



ORDER
OF THE
WEST BENGAL ELECTRICITY REGULATORY
COMMISSION

IN CASE NO. WBERC/OA-240/16-17

ORDER IN RE APPLICATION SUBMITTED BY WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED UNDER SECTION 86 OF THE ELECTRICITY ACT, 2003 SEEKING DIRECTIONS TO CESC LIMITED FOR MAKING PAYMENT OF RS. 82,42,87,534 ARISEN OUT OF REVISED BILLS UNDER SINGLE PART TARIFF, AT RS. 7.3667/KWH FOR THE MONTHS FROM APRIL 2015 TO JULY 2015 IN TERMS OF THE TARIFF ORDER DATED 04.03.2015.

PRESENT:

SRI RABINDRANATH SEN, CHAIRPERSON
SRI AMITAVA BISWAS, MEMBER

DATE: 11.12.2017



Further Order in Re application submitted by West Bengal State Electricity Distribution Company Limited under section 86 of the Electricity Act, 2003 seeking direction to CESC Limited for making a payment of Rs. 82,42,87,534 arisen out of revised bills under single part tariff, at Rs. 7.3667/kWh for the months from April 2015 To July 2015 in terms of the Tariff Order dated 04.03.2015.

Noting by Office or Advocate	Sl. No.	Date	Office notes, reports orders or proceedings with signature
		11.12.2017	<p style="text-align: center;"><u>ORDER</u></p> <p>1.0 The present matter relates to the petition submitted by West Bengal State Electricity Distribution Company Limited (in short 'WBSEDCL') on 09.11.2016 under section 86 of the Electricity Act, 2003 (in short 'Act') praying for directions by the Commission to the CESC Limited for paying a sum of Rs. 82,42,87,534.00 (Rupees eighty two crore forty two lakh eighty seven thousand five hundred thirty four only) to WBSEDCL against the revised bills raised under single part tariff at the rate of Rs. 7.3667 per kWh for the months from April, 2015 to July, 2015 in terms of the tariff order dated 04.03.2015 passed by the Commission in respect of WBSEDCL.</p> <p>2.0 On perusal of the contents of the petition and the documents annexed therewith, the Commission called for a hearing upon service of notice, fixing the date on 29.05.2017 at 12.30 hours. In the hearing, both the parties, i.e., WBSEDCL and CESC Limited were present and the following directions were given by the Commission vide order dated 29.05.2017.</p> <p>Quote:</p> <p>i) WBSEDCL will serve a copy of the petition, filed by them to the Commission, upon CESC Limited by 30th May, 2017.</p>



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			<p>ii) CESC will submit their written submission on the petition to the Commission with a copy to WBSEDCL by 14th July, 2017.</p> <p>iii) WBSEDCL will submit rejoinder, if any, to the Commission on the written submission of CESC Limited with a copy to CESC Limited thereafter and not later than 21.07.2017.</p> <p>iv) Upon receipt of the submission of CESC Limited and the rejoinder, if any, of WBSEDCL, the Commission will fix another date for hearing in due course of time</p> <p style="text-align: right;">Unquote:</p>
		3.0	<p>As per the directions of the Commission, a copy of the petition, in question, was served upon CESC Limited by WBSEDCL vide its letter no. REG/Legal/CESC/88 dated 30.05.2017 with a copy to the Commission. Upon receipt of the copy of the petition from WBSEDCL, CESC Limited submitted their written submission vide letter dated MD:9557 dated 14.07.2017 with a copy to WBSEDCL as per the directions of the Commission. WBSEDCL submitted their rejoinder to counter-affidavit filed by CESC Limited vide memo no. REG/SERC/CESC/159 dated 04.08.2017 in terms of Commission's order dated 29.05.2017.</p>
		4.0	<p>On perusal of the counter-affidavit and the rejoinder to counter-affidavit, as aforesaid, a further hearing was held on 23.08.2017 at 15.00 hours at the office of the Commission where the representatives of both WBSEDCL and CESC were present.</p>
		5.0	<p>Upon hearing the submissions of both the parties as to</p>



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			<p>the adjournment of the hearing to 18.10.2017, the Commission directed vide its order dated 05.09.2017 both the parties to submit their prayer in proper manner in writing separately for adjournment of the hearing to 18th October, 2017, upon receipt of which the Commission will pass necessary directions.</p> <p>6.0 Accordingly, both WBSEDCL and CESC Limited have submitted their prayer in writing separately for adjournment of the hearing till 18.10.2017 vide their letters both dated 24.08.2017.</p> <p>7.0 Upon receipt of the prayers of both WBSEDCL and CESC, the Commission has been pleased to fix the hearing on 18.10.2017 at 15.00 hours at the office of the Commission and served notice upon both the parties vide reference no. WBERC/OA-240/16-17/0885-0886 dated 7th September, 2017.</p> <p>8.0 The hearing was held on 18.10.2017 at 15.00 hours as scheduled. Shri Amit Kapur, Ld. Counsel of WBSEDCL along with other representatives of WBSEDCL attended the hearing on behalf of WBSEDCL with due authorization. On the other hand, Mr. M. G. Ramachandran and Ms. Divya Chaturvedi, Ld. Counsel of CESC Limited along with other representatives of CESC Limited attended the hearing on behalf of CESC Limited with due authorization.</p> <p>9.0 The representative of WBSEDCL has submitted a written submission during the hearing which, inter-alia, stated that CESC Limited is liable to pay single part tariff on account of non-compliance with the directions of the</p>
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			<p>Commission given in the tariff order dated 04.03.2015 for the years 2014 – 2015, 2015 – 2016 and 2016 – 2017. A copy of the said written submission by WBSEDCL was also handed over to CESC Limited during the hearing.</p> <p>10.0 The representative of CESC Limited has made his submission denying the contention of WBSEDCL regarding liability on the part of CESC Limited for payment of power purchase cost on the basis of single-part tariff. CESC Limited has rather insisted on payment of power purchase cost on two-part basis based on the tariff order dated 10.08.2015.</p> <p>11.0 Upon hearing both the parties, the Commission raised the following questions to both the parties, i.e., WBSEDCL and CESC Limited regarding the way they have handled the matter in the case:</p> <p>To WBSEDCL:</p> <p>a) The supplementary bills for the months of April to July, 2015 based on the single tariff was raised by WBSEDCL to CESC Limited. Why the same method was not followed by WBSEDCL for the month of March, 2015, though the effective date was from March, 2015 as per the tariff order?</p> <p>b) When WBSEDCL has approached Government of West Bengal for approval of reduction in capacity on the basis of two part tariff and the same was accepted by Government of West Bengal on 05.06.2015, it appears that WBSEDCL has by conduct agreed to an extension on the three months period for submitting</p>
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			<p>draft PSA.</p> <p>c) WBSEDCL has not challenged the second tariff order of the Commission wherein it was specified that WBSEDCL will bill to CESC Limited for the supply of power for the periods April to July, 2015 on two part basis and thereby attained finality that a two part tariff continues despite CESC not meeting the requirements of submitting revised PSA for approval before the Commission in terms of first tariff order.</p> <p>To CESC Limited:</p> <p>a) CESC has to clarify as to why they reduced the quantity of bulk power supply from WBSEDCL.</p> <p>b) Why CESC Limited did not finalize the draft PSA.</p> <p>12.0 In view of above, the Commission directed both WBSEDCL and CESC Limited to exchange between themselves written notes of their submissions. WBSEDCL and CESC Limited both would submit their written reply on submission of other party and also on the queries raised by the Commission, as mentioned hereinabove, within 3rd November, 2017. Upon receipt of written reply from both the parties, the Commission will issue further order in the matter, as deems fit. Both WBSEDCL and CESC made their submission on 3rd November, 2017.</p> <p>13.0 WBSEDCL, in their written submission, inter-alia, stated the following:</p> <p>a) CESC Limited is liable to pay single part tariff on</p>
