

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION  
BHOPAL**

**Sub: In the matter of petition under section 86(1)(f) of the Electricity Act, 2003 for adjudication of disputes between the generator and the procurer of electricity regarding the arrears/ interest bills raised by the petitioner in terms of the liberty given by the Hon'ble Appellate Tribunal for Electricity in the judgment dated 29.05.2018 in EP No. 2 of 2017 in Appeal No. 338 of 2016.**

---

**Petition No. 35 of 2018**

**ORDER**

**(Date of Order: 6<sup>th</sup> April' 2021)**

**M/s. Arya Energy Ltd.**

Third Floor, E-14, Shyam Plaza, Pandri  
Raipur - 492 001.

- **Petitioner No. 1**

**M/s. Orient Green Power Co. Ltd.**

Sigappi Achi Building - 4<sup>th</sup> Floor,  
No. 18/3, Rukmani Road (Marshalls Road),  
Egmore, Chennai - 600 008.

- **Petitioner No. 2**

**Vs.**

**M.P. Power Management Co. Ltd.**

Shakti Bhawan, Rampur, Jabalpur - 482 008

- **Respondent No. 1**

**State Load Dispatch Centre (SLDC)**

Nayagaon, Jabalpur - 482 008

- **Respondent No. 2**

Ms. Swapna Seshadri, Advocate, Shri Aditya K. Singh, Advocate, Ms. Neha Garg, Advocate, Shri Ashwin Ramanathan, Advocate, Shri Manish Nathani, Director and Ms. Ritu Apurva, Advocate appeared on behalf of the petitioners.

Shri Aashish Anand Bernard, Advocate, Shri Manoj Dubey, Advocate and Shri Sanjeev Khare, DGM appeared on behalf of Respondent No. 1.

Shri S.S. Patel, SE, Shri D. Chakraborty, EE, SLDC and Shri Anurag Misra, EE, SLDC appeared on behalf of Respondent No. 2.

**2.** The petitioners, M/s. Arya Energy Ltd. and M/s. Orient Green Power Co. Ltd. filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between the petitioners and the Respondent No.1 (procurer of electricity) regarding the arrears/ interest bills raised from 19.09.2013 to 17.1.2017 by the petitioner No. 1 and from 20.01.2014 to 17.01.2017 by the petitioner No. 2 along with delayed payment surcharge @ 1.25% per annum on the aforesaid arrears under dispute. The petitioners have sought adjudication of dispute in terms of the liberty granted by the Hon'ble Appellate Tribunal for Electricity vide Judgment dated 29<sup>th</sup> May' 2018 in EP No. 2 of 2017 in Appeal No. 338 of 2016.

3. The petitioners broadly submitted the following in the subject petition:
- (i) *The present petition is filed by the Petitioners in accordance with the liberty and directions of the Hon'ble Appellate Tribunal for Electricity (hereinafter referred to as 'Hon'ble Tribunal') in the order dated 29.05.2018 in Execution Petition No. 02 of 2017 in Appeal No. 338 of 2017 merged with tariff order dated 30.11.2016 in SMP No. 8/2013 passed by the Hon'ble Commission. As per the order dated 29.05.2018 the Hon'ble Tribunal has held that before passing any directions on the payment of arrears and interest thereon, the Hon'ble Commission should decide the issue.*
  - (ii) *The Petitioners have already filed a petition being No. 32/2018 pertaining to the issue of payment of fixed charges on 07.07.2018, since the parties were discussing to mutually resolve the issue of payment of arrears and interest thereon. In the said petition, the Petitioners had sought liberty to approach the Hon'ble Commission in case the settlement process does not fructify. Since the parties have not been able to settle the matter, the present petition is being filed.*
  - (iii) *The Petitioners are biomass generating companies in the State of Madhya Pradesh. The Respondent is a fully owned company of the Government of Madhya Pradesh and entrusted for procurement of power for three Distribution companies of the State viz. Madhya Pradesh.*
  - (iv) *The tariff order dated 02.03.2012 passed by the Hon'ble Commission was challenged by one of the Biomass based power plant M/s. Harvest Energy Limited by way of an appeal, 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 Hon'ble 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 C.*
  - (v) *It is submitted that the issue raised by M/s. Harvest Energy Ltd. in Appeal No. 93 of 2012 before the Hon'ble Tribunal only related to the expenses allowed under various heads in determination of the tariff Order dated 02.03.2012.*
  - (vi) *This Hon'ble Commission pursuant to the remand passed the Order dated 03.05.2013 in SMP No. 8/2013.*
  - (vii) *The aforesaid Order dated 03.05.2013 passed by the Hon'ble Commission was again challenged by way of an appeal, 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 Commission for re-determination of Gross Calorific Value (GCV) of the fuel and the Station Heat Rate (SHR). In addition to the above, it is also submitted that the Hon'ble Tribunal vide the order dated 03.05.2013 clearly held that in the interim period till redetermination of GCV and SHR, the distribution licensee will pay the generators at the tariff decided*
-

by the Hon'ble Commission in the order dated 03.05.2013 subject to adjustment on the final determination by the Hon'ble Commission.

- (viii) The Hon'ble Commission in remand passed the order dated 13.08.2015, a copy of which is attached hereto and marked as Annexure F.
- (ix) The Order dated 13.08.2015 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 values of SHR and GCV as determined by the Hon'ble Commission. The Hon'ble Tribunal itself determined the value of GCV and SHR as 3100 Kcal/kwh and 4200 Kcal/Kwh respectively. The matter was only remanded to the Hon'ble Commission with the directions to determine the tariff adopting the GCV and SHR as decided by the Hon'bel Tribunal within two months from the date of order.
- (x) Aggrieved by the judgment dated 04.05.2016 in Appeal No. 211 of 2016 passed by the Hon'ble Tribunal the Respondent No. 1 approached the Hon'ble Supreme Court by way of second appeal, Civil Appeal No. 6547 of 2016. The Hon'ble Supreme Court dismissed the civil appeal vide an order dated 25.07.2016 and confirmed the order dated 04.05.2016 in Appeal No. 211 of 2015 passed by the Hon'ble Tribunal. 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 H.
- (xi) The Hon'ble Commission has also sought a review of the above judgment which review stood rejected. Thereafter, the Hon'ble Commission re-determined the tariff vide an order dated 30.11.2016 adopting the GCV and SHR as decided by the Hon'ble Tribunal in its order dated 04.05.2016 in Appeal No. 211 of 2015. However, the re-determination of tariff was subject to certain terms and conditions as enumerated below:
- (a) This tariff shall be applicable till 31.03.2017 or till the new tariff order is issued, whichever is earlier.
- (b) The project for more than 2 MW are subjected to the 'scheduling' and 'merit order dispatch principles' in terms of para 8.10 of the tariff order dated 02.03.2012 since the date of commissioning.
- (c) This tariff order is applicable to the projects using rice husk, wheat husk, mulberry and coal (limited to 15% of the total fuel on annual basis) only as a fuel based on which GCV has been decided by the Hon'ble Tribunal in its judgment dated 04.05.2016.
- (d) This tariff shall be applicable for the projects for which the Power Purchase Agreements has already been executed at the time of commissioning of the project.

- (e) *The Madhya Pradesh Power Management Company i.e. Respondent No. 1 in the present petition shall submit the draft of the power purchase agreement to be executed, if any, with the developers of biomass based power projects to be commissioned after the date of order, for approval of the Commission.*
- (f) *The developer shall have to submit monthly information, as required under para 8.25 of the tariff order dated 02.03.2012, to Respondent No. 1 by 10<sup>th</sup> day of each month following the month of information failing which action as per the provisions of para 8.26 of the tariff order dated 02.03.2012 must be ensured by the Respondent No. 1.*

*A copy of the order dated 30.11.2016 in SMP – 8/2013 passed by the Hon'ble Commission is attached hereto and marked as Annexure I.*

- (xii) *Aggrieved by the order dated 30.11.2016 in SMP-8/2013 passed by the Hon'ble Commission, the Petitioner challenged the same by way of an appeal, Appeal No. 338 of 2016 before the Hon'ble Tribunal. The said appeal was filed on 13.12.2016 on the ground that imposition of new conditions i.e. an existing PPA at the time of commissioning of the project for applicability of tariff by the Hon'ble Commission has taken away the effect of the Hon'ble Tribunal's judgment dated 04.05.2016 in Appeal No. 211 of 2015.*
- (xiii) *It is submitted that the Hon'ble Tribunal decided the aforementioned appeal, Appeal No. 338 of 2016 by the Judgment dated 20.03.2017. The Hon'ble Tribunal opined that condition (e) and (f) are nothing but general directions to Respondent No. 1 as a monitoring mechanism and therefore there is no illegality found in these two conditions. The rest of the conditions (a), (b), (c) and (d) specified in para 15 of the order dated 30.11.2016 in SMP-8/2013 passed by the Hon'ble Commission were set aside. 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 J.*
- (xiv) *Aggrieved by the order dated 20.03.2017 in Appeal No. 338 of 2016 passed by the Hon'ble Tribunal both the Hon'ble Commission and Respondent No. 1 reviews, being Review Petition No. 5 of 2017 and Review Petition no. 4 of 2017 on 11.05.2017 before the Hon'ble Tribunal respectively. The primary ground for filing the review application was that the biomass plants have been excluded from scheduling and merit order dispatch principle and to set aside the finding that Respondent No. 2 has already entered into a PPA with Respondent No. 1.*
- (xv) *It is submitted that the Hon'ble Tribunal dismissed the above review petitions vide an order dated 02.08.2017. A copy of the order dated 18.01.2017 in Review Petition No. 4 & 5 of 2017 is attached hereto and marked as Annexure K.*
- (xvi) *The Respondent No. 1 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. Even though*

other issues were raised by Respondent No. 1, the only issue which was argued was the one of must run status versus merit order dispatch.

(xvii) The Hon'ble Supreme Court vide an order dated 26.04.2018 allowed the civil appeal only on the issue of giving 'must run' status to the Petitioners. The Hon'ble Supreme Court has inter-alia held as under:

**"8. We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulations, 2010. The fact remains that the said Regulation stands substituted by the MPERC tariff order 2012 and thereafter in the PPA it was agreed that clause 8.10 of the Tariff Order as amended on 03.05.2013 will apply. The said tariff order has now become final between the parties to the agreement which provides for single part tariff. Thus, the findings of two part tariff cannot be sustained. We are unable to uphold the findings that clause 8.10 of the tariff order dated 02.03.2012 will not apply in these circumstances.**

**9. Accordingly, we set aside the impugned order and restore the order of the MPERC dated 30.11.2016 insofar as condition (b) of Para 15 quoted above is concerned. The remaining conditions will remain unaffected.**

**10. The appeals are, accordingly, disposed of.**

**11. Pending execution application(s) may now be decided in accordance with law."**

A copy of the order dated 26.04.2018 in Civil Appeal No. 4550-4551 of 2017 passed by the Hon'ble Supreme Court is attached hereto and marked as Annexure I.

(xviii) It is submitted that till the final decision in Civil Appeal No. 4550-4551 of 2017 was taken by the Hon'ble Supreme Court, the Hon'ble Tribunal kept on postponing the hearing of the Execution Petition No. 02 of 2017. It is only after the Order dated 26.04.2017 was passed, the execution petition was heard by the Hon'ble Tribunal.

(xix) In any event, there was no issue at all pertaining to the tariff fixed for generation and sale of electricity from the Petitioners to the Respondent No. 1 which had attained finality upon the dismissal of Civil Appeal 6547 of 2016 on 25.07.2016.

(xx) For the period from 17.01.2017, the Respondent No. 1 had applied the merit order dispatch principle on the Petitioners and the plants have been shut. For the prior period i.e. the period for which electricity had been supplied by the Petitioners to Respondent No. 1, the payment has been made as per the earlier

tariff and not as per the Tariff Order dated 30.11.2016 of this Hon'ble Commission and judgment dated 04.05.2016 of the Hon'ble Tribunal.

- (xxi) It is respectfully submitted that in terms of the Order passed by the Appellate Tribunal & this Hon'ble Commission the tariff for the purchase of electricity by Respondent No. 1 from the petitioners is settled at Rs. 6.58/KwH/6.31/KwH/Rs. 6.49/KwH progressively for FY 2013-14; The Respondent has been supplied 60,115,898 MU and 228,324,400 MU of electricity by the Petitioners No. 1 and 2 respectively, till January 2017. The same has been taken delivery of by the Respondent No. 1. The Respondent No. 1 has paid for the said quantum at the reduced rate of Rs. 5.64/ 5.32/5.45 /KwH. The difference between the rates mentioned herein above and the rate already paid is outstanding from Respondent No. 1 to the Petitioner No. 1 and 2.
- (xxii) The COD of the Petitioner No. 1 was 30.05.2013 and the power was being supplied by the Petitioner No.1 in terms of the LOI dated 11.10.2013. The relevant clauses of the LOI are reproduced as hereunder:

**"2. Rate: Applicable rate for this LOI is Rs. 5.64/kWh (this rate is for first year after commissioning of the plant during FY 2013-14 as per MPERC tariff Order dated 03.05.2013 and read with MPERC tariff Order 02.03.2012). This rate is inclusive of all charges on account of taxes/ duties/ cess/ octroi etc.**

**3. The above rate shall be subject to outcome of the Appeal No. 144 of 2013 before the Hon'ble Appellate Tribunal of Electricity, New Delhi and without prejudice to the rights of the parties as per Order dated 04.09.2013 of Appellate Tribunal, New Delhi."**

- (xxiii) The COD of the Petitioner No. 2 was 22.01.2014 and the power was being supplied by Petitioner No. 2 in terms of LOI dated 20.12.2013. Subsequently, the Petitioner No. 2 had entered into a PPA with the Respondent No. 1. The relevant clauses of the said LOI dated 20.12.2013 with respect to the tariff are as follows:

**"6. Rate: Applicable rate for this LOI is Rs. 5.64/kWh (this rate is for the plants commissioned during FY 2013-14 for their first year of operation as per MPERC tariff Order dated 03.05.2013 and read with MPERC tariff Order 02.03.2012). This rate is inclusive of all charges on account of taxes/ duties/ cess/ octroi etc.**

**7. The above rate shall be subject to outcome of the Appeal No. 144 of 2013 before the Hon'ble Appellate Tribunal of Electricity, New Delhi and without prejudice to the rights of the parties as per Order dated 04.09.2013 of Appellate Tribunal, New Delhi."**

- (xxiv) Further, since there will be substantial delay in the payment of arrears by the Respondent, interest/ delayed payment surcharge also needs to be paid on the same. In this regard, in terms of the LOI and the PPA, the interest is payable on

*the above amount at the Delayed Payment Surcharge @ 1.25% per month. The relevant clause of the LOI dated 11.10.2013 of Arya Energy Limited reads as follows:*

***“2(e) Surcharge for Late payment – A surcharge of 1.25% per month shall be payable by MPPMCL on the amount outstanding after the 30<sup>th</sup> day of the receipt of the bill. Surcharge shall be calculated on day to day basis.”***

*The relevant clause of the PPA executed by Orient Energy Limited reads as follows:*

***“7.6.4 In case the Procurer makes full payment within 15 days from the date of submission of bill by Seller, an incentive @ 1% of billed amount shall be allowed by the Seller towards prompt payment. In case of delay beyond the 30 days payment period, the Procurer will pay delayed payment penalty on outstanding amount at the rate of 1.25% per month or part thereof.”***

*Copies of the LOI and PPA entered into is attached hereto and marked as Annexure O.*

*(xxv) Due to the non-payment of the tariff validity due to the Petitioners, the assets of the Petitioners have been declared as NPA and recovery proceedings against the Petitioners have started. Copies of the letters pertaining to NPA declaration are attached hereto and marked as Annexure P.*

*(xxvi) It is also submitted that the Hon’ble Tribunal in addition to the above, opines that the dispute on payment of arrears and interest by Respondent No. 1 does hold merit but first needs to be adjudicated by the Hon’ble Commission. The appropriate forum for adjudication of disputes is the Hon’ble Commission and not the Appellate authority.*

*(xxvii) In the circumstances, the Petitioners are approaching the Hon’ble Commission for directions and an expedited disposal of the present petition.”*

**4.** With the above submissions, the petitioners prayed the following in the subject petition:

*(a) “Direct Respondent No. 1 to pay the arrears bills raised by the Petitioners for the power supplied from 19.09.2013 till 17.01.2017 for Petitioner No. 1 and from 20.01.2014 till 17.01.2017 for Petitioner No. 2;*

*(b) Direct the Respondent No. 1 to pay delayed payment surcharge @ 1.25% per annum on the above adjudicated arrears;*

*(c) Pass any such further orders as this Hon’ble Commission may deem fit in the facts and circumstances of the case.”*

**5.** The petition was admitted on 28<sup>th</sup> August'2018. The petitioners were directed to serve copy of the subject petition on the Respondents and the Respondents were directed to file their replies to the petition by 18<sup>th</sup> September' 2018. They were also directed to serve copy of their replies to the petitioners simultaneously.

**6.** At the hearing held on 25<sup>th</sup> September' 2018, the Respondent No.1 sought additional time for filing reply to the subject petition. The Respondent No.1 was allowed to file reply by 3<sup>rd</sup> October' 2018.

**7.** By affidavit dated 29<sup>th</sup> October' 2018, the Respondent No.1 (MPPMCL) filed reply to the subject petition. Thereafter, the petitioners by affidavit dated 13<sup>th</sup> November' 2018 filed their rejoinder on the aforesaid reply. The Respondent No.1 filed sur-rejoinder to the aforesaid rejoinder filed by the petitioners.

**8.** In view of the issues involved in the subject petition, the State Load Despatch Centre MP was also made Respondent in this matter. The State Load Despatch Centre MP filed reply on 10.12.2018.

**9.** The petitioners had requested for time extensions for filing their submissions and sought adjournment in the hearings held on 15.11.2018, 12.12.2018, 08.01.2019, 30.01.2019, 05.03.2019 and 14.05.2019. At the hearing held on 14.05.2019, this matter could not be fixed for hearing in the month of May' 2019 and June'2019 due to inability shown by Ld. Counsels who appeared for the petitioners and the Respondent No.1, respectively. As agreed by both the parties, the case was fixed for next hearing on 16<sup>th</sup> July' 2019. However, the hearing held on 16<sup>th</sup> July' 2019 was also deferred due to Advocates' strike.

**10.** The arguments by the petitioners and Respondent No.1 were held on the next hearing held on 20<sup>th</sup> August' 2019. None appeared for the parties in the next hearing held on 3<sup>rd</sup> September' 2019. At the hearing held on 15<sup>th</sup> October' 2019 it was observed that the petitioners in their written submission mentioned about the Judgment dated 26.08.2019 pronounced by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 396 of 2018.

**11.** Looking into the period of the issue involved in the subject matter and in order to understand the actual status of scheduling, billing and payments made since COD and also for adjudication of the subject petition in light of above-mentioned Judgment passed by the Hon'ble Appellate Tribunal for Electricity, the petitioners vide Commission's order dated 08.11.2019 were asked to file the following information with the Commission:

- (i) Whether Merit Order Dispatch principles have been applied since COD for scheduling electricity from petitioners' power plant in the subject matter?

- (ii) The details of month-wise energy scheduled/ unscheduled available capacity from the petitioners' power plant from COD alongwith the tariff billed by the petitioners and paid by MPPMCL.
- (iii) The details of a monthly information required under Para 8.25 of the tariff order dated 02.03.2012 alongwith any actions if taken by MPPMCL in terms of Para 8.26 of the aforesaid tariff order while billing and payment of electricity supplied by the petitioners to MPPMCL since the CoD.

**12.** The above information was sought from the petitioners latest by 30<sup>th</sup> November' 2019. However, the petitioners filed their reply on 2<sup>nd</sup> March' 2020 after a period of three months. On perusal of the aforesaid reply filed by the petitioners, it was observed that the petitioners could not furnish the information as sought by the Commission. The Respondent, MPPMCL, filed its rejoinder on 20<sup>th</sup> March' 2020 to the aforesaid reply submitted by the petitioners. The subject matter could not be heard thereafter due to outbreak of Covid-19 followed by Nationwide lock down. In view of aforesaid reasons, this case was heard on 23<sup>rd</sup> June' 2020 through video conferencing.

**13.** At the hearing held on 23<sup>rd</sup> June' 2020, Ld. Counsel for the Respondent No. 1 had sought adjournment for the reason that he could not collect the file in this matter from his New Delhi office due to outbreak of Covid-19. Considering the reasons mentioned by Ld. Counsel of the Respondent No.1, the hearing was adjourned. The petitioners were again directed to file the information by 10<sup>th</sup> July'2020 as sought by the Commission in its daily order dated 8<sup>th</sup> November' 2019 in this matter.

**14.** At the hearing held on the 06<sup>th</sup> October'2020, the Commission observed the following:

- (i) In response to the Commission's directions in daily orders dated 08<sup>th</sup> November' 2019 and 23<sup>rd</sup> June'2020, the petitioners filed their response on 13<sup>th</sup> July' 2020.
- (ii) The Respondent No.1 also filed reply on 05<sup>th</sup> September'2020 to the above response filed by the petitioners.
- (iii) Ld. Counsels for the petitioners and the Respondent No.1 concluded their arguments. Ld. Counsel for the petitioners sought time to file written note on arguments.
- (iv) In view of the issues involved and the response filed by the petitioners, the Respondent No.1, who paid bills for electricity supplied from the petitioners' power plants to the Respondent during the period under billing dispute, was directed to submit the following details/information for that period:
  - (a) Whether Merit Order Dispatch principles were applied since COD for scheduling electricity from petitioners' power plant during the billing dispute period and thereafter.

- (b) If the Merit Order Dispatch principles have not been applied for scheduling electricity from petitioners' power plant, the reasons for the same be submitted.
- (c) Provide complete details of monthly bills paid by MPPMCL to the petitioners during the period of billing dispute. To provide details of amount for the same period that may be payable by MPPMCL to the petitioners, if tariffs is calculated based on Tariff Order dated 30.11.2016. The comparison may be provided in a tabular form. As per the order of Hon'ble Supreme Court, MoD principle has to be applied for the aforesaid period. Therefore, it may be confirmed if MoD principle was applied for the aforesaid period. In the event that MoD principle was not applied, then provide fresh calculation of quantum of power that should have been scheduled and the tariff at which payment should have been made by MPPMCL to the petitioner for the aforesaid period.
- (d) With regard to compliance with para 8.25 of the Tariff Order dated 02.03.2012, the reply of the petitioners in this petition may be verified by MPPMCL and findings thereon be communicated to the Commission.

15. Having heard the arguments at length placed by the petitioner and Respondent No.1, the parties were allowed to file their written submissions within ten days. The Respondent No.1 was directed to file the details/information as sought above within ten days. The petitioners filed their written submissions on 31.10.2020 however, the Respondent No.1 after seeking time extension filed its written submission on 31.12.2020.

**Submissions by the Parties:**

16. By affidavit dated 29<sup>th</sup> October'2018, the Respondent No. 1 (MPPMCL) broadly submitted the following in reply to the subject petition:

*"(1) It is respectfully submitted that the instant matter is arising out of several rounds of litigation between the parties wherein the Hon'ble Appellate Tribunal for Electricity vide order dated 29/5/2018 in Execution Petition 2/2017, has remanded the matter to this Hon'ble Commission for adjudication of disputes in light of the judgment of the Hon'ble Apex Court.*

*In para (3) (i) of the APTEL order dated 29/5/18, it is stated that;*

*"In the instant petition, the Execution Petitioners have pressed upon two issues i.e. **arrears and interest for the power supplied by the Petitioners from Commercial Operation Date (COD) till 17.2.2017** and payment of fixed charges and interest thereon from 17.2.2017 when MOD was applied by MPPMCL and stopped scheduling power from the biomass power projects of the Petitioners 2 to 4."*

*Copy of the order dated 29/5/18 is placed at Annexure-A of the Petition.*

**Re: Issue Decided by Hon'ble Apex Court**

- (2) *In this regard it is most respectfully submitted that the above matter of pending Execution Petition 2/2017 before APTEL was brought in notice to Hon'ble Supreme Court during the adjudication of SLP No. 25150-25151/2017 against APTEL Order dated 20.03.2017 and 02.08.2017 in the matter of MPERC Tariff order dated 30.11.2016. In this regard, Hon'ble Supreme court was pleased to pass the following order on 26.03.2018;*

*“On, request, the matters are adjourned to 26th April, 2018. Learned counsel for the respondent (Petitioners in the instant case) has made a statement that in the meanwhile respondents will not proceed with the execution.”*

*Copy of the order dated 26.03.2018 is placed at Annexure-R-1.*

*After hearing the matters including payment of arrears, finally, Hon'ble Supreme Court in a lis between the parties vide order dated 26/4/2018 in Civil Appeal No. 25150-25151/2017 has clearly held that the Tariff order dated 3.5.2013 and the agreement has now become final between the Parties (Petitioner and Respondent) and therefore in view of this clear enunciation of facts and directions by the Hon'ble Apex Court it is illegal and mischievous on the part of the Petitioners to claim arrears of bills.*

- (3) *Thus, it is most respectfully submitted that the instant issue of payment of arrears is no longer open to be adjudicated between the parties as the Hon'ble Supreme Court vide order dated 26/4/2018 has very specifically held in para 8 of the Order, that the agreement and tariff order dated 3.5.2013 is now final. A copy of the order dated 26/4/2018 is attached as Annexure-L to the Petition.*

- (4) *It is most respectfully submitted that for the convenience of this Hon'ble Commission the Respondent seeks leave to reproduce the relevant paras 6-8 of the order and judgment date 26/4/2018 passed by the Hon'ble Supreme Court as under:*

*“6. The APTEL held that notwithstanding Clause 8.10 in the Tariff Order, MR principle will apply in view of Regulation 9 of the MPERC Regulation 2010. The APTEL observed:*

*“16.2 Thus, we do not agree with the State Commission to keep the Biomass Power plants in scheduling as mentioned in the Clause 8.10 of the tariff order dated 02.03.2012 but at the same time, the clause 9 of the Regulation supports the Biomass plants under non-scheduling category and as per clause 5.6 of the tariff order dated 02.03.2012, the Biomass plants should be given 'Must Run Status'. Further this Tribunal in various judgments upheld that the State Commissions should follow their own*

condition of the Regulations while determining the Tariff Order.

**16.3** *It is also to state that in the tariff order dated 02.03.2012, a two part tariff was introduced and thereby the biomass power plants can survive with fixed charges to meet their capital cost, O&M expenses etc. even if the plants are in scheduling so that the generators can pay back their commitments towards loan re-payment to the nationalized banks and to financial institutions. In the subsequent tariff orders, the two part tariff was replaced by single part tariff. In the single part tariff if the biomass generators are kept under scheduling and dispatch principles it is difficult for the generators to meet their expenditures like payment of loan, O&M expenses etc. and thereby the biomass plants are forced to close down and thereby the principle of promotion of renewable energy sources will be defeated.*

**16.4** *In view of above, we feel that the biomass generating plants are to be kept under must run status so that the obligated entities can fulfill their RPO obligation and thereby the object of National Tariff Policy and promotion of co-generation and renewable energy generation can be fulfilled. Further, the biomass generation can survive in the State of M.P. It is pertinent to mention that the Appellant plants are supplying power from the date of commissioning without any scheduling by the State Load Dispatch Centres. In the light of the above, the very basis for providing for scheduling and merit order principles and not giving must run status contained in the Tariff Order dated 02.03.2012 ceased to apply. Further, in general we feel that merit order principle would apply when there is a two part tariff but in the case of single part tariff, there is no question of applying merit order dispatch principle.*

**16.5.** *Accordingly, we are not agreeing with the decision of the State Commission that the project for more than 2 M.W. are subject to scheduling and merit order principles in terms of the para 8.10 of the Tariff Order dated 02.03.2012 since date of commissioning.*

*We set aside the conditions (a), (b), and (d) specified in para 15 of the impugned Tariff Order dated 30.11.2016.”*

7. *We have heard learned counsel for the parties on the correctness of the issue whether the principle of MR will apply or of MOD in relation to respondents 2,3 and 4 having regard to the agreement with the said parties.*

8. *We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulation 2010. The fact remains that the said Regulation stands substituted by MPERC Tariff Order 2012 and thereafter in the PPA it was agreed that Clause 8.10 of the Tariff Order as amended on 03.05.2013 will apply. **The said Tariff Order has now become final between the parties to the agreement which provides for single part tariff. Thus, the findings of two part tariff cannot be sustained.** We are unable to uphold the findings that clause 8.10 of the tariff order dated*

02.03.2012 will not apply in these circumstances.”

- (5) *It is submitted that the Hon'ble Supreme Court has clearly held that the Tariff order dated 3.5.2013 is now final and binding between the Parties vide its order dated 26.4.2018, therefore for the Petitioners to now aver and claim arrears as per the Tariff Order dated 30.11.2016 is illegal and not in accordance with law.*
- (6) *It is further submitted that in accordance with the law as laid down in Hon'ble Supreme Court in the case of “**South Central Railway Employees Cooperative Credit Society Employees Union Vs. B. Yashodabai and ors**” reported in “[2015] 2 SCC 727”, the Hon'ble Commission cannot sit over the judgement and order of the Hon'ble Supreme Court dated 24.4.2018.*
- (7) *It is submitted that in **South Central Railway Employees** case a Three Judge Bench of the Hon'ble Supreme Court has held that once the Hon'ble Supreme Court has decided a matter then even the High Court could not have sat over the judgement of the Hon'ble Supreme Court and interpret the same on the ground that certain points were not raised before the Hon'ble Supreme Court. In this regard attention of this Hon'ble Commission is invited to paras 11-16 of the judgement. A copy of the judgement reported in [2015] 2 SCC 727 is attached as Annexure-R-2. It is submitted that the relevant paras 11-16 are also reproduced herein-under:*

*“11. We have heard the learned counsel at length and have also considered the submissions made, the judgments relied upon by the counsel, the earlier judgment delivered by this Court in C.A. No.4343 of 1988 and the impugned judgment. In our opinion, the High Court has committed a grave error by taking a different view than the one which had been taken by this Court in C.A. No.4343 of 1988, especially when the rules governing the promotion policy had not been amended after the afore-stated judgment was delivered by this Court. It is pertinent to note that a review application had been filed in the afore-stated C.A. No.4343 of 1988 and the same had been rejected and therefore, the judgment delivered by this Court in C.A. No.4343 of 1988 had become final.*

*12. Once in pursuance of a judgment delivered by this Court orders had been issued by the Society to its employees who had been wrongly promoted, the High Court could not have held that the orders were not valid because there were certain other factors which had made the promotions given to the concerned employees valid.*

***13. In our opinion, the High Court should not have considered any other factor especially when this Court had come to a final conclusion that the policy with regard to reservation in the matter of promotion to the employees was not legal and proper.***

*14. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in C.A. No.4343 of 1988 was per incuriam.*

***15. If the view taken by the High Court is accepted, in our opinion,***

---

*there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when C.A. No.4343 of 1988 was decided. If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the Subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India.*

*16. We do not want to go into the arguments advanced by the learned counsel appearing for the respondents before the High Court for the simple reason that it was not open to them to advance any argument which would run contrary to the judgment delivered by this Court in C.A. No.4343 of 1988. In our opinion, the High Court did something which would be like setting aside a decree in the execution proceedings.*

*(8) It is submitted that entertaining the instant petition on the issue of payment of arrears (difference between tariff order dated 3.5.2013 and 30.11.2016) shall be committing hara-kiri with the order and directions of Hon'ble Supreme Court dated 26/4/2018 and the directions and findings as settled by the Hon'ble Supreme Court which clearly held that the Tariff Order dated 3.5.2013 is now final between the Parties. As such, in this order, Hon'ble Supreme Court has maintained the sanctity of the PPA tariff and terms and conditions agreed up on by the parties. It is submitted that judicial discipline is paramount and this Hon'ble Commission is also bound by the orders and findings of the Hon'ble Supreme Court.*

*(9) It is submitted that once the Supreme Court has returned a specific finding vide order dated 26/4/2018 in a previous round of litigation between the parties, it is now not open for the petitioner to re-agitate the same issue before this Hon'ble Commission as the principle of res-judicata will also be applicable. Therefore, this Hon'ble Commission ought to dismiss the instant petition summarily and with costs.*

***Re: Specific Fuel Consumption obtained with Biomass available in the State of Madhya Pradesh***

*(10) The norms of Station Heat Rate and Gross Calorific Value considered in various Biomass Tariff Orders passed by MPERC are as under:*

<b><i>MPERC Order date</i></b>	<b><i>SHR kcal/kWh</i></b>	<b><i>GCV kcal/kg</i></b>	<b><i>Specific Fuel Consumption kg/kWh</i></b>
--------------------------------	--------------------------------	-------------------------------	--

1	2	3	4 = 2 / 3
07.08.2007	3600	3325	1.0827
02.03.2012	3800	3612	1.052
03.05.2013	3800	3600	1.056
30.11.2016	4200	3100	1.355

- (11) The value of SHR and GCV is utilized to determine the Specific Fuel Consumption (SFC) which is the ratio of SHR/GCV and is of paramount importance.
- (12) It is further submitted, without prejudice to the above, the answering Respondent MPPMCL would also like to place on record the Fuel Usage Certificates of M/s Arya Energy Ltd. for the FY 2013-14 & 2014-15 (Annexure-R-3, Colly.), which were not submitted by Arya Energy during Remand Proceedings before Hon'ble MPERC. Salient details of the same are discussed below.
- (13) As per the Fuel Consumption Certificate and Gross Generation statement submitted by M/s Arya Energy Ltd year wise fuel consumption and gross generation details are given below (Annexure-R-4):

Financial Year	Total Fuel used as per CA Certificate in MT	Gross Generation of Electricity as per CA Certificate in MWh	Specific Fuel Consumption Kg/kWh
1	2	3	4 = 2 / 3
2013-14	33603.02	30913.40	1.087
2014-15	66199.54	60958.08	1.086
Total	99802.56	91871.48	1.0863

- (14) From the same, it will be observed that **whatever may be the SHR of the Plant and whatever may be the GCV of Biomass fuel, the Specific Fuel Consumption obtained with Biomass available in the State of Madhya Pradesh is 1.086 kg/kWh**, for the period September 2013 to March 2014 and April 2014 to March 2015, which has been derived on the basis of about **One Lakh Metric Ton fuel used during more than 550 days** in a Biomass Power Plant situated in the State of Madhya Pradesh only, and is calculated on the basis of **C.A. certified Fuel Consumption Statement** submitted by **M/s Arya Energy Ltd.**
- (15) MPERC in its order dated 13.08.2015 in SMP No. 8/2013 has mentioned as below:
- "As per SLDC data, one of the better performing biomass power plants viz. M/s Arya Biomass project of 10 mw operated at Plant Load Factor (PLF) of 60 % for the period from June 2014 to December 2014 and other biomass power plants are operating at less than 50 % PLF"

The Power Plant of M/s Arya Energy Ltd therefore run with PLF much less than the normative PLF during the said period, Had the Power Plant ran near about

*normative PLF, SFC would have been much less.*

- (16) *It is therefore submitted that the demand of the Petitioners to claim arrears as per the Tariff Order dated 30.11.2016 for an SFC of 1.355 KG/kWH is completely illegal, unjustified and an unjust enrichment as it has already been demonstrated that the SFC was only 1.0863 kG/kWh, that too with much less PLF. If PLF would have been near about the Normative PLF, the SFC would have been much less.*
- (17) *It is submitted that the above facts are undisputed as the same have been derived on the basis of the documents submitted by the one of the Petitioners itself as of 30.09.2016. It is further submitted that this specific information of SFC derived on the usage of One Lac MT fuel over a 550 day period for the year 2013-14 and 2014-15 was never submitted to the Hon'ble APTEL also by the Petitioner and was concealed by them and therefore this Hon'ble Commission ought to consider this aspect as the Petitioner were required to submit all information and approach the court with clean hands and this act of concealment on the part of the Petitioner amounts to fraud.*
- (18) *It is submitted that the above is also an extremely important fact for the adjudication of the instant petition. It is submitted that the Petitioner cannot claim the tariff of 30.11.2016 for the years 2013-14 and 2014-15 as the same would amount to unjust enrichment.*
- (19) *It may be relevant to pointed out here that the proceedings and order dtd. 13.08.2015 issued by MPERC (Annexure-R-5) are of critical importance and its Para no. 3 & 4 are reproduced and commented below :*

**Para 3 of Order:**

*"A public notice was issued to the appellants, respondents and the Department of New and Renewable Energy, Government of Madhya Pradesh (hereinafter referred as NRED) and the hearing was held on 03.07.2014. The Department of New and Renewable Energy of the Government of Madhya Pradesh was directed to furnish a report on the aforementioned issues. By letter no. 1174 dated 08.09.2014, Dy. Commissioner, NRED, Bhopal submitted the GCV test results of two samples of Rice husk, one sample of Wheat husk and Mulberry each. The Commission found that the sample size taken by the NRED was too small and did not represent the GCV of the biomass fuel in the State as a whole."*

**Comment of Respondent:**

*Here it is to point out that sample size of Biomass was of 100 gm each in powder form on which GCV Tests were conducted in Lab. A copy of the said letter dtd. 08.09.2014 is attached as Annexure-R-6.*

**Para 4 of Order:**

*"By letter no. 2354 dated 23.03.2015, Dy. Commissioner, NRED, Bhopal submitted the values of SHR worked out on the basis of the aforesaid GCVs of various fuels and the normative specific fuel consumption as per CERC (Terms and Conditions for tariff determination from renewable energy sources) (First*

amendment) Regulations, 2014. The SHR of the plant actually functioning in the State was not furnished. By letter dated 10.04.2015, the NRED was again directed to furnish GCVs of the samples from various districts of Madhya Pradesh to arrive at the representative GCV along with the SHR of the plant actually functioning in the State.”

**Comment of Respondent :**

Here it is to point out that although not mentioned in report, the sample size would also be in the range of some 100 gms each.

A copy of the said letter dated. 23.03.2015 is attached as Annexure-R-7.

Moreover, no data of SHR of the plant actually functioning in the State was provided to Hon’ble Commission.

- (20) **Had the Fuel Consumption Certificates or data been provided by NRED to the Commission, Hon’ble Commission would have given a more reasoned findings for Gross Calorific Value of fuel and Station Heat Rate and the Chapter would have been closed. (Emphasis supplied).**
- (21) **On seeing SFC of 1 kG and 86 grams per kWh of Biomass based power plant in MP for more than 550 days of Operation with about One Lakh ton of Fuel, the APTEL would not have gone to decide the value of GCV on the basis of Sample size of a few 100 grams and value of SHR on the basis of operation of some Biomass Power plants for 4-5 days that too situated outside the state of Madhya Pradesh, resulting in SFC of 1Kg 350 Grams per kWh. (Emphasis supplied).**
- (22) **This Fuel Consumption data was deliberately not furnished by Arya Energy to Hon’ble Commission as it would have posed hindrance in their illegal act of profiteering and unjust enrichment by getting an exorbitantly high tariff.**

**(Emphasis supplied)**

- (23) *It is submitted that this Hon’ble Commission ought to enquire from the Petitioners as to how their financial viability is affected, as the payments were made as per the Tariff order dated 3.5.2013, and therefore the averment of the Petitioner that their financial viability is affected cannot be saddled on the shoulders of the answering Respondent and it is the Petitioners who themselves have to blame if they could not manage their plant in a fiscally prudent manner.*

**Re: Petitioner entered into Agreement for Sale of Power on the Basis of Generic Tariff Order dated 3.5.2013 with Open Eyes**

- (24) *Without prejudice to the above it is very much pertinent to mention here that:*  
a. *MPPMCL tied up with both the Developers after they clearly Expressed Interest for supplying power at tariff as per MPERC Order dtd. 03.05.2013 tariff. Therefore, any other tariff will not be applicable on*

them. In this regard Letter dated 07.05.2013 from M/s Arya Energy Ltd. And Letter dtd. 13.06.2013 are enclosed as Annexure-R-8 & Annexure-R-9, respectively.

- b. The Petitioners had specifically undertaken to supply power at the Generic Tariff as per the MPERC Order dated 03.05.2013. PPA with M/s Orient is on specific tariff as per MPERC order dated. 03.05.2013. Further, the ultimate tariff applicable in LoI with M/s Arya Energy is also as per order dtd. 03.05.2013.
- c. MPPMCL has already paid tariff for the energy supplied by the petitioners (two generators) in accordance with the Tariff on which Generators requested to supply power to MPPMCL and accordingly entered in to the PPA or accepted LoI, wherein it is clearly mentioned that the applicable tariff of the Agreement/LoI is as per MPERC tariff order dated 03.05.2013,.
- d. The Petitioners entered into the Agreement/LOI with Open Eyes and on the basis of the rates given in the Tariff Order dated 3.5.2013 and therefore they are estopped from claiming any arrears for the years 2013-14 and 2014-15.
- e. Tariff as per Order dtd. 30.11.2016 cannot be made applicable on LoI/PPAs with the Petitioners for their Biomass Power Plants as they had already set up their power plants before challenging the operating norms which is wholly illegal in the case of a generic tariff (challenging the norms after setting up of power plant). Therefore, Hon'ble Supreme court has upheld the sanctity of the agreement.

(25) It is also relevant to put up for the consideration of MPERC that the Appropriate Commission issues a generic Tariff Order on the basis of certain norms so that interested Developers, if satisfied with the norms and tariff, can take up installation of the Power Project for supply of power to Distribution Licensee and therefore any developer not satisfied with the norms was not required and was at liberty not to install a power plant at all.

(26) The legal question which arises in the given facts and circumstances is whether the operating norms can be challenged by developer after installation of power plant in a generic tariff regime. If the Developers were not satisfied with the norms and tariff given in any generic Tariff order, they should not have taken up installation of power plants for the purpose of selling power to Discoms and should have challenged the tariff order at appropriate forum and only after satisfactory norms and tariff, they should have taken up installation of the power plant and entered into agreement/LOI with the Respondent.

(27) In a generic tariff regime it is impermissible that first a plant is established and then the norms of the generic tariff are challenged. Such purported act of Developers will defeat the very basic purpose of Generic tariff. This is against the object of generic tariff.

(28) It is submitted that it was in this light that the Hon'ble Apex Court in its order dated 26.4.2018 clearly held that the Tariff Order dated 3.5.2013 is now final and binding between the parties and therefore no change is permissible.

- (29) *Thus allowing the claim for revised tariff to the Developers would result in serious ramification in future in respect of other generic tariff orders issued from time to time. The generators would set up power plants, tie up with Discoms on preferential tariff and then challenge the norms considered in that tariff order for getting better norms to get higher tariff against the interest of the consumers of concerned States.*
- (30) *It is further submitted that Petitioners are not entitled to challenge the Generic Tariff order after setting up of the Power Plant. In the instant case, the developers have first installed the power plant and thereafter challenged the Norms, which is wholly illegal in the case of a generic tariff.*
- (31) *It is submitted MPPMCL has already paid tariff for the energy supplied by the two petitioners in accordance with MPERC Generic Tariff order dated 3.5.2013, i.e. Tariff on which Generators requested to supply power to MPPMCL and which has been mentioned in PPA/ Lol.*
- (32) *If any change in applicable Tariff is effected by any authority, then before such application of tariff, PPA or Lol needs to be terminated by MPPMCL and thereafter if the answering Respondent (MPPMCL) feels that it will be in the interest of consumers of the state and also MPPMCL to procure power from the Petitioners, it may consider entering into any kind of agreement with the these generators. It is submitted that public interest is paramount and the Answering Respondent entered into agreement for purchase of power on the basis of the Tariff Order dated 3.5.2013 and this Hon'ble Commission ought to consider the cost of power on public and public interest.*
- (33) *It is further submitted, without prejudice, that the tariff order dated 30.11.2016 does not mention about arrears to be paid and therefore for the Petitioners to demand the same is against the order dated 30.11.2016.*
- (34) *From the above submissions, it is very much clear that payment of difference amount as per tariff order dtd. 30.11.2016 and 03.05.2013 is not payable to respondents because :*
- i. The Hon'ble Supreme Court has held that the Tariff Order 03.05.2013 has become final between the parties to the agreement. Thus any claim for differential tariff or interest in the present proceedings is wholly unsustainable and illegal.*
  - ii. There is no direction from the Hon'ble Supreme Court for grant of any revised tariff to the Petitioners by the Respondent. Thus the claim for differential tariff is wholly untenable.*
  - iii. Developers had specifically undertaken to supply power at the Generic Tariff as per the MPERC Order dated 03.05.2013. MPPMCL tied up with both the Developers after they clearly Expressed their intention for supplying power at tariff as per MPERC Order dtd. 03.05.2013 tariff. Therefore, claim of any other tariff is breach of contract and will not be applicable on them.*

- iv. PPA with M/s Orient is on specific tariff as per MPERC order dated. 03.05.2013. Further, the ultimate tariff applicable in Lol with M/s Arya Energy is also as per order dtd. 03.05.2013.
- v. The Specific Fuel Consumption of about 1.08 kg/ kWh, which is derived on the basis of about One Lakh Metric Ton fuel used during more than 550 days in a Biomass Power Plant situated in the State of Madhya Pradesh which is very much near to the Specific Fuel Consumption considered in MPERC Order dtd. 03.05.2013.
- vi. Had the Fuel Consumption Certificates or data been provided by NRED or Generators to the Commission, Hon'ble Commission would have given a reasoned findings for Gross Calorific Value of fuel and Station Heat Rate and the Chapter would have been closed.
- vii. On seeing SFC of 1 kG and 86 grams per kWh of Biomass based power plant in MP for more than 550 days of Operation with about One Lakh ton of Fuel, the APTEL would not have gone to decide the value of GCV on the basis of Sample size of a few 100 grams and value of SHR on the basis of operation of some Biomass Power plants for 4-5 days, that too situated outside the state of Madhya Pradesh, resulting in SFC of 1Kg 350 Grams per kWh.
- viii. In a generic tariff regime it cannot so happen that first a plant is established and then the norms of the generic tariff are challenged. Such purported act of Developers will defeat the very basic purpose of Generic tariff. This is against the object of generic tariff.
- ix. Even after entering into Agreement / Lol at Tariff as per order dtd. 03.05.2013, the Petitioners continued to challenge the Norms, which is totally illegal. If they were not satisfied with the norms and tariff the Petitioners ought not to have entered into PPA/ supplied power Lol.
- x. Thus the claim for revised tariff to the Developers would result in serious ramification in future in respect of other generic tariff orders issued from time to time. The generators would set up power plants, tie up with Discoms on preferential tariff and then challenge the norms considered in that tariff order for getting better norms to get higher tariff against the interest of the consumers of concerned States.

(35) The answering respondent respectfully wishes further to bring it to the kind notice of Hon'ble MPERC that the purpose of setting up Biomass based Power plant by the two Petitioners was not to sell power generated from their power plants to MPPMCL / Discoms under the preferential tariff determined by MPERC, rather it was something different as brought out below :

<b>Biomass Developer</b>	<b>Purpose</b>
M/s Orient Green Power Co. Ltd.	Sale to Tata Power Trading Co. Ltd.
M/s. Arya Energy Ltd.	Sale to MPPMCL at APPC rate under REC Mechanism.

The relevant documents in this this regard are Annexed as Annexure- colly.

(36) In Para 30 of the Petition, it has been mention that " Due to non payment of the tariff validly due to the petitioners, the assets of the Petitioner have been declared as NPA and recovery proceedings against the Petitioners have been

started.” In this regard it is to mention that MPPMCL has already paid tariff for the energy supplied by the two generators in accordance with MPERC Generic Tariff order dtd. 3.5.2013, i.e., Tariff on which Generators requested to supply power to MPPMCL and which has been mentioned in PPA/ LoI. It is evident from the said order of the Hon’ble Supreme Court that the Tariff order as amended on 03.05.2013 has become final between the parties which provides for a Single Part Tariff and that since Clause 8.10 of the Tariff Order was incorporated in the PPA/LoI, it would apply to the Biomass developers and they would be subjected to Merit Order Dispatch (MOD) and are not entitled to Must Run status. Under such circumstances, it is open to the Petitioners to go for third party sale, to avoid/save their assets from becoming NPA. The answering respondent has no objection to such third party sale. As per the State Govt. Policy they can sell power to any party. The Policy does not compel them to sell power to MPPMCL. Also the Power Plants were not set up after getting any assurance from MPPMCL for purchase of power from them. On issuance of MPERC Tariff Order dtd. 3.5.2013, both of them approached MPPMCL to sell the power as per the tariff determined by the MPERC vide tariff order dated 3.5.2013 specifically.

- (37) *It is therefore submitted that in light of the submissions made hereinabove the entire petition is devoid of merit and ought to be dismissed with costs awarded in favour Of the Respondent.*
- (38) *Without prejudice to the above, it is prayed that if need so arises looking to further submissions of the Petitioners, MPPMCL reserves its right to make further submissions in the Petition.”*

17. In response to the above, the petitioners by affidavit dated 13.11.2018 submitted the following:

- (1) *The Respondent No. 1 - Madhya Pradesh Power Management Company Limited (MPPMCL), in its reply has stated that the issues sought to be raised by the Petitioners stands covered and decided by the Order dated 26.04.2018 passed by the Hon'ble Supreme Court in Civil Appeal No.4550-4551/2018.*
- (2) *The claim of MPPMCL is incorrect, misleading and without any merit whatsoever. MPPMCL's approach is perverse and seeks to reopen the tariff issues which have been settled with the dismissal of Civil Appeal No. 6547 of 2016 by the Hon'ble Supreme Court which had been filed by MPPMCL against the Judgment dated 04.05.2016 of the Hon'ble Appellate Tribunal in Appeal No. 211 of 2015. The contentions sought to be raised by MPPMCL border on absurdity and is only an attempt to deny the valid and just tariff to the Petitioners for the electricity already consumed by MPPMCL*
- (3) *In Para 1 of the reply, MPPMCL has admitted that the matter has been preferred in terms of the Order dated 29.05.2018 passed by the Hon'ble Tribunal in Execution Petition No. 02 of 2017 in Appeal No. 338 of 2017 merged with tariff order dated 30.11.2016 in SMP No. 8/2013 passed by the Hon'ble*

*Commission.*

(4) *The EP No. 2 of 2017 was taken up by the Hon'ble Tribunal after the Order dated 26.04.2018 was passed by the Hon'ble Supreme Court. The Petitioners has raised the issue of arrears and interest for the electricity already taken by MPPMCL before the Hon'ble Tribunal. If indeed the Hon'ble Supreme Court has rejected the claim for arrears in the Order dated 29.05.2018, there would be no reason for the Hon'ble Tribunal to see merits in the EP No. 2 of 2017 and remand the matter back to this Hon'ble Commission. The Hon'ble Tribunal would have simply dismissed the EP No. 2 of 2017.*

(5) *In fact, MPPMCL had raised this argument before the Hon'ble Tribunal in EP No. 2 of 2017 as under-*

*"(i) In view of the judgement dated 26.4.2018 of the Hon'ble Supreme Court, the tariff order dated 3.5.2013; which provides for single part tariff, in the PPA has become final and there is no direction from for grant of revised tariff other than as in order dated 3.5.2013."*

(6) *However, this argument was not accepted by the Hon'ble Tribunal and the matter has been remanded for adjudication by this Hon'ble Commission with the following directions-*

*For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the present Execution Petition have merits as discussed above which are to be first adjudicated by the State Commission.*

*Hence, we hereby direct the State Commission to first adjudicate the disputes between the parties as stated supra within a period of three months from the date of receipt of copy of this Order.*

*The instant Execution Petition stands disposed of as such with directions as above.*

(7) *Therefore, the submissions of MPPMCL that the issue of tariff has been finalized by the Hon'ble Supreme Court in the Order dated 26.04.2018 is absolutely incorrect and misleading and only because MPPMCL has no answer to the merits of the petition.*

(8) *Therefore, if the Hon'ble Supreme Court had indeed finally decided the matter of tariff as being claimed by MPPMCL, there would be no occasion for the Hon'ble Tribunal to hold that EP No. 2 of 2017 has merits but needed to be remanded to be decided by this Hon'ble Commission. In fact, the issue of arrears was not even raised by MPPMCL in Civil Appeals 4550-4551/2018. Only the Petitioners had raised in issue in EP No. 2 of 2017. There was no occasion for the Hon'ble Supreme Court to go into the issue of what tariff should be paid to the Petitioners.*

- (9) *The only issue which was raised in Civil Appeals 4550-4551/2018 was whether as per the Regulations framed by this Hon'ble Commission, the biomass projects of the Petitioner have a 'mustrun status' OR 'Merit Order Dispatch' can be enforced on the biomass projects.*
- (10) *Assuming the case of MPPMCL at the best, and even if the Judgment dated 20.03.2017 and Review Order dated 02.08.2017 of the Appellate Tribunal had been stayed by the Hon'ble Supreme Court, it could have only been to the extent challenged by MPPMCL which is on the aspect of applying 'Merit Order Dispatch' principles and not on the other issues.*
- (11) *The issue to be decided by this Hon'ble Commission in the present petition is the difference in tariff which is due to the Petitioners due to the MPPMCL paying the old tariff which has no basis today since the tariff has been re-determined by this Hon'ble Commission in the Order dated 30.11.2016 as a consequence of the Judgment dated 04.05.2016 passed by the Hon'ble Tribunal.*
- (12) *There is a complete finality in so far as the tariff to be paid to the biomass projects is concerned (after four rounds of litigation) as decided in the Order dated 30.11.2016 passed by the Hon'ble Commission. For quantum of electricity supplied from the respective COD of the biomass projects till 17.01.2017 is concerned, the difference in tariff paid and the tariff decided in the Order dated 30.11.2016 needs to be paid along with Delayed Payment Surcharge in terms of Article 7.6.2 of the PPA at the rate of 1.25% per month.*
- (13) *Finally in the Order dated 26.04.2018, the Hon'ble Supreme Court allowed the Civil Appeals 4550-4551/2018 and held that the Petitioners cannot insist on getting a 'Must Run' status and will be subjected to 'Merit Order Dispatch' principles. Therefore, at Para 11 of the Order dated 26.04.2018, the Hon'ble Supreme Court ordered asunder-*
- "11. Pending execution application(s) may now be decided in accordance with law."*
- (14) *The contention of MPPMCL is so absurd that it would render the above direction of the Hon'ble Supreme Court meaningless. The only issue raised in the EP No. 2 of 2017 was of arrears (with interest) and fixed charges (with interest). If indeed the tariff had been finalized by the Hon'ble Supreme Court to be as per the Order dated 03.05.2013 in the Order dated 26.04.2018, what was the need for the Hon'ble Supreme Court to state that the pending execution applications would be decided in accordance with law.*
- (15) *It is unbecoming of MPPMCL as a public utility, to mislead this Hon'ble Commission with regard to the issue which was decided by the Hon'ble Supreme Court in the Order dated 26.04.2018. In order to set the record straight, the Petitioners are filing herewith as Appendix A, a copy of the Civil Appeals 4550-4551/2018 preferred by MPPMCL before the Hon'ble Supreme Court. No issue has been raised before the Hon'ble Supreme Court on the aspect of tariff. The Civil Appeal itself was filed against the Judgment dated 20.03.2017 and Review*
-

Order dated 02.08.2017 of the Appellate Tribunal wherein there was no dispute on tariff but only on the conditions imposed vide the Order dated 30.11.2016.

- (16) In the above background, the issue wise rejoinder to the reply of MPPMCL is as under-

**RE: Issue Decided by Hon'ble Apex Court - Paras (2) - (9) of MPPMCL's Reply**

- (17) MPPMCL has relied on Paras 6 - 8 of the Order dated 26.04.2018. As is clear from a perusal of the said paras, the issue was framed and heard only with respect to whether the principle of merit order dispatch would apply or must run status has to be given to the biomass projects. In Para 8, the finality of the Tariff Order is with respect to the issue of merit order dispatch. Since the Appellate Tribunal had applied the principle of must run due to single part tariff, the Hon'ble Supreme Court while reversing the same, held that the Merit Order Dispatch was provided for in the 02.03.2012 Order, the PPA and the Order dated 03.05.2013, it had become final on the parties.
- (18) If the submissions of MPPMCL is accepted, then the Petitioners should be paid only the tariff as per the Order dated 02.03.2012 and not 03.05.2013 also. However, MPPMCL cannot be permitted to raise such illogical defenses to defeat the just claims of the Petitioner.
- (19) The tariff in the Order dated 03.05.2013 has no meaning since it already stands modified by the Order dated 30.11.2016. A PPA entered into between the parties cannot override the tariff orders passed by this Hon'ble Commission. Further, it is the same tariff order dated 02.03.2012 which has been subsequently modified by this Hon'ble Commission vide the Orders dated 03.05.2013, 13.08.2015 and 30.11.2016.
- (20) The reliance placed by MPPMCL on the ratio laid down by the Hon'ble Supreme Court in **South Central Railway Employees Cooperative Credit Society Employees Union v B. Yashodabal & Ors**, (2015) 2 SCC 727 is misplaced. In the said case, the High court was seeking to overreach the earlier judgment of the Hon'ble Supreme Court and the Respondents were seeking to argue against the earlier Judgment of the Hon'ble Supreme Court. None of these aspects exist in the present case. The Hon'ble Supreme Court was not even concerned with the issue of tariff in Civil Appeals No. 4550-4551 of 2018.
- (21) On 04.05.2016, the Appellate Tribunal passed a Judgment determining the tariff parameters in favour of the Petitioners. On 25.07.2016, the Hon'ble Court Supreme dismissed the Civil Appeal No. 6547 of 2016 filed by MPPMCL against the Judgment dated 04.05.2016. Hence, the tariff to be paid to the Petitioners became final & binding between the parties. On 30.11.2016, upon remand, this Hon'ble Commission computed the tariff in terms of the Appellate Tribunal's Judgment dated 04.05.2016.
- (22) After the above, the issue of tariff became final. The only issue which was

challenged by the Petitioners in respect of the Order dated 30.11.2016 were the following conditions imposed by the Hon'ble Commission-

- a. Plants must have entered into a PPA as on the date of their commissioning;
- b. Only certain types of biomass could be used for applicability of tariff;
- c. Tariff to be applicable only till 31.03.2017;
- d. The biomass plants would be subjected to 'scheduling' & 'merit order dispatch'

(23) MPPMCL did not challenge the tariff computed by the Order dated 30.11.2016 and the said tariff became final and binding between the parties. On 20.03.2017, the Appellant Tribunal allowed Appeal No.338 of 2016 and removed the conditions imposed by the Hon'ble Commission. On 02.08.2017, the Review Petitions filed by MPPMCL & the Hon'ble Commission were dismissed by the Appellate Tribunal.

(24) Civil Appeals 4550-4551 of 2018 (SLPs 25150-25151/2017) filed by MPPMCL before the Hon'ble Supreme Court challenging the Appellate Tribunal Judgments dated 20.03.2017 & 02.08.2017 only raised the issue whether as per the Regulations framed by the Hon'ble Commission, the biomass projects of the Petitioners have a 'must run status' OR 'Merit Order Dispatch' can be enforced on the biomass projects.

(25) In view of the above position, it is completely misleading on the part of MPPMCL to even suggest that Hon'ble Supreme Court has returned any finding with regard to the binding nature of the tariff between the parties. By no stretch of imagination is the principle of res judicata to be applied.

**RE: Specific Fuel Consumption obtained with Biomass available in the State of Madhya Pradesh - Paras (10) - (23) of MPPMCL's Reply**

(26) In Paras 10 - 23 of the Reply, MPPMCL is seeking to reopen and reargue the aspects of GCV at 3100 kCal/Kg and SHR at 4200 kCal/kWh which has attained finality in the Judgment dated 04.05.2016 of the Appellate Tribunal and Order dated 30.11.2016 of this Hon'ble Commission. If the GCV at 3100 kCal/Kg is taken and SHR at 4200 kCal/kWh is taken, the SFC works out to 1.35. Therefore, accordingly to MPPMCL, since Arya Energy is achieving better SFC than 1.35, it does not deserve the GCV 3100 kCal/Kg and SHR at 4200 kCal/kWh.

(27) The approach of MPPMCL is absolutely perverse, seeking to re-agitate issues which it has already lost right upto the Hon'ble Supreme Court and deserves imposition of heavy costs.

(28) MPPMCL itself has contended that since this Hon'ble Commission has proceeded on a generic tariff regime, the tariff cannot be challenged. If the approach is generic, then how can MPPMCL single out only one parameter of SFC in so far as Arya Energy is concerned and reply on the same before the Hon'ble

Commission?

- (29) *MPPMCL has deliberately not filed the certificates and SFC value in so far as Orient Green Energy Limited are concerned wherein the following SFC has been observed-*

FUEL CONSUMPTION AND GENERATION

ORIENT GREEN POWER CO LIMITED

YEAR	CONSUMPTION		GENERATION (MWH"	SFC (kg/Kwh
	BIOMASS (MT)	COAL (MT)		
FY 2014-2015	75,372	0	29,089	2.59
FY 2015-2016	58,612	0	27,241	2.15
FY 2016-2017	21,165	0	10,991	1.93

$$SFC = \frac{CONSUMPTION}{GENERATION}$$

*Copies of the CA Certificates have been given by Orient Green Power Limited to MPPMCL which are attached hereto and marked as Appendix B. MPPMCL being "such a responsible public utility" has deliberately chosen not to file the SFC figures of Orient Green Power Limited or any other biomass generator in the State except for Arya Energy Limited.*

- (30) *Even in the case of Arya Energy Limited, MPPMCL has not given any other tariff parameter comparison as this does not suit the case of MPPMCL. MPPMCL has left out other parameters like cost of biomass and palatization cost which are much higher in the case of Arya Energy. It is MPPMCL's own contention that in a generic tariff, a generators may lose in one parameter but gain in others but tariff is a package. That being the case, how can MPPMCL be allowed to contend that since Arya Energy has over achieved the SFC in certain years, the GCV and SHR have been wrongly fixed.*
- (31) *MPPMCL has exhausted its remedies in so far as the tariff norms and parameters are concerned with the dismissal of Civil Appeal No. 6547 of 2016 filed by MPPMCL against the Judgment dated 04.05.2016.*

*The tariff to be paid to the Petitioners became final & binding between the parties. On 30.11.2016, upon remand, this Hon'ble Commission computed the tariff in terms of the Appellate Tribunal's Judgment dated 04.05.2016.*

- (32) *However, MPPMCL is unable to accept the fact that its appeal against the*

*Judgment dated 04.05.2016 of the Appellate Tribunal has been dismissed and is seeking to re-agitate all these issues and calling upon this Hon'ble Commission to overreach the Orders passed by the Hon'ble Supreme Court.*

- (33) *It is wrong and denied that Arya Energy Limited deliberately did not furnish some information to this Hon'ble Commission. It is wrong and denied that Arya Energy is seeking to profiteer illegally or unjust enrichment. Both Petitioners are only seeking the payment of the just tariff as determined by this Hon'ble Commission on 30.11.2016.*
- (34) *MPPMCL cannot be permitted to make the tariff decided in the Tariff Order dated 30.11.2016 by this Hon'ble Commission and the Judgment dated 04.05.2016 of the Appellate Tribunal redundant by raising such illogical arguments.*
- (35) *There is no basis for MPPMCL to rely on the findings rendered by the Hon'ble Commission in the earlier Order dated 13.08.2015. This Order has merged with the Order dated 30.11.2016. If the case of MPPMCL is accepted, then it could have to pay Orient Green Energy Limited as per the actual SFC.*
- (36) *All arguments, averments, submissions to the contrary in Paras(10)- (23) of MPPMCL's reply are wrong and are denied.*

**RE:Petitioner entered into Agreement for Sale of Power on the Basis of Generic Tariff Order dated 03.05.2013 with open eyes**

- (37) *It is preposterous on the part of MPPMCL to contend that since in the PPA with Orient Green and the LOI with Arya Energy, the tariff was stated to be as per the Order dated 03.05.2013 of the State Commission and this was entered into with open eyes, the Petitioners become estopped from claiming any arrears for the power supplied for FY 2013-14 & FY2014-15.*
- (38) *There is no merit in the contention that developers should not take up installation of biomass plants if they are not satisfied with the generic tariff regime. This would lead to absurdity and render the legal right under Section 111 of the Electricity Act, 2003 meaningless and otiose. Every order / decision including the generic tariff orders passed by the Hon'ble Commission are subject to challenge before the Appellate Courts. It does not mean that the generic tariff orders passed by the various regulatory commissions have absolute sanctity.*
- (39) *The purpose of generic tariff orders is that there is no need to do a project specific tariff determination for each developer since the non- conventional energy projects are small in size and it would be impossible to determine the individual tariff of each project. The purpose of generic tariff is not that the norms adopted cannot be challenged by the project developers but only to avoid multiplicity of proceedings and determining tariff in each and every case.*
- (40) *It is wrong on the part of MPPMCL to suggest that the Petitioners have*
-

accepted the tariff of the Order dated 03.05.2013. The COD of Arya Energy was 30.05.2013 and the power was being supplied by the Arya Energy in terms of the LOI dated 11.10.2013. The relevant clauses of the LOI are reproduced as hereunder:

"2. Rate: Applicable rate for this LOI is Rs.5.64/kWh (this rate is for first year after commissioning of the plant during FY 2013-14 as per MPERC tariff Order dated 03.05.2013 and read with MPERC tariff Order 02.03.2012). This rate is inclusive of all charges on account of taxes/duties/cess/octroi etc.

3. The above rate shall be subject to outcome of the Appeal No.144 of 2013 before the Hon'ble Appellate Tribunal of Electricity, New Delhi and without prejudice to the rights of the parties as per Order dated 04.09.2013 of Appellate Tribunal, New Delhi.

(41) The COD of Orient Green was 22.01.2014 and the power was being supplied by Orient Green in terms of LOI dated 20.12.2013 Subsequently, the Orient Green had entered into a PPA with MPPMCL. The relevant clauses of the said LOI dated 20.12.2013 with respect to the tariff are as follows-

"6. Rate: Applicable rate for this LOI is Rs. 5.64/kWh (this rate is for the plants commissioned during FY 2013-14 for their first year of operation as per MPERC tariff Order dated 03.05.2013 and read with MPERC tariff Order 02.03.2012). This rate is inclusive of all charges on account of taxes/duties/cess/octroi etc.

7. The above rate shall be subject to outcome of the Appeal No. 144 of 2013 before the Hon'ble Appellate Tribunal of Electricity, New Delhi and without prejudice to the rights of the parties as per Order dated 04.09.2013 of Appellate Tribunal, New Delhi."

(42) In fact, even if the above clauses were not there, the Order dated 03.05.2013 was challenged by the Petitioners in Appeal No. 144 of 2013 before the Appellate Tribunal. The Appellate Tribunal vide Judgment dated 29.05.2014 allowed the appeal partly and the matter was remanded to the Hon'ble Commission for re determination of Gross Calorific Value (GCV) of the fuel and the Station Heat Rate (SHR). In addition to the above, it is also submitted that the Hon'ble Tribunal vide the Judgment dated 29.05.2014 clearly held that in the interim period till redetermination of GCV and SHR, the distribution licensee will pay the generators at the tariff decided by the Hon'ble Commission in the order dated 03.05.2013 subject to adjustment on the final determination by the Hon'ble Commission. The said finding is as under-

**44. Summary of our findings:**

i) We do not find any infirmity in the findings of the State Commission regarding capital cost, and fuel price.

ii) We find that the State Commission has again not given a reasoned findings for Gross Calorific Value of fuel and Station Heat Rate. We again

---

remand them after to the State Commission to re-determine these norms.

- iii) In the interim period till redetermination of GCV and SHR, the distribution licensee will pay the generators at the tariff decided by the State Commission in the impugned order subject to adjustment on the final determination by the State Commission.

(Emphasis Supplied)

(43) MPPMCL never challenged the Judgment dated 29.05.2014 and is seeking to twist the matter after having lost before all courts on the issue of tariff including the Hon'ble Supreme Court when its Civil Appeal being Civil Appeal No. 6547 of 2016 was dismissed by the Hon'ble Supreme Court vide Order dated 25.07.2016. The Hon'ble Supreme Court confirmed the Judgment dated 04.05.2016 in Appeal No. 211 of 2015 passed by the Hon'ble Tribunal in compliance of which this Hon'ble Commission has recomputed the tariff vide Order dated 30.11.2015.

(44) The arguments of MPPMCL on public interest are laughable and without any merit. MPPMCL has over contracted power from bid generators and is simply paying fixed costs for stranded capacity and is raising the issue of public interest for a total of 24 MW biomass capacity of the Petitioners.

(45) The tariff order of 30.11.2016 need not speak about payment of arrears. When the Order dated 02.03.2012 got modified by the Hon'ble Commission on 03.05.2013, MPPMCL did not raise the issue that the Order dated 03.05.2013 does not speak about payment of arrears. Therefore, why should the issue be raised at this stage?

(46) There is absolutely no merit in the reply of MPPMCL. The reply is vexatious, perverse, absolutely frivolous and deserves to be rejected."

18. In reply to the aforesaid rejoinder filed by the petitioners on 13.11.2018, the Respondent No.1 submitted the following in sur-rejoinder filed on 5<sup>th</sup> December' 2018:

"(1) It is most respectfully submitted at the outset that this Hon'ble Commission has recently passed the final order dated 16.11.2018 in Petition no. 32 of 2018 wherein the Hon'ble Commission has followed the order and findings of the Hon'ble Supreme Court passed in C.A 4550-4551 of 2018 dated 26.4.2018. It is submitted at the outset and as stated in the reply of the Respondent that the order dated 26.4.2018 is squarely applicable to the facts of the instant case as the Tariff Order dated 3.5.2013 is now final and binding between the parties, hence it is most respectfully submitted that there is nothing remaining for adjudication in the instant petition in light of the order dated 16.11.2018 passed in petition no. 32 of 2018 by this Hon'ble Commission and the order dated 26.4.2018 passed by the Hon'ble Supreme Court in C.A No. 4550-4551 of 2018. A copy of the order dated 16.11.2018 passed in Petition no. 32 of 2018 is attached as **Annexure-1**.

---

- (2) However without prejudice to the above the answering respondent submits its sur-rejoinder as under to the rejoinder filed by the Petitioner.
- (3) **Para 4:** Contentions made in Para 4 of the Rejoinder are not correct. It is stated that APTEL could not decide issues which are first to be adjudicated by MPERC. Therefore APTEL did not dismiss the EP but had remanded matter to State Commission to first adjudicate the disputes between the parties considering the case on merits in totality and judgments of Appellate Tribunal & Hon'ble Supreme Court.
- (4) **Para 6 :** It is contended in Para 6 of the Rejoinder by petitioners that the submissions made by the Respondent in the Reply to the Petition, have already been made by it before Hon'ble APTEL during proceedings of Execution Petition No. 2/2017 and APTEL after considering them have passed the order dated. 29.5.2018 and therefore there is no point in repeating them before MPERC.
- (5) In this context, last part of Para 6, [i.e. 6 (i) & 6 (j)] of Order in the judgment of APTEL dated 29.5.2018 are reproduced below :
- “ (i) In view of our discussions as above and considering all the relevant aspects of the instant Execution Petition, we are of the considered opinion that the dispute between the Petitioners and MPPMCL is first required to be adjudicated before the State Commission. Accordingly, we direct the Petitioners to take up the matter with the State Commission for adjudication of the said disputes. The State Commission is also directed to adjudicate the disputes between the parties considering the case on merits in totality and judgements of this Tribunal and Hon'ble Supreme Court.
- j) Having directed as above, we would like to clarify that the observations made by us, which touch on the merits of the case, based on submissions of the parties were to dispose of this EP and it will be open for this Tribunal to deal the same again if required in future.”
- (6) From the said order it is very much clear that APTEL did not pass any verdict on the submissions made by this Respondent rather it directed State Commission to first adjudicate the disputes between the parties considering the case on merits in totality and judgments of this Tribunal & Hon'ble Supreme Court. The judgment of the Hon'ble Supreme Court is clear and precise in which it is clearly held that the Tariff order dated 3.5.2013 has now become final between the parties to the agreement which provides for single part tariff and therefore in view of this clear enunciation of facts and directions by the Hon'ble Apex Court it is illegal and mischievous on the part of the Petitioners to claim arrears of bills.
- (7) **Para 7 :** In regard to Para 7 of Rejoinder, it is to state that in the judgment of the Hon'ble Supreme Court it is clearly held that the Tariff order dated 3.5.2013 has now become final between the parties to the agreement. In other words the judgment of the Hon'ble Supreme Court holds that the sanctity of Agreement is

*paramount.*

(8) **Para 8-10** : *In regard to Para 8-10 of Rejoinder, it is to state that in the EP 2 of 2017 filed by the petitioners before Hon'ble APTEL in May 2017, following prayers were made :*

- A. *Direct the MPPMCL to comply with the Judgment dated 20.03.2017 of this Hon'ble Tribunal with immediate effect;*
  - B. *Direct the MPPMCL to give must run status to the generating companies of the Petitioners;*
  - C. *Direct MPPMCL to start scheduling the power from the plants of the Petitioners;*
  - D. *Direct MPPMCL to pay the bills raised by the Petitioners for the period from 17.02.2017 onwards whereby despite the interim order passed by this Hon'ble Tribunal, MPPMCL took coercive steps and stopped giving schedule to the plant of the Petitioners;*
  - E. *Direct MPPMCL to pay the arrears with interest of 18%*
  - F. *Give effect to the revised tariff from the date of commercial operation of the respective biomass plants of Petitioners No. 2-4;*
- i. *Pass such further order of orders as may be deemed just and proper in the circumstances of the case.*

*Further, during the pendency of above execution petition MPPMCL had filed SLPs No.25150-25151/2017 before Hon'ble Supreme Court wherein, the matter of execution petition was put up before the Hon'ble Supreme Court by MPPMCL and the respondents (petitioners in the instant case) also made submission in this regard. Copy of an application on behalf of the respondent No.1 to 4 of the SLPs (including petitioners in the instant case) is placed at **Annexure R-1**, wherein, then respondents prayed before Hon'ble Supreme Court as under:-*

- (a) *Dismiss the instant Special Leave Petition in view of the 7th Amendment Regulations;*
- (b) *Direct the Petitioner to pay the arrears for the period from 2013 till January 2017 and the fixed costs from January 2017 onwards along with interest of 15% to the Respondents immediately; and*
- (c) *Pass such other and further order(s) as this Hon'ble Court may deem fit in the interest of justice.*

*It needs to be mentioned here that, even during the pendency of the aforesaid SLP and their application before Hon'ble Supreme Court, petitioners of the instant case filed IA No.196/2018 in execution petition No. 2 of 2017 before Hon'ble APTEL praying for the urgent hearing. In response to the above application, MPPMCL had filed application on 05.03.2018 before Hon'ble Supreme Court with prayer for stay of execution petition proceeding before Hon'ble APTEL. Copy of the application dated 05.03.2018 along with copy of IA No. 196/2018 is placed at Annexure R-2. The matter was heard by Hon'ble Supreme Court on 26.03.2018 and upon hearing of the counsel with due deliberations including the issue of arrears for the period from 2013 till January 2017 and the fixed costs from January 2017 onwards along with*

interest of 15% as prayed by the respondents (Petitioners in the instant case) the Hon'ble court made following order:-

*"On request, the matters are adjourned to 26th April, 2018. Learned counsel for the respondents has made a statement in the meanwhile respondents will not proceed with the execution."*

*Copy of the Hon'ble Supreme Court order dated 26.03.2018 is placed at Annexure R-3.*

*On final and comprehensive hearing of the case including the matter of SLPs along with the aforesaid applications, Hon'ble Supreme Court passed the judgment dated 26.04.2018.*

*Therefore, the averment of the Petitioner that Hon'ble Supreme Court judgment dated 26.04.2018 is only restricted to the matter of MOD Principle, is baseless and incorrect and false in light of the facts of the case as stated above. In fact, Hon'ble Supreme Court judgment covers the applicability of MOD Principle as well as applicability of tariff in respect of the agreements executed/LoI placed, based on the tariff order dated 03.05.2013. Accordingly, the Hon'ble Supreme Court has explicitly mentioned in the judgment that Tariff order dated 03.05.2013 and the agreement has now become final between the parties.*

*APTEL has not elaborated the merits of the EP rather has simply remanded the matter to MPERC to adjudicate the disputes between the parties considering the case on merits in totality and judgments of Tribunal & Hon'ble Supreme Court, since APTEL cannot decide issues which are first to be adjudicated by MPERC.*

- (9) **Para 11** : *In regard to Para 11 of Rejoinder, it is to state that in the judgment of the Hon'ble Supreme Court it is clearly held that the Tariff order dated 3.5.2013 has now become final between the parties to the agreement. It is submitted MPPMCL has already paid tariff for the energy supplied by the two petitioners in accordance with MPERC Generic Tariff order dated 3.5.2013, i.e. Tariff on which Generators requested to supply power to MPPMCL and which has been mentioned in PPA/LoI.*
- (10) **Para 12** : *There is complete finality so far as tariff to be paid in light of Hon'ble Apex Court order dated 26.4.2018 wherein it is held that Tariff order dated 3.5.2013 has now become final between the parties to the agreement.*
- (11) **Para 13**: *In regard to Para 13 of the Rejoinder, as already stated before it is reiterated that there were many issues raised in the Execution Petition.*
- (12) **Para 14** : *It is a wrong statement by the Petitioners that only issues raised in EP no. 2 of 2017 was of Arrears and fixed charges. As already brought out hereinbefore, there were at least six issues in the EP. Decision of Hon'ble APEX Court dated. 26.4.2018 holds that the Tariff order dated 3.5.2013 has now become final between the parties to the agreement which provides for single part tariff. This implies that:*

**a.** No difference of tariff is payable;

**b.** No fixed charges are to be paid.

So, Remaining issues of Execution Petition could be decided in accordance with law.

(13) **Para 15 :** MPPMCL is not misleading the Hon'ble Commission as Order dated. 26.04.2018 of Hon'ble APEX Court is crystal clear.

(14) **Para 18:** In PPA as well as LoI, Tariff payable is mentioned as per Order dated. 3.5.2013. So argument of Petitioners is baseless and illogical.

(15) **Para 19:**It is submitted that the tariff in order dated 03.05.2016 may or may not have meaning for others but so far as the Petitioners are concerned, the Hon'ble Supreme Court has clearly held that the Tariff order dated 3.5.2013 is now final and binding between the Parties vide its order dated 26.4.2018, therefore for the Petitioners to now aver and claim arrears as per the Tariff Order dated 30.11.2016 is illegal and not in accordance with law.

(16) **Para 20 to 25 :**It is the sole submission of the Petitioner in the para 20-25 that the Hon'ble Supreme Court did not return any finding with respect to the binding nature of the Tariff. It is submitted and reiterated that the Hon'ble Supreme Court has conclusively decided the issue of binding nature of tariff between the parties in the order dated 26.4.2018, and the same has been demonstrated in detail by the Respondent in its reply and also hereinabove. In this regard furthermore, this Hon'ble Commission has also returned a definitive finding in the order dated 16.11.2018 in Petition no. 32 of 2018 wherein this Hon'ble Commission has rightly followed the orders and directions of the Hon'ble Supreme Court given in order dated 26.4.2018. It is therefore completely incorrect and illegal for the Petitioner to now aver or even allege that the Hon'ble Supreme Court has not returned any definitive finding with respect to the binding nature of the Tariff order dated 3.5.2013. It is submitted that the entire petition is therefore devoid of merits and ought to be dismissed with heavy costs.

(17) **Para 26 to 28:** MPPMCL is not seeking to reopen the issue on GCV and SHR, rather it is bringing to the kind knowledge of MPERC the ratio of SHR / GCV i.e. SFC, achievable with Biomass available in the State of MP based on more than 550 days of operation and consumption of about one lakh ton of fuel, which was not submitted by any of the Petitioner before Hon'ble MPERC during proceeding held in 2015.

Hon'ble MPERC itself in its order dated 13.08.2015 in SMP No. 8/2013 has mentioned as below:

*"As per SLDC data, one of the better performing biomass power plants viz. M/s Arya Biomass project of 10 mw operated at Plant Load Factor (PLF) of 60 % for the period from June 2014 to December 2014 and other biomass power plants are operating at less than 50 % PLF."*

(18) **Para 29:** As already brought out in said order dated. 13.08.2015 of Hon'ble

---

MPERC, only M/s Arya Biomass project operated at PLF of 60 % and other biomass power plants were operating at less than 50 % PLF.

Since now Petitioners have placed on record SFC of M/s Orient also, it opens a new avenue to look into the whole matter. Biomass Power Plant of M/s Orient was commissioned in January 2014 and power was supplied to MPPMCL till 17.1.2017. Thus there were two complete Financial years of 2014-15 and 2015-16, in which this Power Plant operated. As per the Petitioners, SFC achieved these Financial years is as follows:

<b>Financial Year</b>	<b>Specific Fuel Consumption</b>
2014-15	2.59 kg/kWh
2015-16	2.15 kg/kWh

As can be computed, SFC as per order dated. 03.05.2013 is 1.056 kg/kWh whereas M/s Orient continued to sustain its operation at SFC of 2.59 kg/kWh for 2014-15 and at SFC of 2.15 kg/kWh for 2015-16.

From the Fuel Usage Statement annexed by the Petitioners with the Rejoinder, it may be seen that M/s Orient used:

- i. Cow dung,
- ii. Soya Husk,
- iii. Gram Husk,
- iv. Rice Husk,
- v. Bagasse, Bailed Bagasse, Loose Bagasse,
- vi. Arhar Chipped, Arhar Stick, Arhar Husk,
- vii. Wheat Husk,
- viii. Mixed Husk,
- ix. Peddy Straw,
- x. Napier Grass,
- xi. Poultry Waste,
- xii. Mustard Husk
- xiii. Cane Trash , Cane waste  
etc. in their Power Plant.

It may also be noted that M/s Orient had not used any coal in the fuel mix. It clearly indicates that biomass used in the Power Plant is available at throw away price or even at free of cost that's why M/s Orient was able to sustain operations of their Power Plant continuously for four FYs with such high SFCs.

It poses following questions:

- i. How this Power Plant can sustain with SFC of 30.11.2016 order of 1.35 kg/kWh, with achieving SFC of 2.59 or 2.15 or 1.93 kg/kWh if biomass is not available at throw away price or free of cost.
- ii. Whether M/s Arya was compensating M/s Orient on account of SFC.
- iii. Whether Commission is required to determine tariff for Biomass on the basis of SFC of 2.59/ 2.15 or 1.93 kg/kWh.

*In view of the foregoing, the Respondent is of firm opinion that cost of Biomass fuel mix considered in Tariff order needs to be adjusted on the basis of SFC of 2.59 (because M/s Orient were able to sustain their operations with this SFC for whole year of 2014-15) as follows :*

*Cost of fuel for FY 2013-14, considered in order dtd 03.05.2013 is Rs. 2653 per MT for the projects commissioned during FY 2013-14 with 5% escalation per annum with SFC of 1.056 kg/kWh.*

*Cost of fuel needs to be considered = 2653 X 1.056*

*-----  
2.59*

*= Rs. 1082 / Ton.*

- (19) **Para 30:** *From the Para 17 above, it is clear that in MP Biomass is available at throw away price or even free of cost. So statement of Petitioners appears to be totally absurd.*
- (20) **Para 31 &32:** *Hon'ble MPERC might have computed tariff vide order dated. 30.11.2016 consequent upon any ground and after whatever number of rounds of litigation, but the same is not applicable in respect of the Petitioners in light of decision of Hon'ble APEX Court dated. 26.4.2018 which holds that the Tariff order dated 3.5.2013 has now become final between the parties to the agreement and various rationale given in the Reply by the Respondent. MPPMCL is a law abiding entity and is not seeking at all to re-agitate any issue related to GCV, SHR. It is the Petitioners which are calling upon the Hon'ble MPERC to over reach the Order passed by Hon'ble APEX Court in SLP No. 25150-25151/2017 or C.A 4550-4551 of 2018 dated 26.4.2018.*
- (21) **Para 33:** *It is very much established from the SFC data of One Lakh Metric Ton fuel used during more than 550 days in a Biomass Power Plant situated in the State of Madhya Pradesh only, and is calculated on the basis of C.A. certified Fuel Consumption Statement submitted by M/s Arya Energy Ltd., that they are seeking to profiteer and unjust enrichment by demanding a tariff with an exorbitantly high value of SFC as against much lower SFC actually achieved in their power plant.*

*After the Decision of Hon'ble APEX Court in SLP No. 25150-25151/2017 (C.A 4550-4551 of 2018) dated 26.04.2018, Petitioners are not entitled to claim any difference amount as MPPMCL has already paid tariff for the energy supplied by the two petitioners in accordance with MPERC Generic Tariff order dated 3.5.2013, i.e. Tariff which has now become final between the parties to the agreement.*

- (22) **Para 37 to 43 :** *It is submitted before the Hon'ble MPERC that in a Generic Tariff Order, Appropriate Commission determines generic Tariff on the basis of certain norms so that interested Developers, if satisfied with the norms and tariff, can take up installation of the Power Project for supply of power to*

*Distribution Licensee. Any developer not satisfied with the norms is not required and is at liberty not to install a power plant at all.*

*If the Petitioners were not satisfied with the norms and tariff given in any generic Tariff order, they should not have taken up installation of power plants for the purpose of selling power to Discoms and should have challenged the tariff order at appropriate forum and only after satisfactory norms and tariff, they should have taken up installation of the power plant and entered into agreement/LOI with the Respondent.*

*In the instant matter what has happened is that the Petitioners had first installed their power plants and their initial purpose was not to sell power generated from their power plants to MPPMCL/ Discoms under the preferential tariff determined by MPERC, rather it was something different.*

*On issuance of Tariff Order dated 3.5.2013, both the Petitioners approached the Respondent for supplying power at tariff as per MPERC Order dated. 03.05.2013 tariff. In this regard Letter dated 07.05.2013 from M/s Arya Energy ltd. And Letter dated. 13.06.2013 has already been submitted as Annex-8 & 9 of the Reply dated. 30.10.2018. **It is very much clearly established from their letters that they requested MPPMCL to supply power as per the tariff of order dated. 3.5.2013.***

*The Petitioners had specifically undertaken to supply power at the Generic Tariff as per the MPERC Order dated 03.05.2013. PPA with M/s Orient is on specific tariff as per MPERC order dated. 03.05.2013. Further, the ultimate tariff applicable in LoI with M/s Arya Energy is also as per order dated. 03.05.2013.*

*Even after entering into Agreement / LoI at Tariff as per order dated. 03.05.2013, the Petitioners continued to challenge the Norms, which is totally illegal and the Petitioners cannot be permitted to approbate and reprobate in commercial matters which involve public money and interest. If they were not satisfied with the norms and tariff the Petitioners ought not to have entered into PPA / supplied power under LoI to a State Utility rather have gone to sell power to any other party.*

*However, seeing an opportunity of getting a higher tariff, M/s Arya & M/s Orient also became a part in various Appeals filed before Hon'ble APTEL in the greed of profiteering and unjust enrichment.*

*Such purported act of profiteering by challenging the Norms of Tariff order after installation of plant in a generic tariff regime should be punished severely to discourage such practices by others in future and to safeguard the interests of the consumers of the State.*

*Allowing the claim for revised tariff to the Developers would result in serious ramification in future in respect of other generic tariff orders issued from time to time. The generators would set up power plants, tie up with Discoms on preferential tariff and then challenge the norms considered in that tariff order for getting better norms to get higher tariff against the interest of the consumers of concerned States.*

- (23) *With special reference to contentions made in Para 38, it is to state that Developers may take up installation of biomass power plants, if they are not satisfied with the generic tariff regime, for sell of power to anybody other than the State utility but should not tie up with any state utility. Tying up with State*
-

Utility and also challenging the norms of Tariff Order cannot go side by side. Such purported act of Developers will defeat the very basic purpose of Generic tariff. This is against the object of generic tariff.

If the Developers are not satisfied with the norms and tariff given in any generic Tariff order, they should not take up installation of power plants for the purpose of selling power to State utility as per generic tariff order and should have challenged the tariff order at appropriate forum and only after satisfactory norms and tariff, they should take up installation of the power plant and enter into agreement/LOI with the State utility.

In a generic tariff regime it is impermissible that first a plant is established and Developers enter into agreement / LOI with the State utility on preferential tariff and then challenge the norms considered in that tariff order for getting better norms to get higher tariff against the interest of the consumers of concerned States. Such purported act of Developers will defeat the very basic purpose of Generic tariff. This is against the object of generic tariff.

Allowing the claim for revised tariff to such Developers would result in serious ramification in future in respect of other generic tariff orders issued from time to time also.

This will lead to a situation where the generators would set up power plants, tie up with Discoms on preferential tariff and then challenge the norms considered in that tariff order for getting better norms to get higher tariff. This is against the very basic purpose and object of the Generic Tariff Order.

In other words the entire conduct of the Petitioner is against the settled principle of Sale of Goods Act and commercial law.

- (24) **Para 44.** Statement of the petitioners that argument of MPPMCL on public interest is laughable is totally absurd. They are not required to make such statement with which they are not concerned and to look into such matters for which a Statutory Agency is there.

What is laughable is that capacity of the two petitioners which is 12 + 10 =22 MW has been mentioned as 24 MW. Petitioners who cannot even total two simple numbers are laughing on the public interest and which themselves are repeatedly indulging in illegal activity to seek profiteering and unjust enrichment.

- (25) **Para 45:** Averment made in this para that when the Order dated 02.03.2012 got modified by the Hon'ble Commission on 03.05.2013, MPPMCL did not raise the issue that the Order dated 03.05.2013 does not speak about payment of arrears. Therefore, why the issue should be raised at this stage? This argument of Petitioners is not relevant. Because, Petitioners has entered into PPA at Tariff Order dated 03.05.2013 which has now become final between the parties, as per Hon'ble Supreme Court Judgment dated 26.04.2018. Therefore, any arrears in respect of any earlier or later Tariff Order passed, shall not be applicable.

- (26) It is therefore submitted that in light of the submissions made hereinabove and in the reply the entire petition is devoid of merit and ought to be dismissed with costs awarded in favour Of the Respondent.

- (27) Without prejudice to the above, it is prayed that if need so arises looking to
-

*further submissions of the Petitioners, MPPMCL reserves its right to make further submissions in the Petition.”*

**19.** The State Load Despatch Centre, Jabalpur vide its letter dated 10.12.2018 had broadly submitted the following:

- “(i) It is submitted that in the matter of petition the role of SLDC is limited to issue generation schedule to the petitioner based on the requisition received from respondent No. 1 (MPPMCL) on behalf of Discoms. As per provisions of Madhya Pradesh Electricity Balancing and Settlement Code 2015, MPPMCL on behalf of Discoms furnishes requisition on day ahead basis and carry out real time revisions if any on the basis of Declared Capacity/ Revision in Declared Capacity submitted by the Generating Plant. The respondent No. 1 (MPPMCL) is running Merit Order Despatch for State as a whole for all power plants including Biomass Plants as per individual Merit Order i.e. in ascending order of the cost of energy (i.e. variable cost) of Generating Stations in accordance with the PPA’s executed between the Seller and Buyer. In the instant case the PPA/ LOI is executed between the Petitioner and respondent No. 1 (MPPMCL).*
- (ii) It is submitted that as per clause 8.10 of MPEC Tariff Order dated 02.03.2012 for procurement of power from Biomass Based Power Projects, the Biomass based power generation plants for more than 2 MW shall be subject to the “Scheduling and Merit Order Despatch principles”. In accordance with the above provisions of tariff order dated 02.03.2012, the 12MW Biomass plant of M/s. Arya Energy Ltd. comes under Scheduling and Merit Order Despatch principles.*
- (iii) As per Madhya Pradesh Electricity Balancing and Settlement Code 2015, responsibility of running Merit Order Despatch is assigned to Respondent No. 1 (MPPMCL). The responsibility of SLDC is to issue entitlement to the Discoms based on the Demand Capacity furnished by the Generating Stations and on receipt of requisition to issue generation schedule to the Generating Plant.*
- (iv) It is submitted that issues raised by the petitioners are mainly related to payment of arrears bills and delayed payment surcharge which are purely commercial issues and beyond the purview of SLDC, hence no comments are submitted by SLDC on this issue.”*

**20.** Vide letter dated 02.03.2020 on affidavit dated 29.02.2020, the petitioners submitted the following reply in response to the issues raised vide Commission’s daily order dated 08.11.2019:

- “(i) The present petition has been filed only with respect to payment of arrears of bills and interest for the power supplied by the Petitioners to MPPMCL from the respective dates of commissioning till 17/01/2017. Therefore, the information sought for by the Hon’ble Commission is not relevant to decide the present petition.*

- (ii) *Without prejudice to the above, I say that the Petitioners have been complying with all applicable laws/regulations and have been supplying electricity to MPPMCL which has been used by MPPMCL to supply to the consumer and tariff has been collected from the consumer for such supplies. Further, this Hon'ble Commission has approved the procurement of power from the Petitioners in ARR and true up proceedings for the years in question.*
- (iii) *I further state that when power has actually been supplied by the Petitioners and MPPMCL has also availed the benefit of the same, the only dispute is with respect to the tariff to be paid to the Petitioners. While the tariff paid by MPPMCL for the period up till 17/01/2017 was in terms of the tariff order dated 03/05/2013 which got modified by the Tariff Order dated 30/11/2016, the only issue to be decided by the Hon'ble Commission now is regarding the difference payable by MPPMCL along with interest.*
- (iv) *I say that it is a well-known fact that since COD of the biomass generating stations of both the Petitioners, the electricity from the stations was purchased by MPPMCL till the period up till 17/01/2017 in terms of applicable procedures mentioned in LOI dated 11/10/2013 of M/s Arya Energy Limited and LOI & PPA of M/s Orient Green Energy. JMR was conducted on the last day of the month from the ABT meter. The data of the MRI reading downloaded and duly verified and signed by SE, Satna and O&M Anuppur sent along with bills raised. Since the electricity has actually been received by MPPMCL in full and also paid for in terms of the tariff order dated 03/05/2013, it is not understood as to how is the MOD to be applied on the Petitioner's plants for the period in which the electricity itself was taken by MPPMCL. Proof of the above process in case of both Petitioners for November 2016 as an example is attached hereto and marked as Appendix A & B respectively. The same process has been followed in all other months.*
- (v) *I say with respect to the information sought regarding month-wise energy scheduled/unscheduled available capacity from the Petitioners' plant, it is submitted that the month-wise energy scheduled is clearly reflected in the bills that were raised during the period of supply. Since the entire electricity was scheduled and payments were also made for the same by MPPMCL, there was no unscheduled available capacity. The issue now as stated above, only relates to the difference in tariff to be paid by MPPMCL along with interest. There is no dispute with regard to the units scheduled or actually consumed.*
- (vi) *I say that in specific terms of LOI and Tariff Order the Petitioners have been using fossil fuel within the annual limited prescribed by the Hon'ble Commission (15%). The relevant information containing month wise fuel data was submitted to MPPMCL when it was sought by MPPMCL. The information given by the Petitioners was also duly accepted by MPPMCL. Copies of the information submitted by the Petitioners to MPPMCL are attached hereto and marked as Appendix C and Appendix D respectively.*
- (vii) *In the case of Petitioner No. 2, of M/s Orient Green, MPPMCL had additionally deducted Rs.1 per unit of tariff paid on monthly basis and after production of*
-

the coal consumption certificate at the end of financial year, the said amounts were released. This deduction was due to a specific clause in the LOI / PPA of the Petitioner No. 2.

- (viii) I say that the Hon'ble Commission vide its Order dated 30.11.2016 inserted a new condition obliging monthly submission of fuel data which was duly complied by the Petitioners. Copies of the filings of the Petitioners before MPPMCL are attached hereto as Appendix E.
- (ix) I say that this Hon'ble Commission does not require any of the above information to decide on the aspect of arrears to be paid to the Petitioners along with interest. In the above circumstances, it is prayed that the prayers made in the Petition filed by the Petitioner be allowed by the Hon'ble Commission.

**21.** The Respondent No. 1 by affidavit dated 20.03.2020 broadly submitted the following response on the abovementioned reply filed (on affidavit dated 29.02.2020) by the petitioners:

- (i) Without prejudice to the above it is submitted that the answering Respondent has submitted its reply dated 29.10.2018, Sur-Rejoinder dated 05.12.2018 and also Written Submissions dated 27.08.2019 and the Respondent seeks to refer and rely on the same, to the extent the same are consistent and in consonance with the order dated 02.12.2019 passed by the Hon'ble Supreme Court in C.a. No. 8860/2019 and order dated 26.08.2019 passed by the Hon'ble APTEL in Appeal No. 396/2018.
- (ii) It is reiterated that no arrears are payable to the petitioner and also no interest is payable as the Respondent has paid the applicable tariff in full and therefore today there is no pending/ balance dues for which arrears are to be paid. It is further submitted that the tariff that was paid to the petitioner was on the earlier Single Part Tariff order dated 03.05.2013 and now with the passing of the order dated 02.12.2019 passed by the Hon'ble Supreme Court in C.A. No. 8860/2019 and order dated 26.08.2019 passed by the Hon'ble APTEL in Appeal No. 396/2018 two part tariff is to be verified and for this purpose a petition has been filed by the Respondent and the same is admitted for hearing. Therefore, it will be seen that till date there is no final tariff determined for the petitioners and therefore to seek payment of arrears is incorrect and illegal.
- (iii) It is further submitted that the petitioner have not complied with the provisions of Para 8.25 of the tariff order dated 02.03.2012 and no voluntary monthly information was submitted to the Respondent by the Petitioner No. 1 and 2 for enabling monitoring on an annual basis. It is submitted that therefore in any-which way the provisions of the tariff order dated 30.11.2016 shall not become

*applicable on the petitioner's and therefore the petition is liable to be dismissed on this ground alone.*

*(iv) It is further submitted that the Hon'ble APTEL vide its order dated 26.08.2019 passed in Appeal 396/2018 had directed this Hon'ble Commission to verify the claims of the petitioner and then determine/ verify the tariff. In other words the Hon'ble APTEL has requested this Hon'ble Commission to re-look and verify the tariff applicable to the petitioner and therefore it is submitted that in compliance of the same, this Hon'ble Commission ought to verify and enquire the same on the basis of the certificates submitted by the petitioner No. 1 about consumption of SFC etc and only once the enquiry/ verification is complete should this Hon'ble Commission determine the applicable tariff so that there is no loss to public and consumer interest is protected. Therefore also there is no liability of payment of arrears or interest. It is further submitted that it is settled principle of law that all rules, regulations and orders are prospective unless specifically mentioned to apply retrospectively and therefore on this account also there is no liability to pay any arrears or interest to the petitioner.*

*(v) It is therefore submitted that in light of the submissions made hereinabove the entire petition is devoid of merit and ought to be dismissed with costs awarded in favor of the Respondent.*

**22.** By affidavit dated 13.07.2020, the petitioners further submitted the following in reply to the information sought by the Commission:

*“(i) I say that the Petitioner had thereafter filed an affidavit dated 29/02/2020 before the Hon'ble Commission wherein, the Petitioner had submitted its position with respect to the information sought by the Hon'ble Commission. The Petitioner had submitted that the Petition had been filed only with respect to payment of arrears of bills and interest for the power supplied till 17/01/2017, and that the information sought by the Hon'ble Commission was not relevant for deciding the matter. However, without prejudice to this position, the Petitioner has already made available sufficient information to the Hon'ble Commission along with its affidavit dated 29/02/2020.*

*(ii) Pursuant to the above, the Hon'ble Commission has again vide order dated 23/06/2020 directed the Petitioner to submit the above information.*

*(iii) Without prejudice to the Petitioner's stand that the above information is not relevant, for the purpose of bringing clarity on the issue, I say that the power has actually been supplied and MPPMCL has also availed the benefit of the same up till 17/01/2017. The supply has been made by the Petitioner in compliance with all applicable laws/regulations. In fact, the Hon'ble Commission has also approved the procurement of power from the Petitioner in ARR and True up proceedings for the years in question.*

(iv) I say that while the tariff paid by MPPMCL for the period up till 17/01/2017 was in terms of the tariff order dated 03/05/2013 which got subsumed in the Tariff Order dated 30/11/2016, the only issue to be decided by the Hon'ble Commission now is regarding the difference payable by MPPMCL.

(v) I say that with regard to the information sought by the Hon'ble Commission regarding application of Merit Order Dispatch principles since COD for scheduling electricity from the Petitioners' plant, for the period up till 17/01/2017, the Hon'ble Commission may kindly take note of Regulation 5(3) of the Madhya Pradesh Balancing and settlement code 2015 which reads as under:

*Merit Order Operation: Discoms or Madhya Pradesh Power Management Company Limited on behalf of Discoms (on receipt of requisition from Discoms) will give their requisitions on day ahead and real time basis as per individual Merit Order i.e. in ascending order of the cost of energy (i.e. variable cost) of Inter State Generating Station, State Area Generating Station excluding Hydro Power Stations, Independent Power Producer and other Long Term, Medium Term Open Access and intra state short term Open Access allocated to individual Discom /Madhya Pradesh Power Management Company Limited.*

*Hence the information sought by the Hon'ble Commission if MOD was applied since the COD can certainly be verified from MPPMCL itself.*

(vi) I say that to the best of the Petitioners' knowledge, due to shortfall in RPO the Petitioners' plant was must run and electricity from the plants was actually supplied to MPPMCL who had purchased and paid tariff for the same in terms of the tariff order dated 03/05/2013. MPPMCL may verify if the power was purchased under MOD or Must run or RPO obligation. In either case, the power was duly purchased by MPPMCL, and the only question is with regard to the difference in tariff to be paid now.

(vii) I say that the supply was made strictly in terms of the applicable procedures mentioned in the Lol dated 11/10/2013 of the Petitioner No.1 and Lol& PPA of the Petitioner No.2.

(viii) I say that the proof of the process followed for joint meter reading of the ABT meter and downloading of MRI data etc. has already been filed by the Petitioner alongwith its earlier affidavit dated 29/02/2020.

(ix) I say that the information with regard to the application of MOD as well as quantum of power scheduled can be sought from MPPMCL who can clarify the same. As the application of MOD (if at all) is done by MPPMCL, it is therefore for MPPMCL to clarify on the issue.

(x) I say that regarding month-wise energy scheduled/unscheduled available capacity from the Petitioners' plant, the month-wise energy scheduled is clearly

---

*reflected in the bills that were raised during the period of supply. Since the entire electricity till 17/01/2017 was scheduled and payments were also made for the same by MPPMCL, there was no unscheduled available capacity. However, MPPMCL can clarify to the Hon'ble Commission on the aspect of the quantum of power scheduled from the Petitioners' plant, and the tariff been paid for the same. The issue now as stated above, only relates to the difference in tariff already paid and the tariff to be paid by MPPMCL. There is no dispute with regard to the units scheduled or actually consumed.*

- (xi) *I say that with regard to the details of monthly information required under Para 8.25, the Petitioner has already submitted in its Affidavit dated 29/02/2020, that the fuel consumption was strictly in terms of the LOI and Tariff Order, and the monthly information containing fuel data was submitted to MPPMCL as and when sought by it. This information had also been duly accepted by MPPMCL without any protest. The copies of such information submitted to MPPMCL has also been filed by the Petitioner along with its earlier affidavit.*
- (xii) *I say that it may be relevant to mention that during the period of supply, MPPMCL had also sought to withhold payments under the monthly bills of the Petitioners for this reason and had sought for this monthly information regarding consumption of fuel mix. These payments were eventually released by MPPMCL on submission of fuel consumption certificates at the end of the financial year. This can be confirmed by MPPMCL also.*
- (xiii) *I say that while in the case of the Petitioner No.2, Orient Green Ltd., MPPMCL had additionally deducted Rs. 1 per Unit of tariff from the monthly bills as per the clause under its PPA, in the case of the Petitioner No.1, Arya Energy Ltd., MPPMCL had withheld the entire bill amounts for the months of February 2016 and March 2016. These amounts were eventually only released by MPPMCL upon verification of the monthly information submitted with regard to the fuel consumption etc. Therefore, evidently MPPMCL had also accepted this information to be in order and had released payments accordingly.*
- (xiv) *I reiterate with utmost respect that the issues of MOD applicability, scheduled/unscheduled quantum and fuel consumption etc. are in no manner relevant to decide the present Petition which is on the specific aspect of arrears.*
- (xv) *In the above circumstances, it is prayed that the prayers made in the Petition filed by the Petitioner be allowed by the Hon'ble Commission."*

**23.** The Respondent No. 1 by affidavit dated 05.09.2020 filed its response on the above reply filed by the petitioners. Having heard the arguments at length placed by the petitioner and Respondent No.1, the parties were allowed to file their written submissions within ten days. The Respondent No.1 was directed to file the details/information as sought above within ten days. The petitioners filed their written submissions on 31.10.2020 however, the Respondent No.1 after seeking time extension filed its written submission on 31.12.2020.

---

24. The petitioners vide their letter dated 31.10.2020 submitted the following in its final written submission:

- (i) *The original tariff order for biomass plants commissioned in the year 2012-2013 was passed by this Commission on 02.03.2012, which came to be challenged before the Hon'ble Tribunal in Appeal No. 93/2012. Vide Order dated 18.02.2013 the matter stood remanded back to the Hon'ble Commission for re-determination of tariff. This Hon'ble Commission then after re-determination, subsequently issued Tariff Order dated 03.05.2013, which again came to be challenged vide Appeal No. 144/2013 before the Hon'ble Tribunal.*
- (ii) *In the meanwhile, the Petitioners commissioned their respective projects on 30.05.2013 and 22.01.2014, and were supplying power to MPPMCL in terms of LOIs dated 11.10.2013 and 20.12.2013 respectively. In terms of the LOIs, the Tariff Order dated 03.05.2013 was made applicable to the projects of the Petitioners and the applicable rate of Rs. 5.64/kWh was decided accordingly. However, the above rate was made subject to the outcome of the Appeal No. 144/2013 pending before the Hon'ble Tribunal.*
- (iii) *The Appeal No. 144/2013 preferred by the Petitioners herein, thereafter came to be allowed by the Hon'ble Tribunal vide its Order dated 29.05.2014, whereby it again remanded the matter back to this Commission for re-determination of Gross Calorific Value (GCV) of the fuel and the Station Heat Rate (SHR). The Hon'ble Tribunal further held that in the interim period till re-determination of GCV and SHR, the distribution licensee (i.e. MPPMCL) will pay the generators (i.e. the Petitioners) at the tariff decided by the State Commission in the impugned tariff order dated 03.05.2013, subject to adjustment on the final determination by the State Commission.*
- (iv) *Pursuant to the directions of the Tribunal, this Commission passed Tariff Order dated 13.08.2015 retaining the values of GCV and SHR in the earlier tariff orders, and therefore the tariff order also came to be challenged vide Appeal No. 211/2015. This time, the Tribunal vide its Judgment dated 04.05.2016 set aside the tariff order and took it upon itself to determine the values of the GCV and SHR. The GCV was determined at 3100 Kcal/Kg And SHR determined at 4100 Kcal/Kg and the matter was sent back to this Commission only to calculate the final tariff within two months adopting the GCV and SHR values as determined by the Tribunal itself.*
- (v) *The Hon'ble Supreme Court, vide its Order dated 25.07.2016 upheld the Tribunal's Judgment dated 04.05.2016 when MPPMCL approached it by way of Civil Appeal No. 6547/2016.*
- (vi) *The Review Petition moved by this Commission for review of the Judgment dated 04.05.2016 was also dismissed by the Tribunal.*

- (vii) *After the Hon'ble Supreme Court's nod, since the issue pertaining to the values of the GCV and SHR for generation and sale of electricity from the Petitioners to MPPMCL had attained finality, this Commission re-determined the tariff and issued the Tariff Order dated 30.11.2016 adopting the GCV and SHR values as determined by the Tribunal. However, the same was made subject to certain conditions (a) to (f) contained in Para 15 of the Tariff Order dated 30.11.2016. It erroneously provided that the tariff as determined will only be applicable to those projects who had an existing PPA at the time of commissioning of the project.*
- (viii) *Since the aforesaid conditions (a) to (f) sought to take away the effect of the Tribunal's Judgment dated 04.05.2016, the conditions contained in Para 15 of the Tariff Order dated 30.11.2016 came to be challenged vide Appeal No. 338/2016. It is pertinent to note that only the conditions (a) to (f) contained in Para 15 of the Tariff Order were challenged qua the appeal and not the tariff. The tariff as determined by this Commission vide Tariff Order dated 30.11.2016 never came to be challenged in the appeal before the Tribunal or in any other proceeding(s) before any judicial fora/courts. Resultantly, the tariff as determined under the Tariff Order dated 30.11.2016 had attained finality, and had substituted the tariff as determined under the previous tariff orders passed by this Commission.*
- (ix) *The claims of the Petitioners is simply that they were being paid in terms of the earlier Tariff Orders passed by this Commission, which were subject to the outcome of the tariff finalisation. The controversy related to the tariff came to be finalised by the Tariff Order dated 30.11.2016 after the Hon'ble Supreme Court's Judgment dated 25.07.2016. Consequently, as envisaged in the terms of the LOIs, the payments need to be made to the Petitioners as per the Tariff Order dated 30.11.2016 and in pursuance of the specific directions for adjustment passed by the Hon'ble Tribunal in Appeal No. 144/2013, the difference between the tariff charged needs to be adjusted in favour of the Petitioners along with interest.*
- (x) *Subsequently, the Hon'ble Tribunal vide its Order dated 20.03.2017 in Appeal No. 338/2016, set aside the conditions (a), (b), (c) and (d). The same was then challenged by the MPPMCL before the Hon'ble Supreme Court vide Civil Appeal Nos. 4550-51/2018 which partly allowed the Civil Appeal Nos. 4550-51/2018 only on the issue of application of MOD to the Petitioners and directed that the execution applications which have been preferred by the Petitioners may be decided accordingly.*
- (xi) *Thereafter, when the Execution Petition came up before the Tribunal, even though the Tribunal found merits, since there was no adjudication by this Commission, the court of first instance, the matter has been remanded back.*

**REPLY TO THE OBJECTIONS RAISED BY RESPONDENT NO. 1 - MPPMCL**

- (xii) *Even though in its reply, many contentions had been raised by MPPMCL, including with regard to the interpretation of the Hon'ble Supreme Courts'*
-

*Judgment on applicability of tariff which has now been rejected and settled, the only objection argued by MPPMCL before the Hon'ble Commissions the issue of "Specific Fuel Consumption" of one of the Petitioners' plant (Arya Energy) in 2 year's Fuel Consumption Report (FY 2013-14 and 2014-15)*

- (xiii) *It is submitted that it is highly unbecoming of MPPMCL which is a state utility to keep misleading the Commission by bringing up such issues which are completely irrelevant for the Commission to decide the present matter which is only restricted to payment of arrears.*
- (xiv) *Now even on merits, the contention of MPPMCL with regard to Specific Fuel Consumption of the Petitioners' plant is completely misconceived. This is for the simple reason that while the tariff orders passed by the Hon'ble Commission are generic orders applicable to all biomass plants in the State, MPPMCL is selectively placing reliance on the actual operational SFC achieved by the Petitioner No.1's plant and that too, for 2years. In this regard, the Hon'ble Commission may also take note that this issue has only been raised by MPPMCL qua the parameters of M/s Arya Energy, and no such allegation has been made on the Petitioner No.2 i.e. Orient Green Ltd. Since Orient Energy has Specific Fuel Consumption of 2.2 is conveniently left by MPPMCL for argument.*
- (xv) *In this regard, it is relevant to understand what "Specific Fuel Consumption" is. The formula for Specific Fuel Consumption is  $SHR/GCV$ . Therefore, Specific Fuel Consumption is simply a derivative of  $GCV$  and  $SHR$ .*
- (xvi) *In the present case, the Appellate Tribunal has already determined the  $SHR$  at 4200 and  $GCV$  at 3100, which has been confirmed even by the Hon'ble Supreme Court. MPPMCL after having lost before the Appellate Tribunal and the Hon'ble Supreme Court on the matter of  $GCV$  and  $SHR$  is now essentially seeking to redetermination of Specific Fuel Consumption which is nothing but derived on  $GCV$  of Fuel and  $SHR$  of Plant. This certainly cannot be done at this stage, when the  $GCV$  and  $SHR$  have already been settled up till the Hon'ble Supreme Court. It is submitted that MPPMCL is inviting this Commission to commit contempt of the orders passed by the Hon'ble Supreme Court.*
- (xvii) *The contention of MPPMCL alleging unjust enrichment in this regard is erroneous. The specific contention of MPPMCL is that had the certificates been produced before the Hon'ble Commission, the Hon'ble Commission would have passed a more reasoned order for  $GCV$  and  $SHR$  and the same would not have been set aside by the Tribunal. MPPMCL by relying on certain certificates, is essentially rearguing its case on  $GCV$  and  $SHR$ , which is confirmed even by the Hon'ble Supreme Court now.*
- (xviii) *Without prejudice to the above, it is submitted that the Petitioner has no objection to there being project specific tariff determination for the Petitioners' plants, wherein the actual capital cost along with appropriate returns would have to be allowed to be recovered by the Petitioners. However, in the meanwhile, the tariff as decided by the Hon'ble Commission in its order dated*

30.11.2016 (being the final tariff order) ought to be given effect to, and the arrears in terms of the same also have to be paid.

