nut shell, the petitioner has requested for determination of a fresh project specific two part tariff for 12MW and 10MW biomass based power plant for Respondent No. 1 and 2, respectively in accordance with the provisions under Section 61, 62 and 86(1)(b) of the Electricity Act, 2003 after obtaining financial, technical, operational and other details of the said biomass based power plants, in terms of MPERC (Terms and Conditions for tariff determination of energy from renewable energy sources) Regulations, 2017 or any other applicable Regulations.

14. While going through the submissions filed by the petitioner and the Respondent No. 1 vis-a-vis the observations and directions of the Hon'ble Appellate Tribunal for Electricity in its Judgment dated 26th August' 2019 in Appeal No. 396 of 2018, it is observed that this Commission has to verify the actual fixed cost component for which the Respondents are entitled based on the tariff order dated 30.11.2016 passed by this Commission in SMP No. 08 of 2013. It is abundantly clear from the aforesaid judgment of Hon'ble Appellate Tribunal for Electricity which has been affirmed by the Hon'ble Supreme Court vide order dated 2nd December' 2019 in Civil Appeal No. 8860 of 2019 that the year-wise tariff for generation of electricity from the Biomass based power plants of the Respondents determined by this Commission vide order dated 30th November' 2016 has attained finality. It is undisputed that the aforesaid tariff order dated 30.11.2016 has been issued by this Commission in exercise of its Regulatory Jurisdiction. In view of all the above observations, request of the petitioner seeking determination of project specific two-part tariff for the 12MW and 10MW Biomass based power plants after obtaining financial, technical, operational and other details of the said biomass-based power plants is devoid of merit and can therefore not be entertained.

15. In terms of the Judgment dated 26th August' 2019 passed by the Hon'ble APTEL in Appeal No. 396 of 2018, this Commission has to only verify the actual fixed cost component in year-wise tariff determined by this Commission vide order dated 30.11.2016 for reconciliation of payments by the petitioner after such verification. Accordingly, based on the norms, principles and methodology considered by the Commission while issuing the tariff order dated 30.11.2016 in SMP -08/2013, the Commission has verified year-wise

actual fixed cost component in the aforesaid tariff order for the Biomass energy projects commissioned during FY 2013-14 and thereafter, which is as under:

(Amount in Rs. /unit)

Particulars	1st Year	2nd Year	3rd Year	4th Year	5th Year	6th Year	7th Year	8th Year	9th Year	10th Year
Fixed Charges	2.59	2.12	2.09	2.06	2.03	2.01	1.98	1.96	1.95	1.93
Energy Charges	3.99	4.19	4.40	4.62	4.85	5.10	5.35	5.62	5.90	6.20
Total Tariff	6.58	6.31	6.49	6.68	6.89	7.10	7.34	7.58	7.85	8.13

(Amount in Rs. /unit)

Particulars	11th Year	12th Year	13th Year	14th Year	15th Year	16th Year	17th Year	18th Year	19th Year	20th Year
Fixed Charges	1.57	1.63	1.68	1.74	1.80	1.87	1.93	2.01	2.08	2.16
Energy Charges	6.51	6.83	7.17	7.53	7.91	8.30	8.72	9.15	9.61	10.09
Total Tariff	8.08	8.46	8.85	9.27	9.71	10.17	10.65	11.16	11.69	12.25

16. Accordingly, on perusal of entire record of the case, specially in light of the orders passed by Hon'ble Appellate Tribunal for Electricity and Hon'ble Supreme Court of India, as mentioned above, we are of the considerate view that the prayers of Petitioner are not sustainable and they do not have any force of law. Therefore, the Respondents are entitled to get the fixed cost component as verified above, in accordance with the directions given by Hon'ble Appellate Tribunal for Electricity in para 12.3 of its order dated 26.08.2019 in Appeal No. 396 of 2018.

With aforesaid directions and observations, this petition is hereby disposed of.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman