

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1998 of 2021.

In the matter of:

Petition seeking extension of Scheduled Commercial Operation Date (SCOD) on (i) account of Force Majeure Events and (ii) delays solely attributable to Gujarat Energy Transmission Corporation and consequential reliefs under Section 86(1)(f) of the Electricity Act, 2003 read with Article 10.4 of Power Purchase Agreement executed between Goodwatts WTE Jamnagar Pvt Limited and GUVNL.

Petitioner : Goodwatts WTE Jamnagar Pvt. Limited

Represented by : Ld. Adv. Mr. Saunak Rajguru, Ms. Priyakshi Bhatnagar, Sr. Adv. Rashesh Sanjanwala, Adv. Mr. Tarak Damani alongwith Mr. Krutarth Oza, Mr. Anup Pillai, Mr. Ashish Mehta, Mr. Manuraj Singh Parmar.

V/s.

Respondent No 1 : Gujarat Urja Vikas Nigam Limited,

Represented by : Ld. Adv. Ms. Ashabari Thakur alongwith Mr. R.S. Pareek

Respondent No 2 : Jamnagar Municipal Corporation,

Represented by. : Nobody was present.

Respondent No 3 : Gujarat Energy Development Agency

Represented by : Nobody was present.

Respondent No 4 : Gujarat Energy Transmission Corporation Limited

Represented by : Nobody was present.

Respondent No 5 : State Load Despatch Centre - Gujarat

Represented by : Mr. D.N. Shah

Objector No. 1 : Mr. Nitin Maadam

Represented by : Adv. Mehul Rajput

Objector No. 2 : Utility Users' Welfare Association (UUWA),

Represented by : Nobody was present.

Objector No. 3. : Laghu Udyog Bharti – Gujarat (LUB)
Represented by : Nobody was present.
Objector No. 4 : MPSEZ Utilities Limited
Represented by : Adv. Hemant Singh and Adv. Lakshyajit Singh along with
Mr. Anil Rabadia

CORAM:

Mehul M. Gandhi, Member
S.R. Pandey, Member

Date: 07/10/2023.

DAILY ORDER

1. The matter is kept for hearing on 19.07.2023.
2. Ld. Adv. Mr. Saunak Rajguru on behalf of the Petitioner submitted that substantial arguments have been completed earlier with regard to 'Force Majeure' events, and on other issues on commissioning of 7.5 MW MSW based Waste to Energy Project within the timelines i.e., achieving Scheduled Commercial Operation Date (SCOD) due to reasons beyond its reasonable control. The Petitioner is therefore, not liable to any financial implication including (i) levy of liquidated damages, (ii) forfeiture of Bank Guarantee and (iii) any reduction in tariff for supply of power.
 - 2.1. Ld. Adv. submitted that there are two main issues, which are not going to impact to the Objectors. i.e., SCOD and Liquidated damages. The SCOD is defined in the PPA i.e., 30.06.2020 which was extended till 30.11.2020 apart from hindrances in commissioning of the WTE Project of the Petitioner which was commissioned on 15.11.2021, due to force majeure and several events which were not in control of the Petitioner, hence the Petitioner should be exempted from levy of Liquidated damages.
 - 2.2. The Petitioner has submitted that their project is governed under the project specific tariff under the Waste to Energy Policy, 2016 wherein Power Purchase Agreement was executed with the Respondent GUVNL to supply power to its

project. The said policy envisage the completion of Waste to Energy Project by 31.03.2021. However, various forms of difficulties have been faced by the Petitioner in the completion of the WTE project, despite the same the project was commissioned on 15.11.2021 which was within the Operative period as per the WTE Policy 2016 and its subsequent amendment.

- 2.3. It is further submitted that earlier in the present Petition the Force Majeure issue is already argued at length. Now despite supply of the power to the Respondent and invoices raised by the Petitioner, the Respondent is not paying full amount to the Petitioner. Further, it is submitted that since the project is not commissioned by 31.03.2021, the tariff for previous control period or the new control period, whichever is lower will apply, it is stated that in terms of Articles 4.3.1 and 4.3.3 of the PPA, if the Project cannot be commissioned by SCOD because of (a) Force Majeure event or (b) delay in evacuation system for reasons solely attributable to the Respondents, then the Petitioner will not be liable for any adverse financial implications including reduction in tariff.
- 2.4. Referring to the reply filed on affidavit on 23.01.2023 by the Petitioner , it is submitted that the Respondent GUVNL had undertaken before the Commission to make complete payment upon furnishing of undertaking by the Petitioner. Further, the Petitioner has referred the Para 3 and 9 of Daily Order dated 11.02.2022 which are as under:

“...3. Heard Ld. Adv. Mr. Anand Ganesan, appearing on behalf of the Respondent GUVNL. With regard to submission by Ld. Sr. Adv. for the Petitioner regarding no coercive action by Respondent GUVNL, Ld. Adv. Mr. Anand Ganesan submitted that the Petitioner has raised invoices on the Respondent GUVNL for supply of generation by applying the tariff as determined by the Commission for MSW projects in terms of Article 5.1 of the PPA as if the same tariff would also be applicable even after 31.03.2021. However, the control period of said Tariff Order passed by the Commission is up to 31.03.2021 only and therefore, in case the Commission directs GUVNL to pay to the Petitioner as per the tariff claimed in invoice at present, if any, the same shall be provisional tariff to be paid subject to the Petitioner providing an undertaking to the Respondent GUVNL confirming therein of having not availed any capital subsidy, generation based incentive, accelerated depreciation from MNRE or any other agency and also to be subject to tariff that may be determined by this Commission to be applicable after 31.03.2021 because in case such

new tariff that may be decided may be lower and in that case the Petitioner will have to refund excess payments received with interest as per provisions of the PPA.

9. We have considered the submissions made by the parties. We note that Ld. Sr. Adv. Mr. Thakore appearing on behalf of Petitioner requested that the Commission may direct the Respondent GUVNL regarding no coercive action to be continued till next hearing and also direct the Respondent to pay the invoices raised by the Petitioner at the provisional tariff subject to the outcome of the present petition. We also note the statement of Ld. Adv. Mr. Anand Ganesan that the invoices raised by the Petitioner by applying the tariff in terms of Article 5.1 of the PPA and at present, the same shall be provisional tariff subject to an undertaking provided by the Petitioner confirming of not availing any capital subsidy, generation based incentive, accelerated depreciation from MNRE or any other agency and also subject to tariff determined and applicable after 31.03.2021 by the Commission. The aforesaid issue is neither a part of present Petition nor any pleadings on this subject matter....”

Further, the Petitioner has relied upon the Para 2.25 of Daily Order dated 02.11.2022 which are as under;

“..2.25 It is submitted that the Respondent GUVNL is seeking an undertaking prior to releasing payment towards energy generated and supplied by the Petitioner from the Jamnagar WtE project for which invoices have also been submitted. As such seeking an undertaking is not appropriate but even the format of such undertaking is not provided even though the Petitioner has requested for same. It is submitted that in the given circumstances, the Petitioner is ready and willing to give an unconditional undertaking as desired by the Respondent GUVNL so that payments can be received because the Petitioner is facing financial issues. Therefore, the Respondent GUVNL may be directed to provide the draft undertaking.

.....

4. We note that the Ld. counsel for the Respondent GUVNL has agreed to provide the format of undertaking to the Petitioner in order to enable the Petitioner to submit the same to the Respondent GUVNL. Let the same be provided by the Respondent GUVNL to the Petitioner. We accordingly decide to adjourn the matter. The direction regarding no coercive action by the Respondent GUVNL till next hearing in earlier orders, also stands to be continued till next hearing....”

Further, the Petitioner has relied upon the Para 2.8 of Daily order dated 11.01.2023 in the present matter , which are as under:

“..2.8 As desired by the Respondent, the Petitioner has submitted the ‘Undertaking’ and therefore, there is no reason for withholding the balance payment of 15% by the

Respondent. Therefore, the Petitioner is seeking indulgence of this Commission of directing the Respondent GUVNL to release the said amount..."

Referring to the observations made by the Commission vide Para 3 and Para 9 in Daily Order dated 11.02.2022, Para 2.25 and Para 4 of Daily Order dated 02.12.2022 and Para 2.8 of Daily Order dated 11.01.2023, it is submitted that the Respondent is trying to twist the arguments recorded in the Daily Orders to evade payment of the complete invoice amount to the Petitioner, even after furnishing the undertaking. There remains no ground to deduct 15% from the invoice amount, for which the Petitioner is entitled and ought to be paid the invoice amount in full. In last occasion, it was also directed to the Respondent to file affidavit in this regards but it was not filed by the Respondent. By withholding the 15% amount by the Respondent GUVNL, the Petitioner is suffering the financial crunch in running the WTE Power Plant.

2.5. It is further submitted that the Respondent has made following erroneous and incorrect objection in their reply like: (a) Petitioner seeking higher tariff at this stage is erroneous since the GUVNL has made payments in accordance with the provisions of the PPA, (b) Since the project is admittedly delayed beyond 31.03.2021 the Petitioner is not entitled to the entire tariff but only the lower of the above tariff provided in the PPA or the tariff applicable after 31.03.2021, (c) Out of tariff of Rs. 7.07/- provided for in the PPA the portion of the GUVNL workouts to Rs. 6.31 and the balance 76 paise per unit is to be paid by the GoG, (d) payment of 85% of tariff is per article 6.5 of the PPA, wherein any party may approach the Commission for the settlement of disputes with respect to payment made for invoices, (e) in the daily order dated 11.02.2022 the Commission observed that the issue of tariff is neither the part of Petition nor are there any pleadings on the same, and therefore, it is not correct on part of Petitioner to now claim that Respondent is violating orders of the Commission. Ld. Adv. of the Petitioner submitted that the aforesaid contention of the Respondent are incorrect and ought to be rejected by the Commission in light of the below mentioned submissions.

2.5.1. Article 5.1 of the PPA, Petitioner is entitled to receive a total tariff of Rs. 7.07/ kWh, out of which GUVNL is liable to pay Rs. 6.31 per kWh while the remaining differential amount is to be paid by the Climate Control

Department (CCD) / Urban Development Department (UDD) / Urban Local Body (ULB) i.e. Government Body.

“5.1.....

JMC has awarded the Project at a tariff of Rs. 7.07/kWh. The tariff payable by GUVNL shall be Rs. 6.31/kWh as decided by the State Government as per GR No. REN/11/2015/1343/B1 dated 01.05.2018 and the modalities for disbursement of differential amount (Rs. 0.76/kWh) shall also be as decided by the State Government as per the same GR as under....”

2.5.2. The above mentioned tariff has been determined by the Commission as per Section 62 of Electricity Act, 2003. The tariff was fixed for WTE projects under WTE Policy 2016 as per generic tariff Order No. 4 of 2016 for the control period from 10.11.2016 to 31.03.2019. WTE Policy 2016 was originally operated for 5 years from its notification 28.03.2016 and was valid till 27.03.2021. Thereafter, the control period for Order No. 4 of 2016 was revised to be operative from 10.11.2016 to 31.03.2021. The WTE Policy 2016 was extended till 31.07.2022 vide amendment dated 13.04.2022. Now, the WTE Policy 2022 has extended the validity of WTE Policy 2016 and its amendment till the date of notification of WTE Policy 2022 i.e., 02.11.2022. Thus, the project which are installed and commissioned during the aforesaid period are eligible for the tariff determined in Order No. 4 of 2016 dated 10.11.2016. The Petitioner has developed a project WTE Policy 2016 and it is entitled to receive the tariff fixed under PPA and the generic tariff order throughout the term of PPA. The Petitioner is entitled to receive the tariff of Rs. 7.07/ kWh fixed on the PPA for the entire term of PPA, as there is no any ambiguity in the tariff determined. Further, it is submitted that the Respondent GUVNL has unilaterally withheld the 15% of amount of tariff without any basis and therefore, Respondent GUVNL ought to be directed to pay the entire tariff as per the PPA.

2.6. It is not disputed that the PPA has a Clause viz Article No. 5 which provides that in case the project is commissioned after 31.03.2021 then applicable tariff will be lower for the tariff determined afresh by the Commission or the PPA tariff. The WTE Policy 2016 assures the Petitioner to get entire Rs. 7.07/kWh irrespective of

any changes to share of tariff liability to the Respondent. Further, the Government has also ensured that it does not intervene into the tariff affairs of the Commission.

- 2.7. It is submitted that the Petitioner is entitled to receive a consolidated tariff of Rs. 7.07/ kWh from the Respondent GUVNL as a part of assured benefit under WTE Policy 2016. This tariff for the project has been discovered through the bidding process, since the project is within the validity period of WTE Policy 2016 and extended from time to time therefore, the same tariff will apply throughout the life of the project irrespective of generic tariff being re-determined for subsequent control period. Even, if component of Respondent in this tariff is revised the differential amount will have to borne by UDD / ULB / CCB. Further, the WTE Policy 2016 and WTE Policy 2022 protect the Petitioner by assuring the project will get entire tariff irrespective of any changes to Respondent share of tariff liability.
- 2.8. Ld. Adv. on behalf of the Petitioner objecting the contention of the Respondent GUVNL submitted that the very basic issue of submission made by the Respondent is not clear, there should be clarity with respect to tariff. Ld. Adv. refer the following provision of the WTE Policy 2022:
- (a) Operative Period of the Policy – The WTE Policy 2022 will be operative for a period of 5 years starting from 02.11.2022 till 01.11.2027.
 - (b) Extension of WTE Policy 2016 – As per the Clause 5.2 of the WTE Policy 2022, the WTE Policy 2016 and its amendments, stand extended till the date of notification of WTE Policy 2022 i.e. 02.11.2022.
 - (c) Tariff Modalities under WTE 2022 Policy – For projects under WTE Policy 2022, tariff will be determined as under:-
 - (i) Unlike WTE Policy 2016, wherein a generic tariff was fixed for WTE Projects by the Commission, Clause 8 of WTE Policy 2022 provides that the civic authorities (i.e. Urban Development Department (UDD) / Urban Local Bodies (ULBs) / Municipal Corporations) shall prepare a feasibility report based on which request for proposal (RFP) will be prepared for the purpose of inviting bids.
 - (ii) The tariff discovered in the competitive bidding process i.e. ‘Discovered Tariff’ will thereafter be approved by the Commission which will be termed as ‘Approved Tariff’.

- (iii) Once approved, UDD / ULB / Municipal Corporation is to bear 20% cost of the Approved Tariff and the balance 80% is to be borne by GUVNL.
- (iv) As regard payment made to power generators, GUVNL will pay both components i.e. 80% as mentioned above along with 20% payment to be made from the grant made available by UDD / ULB with GUVNL on quarterly basis.

2.9. Further, Ld. Adv. on behalf of the Petitioner referred to the discussion paper for determination of Generic Tariff and Other Terms and Conditions for procurement of power by Distribution licensee from MSW to Energy project in the State of Gujarat, "MSW Discussion Paper – 2023" referring to clause Para No.4.12 which reads as under:

".....4.12 Applicability of the Order

It is proposed that the tariff determined in the MSW based energy projects Order will be applicable to all MSW based power project using mass incineration / RDF incineration technology commissioned on or after the date of issue of the Order for sale of electricity to the distribution licensees in the State with procurement of new equipment's, machinery etc. and EPC contract and commission the power plant.

The control period of this tariff Order is from this Order till 31st March 2028 (i.e., end of FY 2027-28). The tariff determined by the Commission under Order shall be the ceiling tariff, the distribution licensee may procure electricity from the interested MSW based Power project proponent / generator at a tariff lower than the tariff determined by the Commission.

The MSW based Power projects commissioned prior to Order on present discussion paper shall be governed by the terms and conditions given in the earlier MSW Based Energy Project Tariff Order No. 04 of 2016 dated 10.11.2016 and subsequent Suo-Motu Order dated 23.10.2017 in Petition No. 1654 of 2017.

The Order to be passed on this discussion paper may not come in way of agreed terms & conditions of the Power Purchase Agreement, if any, executed between the MSW Based Power Project Developer (Supplier) and distribution licensee and/or nodal agency for procurement of power from such project like GUVNL....."

Referring to the above it is argued that the MSW based power project commissioned prior to Order of the present discussion paper shall be governed by

the terms and conditions of earlier MSW based Energy Project Tariff Order No. 04 of 2016 and subsequent Suo Motu Order dated 23.10.2017 in Petition No. 1654 of 2017. The Waste to Energy of the Petitioner was first commissioned on 15.11.2021 and therefore the said Power Project will be governed under the Order No. 04 of 2016 passed by the Commission. Further, it is submitted that Waste to Energy Policy 2016 as well as Waste to Energy Policy 2021 protect on the issue of tariff and automatic extension of Schedule of Commercial Operation Date (SCOD).

2.10. Ld. Adv. of Petitioner submitted that its plant was developed during the operation of WTE Policy, 2016, the extension of SCOD if allowed will result in the project falling within the SCOD and there would arise no question of any reduction in applicable tariff. It is further submitted that, absence of tariff for WTE plant for the subsequent control period is not a ground to invoke Article 6.5 of the PPA and unilaterally withdrawal 15% of tariff. In the present case there is no disagreement or dispute between parties regarding the amount raised in the invoices. The tariff vacuum and uncertainty is not on part of the Petitioner and there is no dispute in terms of PPA for even Respondent GUVNL to involve Article 6.5 of PPA.

2.11. Ld. Adv. on behalf of the Petitioner submitted and denied on the part that the tariff has to be re-determined. He has stated that while passing the Tariff Order dated 10.11.2016 the objective of the Commission has been to align the control period with the validity of WTE Policy - 2016. The WTE Policy - 2022 has extended the validity of WTE Policy 2016 and its amendment till the date of the notification of WTE Policy 2022 i.e. 02.11.2022 thus, the applicability of existing tariff under the Tariff Order be extended for the period till 02.11.2022. It is further submitted that assuming without admitting that the tariff of the Petitioner projects has to be re-determined by the Commission in the interim period the Petitioner is entitled to receive full tariff as per the PPA.

2.12. Referring to the PPA executed with the Respondent GUVNL, it is submitted that Rs. 7.07/ kWh is protected to the plant of the Petitioner while the Respondent is paying the 85% of the tariff against the invoice submitted by the Petitioner to the Respondent and thereby withholding the 15% amount of invoice amount.

3. Ld. Adv. Ms. Ashabari Thakore appearing on behalf of the Respondent GUVNL submitted that discussion paper published for the Waste to Energy (WTE) Project

2023 by the Commission is yet to be finalized therefore, the contentions made relying on the said discussion paper is not valid to consider.

- 3.1. Referring to the reply filed vide Affidavit dated 11.01.2023 by the Respondent GUVNL she submitted that the payment has been released in accordance with the PPA and Order of the Commission. The relevant provisions of the PPA referred are extracted as under:

“Article 5:

.....JMC has awarded the Project at a tariff of Rs. 7.07 / kWh. The tariff payable by GUVNL shall be Rs. 6.31 / kWh as decided by State Government as per CR NO REN / 11 / 2015 / 1343 / B1 dated2018 and the modalities for disbursement of differential amount (Rs. 0.76/KWV; shall also be as decided by the State Government as per the same GR as above...

....Above tariff shall apply for the projects commissioned on or before 31st March, 2021. In case, the commissioning of the Project is delayed beyond 31st March 2021, GUVNL shall pay the tariff as determined by the Hon'ble GERC for MSW Projects effective on the date of commissioning of MSW power project or above mentioned tariff, whichever is lower.....

.....

Article 6:

6.5 Disputes. In the event of a dispute as to the amount or any tariff Invoice, GUVNL shall notify the Power Producer of the amount in dispute and GUVNL shall pay the Power Producer 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party shall have the right to approach the GERC to effect a higher or lesser payment on the disputed amount.....”

Further, referring to Article 5 of the PPA executed between the parties stated that the tariff applicable to the project is yet to be determined by the Commission. Since, the project is admittedly delayed beyond 31.03.2021, the Petitioner is not entitled to the entire tariff but only the lower of the above tariff provided in the PPA or the tariff applicable after 31.03.2021. Out of tariff of Rs. 7.07 provided in the PPA the portion of GUVNL worked out to Rs. 6.31 and the balance 0.76 paise per unit is paid by the Government of Gujarat. It is further submitted that in view of the issue of tariff yet to

be resolved, the Petitioner is being paid an interim measure, tariff equivalent to 85% of Rs. 6.31 /kWh which works out to be Rs. 5.36/kWh.

- 3.2. Ld. Adv. of the Respondent submitted that the issue in the present Petition is related to delay in the commissioning of the power project and the consequences thereof in terms of PPA. Admittedly, the Petitioner has not commissioned the Power Project by the revised SCOD of 30.11.2020. The Petitioner has claimed that there were force majeure events which delayed the commissioning which has been denied by the Respondent. The Petitioner has already been granted extension of five months in view of covid - 19. There is no ground or basis for any further extension. The issue of force majeure and extension of SCOD and therefore the liability to pay liquidated damages are issues to be considered in terms of the PPA executed between the parties.
- 3.3. It is further submitted the terms of PPA entered into by the Petitioner, Respondent is clear for its true interpretation. The Respondent is liable to pay only the tariff of Rs. 6.31 / kWh as determined by the Commission as incorporated in the PPA. However, such tariff was applicable in case the project is commissioned by 31st March, 2021. In case the project is not commissioned by 31.03.2021, the applicable tariff payable by the Respondent GUVNL would be tariff of Rs. 6.31 / kWh or the lowest tariff as determined by the Commission as applicable on date of commissioning whichever is lower. This is also admitted by the Petitioner.
- 3.4. Ld. Adv. on behalf of the Respondent GUVNL referred to the provisions of PPA and submitted that the parties to the contract have agreed, now if one goes beyond the Contract then it would become a case of rewriting the PPA/Contract. Further, she submitted that the tariff applicable to the Petitioner would also be as per the Article 5.1 of the PPA, i.e., since the Petitioner's project has not been commissioned before 31.03.2021, the tariff would be the tariff as applicable on the date of commissioning of the project or Rs. 6.31/ kWh whichever is lower. At present the tariff after 31.03.2021 has not been determined by the Commission, hence the Respondent GUVNL has considered the provisional tariff of Rs. 6.31/ kWh subject to the final determination and therefore released 85% of the amounts payable by the Respondent to the Petitioner.