- (xix) Another extreme contention raised by MPPMCL in the hearing was that it should be permitted to terminate the PPA / LOI if the petition is allowed. MPPMCL cannot threaten this Hon'ble Commission in this manner. Being a public utility, MPPMCL is equally bound by the decisions of the Appellate Courts. The tariff Order dated 03.05.2013 has culminated / been revised vide the Order dated 30.11.2016 due to the appellate process and it is not that the Petitioners are seeking to enhance tariff beyond what is provided in the Order dated 30.11.2016. Further, the right of termination flows from the contract in case one of the parties commits a default. It cannot be that PPAs can be terminated only because the tariff orders of the Hon'ble Commission get modified by the process of appeal. This would mean that if the distribution licensee is successful in challenging a tariff order and getting it revised downwards, the generators can simply walk out of the PPA. Such an illogical approach cannot be permitted.
- (xx) It is submitted that the Petitioners are also seeking surcharge for delayed payment in terms of the LOI dated 11.10.2013 with the Petitioner No.1 and the LOI dated 20.12.2013 and the PPA dated 18.01.2016 with the Petitioner No. 2, wherein a surcharge of 1.25% per month on the amount outstanding after the 30<sup>th</sup> day of the receipt of the bill is payable by MPPMCL.

**INFORMATION SOUGHT BY THIS HON'BLE COMMISSION**

- (xxi) This Hon'ble Commission vide Daily Order dated 23.06.2020 directed the Petitioners to give certain details which are not completely relevant for the decision in the present petition.
- (xxii) However, the Petitioners, to their best ability have given the said details in the affidavits filed on 29.02.2020 and 13.07.2020. These include –
- (a) Whether MOD was applied by MPPMCL on the Petitioners from their CODs. Till 17.02.2017, MPPMCL has scheduled the entire energy and also claimed it as per RPO; It is for MPPMCL to show the MOD stack during this period;
  - (b) Electricity supply was made as per the LOI dated 11/10/2013 for M/s Arya Energy Ltd. and the PPA for M/s Arya Energy Ltd.;
  - (c) Month wise consumption and scheduling of electricity as verified by MPPMCL from the bills of the Petitioners has been given;
  - (d) The Fuel consumption was strictly as per the LOI and the PPA and has been given to MPPMCL from time and time.
  - (e) In view of the above, it is submitted that the short issue to be considered by the Hon'ble Commission in the present matter is only with regard to payment of arrears i.e. difference between the tariff paid for the electricity supplied by the Petitioners to MPPMCL till 17.01.2017 and the tariff as per the Order dated 30.11.2016.

25. The Respondent No. 1 (MPPMCL) vide letter dated 31.12.2020 filed final written submission as under:

- (i) *A perusal of the relief clause and the averments of the petitioner more particularly in paragraphs 23 to 26 of the petition (ref: @ page No.12) clearly point out that the petitioner is seeking arrears of bills as per the tariff order dated 30.11.2016 for the power supplied.*
- (ii) *It is an admitted fact that the respondent herein has paid the bills of the petitioner as per the tariff order dated 03.05.2013.*
- (iii) *It is most respectfully submitted that the Hon'ble Appellate Tribunal for Electricity while disposing of Execution Petition No.2/2017 vide order dated 29.05.2018 had directed in para 6(i) (ref:@ page no.37 of the petition) that the dispute between the petitioners and MPPMCL is required to be adjudicated by this Hon'ble Commission on merits considering the judgments of the Hon'ble Tribunal and the Hon'ble Supreme Court.*
- (iv) *It is submitted that it was in the light of this order the petitioners have filed the instant petition claiming arrears of bills for the difference in tariff between the tariff order dated 30.11.2016 and 03.05.2013.*
- (v) *It is submitted that the respondent herein reiterates the submissions made by it in its reply dated 29.10.2018 and sur-rejoinder dated 05.12.2018 and submits that the entire petition is misconceived and without any basis.*
- (vi) *It is also pertinent to mention without prejudice to the above that the petitioners herein had entered into a contract (LOI) with the respondent herein at the rates as per the tariff order dated 03.05.2013 and it was on the basis of this rate that the respondent herein agreed to purchase the power (goods).*
- (vii) *It is, therefore, mentioned that it has been held by the Hon'ble Supreme Court in the case of **Jagdish Mandal vs. State of Orissa, (2007) 14 SCC 517** more particularly in para 21.3 and 21.4 wherein it has been held by the Hon'ble Supreme Court that the award of a contract whether it is by a private party or by a public body or a State is essentially a commercial transaction and the factors which are important are commercial considerations which are:*
- (a) *The price at which the other side is willing to do the work.*
- (viii) *It is submitted that the petitioners herein entered into a contract with the respondent at a particular price as per the tariff order dated 03.05.2013 and thereon are now litigating to claim a higher tariff by way of arrears.*
- (ix) *However, it is a general trend noticed recently that while parties enter into a contract at a particular rate they thereafter start disputing the terms and conditions of the price mentioned in the contract and seeks higher price on one count or another.*
-

- (x) It is submitted that such action on the part of the private generators cannot be countenanced as the respondent being a public sector enterprise is responsible for the purchase of power and as it is well known that power purchase cost is passed through to the downstream consumers.
- (xi) It is submitted that such action on the part of private generators is also against public interest and also violates the sanctity of the contract and, therefore, on this ground also the instant petition ought to be dismissed.

**Re: Actual Fuel usage by Petitioners Is Lower**

- (xii) It is further submitted, without prejudice to the above, the answering Respondent MPPMCL would also like to place on record the Fuel Usage Certificates of M/s Arya Energy Ltd. for the FY 2013-14 & 2014-15, which were not submitted by Arya Energy during Remand Proceedings before Hon'ble MPERC. Salient details of the same are discussed below.
- (xiii) As per the Fuel Consumption Certificate and Gross Generation statement submitted by M/s Arya Energy Ltd year wise fuel consumption and gross generation details are given below:

<b>Financial Year</b>	<b>Total Fuel used as per CA Certificate in MT</b>	<b>Gross Generation of Electricity as per CA Certificate in MWh</b>	<b>Specific Fuel Consumption Kg/kWh</b>
<b>1</b>	<b>2</b>	<b>3</b>	<b>4 = 2 / 3</b>
2013-14	33603.02	30913.40	1.087
2014-15	66199.54	60958.08	1.086
<b>Total</b>	<b>99802.56</b>	<b>91871.48</b>	<b>1.0863</b>

- (xiv) From the same, it will be observed that whatever may be the SHR of the Plant and whatever may be the GCV of Biomass fuel, the **Specific Fuel Consumption obtained with Biomass available in the State of Madhya Pradesh is 1.086 kg/kWh**, for the period September 2013 to March 2014 and April 2014 to March 2015, which has been derived on the basis of about **One Lakh Metric Ton fuel used during more than 550 days** in a Biomass Power Plant situated in the State of Madhya Pradesh only, and is calculated on the basis of C.A. certified Fuel Consumption Statement submitted by M/s Arya Energy Ltd.
- (xv) The Power Plant of M/s Arya Energy Ltd therefore run with PLF much less than the normative PLF during the said period, as may be clear from the Hon'ble MPERC Order dtd. 13.08.2015 in SMP No. 8/2013. Had the Power Plant run near about normative PLF, SFC would have been much less.
- (xvi) The norms of Station Heat Rate and Gross Calorific Value considered in various Biomass Tariff Orders passed by MPERC are as under:

<b>MPERC Order Dtd.</b>	<b>SHR kcal/kWh</b>	<b>GCV kcal/kg</b>	<b>Specific Fuel Consumption kg/kWh</b>
1	2	3	$4 = 2 / 3$
07.08.2007	3600	3325	1.0827
02.03.2012	3800	3612	1.052
03.05.2013	3800	3600	1.056
30.11.2016	4200	3100	1.355

- (xvii) *The value of SHR and GCV is utilized to determine the Specific Fuel Consumption which is the ratio of SHR/GCV and is of paramount importance.*
- (xviii) *The upshot of the entire submission is that, the Power plant of the Petitioners had an SFC of 1.087 KG/kWH for the year 2013-14 and 1.086 KG/kWH for the year 2014-15 and the total for the two financial years is 1.0863KG/kwh. Further when this is compared with the SFC permitted by the Hon'ble Commission in its various Tariff Orders it will be seen that the SFC permitted in 7.8.2007 tariff order of 1.0827 KG/kWH is about the same as the SFC of the Petitioners power plant in the year 2013-14 and 2014-15. In other words the SFC of 1.355 KG/kWH had never been consumed by the Petitioners power plant.*
- (xix) *It is therefore submitted that the demand of the Petitioners to claim arrears as per the Tariff Order dated 30.11.2016 for an SFC of 1.355 KG/kWH is completely illegal, unjustified and an unjust enrichment as the Petitioner never had an actual SFC of 1.355 KG/kWH and as demonstrated the SFC of the Petitioner was only 1.0863 KG/kWH.*
- (xx) *It is submitted that the above facts are undisputed as the same has been derived on the basis of the documents submitted by the Petitioners themselves as of 30.09.2016. It is further submitted that this specific information of SFC derived on the usage of One Lac MT fuel over a 550 day period for the year 2013-14 and 2014-15 was never submitted to the Hon'ble APTEL by the Petitioner and was concealed by them and therefore this Hon'ble Commission ought to consider this aspect as the Petitioner were required to submit all information and approach the court with clean hands and this act of concealment on the part of the Petitioner amounts to fraud.*
- (xxi) *It is submitted that the above is an extremely important fact for the adjudication of the instant petition. It is submitted that the Petitioner cannot claim the tariff of 30.11.2016 for the years 2013-14 and 2014-15 as the same would amount to unjust enrichment.*
- (xxii) *It is submitted that as mentioned hereinabove the Petitioners had an actual SFC of 1.0863 and they have been paid as per the Tariff Order dated 3.5.2013 which provides for an SFC of 1.056, and therefore it is submitted that the payments made are just, proper and appropriate. It is submitted that this Hon'ble Commission ought to enquire from the Petitioners as to how their financial viability is affected, as the payments were made as per the Tariff*

order dated 3.5.2013, whereas the actual SFC of the Petitioners plant was as per tariff order of 2007. In other words the petitioners were any which way paid more than the actual fuel consumed by them and therefore the averment of the Petitioner that their financial viability is affected cannot be saddled on the shoulders of the answering Respondent and it is the Petitioners who have themselves to blame if they could not manage their plant in a fiscally prudent manner.

**Re: Petitioner entered into Agreement for Sale of Power on the Basis of Generic Tariff Order dated 3.5.2013 with Open Eyes**

(xxiii) Without prejudice to the above it is also pertinent to mention herein that the Petitioners entered into the Agreement/LOI with Open Eyes and on the basis of the rates given in the Tariff Order dated 3.5.2013 and therefore they are estopped from claiming any arrears for the years 2013-14 and 2014-15.

(xxiv) It is also relevant to put up for the consideration of MPERC that the Appropriate Commission issued a generic Tariff Order on the basis of certain norms so that interested Developers, if satisfied with the norms and tariff, can take up installation of the Power Project for supply of power to Distribution Licensee and therefore any developer not satisfied with the norms was not required and was at liberty not to install a power plant at all.

(xxv) The legal question which arises in the given facts and circumstances is whether the operating norms can be challenged by developer after installation of power plant in a generic tariff regime. If the Developers were not satisfied with the norms and tariff given in any generic Tariff order, they should not have taken up installation of power plants for the purpose of selling power to Discoms and should have challenged the tariff order at appropriate forum and only after satisfactory norms and tariff, they should have taken up installation of the power plant and entered into agreement/LOI with the Respondent.

(xxvi) In a generic tariff regime it is impermissible that first a plant is established and then the norms of the generic tariff are challenged. Such purported act of Developers will defeat the very basic purpose of Generic tariff. This is against the object of generic tariff.

(xxvii) It is further submitted that the information as required by this Hon'ble Commission as mentioned in the daily order dated 20.10.2020 with respect to monthly bill is attached as **Annexure-1**.

(xxviii) Further with respect to the query if MOD was applied to the Petitioner, it is submitted that the MOD was not applied as informed by the SLDC letter dated 15.12.2020 as the plant was treated as a Must Run Plant. A copy of the SLDC letter is attached as **Annexure-2**.

(xxix) With respect to Query No. D in order dated 20.10.2020 it is to be noted that clause 8.25 of the Tariff order dated 2.3.2012 reads as under:

*"8.25 The project developer shall furnish a monthly fuel procurement and fuel usage statement duly certified by Chartered Accountant, to the*

---

*appropriate agency designated by the Commission for the purpose of monitoring the fossil and non-fossil fuel consumptions. However, the compliance of the condition of fossil fuel usage shall be monitored on annual basis. The statement shall cover details such as :-.....”*

*(xxx) In this regard it is mentioned that the designation of the appropriate agency by the Hon’ble Commission for monitoring the fossil fuel and non-fossil fuel consumptions is still awaited. Further it is mentioned that the Photocopy of CA Certificates showing annual fuel consumption as provided by the Petitioners are attached as **Annexure-3**.*

**Commission’s Observations and Finding:**

**26.** The issue involved in the present petition is with respect to payment of arrears of bills and interest for the power supplied from 19.09.2013 till 17.01.2017 by Petitioner No. 1 and from 20.01.2014 till 17.01.2017 by Petitioner No. 2 arising from the difference in tariff between the Tariff Order dated 03.05.2013 which got subsumed in Commission’s Tariff Order dated 30.11.2016. The petitioners have also sought delayed payment surcharge on the arrears. In their submission, the petitioners also mentioned about the Judgment dated 26.08.2019 pronounced by the Hon’ble Appellate Tribunal for Electricity in Appeal No. 396 of 2018 filed by them against Commission’s Order dated 16.11.2018 in Petition No. 32 of 2018.

**27.** The petitioners are Biomass based power plants in the State of M.P. The petitioner No.1, M/s Arya Energy Limited is a Biomass based power plant at District Anuppur in Madhya Pradesh having capacity of 12 MW commissioned on 31.05.2013. The petitioner No.2, M/s Orient Green Power Company Limited is also a Biomass based power plant at District Narsinghpur in Madhya Pradesh having capacity of 10 MW commissioned on 22.01.2014.

**28.** The COD of petitioner No.1 i.e., Arya Energy was 30.05.2013 and the power was being supplied by the petitioner No.1 to the Respondent No. 1 in terms of the LOI dated 11.10.2013. The relevant clauses of the LOI have been submitted by the petitioners as under:

*"2. Rate: Applicable rate for this LOI is Rs.5.64/kWh (this rate is for first year after commissioning of the plant during FY2013-14 as per MPERC tariff Order dated 03.05.2013 and read with MPERC tariff Order 02.03.2012). This rate is inclusive of all charges on account of taxes/duties/cess/octroi etc.*

*3. The above rate shall be subject to outcome of the Appeal No.144 of 2013 before the Hon'ble Appellate Tribunal of Electricity, New Delhi and without prejudice to the rights of the parties as per Order dated 04.09.2013 of Appellate Tribunal, New Delhi."*

**29.** The COD of petitioner No.2 i.e., Orient Green was 22.01.2014 and the power was being supplied by it to the Respondent No. 1 in terms of LOI dated 20.12.2013

Subsequently, the Orient Green had entered into a PPA with MPPMCL. The relevant clauses of the said LOI dated 20.12.2013 with respect to the tariff are as follows-

*"6. Rate: Applicable rate for this LOI is Rs. 5.64/kWh (this rate is for the plants commissioned during FY 2013-14 for their first year of operation as per MPERC tariff Order dated 03.05.2013 and read with MPERC tariff Order 02.03.2012). This rate is inclusive of all charges on account of taxes/duties/cess/octroi etc.*

*7. The above rate shall be subject to outcome of the Appeal No. 144 of 2013 before the Hon'ble Appellate Tribunal of Electricity, New Delhi and without prejudice to the rights of the parties as per Order dated 04.09.2013 of Appellate Tribunal, New Delhi."*

**30.** Vide Order dated 02.03.2012 in SMP 77 of 2011, the Commission determined the tariff for procurement of power by the Distribution Licensees from the Biomass based power plants. The following was mentioned in clause 4.1 and 5.1 of Commission's aforesaid tariff order:

***Clause 4.1:** Tariff Determined through this order will be applicable to all new biomass based power generation projects in the State of Madhya Pradesh commissioned on or after the date of issue of this order for sale of electricity to the distribution licensees within the State of Madhya Pradesh.....*

***Clause 5.1:** The control period will start from the date of issue of this order and will end on 31.03.2014 (i.e. end of FY 2013-14). The determination of tariff for next control period shall be done separately and in case tariff for the next control period is not determined before commencement of next control period, the tariff as per this Order shall continue to be in force until revised tariff is determined. The tariff decided in this order are two part tariff viz. Fixed tariff and Variable tariff. The Fixed tariff shall apply to all projects which are commissioned during the above mentioned control period and shall remain valid for the project life of 20 years. The variable tariff is determined for the period from the date of issue of this tariff order to 31st March, 2013 in the month of March of its preceding financial year after considering the fuel cost afresh.*

**31.** The Tariff Order dated 02.03.2012 was challenged before the Hon'ble Appellate Tribunal for Electricity in Appeal No. 93 of 2012. As per directions of the Hon'ble Appellate Tribunal for Electricity in Judgment dated 18.02.2013 in aforesaid Appeal No. 93 of 2012, the Commission vide order dated 03.05.2013 re-determined the year-wise tariff for generation of electricity from the following biomass projects:

- (a) Commissioned on or after 02.03.2012 and during FY 2012-13.
- (b) Commissioned during FY 2013-14.

32. The petitioners along with other appellants challenged the Commission's abovementioned order dated 03.05.2013 in Appeal No. 144 of 2013 before the Hon'ble Tribunal. The Hon'ble Tribunal in its Judgment dated 29.05.2014 in Appeal No. 144 of 2013 remanded the matter to the Commission to re-determine the Gross Calorific Value (GCV) of the fuel and the Station Heat Rate (SHR).

