

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)
(Chennai Circuit Bench)**

**Appeal No. 92 of 2013 & IA no. 151 of 2013
&
Appeal No. 109 of 2013**

Dated: 21st January, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal No. 92 of 2013 & IA no. 151 of 2013

In the matter of:

Tamil Nadu Electricity Consumers' Association,

(Represented by its President)

1st Floor, SIEMA Building,

P.B. No. 3847,

8/4, Race Course,

Coimbatore-641 018

... Appellant (s)

Versus

1. **Tamil Nadu Electricity Regulatory Commission,**

TIDCO Office Building,

No. 19-A, Rukmani Lakshmi pathy Salai,

Marshalls Road, Egmore,

Chennai-600 008.

2. **Tamil Nadu Generation & Distribution
Corporation Ltd.,**

(Represented by its Chairman & Managing Director)

No. 144, Anna Salai,

Chennai-600 002

... Respondent(s)

Counsel for Appellant(s) :

Mr. N.L. Rajah, Sr. Advocate,
Mr. Arun Anbumani

Counsel for the Respondent(s):

Mr. T. Mohan for R-1
Mr. S. Vallinayagam,
Mr. A. Yogeshwaran for R-2

Appeal No. 109 of 2013

In the matter of:

Tamil Nadu Spinning Mills Association,

2, Karur Road, Near Beschi College,
Modern Nagar, Dindigul-624 001,
Tamilnadu

(Represented by Dr. K. Venkatachalam,
its Chief Advisor)

... Appellant (s)

Versus

1. **Tamil Nadu Electricity Regulatory Commission,**

TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road, Egmore,
Chennai-600 008.

2. **Tamil Nadu Generation & Distribution
Corporation Ltd.,**

(Represented by its Chairman & Managing Director)
No. 144, Anna Salai,
Chennai-600 002

...Respondent(s)

Counsel for Appellant(s) :

Mr. R.S. Pandiyaraj
Mr. M. Sarwana Kumar

Counsel for the Respondent(s):

Mr. T. Mohan for R-1
Mr. S. Vallinayagam for R-2,
Mr. Rahul Balaji for the Intervener

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

These Appeals have been filed by the Associations of consumers challenging the impugned order dated 7.3.2013 passed by Tamil Nadu Electricity Regulatory Commission (“State Commission”) implementing the

provisions of the Tamil Nadu Solar Energy Policy, 2012 of the State Government consequent on the policy directive issued by the Government of Tamil Nadu under Section 108 of the Electricity Act, 2003.

2. The Appellants in Appeals 92 of 2013 and 109 of 2013 are Tamil Nadu Electricity Consumers Association and Tamil Nadu Spinning Mills Association respectively. The State Commission is the Respondent no. 1. Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) is the Respondent no. 2.

3. The brief facts of the case are as under:

(A) In pursuance of Section 86(1)(e) of the Electricity Act, 2003, the State Commission notified the TNERC Renewable Energy Purchase Obligation Regulations 2010

specifying that every obligated entity mandated under clause 86(1)(e) of the 2003 Act shall purchase not less than the defined minimum percentage of its consumption of energy from renewable energy sources under the Renewable Purchase Obligation (RPO) during a year as specified in the Commission's Regulations/Orders issued from time to time.

- (B) On 29.7.2011, the above Regulations were amended by defining the obligated entity and specifying the minimum quantum of total Renewable Purchase Obligation including the minimum quantum of Solar Renewable Purchase Obligation out of the total RPOs, etc.

- (C) On 19.10.2012, the Government of Tamil Nadu released the Tamil Nadu Solar Energy Policy, 2012 and notified various procedures in the matter of implementation of the policy including Solar Purchase Obligation (SPO). Vide letter dated 6.11.2012, the State Government issued a policy directive under Section 108 of the 2003 Act to the State Commission for necessary action on its policy.
- (D) Pursuant to above policy directive, the State Commission on 10.12.2012 released Consultative Paper on the issues related to the State Government's Solar Energy Policy of 2012. The Appellants submitted their comments on the Consultative Paper.

(E) The State Commission issued the impugned order dated 7.3.2013 notifying the various procedures and modalities for administration of the scheme and various other matters relating to the State Government's Solar Policy to be administered by the TANGEDCO, the second Respondent herein. The members of the Associations and other High Tension (HT) consumers have been notified as obligated consumers in the impugned order fastened with obligation of Solar Purchase Obligation.

(F) Aggrieved by the impugned order dated 7.3.2013, the Appellants have filed these Appeals.

4. As the impugned order as well as the issues raised in the same Appeals are the same, a common Judgment is being rendered.

5. The Appellants have made the following submissions:

(A) The impugned order dated 7.3.2013 is contrary to law and is in violation of the provisions of the Electricity Act, 2003. The entire order has been passed by the State Commission based on the policy direction issued under Section 108 of the Act and not on any independent consideration. The State Commission has proceeded on a mistaken belief that the directive of the State Government is binding upon it without any independent consideration and without any

discussion whatsoever on the merits and demerits of the same. As such there has been no application of mind by the State Commission. The State Commission did not even examine if the percentage of Solar Purchase Obligation (SPO) mandated by the State Government is realistic, practicable, achievable and is in consonance with the relevant Regulations. The State Commission is to be guided and not bound by the directive issued by the State Government under Section 108 of the 2003 Act. Further, the power needs to be exercised only in the matter of discharge of functions of the State Commission. SPO is not without the functional scope of the State Commission

(B) The State Commission has already put in place Regulation with respect to Renewable Purchase Obligation (RPO) and the same has been in force from 2010. Solar Purchase Obligation (SPO) already forms a part of the RPO. The obligated entities are obliged to purchase not less than 9% of their consumption from renewable energy sources out of which 0.05% has to be from solar sources and balance 8.95% from non-solar renewable energy sources. Further, SPO cannot be imposed without amending the existing Regulations. By way of having one Regulation as RPO obligation and another order for SPO as per the Solar Policy of the State Government, the Commission has exceeded its powers.

(C) SPO is impossible of fulfillment and is a numerical stipulation without any relation to reality and would only create confusion. As on 31.1.2013, the installed capacity of TANGEDCO (R-2) is about 10,722 MW. There is no solar capacity at all in this. Only 7MW of power is from Solar Power Plants in the State of Tamil Nadu. The State Commission being aware of the fact that sufficient solar power is not being generated and available in its RPO Amendment Regulations, 2011 dated 29.7.2011, reduced the solar power obligation from 0.15% to 0.05%. The State Commission suddenly in March 2013 has increased the obligation to 3% for the year ending 2013 and 6% for the year commencing from 2014 in addition to RPO obligations. This would

require an installed capacity of 720 MW for the year 2013 and 1500 MW of solar plants in the year 2014 which does not exist.

(D) The State Commission has erred in imposing SPO when several issues as set out in the impugned order in paragraph 5 relating to banking mechanism, transmission and wheeling charges, cross subsidy surcharge, etc., are yet to be even dealt with, leave alone finalized.

(E) The order is discriminatory in nature as SPO has been imposed on HT and LT Commercial Consumers only. The distribution licensee has not been made obligated entity unlike the RPO Obligation Regulations, 2010 wherein the distribution licensee has to purchase a

minimum quantum of 9% of energy from renewable energy sources.

(F) The obligated entity under the RPO Regulations besides meeting 9% of RPO is also mandatorily go with another SPO under the impugned order which is against the whole scheme as enumerated under Section 86(1)(e) of the 2003 Act as for the same purpose of renewable purchase obligation there are two separate legislations independent of each other.

6. TANGEDCO (R-2) has submitted as under in support of the impugned order.

(A) The National Tariff Policy was amended in January 2011 to prescribe solar specific RPO to be increased from 0.25% in 2012 to 3% by

2022. The National Electricity Policy also stipulates that adequate promotional measures would have to be taken for development of technologies and a sustained growth of non-conventional energy sources. The NEP also stipulates that the State Governments have a major role particularly in creation of generation capacity. The Regulatory Commissions have the responsibility of ensuring that the regulatory process facilitates the attainment of this objective. The direction of the State Government is consistent with the National Electricity Policy and the Tariff Policy.