- 3.5. On the query of the Commission as to how the Petitioner is liable for Liquidated Damages, she submitted that already the extension of 5 months has been granted to the Petitioner and the Petitioner could not commission its project within the extended SCOD, hence the Petitioner is liable to pay the liquidated damages.
- 3.6. The Ld. Adv. for the Respondent further submitted that the tariff determination is in the domain of the Commission. The Commission has determined the generic tariff of Rs. 6.31 / kWh by way of Tariff Orders which are applicable to the projects commissioned on or before 31.03.2021. Therefore, the Commission has to determine the generic tariff for the period after 31.03.2021 and thereafter applicable PPA tariff would be the lower of the two. It is further submitted that the claim for compensation by corresponding increase in VGF component is not related to the Respondent GUVNL and same is not admitted.
4. Ld. Adv. on behalf of Petitioner has made submission on part of tariff as under:
- 4.1. Summarising the Gujarat Waste to Energy Policy, 2016 the Ld. Adv. submitted that the MSW has the potential for the source of renewable energy apart from waste disposal, the generation of electricity is a by-product. In preamble of the said Policy ,wherein para no. 1.2 and 1.3 highlight the objectives of the policy incorporated the suitable mechanism for the disposal of MSW with environment friendly manner. Further, the said policy comes out with several incentives to the Project developer. The operative period mentioned in para no. 3 which is of period of 5 years from the date of notification of the said policy i.e., 28.03.2016. The para no. 8 highlights the tariffs and VGA subsidy components. Para no. 8(i) states about the generic tariff determination for the WTE in the State, while para no. 8(ii) state about the development of WTE Projects by UDD/ ULB for Viability Gap Funding (VGA),VGF is over and above the tariff which is determined by the Commission, while VGA is fixed 0.76 paise/kWh.
- 4.2. Ld. Adv. further referred to the Tariff Order No. 4 of 2016 for the determination of tariff and other terms and conditions for Procurement of Power by the Distribution Licensee from the Municipal Waste to Energy Projects in the State, reiterated the Clause No. 2.4.1 (a) wherein the control period ends to 31.03.2019. Further, it is submitted that as per the Tariff Order No. 04 of 2016 computation of tariff for MSW to energy project was decided to be Rs. 6.31/kWh with accelerated

depreciation in case of Mass Incineration and Rs. 6.67/kWh for RDF based incineration projects. Further, Rs. 7.03/kWh without accelerated depreciation in case of Mass Incineration and Rs. 7.07 /kWh for RDF based incineration. Ld. Adv. further refer the Suo Moto Petition No. 1654 of 2017 and submitted that as per the directive passed by the Commission in Para No. 26 of the Order, control period specify in the Para No. 2.4.1 of Order No. 04/2016 dated 10.11.2016 is to be considered as from the date of Order i.e., 10.11.2016 to 31.03.2021. The project commissioned during the aforesaid period i.e., 10.11.2016 to 31.03.2021 are eligible for the tariff determined in Order No. 04 of 2016 dated 10.11.2016.

4.3. Referring to amendment of Gujarat Waste to Energy Project 2016 dated 01.05.2018, the Petitioner referred to the preamble and submitted that the lowest determined generic tariff rate being Rs. 6.31/ kWh and highest is to be Rs. 7.07/ kWh. Further, referring to the para 1, 2 and 4 of the said amendment, it is submitted that the difference between Rs. 6.31/ kWh and discovered bid price in respect of electricity supply to be paid by the UDD / ULB / Climate change department. It is further submitted that the project of the Petitioner wherein as per PPA, tariff is determined at Rs. 7.07/ kWh. Out of the said tariff Rs. 6.31/ kWh is payable by the Respondent GUVNL by difference i.e., Rs. 0.76/ unit, VGA portion is required to be paid by the UDD / ULB / Climate Change Department. It is further submitted that the Respondent GUVNL is paying the 85% of Rs. 6.31 per unit for the invoices submitted by the Petitioner before the Respondent.