33. Hon'ble Tribunal vide aforesaid Judgment dated 29.05.2014 in Appeal No.144 of 2013 held that in the interim period till re-determination of GCV and SHR, the distribution licensee will pay the generators at the tariff decided by the Commission in the order dated 03.05.2013 subject to adjustment on the final determination by the Commission. The summary of findings by Hon'ble Tribunal is as under-

- (i) *We do not find any infirmity in the findings of the State Commission regarding capital cost, and fuel price.*
- (ii) *We find that the State Commission has again not given a reasoned findings for Gross Calorific Value of fuel and Station Heat Rate. We again remand the matter to the State Commission to re-determine these norms.*
- (iii) *In the interim period till redetermination of GCV and SHR, the distribution licensee will pay the generators at the tariff decided by the State Commission in the impugned order subject to adiustment on the final determination by the State Commission.*

34. As per the directions of Hon'ble Tribunal in above Judgment dated 29.05.2014, the Commission passed order dated 13.08.2015 in SMP No. 08 of 2013. In Para 6 of Commission's aforesaid Order, the following was mentioned:

*"By order dated 03.05.2013, the Commission had determined the year wise tariff for the projects commissioned up to the FY 2013-14. Due to review of the norms in terms of the Judgment dated 29.05.2014 issued by the Hon'ble APTEL, the tariff for the control period beyond FY 2013-14 could not be determined. As per clause 5.1 of the impugned tariff order, **in case tariff for the next control period is not determined before commencement of next control period, the tariff as per tariff order dated 02.03.2012 shall continue to be in force until revised tariff is determined.** Also, it would not now be appropriate to determine the tariff for the projects commissioned during the FY 2014-15 and 2015-16. Therefore, based on the order dated 03.05.2013, **the Commission decides 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.**"*

*(Emphasis Supplied)*

35. Aggrieved by the aforesaid Commission's Order dated 13.08.2015, the petitioners along with other appellants challenged the Commission's abovementioned order in Appeal No. 211 of 2015 for fixing of GCV of fuel and SHR. **The Hon'ble Tribunal by Judgment**

**dated 04.05.2016, in Appeal No.211 of 2015 concluded/determined the GCV as 3100 kCal/Kg and SHR at 4200 kCal /kWh and directed the Commission to re-determine the tariff of biomass generating power plants in Madhya Pradesh, considering the aforesaid values of GCV and SHR.**

(Emphasis Supplied)

**36.** The M.P. Biomass Developers Association and others had filed an Execution Petition No. EP-7 of 2016 before the Hon'ble Tribunal for execution of Hon'ble Tribunal's aforesaid order passed on 04.05.2016 in Appeal No. 211 of 2015. The Respondent, M.P. Power Management Company Ltd. filed a Civil Appeal No. 6547/4016 before Hon'ble Supreme Court against the Order dated 04.05.2016 passed by Hon'ble Tribunal in Appeal No. 211 of 2015 and the Hon'ble Supreme Court dismissed the aforesaid Civil Appeal. The Commission filed a Review Petition No. 21 of 2016 before the Hon'ble Tribunal regarding GCV of fuel and SHR determined by Hon'ble Tribunal in its Judgment dated 04.05.2016. This Review Petition was dismissed by the Hon'ble Tribunal.

**37.** In compliance to the directions of Hon'ble Tribunal passed in Judgment dated 04.05.2016, the Gross Calorific Value (GCV) at 3100 kCal/Kg and Station Heat Rate (SHR) at 4200 kCal/kWh was considered by the Commission and the Commission vide order dated 30.11.2016, set the year wise tariff for generation of electricity from the following biomass energy projects:

- (a) Commissioned on or after 02.03.2012 and during FY 2012-13.
- (b) Commissioned during FY 2013-14 and thereafter

The aforesaid tariff order was subjected to the following terms and conditions:

- (a) "This tariff shall be applicable till 31.03.2017 or the new tariff order is issued, whichever is earlier.
- (b) The projects for more than 2 MW are subjected to the 'scheduling' and 'merit order dispatch principles' in terms of the para 8.10 of the tariff order dated 02.03.2012 since date of commissioning.
- (c) This tariff order is applicable to the projects using rice husk, wheat husk, mulbury and coal (limited to 15% of the total fuel on annual basis) only as a fuel based on which GCV has been decided by the Hon'ble APTEL in its Judgment dated 04.05.2016.
- (d) This tariff shall be applicable for the projects for which Power Purchase Agreement has already been executed at the time of commissioning of the project.
- (e) The M.P. Power Management Co. Ltd., Jabalpur shall submit, the draft of the Power Purchase Agreement to be executed, if any, with the developer of biomass based power projects to be commissioned after the date of this order, for approval of the Commission.
- (f) The developers shall have to submit monthly information, as required under para 8.25 of the tariff order dated 02.03.2012, to the M.P. Power Management Co. Ltd., Jabalpur by 10th day of each month following the month of information failing which action as per the provisions of para 8.26 of the tariff order dated 02.03.2012 must be ensured by the M.P. Power Management Company Limited."

38. Aggrieved by above Commission's order dated 30.11.2016 in SMP-8/2013, the petitioners filed an Appeal No. 338 of 2016 before the Hon'ble Tribunal. The Hon'ble Tribunal decided the aforementioned Appeal No. 338 of 2016 by Judgment dated 20.03.2017. Vide aforesaid Judgment, the Hon'ble Tribunal set aside the conditions (a), (b), (c) and (d) specified in para 15 of the Commission's order dated 30.11.2016 in SMP-8/2013.

39. The Commission and Respondent No. 1 filed Review Petitions before the Hon'ble Tribunal against the aforesaid Judgment dated 20.03.2017 in Appeal No. 338 of 2016, The Hon'ble Tribunal dismissed the above Review Petitions vide an order dated 02.08.2017.

40. The Respondent No.1 , 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 Petitions No. 4 & 5 of 2017 which later got converted into Civil Appeal No. 4550-4551 of 2018. The Hon'ble Supreme Court vide an order dated 26.04.2018 allowed the Civil Appeal only on the issue of giving 'must run' status to the petitioners. The Hon'ble Supreme Court has inter-alia held as under:

***“7. We have heard learned counsel for the parties on the correctness of the issue whether the principle of MR will apply or of MOD in relation to respondents 2,3 and 4 having regard to the agreement with the said parties.***

***8. We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulation 2010. The fact remains that the said Regulation stands substituted by MPERC Tariff Order 2012 and thereafter in the PPA it was agreed that Clause 8.10 of the Tariff Order has now become final between the parties to the agreement which provides for single part tariff. Thus, the findings of two part tariff cannot be sustained. We are unable to uphold the findings that clause 8.10 of the tariff order dated 02.03.2012 will not apply in these circumstances.***

***9. Accordingly, we set aside the impugned order and restore the order of the MPERC dated 30.11.2016 insofar as condition (b) of Para 15 quoted above is concerned. The remaining conditions will remain unaffected.***

***10. The appeals are, accordingly, disposed of.***

**11. Pending execution application (s) may now be decided in accordance with law.**

41. From the above, it is observed that the Hon'ble Supreme Court heard the parties on the issue whether the principle of Must Run will apply or of MOD in relation to the respondents 2,3 and 4 (in the aforesaid Civil Appeal) with regard to the agreement between the parties. In the above Order, Hon'ble Supreme Court held that Clause 8.10 of the Tariff Order 2012 which is incorporated in the PPA also has become final between the parties. It is further held in the abovementioned Order that the Commission's order dated 30.11.2016 is restored insofar as condition (b) of Para 15 in aforesaid order is concerned. In Para 8 of above order, the finality of the Tariff Order is with respect to the issue of MOD. Since the Appellate Tribunal had applied the principle of must run due to single part tariff, the Hon'ble Supreme Court while reversing the same, held that the Merit Order Dispatch was provided in the order dated 02.03.2012 and in the PPA it had become final on the parties. Therefore, the contention of Respondent No.1 that the Tariff Order dated 02.03.2012 has been final is not considerable.

42. The Respondent No. 1 in its written submission has submitted that it has paid the bills of the petitioners as per the tariff order dated 3<sup>rd</sup> May' 2013. The Respondent No. 1 has laid emphasis on the issue that there has been a lower Specific Fuel Consumption of the petitioner No. 1 during FY 2013-14 and 2014-15 as per CA Certificate. The Respondent No. 1 has detailed the Specific Fuel Consumption with reference to the norms of SHR and GCV considered by the Commission in various tariff orders. Respondent No. 1 has stated that the petitioner had concealed the information regarding Specific Fuel Consumption derived on the use of 1 lakh MT fuel over the period of 550 days during FY 2013-14 and FY 2014-15 before the Hon'ble Appellate Tribunal for Electricity during the adjudication by Hon'ble APTEL in various appeals. The Respondent No. 1 in its submission has mentioned that the Specific Fuel Consumption is determined as the ratio of SHR/ GCV. With the aforesaid contention, the Respondent No. 1 had urged that the Commission ought to consider this aspect at this stage when the SHR and GCV have been concluded/determined by the Hon'ble APTEL and consequential tariff order dated 30.11.2016 has been issued by the Commission considering the values of SHR and GCV determined by Hon'ble APTEL.

43. On the abovementioned issue related to Specific Fuel Consumption argued by the Respondent No.1, the petitioners have broadly submitted the following:

*(i) The Hon'ble Commission may also take note that this issue has only been raised by MPPMCL qua the parameters of M/s Arya Energy, and no such allegation has been made on the Petitioner No.2 i.e. Orient Green Ltd. Since Orient Energy has Specific Fuel Consumption of 2.2 is conveniently left by MPPMCL for argument.*

(ii) In this regard, it is relevant to understand what "Specific Fuel Consumption" is. The formula for Specific Fuel Consumption is  $SHR/GCV$ . Therefore, Specific Fuel Consumption is simply a derivative of GCV and SHR.

(iii) In the present case, the Appellate Tribunal has already determined the SHR at 4200 and GCV at 3100, which has been confirmed even by the Hon'ble Supreme Court. MPPMCL after having lost before the Appellate Tribunal and the Hon'ble Supreme Court on the matter of GCV and SHR is now essentially seeking to redetermination of Specific Fuel Consumption which is nothing but derived on GCV of Fuel and SHR of Plant. This certainly cannot be done at this stage, when the GCV and SHR have already been settled up till the Hon'ble Supreme Court. It is submitted that MPPMCL is inviting this Commission to commit contempt of the orders passed by the Hon'ble Supreme Court.

**44.** The Commission has noted that the tariff order dated 30.11.2016 issued by the Commission has attained finality after several rounds of litigations before the Hon'ble Appellate Tribunal for Electricity and the Hon'ble Supreme Court of India. Therefore, the aforesaid arguments placed by the Respondent No. 1 indirectly re-agitating the issue of GCV & SHR which have already been settled by Hon'ble Tribunal and have no relevance at this stage for adjudication. The subject petition is basically limited to payment of arrears along with carrying cost on account of difference between the tariff determined by the Commission after several rounds of litigations before the Hon'ble Tribunal.

**45.** With regard to the information about application of Merit Order Dispatch (MOD) principles for scheduling electricity from the petitioners' power plants since COD, the Respondent No 1 (MPPMCL) in its final submission dated 31<sup>st</sup> December' 2020 has submitted that the MOD was not applied to the petitioners as the plants were treated as 'Must Run Plant' as informed by the SLDC vide letter dated 15.12.2020. The Respondent MPPMCL has also enclosed the aforesaid copy of the letter issue by SLDC. As sought by the Commission in its daily order dated 20.10.2020, the Respondent No.1 has filed the monthly details of payments made to the petitioner No.1 during September'2013 to January'2017 as per tariff order dated 03.05.2013 in SMP -08/2013 along with the monthly bills payable as per tariff order dated 30.11.2016. Similarly, the Respondent No.1 has filed the monthly details of payment made to the petitioner No.2 during January'2014 to January'2017 as per tariff order dated 03.05.2013 in SMP -08/2013 along with the monthly bills payable as per tariff order dated 30.11.2016. The Respondent No.1 has also submitted the difference of amount for both the petitioners as per tariff order dated 03.05.2013 and 30.11.2016.

**46.** The petitioners have submitted the following points on the aforesaid issue related to application of MOD:

- (i) MPPMCL has scheduled the entire energy and also claimed it as per RPO till 17.02.2017. MPPMCL has to show the MOD stack during this period.

- (ii) Month wise consumption and scheduling of electricity as verified by MPPMCL from the bills of the Petitioners has been given;
- (iii) The Fuel consumption was strictly as per the LOI and the PPA and has been given to MPPMCL from time and time.

**47.** With regard to the other issue for compliance with Clause 8.25 of the tariff order dated 2<sup>nd</sup> March' 2012, the Respondent No.1 (MPPMCL) while mentioning the aforesaid clause has stated that the designation of the appropriate agency by the Commission for monitoring the fossil fuel and non-fossil fuel consumption is still awaited and the Respondent can present entire data applicable to the agency upon nomination. The Respondent MPPMCL has filed a copy of the CA certificates (annexed as Annexure 3 with the final written submission filed by MPPMCL on 31.12.2020) indicating Annual Fuel Consumption as provided to the Respondent No.1 (MPPMCL) by the petitioners.

**48.** On perusal of aforesaid contention of the Respondent No.1(MPPMCL), the Commission has observed that the condition at Sr. No. (f) of Para 15 of Commission's tariff order dated 30<sup>th</sup> November' 2016 in SMP 8 of 2013 has provided the following:

*"The developers shall have to submit monthly information, as required under Para 8.25 of the tariff order dated 02.03.2012, to the MP Power Management Co. Ltd. Jabalpur by 10<sup>th</sup> day of each month following the month of information failing which action as per the provisions of Para 8.26 of the tariff order dated 02.03.2012 must be ensured by the M.P. Power Management Company Ltd."*

(Emphasis Supplied)

As per the above condition stipulated in Commission's tariff order dated 30.11.2016, the Respondent No.1 has to obtain the information under Para 8.25 of the tariff order dated 02.03.2012 on monthly basis and ensure action as per provisions under clause 8.26 of the tariff order dated 02.03.2012.

**49.** The Commission has observed from the submissions of the petitioner and Respondent No.1 that the power from COD of the petitioners' power plant had been scheduled by the Respondent No.1 without application of merit order principles. The Respondent No.1 has paid bills for the power scheduled in each month from the petitioners based on the tariff order dated 03.05.2013. However, the Respondent No.1 has applied Merit Order Dispatch principles from 17.01.2017 and onwards. The Commission has further observed that the condition at Sr. No. (f) of Para 15 of Commission's tariff order dated 30<sup>th</sup> November' 2016 in SMP 8 of 2013 has not been complied with by the Respondent No.1 before verifying the monthly bills presented by the petitioners to the Respondent No.1.

**50.** Let us examine the retrospective applicability of tariff order passed by the Commission on 30.11.2016. According to clause 5.1 of the Tariff Order dated 02.03.2012, the control period started from the date of issue of this order ended on 31.03.2014. It was further mentioned in the aforesaid clause that in case the tariff is not determined for the next control period, the existing Tariff shall continue to be in force until revised tariff is determined. Accordingly, the applicability of the Tariff order determined vide Commission's order dated 30.11.2016 is applicable up to end of next control period ended on 31.03.2017 and shall be applicable till the new tariff is determined. In fact, the tariff order determined by the Commission vide order dated 02.03.2012 has been re-determined on the directions of the Hon'ble Tribunal on filing Appeals by the petitioners against Commission's orders dated 02.03.2012. Finally, the Commission passed tariff order dated 30.11.2016 in this matter considering the GCV and SHR determined by Hon'ble Tribunal subject to certain terms and conditions stipulated in Para 15 of aforesaid Order. The Hon'ble Tribunal vide Judgment/Order dated 20.03.2017 set aside the terms and conditions (a) to (d) as mentioned in para 15 of the Commission's order dated 30.11.2016. Thereafter, in Civil Appeal filed by the Respondent No.1 (MPPMCL), Hon'ble Supreme Court reinstated the condition (b) of para 15 (related to MOD) of the said order of the Commission. Therefore, the Commission's order dated 30.11.2016 except the terms and conditions (a), (c) and (d) at para 15 of this order dated 30.11.2016 has attained finality.

**51.** It is pertinent to mention that the Commission vide order dated 28.01.2021 in Petition No.08 of 2020, has verified year-wise actual fixed cost component in the tariff order issued by this Commission on 30.11.2016 for the Biomass energy projects commissioned during FY 2013-14 and thereafter, in terms of the Judgment dated 26<sup>th</sup> August' 2019 passed by the Hon'ble APTEL in Appeal No. 396 of 2018. The aforesaid Judgment dated 26.08.2019 in Appeal No. 396 of 2018 passed by the Hon'ble Appellate Tribunal for Electricity has been affirmed by the Hon'ble Supreme Court vide order dated 2<sup>nd</sup> December' 2019 in Civil Appeal No. 8860 of 2019.

**52.** As discussed in the para No. 3 of this order, it is apparent from record that there are several rounds of litigation upto the Hon'ble APTEL and thereafter at Supreme Court of India have been occurred till now on the same matter, therefore, for all the ends of justice, it shall be appropriate that a specific time limit should be provided to the respondent No. 1 for compliance of this order and obey the direction of the Commission in this regard.

**53.** In view all the above observations and findings, the year-wise tariff determined vide Commission's last order dated 30.11.2016 in SMP 08/2013 is applicable from 03.05.2013 for the petitioners in this matter. The subject petition is allowed and the petitioners are entitled to recover the arrears as a difference between the tariff determined vide orders dated 30.11.2016 (in SMP No. 08/2013) and dated 03.05.2013 (in SMP No. 08/2013) passed by this Commission for procurement of power from Biomass based power plants. The Commission has noted a difference in figures of arrears in the statements submitted by the petitioners and

Respondent No.1. Therefore, the petitioners and Respondent No.1 shall reconcile the monthly figures of arrears submitted by them. However, the payment of arrears after reconciliation shall be subject to compliance with the condition at Sr. No. (f) of Para 15 of Commission's tariff order dated 30<sup>th</sup> November' 2016 in SMP 8 of 2013 by the parties in this matter.

**54.** The Respondent No.1 is directed to pay the amount of arrears as aforesaid to the petitioners after reconciliation of figures and compliance with the condition at Sr. No. (f) of Para 15 of Commission's tariff order dated 30<sup>th</sup> November' 2016 in SMP 8 of 2013 along with the delayed payment surcharge in terms of LOI or PPA as the case may be.

**55.** The Respondent No. 1 is also directed to file a compliance report for the direction given in this order, before the Commission within a month period.

With the abovementioned observations and directions, the subject petition is disposed of.

**(Shashi Bhushan Pathak)**  
**Member**

**(Mukul Dhariwal)**  
**Member**

**(S.P.S. Parihar)**  
**Chairman**