(B) The State Government under Section 108 of the 2003 Act is entitled to give directions to the State Commission and the State

Commission under Section 86 of the Act has to be guided by such directions in discharge of its functions u/s 86 of the Act. It is in pursuance of its functions under Section 86 that the State Commission has issued the Consultative Paper and under Section 86(1)(e) of the Act fixed Solar RPO.

- (C) The impugned order is legally sustainable and consistent. In the Amendment Notification of RPO Obligations dated 29.7.2011, it was provided that the State Commission may fix the RPO for the future years beyond 2011-12 taking into account the future developments in REC market and augmentation of Non-Conventional Energy Sources. In view of the State Government directive to bring in capacity addition and

considering the financial viability of Solar Generators, there is no inconsistency in the decision of Regulatory Commission to increase the Solar Purchase Obligation from 0.05% in 2012 to 3% in 2013. The State Commission is empowered as per the RPO Obligation Regulation of 2010 to refix the RPO after 2012.

- (D) The RPO obligation of 0.05% solar was valid until a new order for solar obligation, the solar order 2013 was issued. After the coming into effect of the solar order envisaging SPO, the 0.05% of SPO under RPO ceases to have effect. Thus, there is no inconsistency between the impugned order and the RPO Regulations of 2010. The two relate to different time periods.

(E) The quantum of 3% upto 21.12.2013 and 6% SPO from 2014 would be appropriate considering the availability of equivalent solar installations. TANGEDCO (R-2) has already issued Letter of Intent for 700 MW Solar Projects. Permissions for another 450MW of projects to be set up under REC Scheme have also been received by TANGEDCO (R-2). Even if 50% of these projects get commissioned by 2014, Tamil Nadu will have over 500 MW Solar Projects sufficient to meet the SPO. It is in the above circumstances, TANGEDCO has taken a decision to file an application before the State Commission to defer the implementation of SPO till 2014.

(F) In the absence of SPO as per the impugned order, many of the bidders for the Solar Projects may withdraw their bids.

7. The State Commission has also made submissions supporting the impugned order stating that the impugned order is not contrary to the Electricity Act, 2003 and the SPO does not violate the RPO Obligation Regulations, 2010 and these are not contrary to each other and ought to be read in a harmonious fashion. Further, the impugned order is also not discriminatory.

8. On the above issues we have heard the learned counsel for the Appellants, TANGEDCO and the State Commission.

9. On the basis of the rival contentions of the parties, the following questions would arise for our

consideration:

i) Whether the policy directive issued by the State Government to the State Commission under Section 108 of the Electricity Act, 2003 regarding the implementation of the Solar Policy was binding on the State Commission?

ii) Whether the State Commission was correct in specifying the Solar Purchase Obligation for the HT and LT Commercial category of consumers of the distribution licensee in consonance with the State Government's directive without considering its own Renewable Purchase Obligation Regulations, 2010?

iii) Whether the impugned order regarding Solar Purchase Obligation on some category of consumers of the distribution licensee is discriminatory and is

contrary to its Renewable Purchase Obligation Regulations, 2010?

iv) Whether the State Commission could have stipulated the Solar Purchase Obligation consequent upon the policy directive issued by the State Commission u/s 108 independent of exercising the powers vested with the State Commission under Section 86(1)(e) of the 2003 Act?

v) Whether the impugned order has been passed simply to implement the directions of State Government u/s 108 without appreciating the position of law and without application of mind?

10. As all the above issues are interwoven, we shall be considering them together.

11. Let us examine Section 108 of the 2003 Act under which the State Government gave direction to the State Government.

“108. Directions by State Government.—*(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.*

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

12. Thus, the State Commission shall be guided by the directions of the State Government given under Section 108 in discharge of its functions under the Act. However, the direction by the State Government has to be relating to discharge of functions of the State Commission as stipulated in the Electricity Act, 2003.