4.4. Ld. Adv. further referred the Gujarat Waste to Energy Policy 2022 dated 02.11.2022 and relying upon the Clause No. 5 i.e. operative period. It is submitted that said policy having operative period of five years of its notification and it is up to 01.11.2027. He further submitted that the Gujarat Waste to Energy Policy 2016 and its amendment stand extended till the notification of Gujarat Waste to Energy Policy 2022 i.e. 02.11.2022. Further referring to clause no. 7.8 of the said policy he has submitted that the projects which are in pipeline and which are under construction / implementation stage but are not commissioned as on date of notification of this policy will be termed as pipeline projects and if such project are commissioned by March, 2024 then it shall be eligible for benefit under the Gujarat Waste to Energy Policy 2016 and amendment thereto. Relying on the aforesaid, it is submitted that all such benefit shall be applicable including

extension of SCOD as per Order passed by the Commission in case of MSW Waste to Energy Project will apply prospectively and VGF remain intact in such case.

- 4.5. In support of argument, Ld. Adv. of the Petitioner referred the Judgment passed by the Supreme Court in case of AP Electricity Regulatory Commission Vs. R.V.K. Energy Pvt. Ltd. and Ors. (2008) 17 Supreme Court Cases 769.

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The Judgment of the Court was delivered by.... Interpretation and/or application of the provisions of the Andhra Pradesh Electricity Reform Act, 1998 (for short “the 1998 Act”) vis-à-vis the Orders passed by the Andhra Pradesh Electricity Regulatory Commission (for short “the Commission”) are involved in these appeals which arise out of the judgments and orders passed by a Division Bench of the Andhra Pradesh High Court.....

The matter relating to generation, supply and distribution of electrical energy in the State of Andhra Pradesh used to be governed by the provisions of the Electricity (Supply) Act, 1948 (for short “the 1948 Act”). With a view to bring reforms in the power sector and to meet shortages in power supply, the State of Andhra Pradesh adopted a policy decision for generation of power through mini power plants (MPPs) of 30 MW capacity in private sector. For the said purpose it issued two G.Os. being G.O. No. 116 dated 05.08.1995 and G.O. No. 152 dated 29.11.1995.....

In the said government orders, the liberalisation policy of the State in respect of its industrial economy so as to enable the State Government to attract investment from other parts of the country as also from outside the country was highlighted. It intended to bring about competition in the industry. It is stated to have taken a series of measures for augmenting power including privatisation. It took into consideration the fact that the power plants costing less than Rs. 100 crores and which do not require Central Electricity Authority’s clearance, and in respect of which project clearance at the State Level would suffice, as a result thereof the period may be reduced considerably.....

There is absolutely no doubt whatsoever that the Commission, which is a statutory authority, is bound by the direction of the State but it would not be so bound if it is contrary to or inconsistent with any of the provisions contained in the 1998 Act. The respondents herein sought for an exemption from the provisions thereof. They filed applications in terms of Section 16 of the 1998 Act. Whether such an

application was filed on a mistaken belief or not is one question but the action taken by the Commission must be construed upon taking a holistic view of the matter..... The Commission, keeping in view the purported object of the Act, ordinarily was bound to give effect to the policy decision of the State. The Act was enacted to encourage competition. It speaks of privatisation of generation of power. The Commission's power to regulate supply of power must be considered keeping in view the purport and object of the Act.....

If the State has accorded sanction for sale of electrical energy generated by the MPPs, the Commission save and except for cogent and compelling reasons could not have directed the sale of entire production of electrical energy to A.P. TRANSCO. If that was the stand of the commission and A.P. TRANSCO, the question of entering into any wheeling agreement did not arise. It is one thing to say that the privileges conferred by GOMs issued by the State Government were prior to the coming into force of the 1998 Act, and appointment of the Commission, but then the Commission was bound to give due weight to the policy decision taken by the State even prior to its establishment and coming into force of the 1998 Act, particularly when the Act was enacted in furtherance thereof.....”