13. Let us examine the letter dated 6.11.2012 sent by the State Government to the State Commission

communicating the direction under Section 108. The contents of the letter are reproduced below:

“In order to achieve energy security as well as reduce carbon emissions, in public interest, Tamil Nadu Government has released Tamil Nadu Solar Energy Policy 2012 as per GO(Ms.) No. 121 dated 19.10.2012.

2. I am therefore directed to state that as a policy directive Tamil Nadu Policy 2012 is enclosed herewith for necessary action, under Section 108 of the Electricity Act, 2003.”

Thus, the State Government has directed the State Commission u/s 108 of the 2003 Act to implement the State Government’s Solar Policy.

14. The Solar Purchase Obligation (SPO) stipulated in the State Government’s Solar Policy is as under:

i) The State will mandate 6% SPO (starting with 3% till December 2013 & 6% from January 2014) for

HT consumers (HT Tariff I to V) and LT Commercial consumers (LT Tariff V).

- ii) The SPO will be administered by TANGEDCO.
- iii) The above obligated consumers may fulfill their SPO by generating captive Solar Power in Tamil Nadu, buying from other third party developers in Tamil Nadu, buying Renewable Energy Certificates (RECs) generated by Solar Power Projects in Tamil Nadu and purchasing power from TANGEDCO at solar tariff.

Thus, the Solar Policy of the State Government mandates SPOs to be imposed on HT and LT Commercial consumers only and not on the distribution licensee (TANGEDCO).

15. Let us now examine the functions of the State Commission regarding promotion of renewable energy sources under the Electricity Act, 2003.

16. Section 86(1)(e) of the Act provides for promotion of cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and also specify for purchase of electricity from such sources, a percentage of total consumption of electricity in the area of a distribution licensee. Under Section 61 of the Act, the State Commission has to specify terms and conditions for determination of tariff and in doing so shall be guided by *inter alia*, the promotion of cogeneration and generation of electricity from renewable sources of energy, the National Electricity Policy and Tariff Policy.

17. Thus, the directions of the State Government to the State Commission regarding promotion of Solar energy through SPO has to be exercised only under Section 86(1)(e) of the 2003 Act.

18. The State Commission had already notified the RPO Regulations, 2010 as amended on 29.7.2011, under Section 86(1)(e) of the 2003 Act. The RPO Regulations, 2010 as amended on 29.7.2011 defines the obligated entity who have to mandatorily comply with the RPO as under:

“Obligated Entity” means the distribution licensee, consumers owning grid Connected Captive Generating Plants (CGPs) and open access consumers in the State of Tamil Nadu, who have to mandatorily comply with renewable purchase obligation under these Regulations subject to fulfillment of conditions outlined under Regulation 3.”

Thus, the obligated entities are the distribution licensees, consumers having grid connected Captive Power Plants and open access consumers. However, other consumers of distribution licensees who do not have Captive Power Plants and who are not availing power under open access are not included in the definition of the obligated entity.

19. The total Renewable Purchase Obligation for the FY 2011-12 for the obligated entity are specified as 9%, out of which 0.05% has to be Solar Renewable Purchase Obligation. It is also specified that till the RPOs are modified, the RPOs as specified under the Regulations would continue to be effective.

20. Let us now examine the impugned order dated 7.3.2013.

21. The matter of the impugned order is “Issues Related to Tamil Nadu Solar Energy Policy 2012”. We find that the State Commission has issued the impugned order consequent on the policy direction issued by the Government of Tamil Nadu under Section 108 of the 2003 Act which is independent of the powers vested with the State Commission under Section 86(1)(e) of the 2003 Act. The State Commission in the impugned order has stated that the Commission is of the view that considering the public interest involved in the issue i.e. scarcity of power in the State and prevalence of Restriction & Control Measures and the necessity to overcome the power deficit and also considering the fact that solar energy is a clean and green power the directive u/s 108 has to be implemented in the interest of public at large.

22. We find that the State Commission in the impugned order has stipulated SPO in the same manner as directed by the State Government. The obligated consumer has been defined as the category of consumers who are required to fulfill the SPO as mandated in the State Government's Solar Policy viz. the HT consumers and LT Commercial consumers. The SPO obligation has also been stipulated as per the State Government's Solar Policy i.e. 3% till December 2013 and 6% from January 2014.

23. Thus the obligated consumer under the impugned order stipulating SPO has only certain categories of consumers but does not include the distribution licensee. The obligated consumer under SPO is different from the obligated consumers under RPO Obligation Regulations, 2010, which includes the distribution licensee. In reply to the comments of the

objectors before the State Commission pointing out that the obligated entity is defined differently in the Solar Policy 2012 and in RPO Regulations 2010 and the suggestion that the obligated entity be defined same as per the RPO Regulations, the State Commission has stated that the SPO and RPO are two different obligations and SPO has been fixed as per the Solar Policy of State Government which has been communicated to the State Commission u/s 108 of the Act.

24. We feel that the State Commission has to be guided by the directions of the State Government u/s 108 only in discharge of its functions assigned under the Act. Such directions have to be implemented only under the functions and powers assigned to the State Commission under the 2003 Act. The Act only provides for specifying the purchase obligation from

the renewable energy sources under Section 86(1)(e). Thus, the directions of the State Government for Solar Purchase Obligation can only be considered by the State Commission in exercising its powers under Section 86(1)(e) of the 2003 Act. The contention of the State Commission that SPO and RPO are two different obligations and the RPO has been fixed under the RPO Regulations 2010 under Section 86(1)(e) and SPO as per implementation of Policy directions of the State Government under Section 108 is not correct and not valid legally.

25. The State Commission has to consider the directions of the State Government issued under section 108 of the 2003 Act in the matter of discharge of functions of the State Commission under the Act and not in a general way outside the functional scope of the State Commission. The State Commission will

be guided by such directions of the State Government if these are within the functional scope of the State Commission, as further stipulated u/s 86 of the 2003 Act and not in all the ways and means as contended by TANGEDCO and the State Commission. Thus, the State Commission had no power to issue an SPO order as per the directions of the State Government u/s 108 in addition and contrary to RPO obligations specified in the RPO Regulations 2010 under Section 86(1)(e) of the Act. The State Commission could have provided for additional SPO obligation only by amending its RPO Regulations, 2010. The State Commission should not have created two dispensations for Renewable energy purchase obligation one as per the RPO Regulations 2010 and the other following the policy direction of the State Government u/s 108.

26. TANGEDCO has contended that there is no inconsistency in the RPO Regulation and the SPO order (impugned order) as two relate to different periods as the Solar Purchase Obligation under RPO Regulation was valid upto FY 2011-12 and the State Commission has refixed the SPO after 2012. This contention is not correct as the State Commission in the impugned order as well as in the submissions before us has contended that the SPO stipulated under the impugned order is different and distinct from the RPO Regulation 2010 and SPO in the impugned order have been decided in compliance of the directions of the State Government under Section 108.

27. Further, the RPO Regulation 2010 specify the obligated entity as distribution licensee, consumers with grid connected Captive Power Plants and open

access consumers whereas the obligated entity as defined in the impugned order as obligated consumers are some categories of consumer of TANGEDCO, viz., HT and LT commercial consumers. The State Commission should not have fastened the Solar Purchase Obligation directly on some categories of consumers of TANGEDCO. Section 86(1)(e) of the 2003 Act empowers the State Commission to specify purchase of electricity from renewable sources of energy as a percentage of total consumption of electricity in the area of a distribution licensee. Thus, the State Commission has to specify the RPO/SPO on the total consumption of the distribution licensee and not selectively and directly on some categories of consumers of the distribution licensee.