Referring to the aforesaid judgment, Ld. Adv. on behalf of Petitioner submitted that State has power to lay down the policy decision whereas the Commission is bound to give effect thereto having regard to its function as envisaged under Electricity Act, 2003 being a Statutory and thus, bound to promote the competitiveness as far as the Waste to Energy Project is concerned, further, Ld. Adv. submitted that the para no. 13 is related with AP Reform Act, which came into force in 1998 and thereafter the Order passed by the Hon. Supreme Court is binding to or not is required to be decided.

- 4.6. On the query of the Commission whether in the tariff matter the Govt. Policy is binding to the Commission, in reply to the same Ld. Adv. of the Petitioner submitted that as per the MSW Waste to Energy Policy framed by the Government, on the part of VGA, the Commission had to intervene in the matter. Referring to the above mentioned judgment para no. 83, it is submitted that the Commission has power to regulate the supply of electricity.

4.7. Ld. Adv. on behalf of the Petitioner further relied upon the judgment 2019 SCC Online CERC 2005, GUVNL Vs. ADANI POWER (Mundra) and Ors. And refer the para no. 61, 63 of the which are as under:

“...61. We note that these decisions are in the context of judicial review of the Policy Decisions of the Government. The above judgments lay down the principles for testing the legality of the policy decisions taken by the Governments in the course of exercise of their decision making power. These principles nevertheless can be the touchstones on which it can be tested whether the proposed amendments to the PPAs are in public interest or not.

63. We are of the view that the recommendations of the High Power Committee and the Policy Directives of the Govt. of Gujarat in the GR dated 01.12.2018 are public interest. Therefore, it has to be examined whether the proposed amendments are indeed in public interest and relevant considerations have gone into to protect and subserve the public interest...”

Referring to the abovesaid order the directive of the Waste to Energy Policy 2016 and subsequent amendment on its are applicable in view of the latest Waste to Energy Policy- 2022.

5. On the query of the Commission in regard to the tariff related submission, Adv. Mr. Hemant Singh on behalf of MPSEZ Ltd. submitted that if Force Majeure is allowed in this case then it would impact on tariff of the Petitioner. Further, Ld. Adv. on behalf of MPSEZ has requested to allow to file submission on the Force majeure as well as tariff related part which was not objected by the Petitioner.
6. Adv. Mehul Rajput remained present on behalf of objector No. 1, Mr. Nitin Maadam submitted that he has been instructed to appear in the hearing on behalf of Objector No.1 Mr. Nitin Maadam. He submitted that objection has been filed in the subject matter. Adv. further sought time for filing the Vakalatnama in the present matter. He further submitted that he would require one week time to file the submission on the tariff related issue. On the query raised by the Petitioner related to submission made in Gujarati language by the Objector No. 1 Mr. Nitin Maadam, he submitted that the liberty be granted to the objector for file its submissions on it.
7. We note that the Office of the Commission has received email dated 19.07.2023 from the Objector No. 1 Mr. Nitin Maadam, requesting that written submission has been made by them which may be considered while deciding the subject matter. Further,

he submitted that Adv. Mr. Mehul Rajput will remain present on behalf of Objector No.1 on 19.07.2023 during hearing before the Commission. He submitted that Vakalatnama will be filed by the time of next hearing before the Commission.

8. We have heard the submission made by the parties. The matter was heard by the Commission limited to issue raised by the Petitioner that the Respondent No. 1 GUVNL has deducted wrongly 15% amount from the bill invoices raised by the Petitioner for energy supplied by them as per SEA on monthly basis is contrary to provisions of PPA. We note that Respondent No. 2, 3, 4 and Objector No. 2 and 3, did not remain present nor communicated their inability to remain present. As the Advocate appearing on behalf of Objector No. 1 Mr. Nitin Maadam, requested to file the Vakalatnama and submissions in the subject matter, let it be filed within 7 days with a copy to other parties. The Advocate on behalf of MPSEZ also requested to allow the submission in the subject matter and which is not objected by the Petitioner, hence we allow the same, let it be filed within 7 days with copy to the other parties. The Petitioner and the Respondents and objectors are at liberties to file their submission on the deduction of amount from bill invoices by the Respondent No. 1, if any, within week time after receipt of the copy of submissions from Objector No.1 and MPSEZ Utilities Ltd. with a copy to other parties.
9. The next date of hearing will be intimated separately.
10. Order accordingly.

Sd/
[S.R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.
Date: 07/10/2023.