28. In the RPO Regulations 2010, the State Commission has fastened the RPO on the distribution

licensee and consumers who take power from their CPP or through open access so as to cover the entire energy consumption taking place in the area of distribution licensee. However, in the impugned order the SPO obligation has been fastened directly upon some categories of consumers. Thus, the obligation as provided under the impugned order is contrary to its own Regulations viz., RPO Regulations 2010 and beyond the powers of the State Commission assigned under the Electricity Act. Therefore, this is not legally valid. The impugned order is also discriminatory to some categories of consumers, as they have been entrusted with the SPO obligation even though they are exclusive consumers of TANGEDCO, the distribution licensee. As the exclusive consumers of the distribution licensees, these HT and LT Commercial consumers already consume energy that

has a component of RPO/SPO fastened on the distribution licensee (TANGEDCO) as per the Renewable Energy Regulations 2010. By additional SPO as per the impugned order they will be liable to additional 3/6% SPO compared to other consumers of the distribution licensee.

29. This Tribunal in judgment dated 4.10.2012 in Appeal no. 200 of 2011 in the matter of Maruti Suzuki India Ltd. vs. Haryana Electricity Regulatory Commission & Others has held as under:

“18. The issue in regard to superiority of the Regulations framed under Section 181 of the Act over the orders passed by the Commission in discharge of its functions enumerated in Section 79 and Section 86 of the Act has been put to rest by the Hon’ble Supreme Court in PTC vs CERC; 2010 (4) SCC 603 where in the Hon’ble Supreme Court has held that the Central Commission is empowered to take steps /measures in discharge

its function enumerated in Section 79(1). These measures which the Central Commission is empowered to take have got to be in conformity with the Regulations made under Section 178 of the Act. In order to have better understanding of the findings of the Hon'ble Supreme Court it would be desirable to reproduce the relevant portion of the judgment as below:

“40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to

regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under

*Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. **Making of a regulation under Section 178 is not a precondition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation.***

Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178.

However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre-condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with

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

Thus, if there is a regulation, then the measures under Section 86(1) has to be in conformity with such Regulation. Thus, the additional SPO obligation decided by the State Commission had to be in terms of the RPO Regulations, 2010 only by way of amendment of the RPO Regulations.

30. We find that the State Commission has not dealt with a number of important issues raised by the objectors which are enumerated in the impugned order under paragraph 5.0. Without the findings on these important issues the SPO order was incomplete and this would create confusion and disputes.

31. Thus, we find that the State Commission has simply tried to implement the directions of the State Government u/s 108 by passing the impugned order without considering its own functions and powers

under the 2003 Act and its own Regulations notified under the Act.

32. Now we shall consider as to whether the directions issued under Section 108 were binding on the State Commission.

33. In Appeal no. 200 of 2011 this Tribunal has considered this issue. The relevant extracts of the judgment dated 4.10.2012 are as under:

“29. The Hon’ble Supreme Court in APTRANSCO vs Sai Renewable Energy Pvt. Ltd.: (2011)11SCC34 has held that State Commission is not bound by any policy directions issued by the Government under the Act if such directions hamper the statutory functions of the Commission. The relevant extracts of the Hon’ble Supreme Court’s judgment delivered on 8.7.2010 is quoted below:

“27. The Reform Act, 1998 was enacted, primarily, with the object of constituting two

separate corporations; one for generation and other for transmission and distribution of electrical energy. The essence was restructuring, so as to achieve the balance required to be maintained in regard to competitiveness and efficiency on the one part and the social objective of ensuring a fair deal to the consumer on the other. This Act is also intended for creation of a statutory regulatory authority. Section 3 of the Act requires the State Govt. to establish by notification a Commission to be known as Andhra Pradesh Electricity Regulatory Commission. This was done by notification dated 3rd April, 1999. As already noticed, Section 11 detailed the functions of the Regulatory Commission and primarily it had advisory as well as regulatory functions. In terms of Section 11(1)(c) it was required to issue licenses in accordance with the provisions of the Act and determine the conditions to be included in the license. However, 11(1)(e) gave it much wider power and duty to regulate the purchase,

*distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected. In terms of Section 11(1)(l) it was to undertake all incidental or ancillary things to the functions assigned to it under the provisions of the Act. **Section 12 of the Act vests the State Govt. with the power to issue policy directions on matters concerning electricity in the State including the overall planning and co-ordination. All policy directions shall be issued by the State Govt. consistent with the objects sought to be achieved by this Act and, accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs***

for supply of electricity to various classes of consumers. The State Govt. is further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Regulatory Commission on all such matters. Thus the scheme of these provisions is to grant supremacy to the Regulatory Commission and the State is not expected to take any policy decision or planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. This provision also clearly implies that fixation of tariff is the function of the Regulatory Commission and the State Govt. has a minimum role in that regard.”

30. Thus, the judgments cited by the Appellant as above have been overruled by the Hon'ble Supreme

Court in APTRANSCO vs Sai Renewable Energy Pvt. Ltd.: (2011)11SCC 34.

31. Further, this Tribunal in Polyplex Corporation vs Utrakhand Electricity Regulatory Commission in Appeal no. 41,42 and 43 of 2010 has held that

“The State Commission is independent statutory body. Therefore the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Government (sic Commission) in the matter of determination of tariff. The State Government may have given any such policy direction in order to cater to the popular demand made by the public but while determining tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission which has statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances. It is purely discretionary on the part of the State

Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff.

“35. In view of the judgment of Hon’ble Supreme Court in APTRANSCO case and this Tribunal judgment in Polyplex case, Appeal no. 41,42 and 43 of 2010 and in BRPL vs DERC Appeal no. 106 & 107 of 2008 following inferences can be made:

i. The commissions are independent statutory authorities and are not bound by any policy or direction which hampers with its statutory functions.

ii. The term ‘shall be guided’ is not mandatory and its character would depend upon case to case.”

34. The findings in the above case would squarely apply to the present Appeals as well. Thus, the State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government but the same are not mandatory and the

State Commission being an independent statutory authority is not bound by any policy directions which hampers with its statutory functions.

35. Summary of our findings:

i) The State Commission in discharge of its functions under the Electricity Act, 2003 has to be guided by the directions of the State Government u/s 108 of the 2003 Act but the same are not mandatory and binding. The State Commission being an independent statutory authority is not bound by any policy directions which hampers its statutory functions.

ii) The State Commission has to be guided by the directions of the State Government u/s 108 of the Act only in discharge of the functions assigned to it under the 2003 Act. Such directions have to

be implemented only under the functions and powers assigned to the State Commission under the 2003 Act. The Act only provides for specifying the purchase obligation from the renewable energy sources under Section 86(1)(e). Thus, the directions of the State Government for SPO can only be considered by the State Commission in exercise of its powers under Section 86(1)(e) of the Act.

iii) The contention of the State Commission that SPO and RPO are two different obligations and the RPO has been fixed under RPO Regulations 2010 under Section 86(1)(e) and SPO as per implementation of Policy directions of the State Government under Section 108 is not legally valid. The State Commission has to consider the directions of the State Government under section

108 in the matter of discharge of its functions under the Act and not in a general way outside the functional scope of the Act. The State Commission had no power to issue an SPO order as per the directions of the State Government u/s 108 in addition and contrary to RPO obligations specified in the RPO Regulations 2010.

iv) The State Commission can specify the RPO/SPO on the total consumption of the distribution licensee and not selectively and directly on some categories of consumers of the distribution licensee. The SPO obligation as provided in the impugned order is contrary to the State Commission's Renewable Energy Regulations 2010 and is beyond the powers of the State Commissions. The impugned order is also

discriminatory to some categories of consumers of the distribution licensee.

v) The State Commission has simply tried to implement the directions of the State Government by passing the impugned order without considering its own functions and powers under the 2003 Act and its own Renewable Energy Regulations notified under the Act and even without considering the other important issues raised by the objectors.

36. In view of above, the Appeals are allowed and the impugned order is set aside. No order as to costs.

37. Pronounced in the open court on this **21st January, 2014.**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE/NON-REPORTABLE

Vs