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			<p>account of non-compliance with the directions of the Commission given in the tariff order dated 04.03.2015 for the years 2014 – 2015, 2015 – 2016 and 2016 – 2017. It is submitted that the direction in the said order was to levy two-part tariff for sale of power by WBSEDCL to CESC Limited with effect from 01.03.2015 subject to submission of an agreed draft PSA to the Commission within a period of three months, failing which, there will be a reversion to single part tariff structure. It is also submitted that as per direction of the Commission the single part tariff for 2015 – 2016 and 2016 – 2017 are 736.67 paise / kWh and 757.30 paise / kWh respectively.</p> <p>b) WBSEDCL requested CESC Limited several times to hold discussions to finalize the draft PSA, but CESC limited did not take any effective step towards mutually arriving at an agreed form of the draft PSA along with the objection of CESC to the data provided by CESC Limited themselves used for calculating the drawal of energy for determination of tariff order dated 04.03.2015. Since CESC never agreed to a draft PSA nor complied with the timeline stipulated for submission of such draft PSA to the Commission, WBSEDCL issued revised bills to CESC.</p> <p>c) Further, Second Tariff Order did not do away with the mandatory requirement of submission of Draft PSA for the two-part tariff to be effective which is evident from the fact that the Commission through their letter dated</p>
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			<p>11.08.2015 (after passing the Second Tariff Order) intimated WBSEDCL that the tariff for sale of power from WBSEDCL to CESC would be as per the rates specified in Annexure 6E of the First Tariff Order read with Paragraph 6.5.3 and directions given in Paragraph 8.14 thereof. It is implicit in this communication that although the power procurement plan was amended vide Second Tariff Order, the pre-condition of submission of an agreed draft PSA in terms of the First Tariff Order remains in effect. Since this condition has not been fulfilled, CESC is liable to pay single-part tariff as claimed by WBSEDCL.</p> <p>d) Commission's orders are to be interpreted strictly as there is no ambiguity in the same. In this regard, they referred an order of Hon'ble Supreme Court of India where the Supreme Court of India in the case of TNSEB v CERC {2007} 7 SCC 636, has elaborated the usage of the rule of literal interpretation. The meaning of the condition and its effect laid down in the First Tariff Order has to be construed literally. The Hon'ble Commission has used the term 'reversion to single-part tariff. Therefore, the failure of CESC to submit a PSA within the specified timeline would result for the period in question. It is further submitted that there is no scope for reading any implied meaning into the directions passed by this Hon'ble Commission in the First Tariff Order. In the recent judgment of the Hon'ble Supreme Court of India in</p>
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			<p>Nabha Power Limited v PSPCL dated 05.10.2017 in Civil Appeal No. 179 of 2017, the Hon'ble Supreme Court of India has laid down the legal principle with regard to reading of commercial terms. It stated that there has to be strict necessity for reading implied terms into a contract. Hence, when the formula of calculating energy charges was clear in that instance, the PSA was to be read in a strict manner. Hence, there is no necessity for imputing any implied terms into the First Tariff Order passed by the Commission as there is no ambiguity to the same.</p> <p>e) It is submitted that the 'reversion' to single-part tariff referred to in paragraph 8.14 of the First Tariff Order is retrospective and not prospective. The reversion to single-part tariff system cannot be applied prospectively from the last date of submission of draft PSA. At the time of passing of First Tariff Order, the Commission allowed the shift to two-part tariff and determined the tariff for the year 2015-2016 in order to facilitate the operation of the two-part tariff for FY 2015-2016. Moreover, execution of a new PSA was necessitated on account of this shift. Therefore, the submission that reversion to two-part tariff will be prospective is clearly misplaced.</p> <p>f) The 'reversion' to single-part tariff is to be read retrospectively. Otherwise, it would result in CESC availing the benefits of two-part tariff system even without complying with the mandatory condition of</p>
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			<p>submission of a new PSA incorporating the two-part tariff system. It is submitted that the two-part tariff system will not be applicable at all without parties agreeing to the same by concluding a PSA. In the absence of written agreement to shift to two-part tariff system which will also incorporate the consequential changes in the PSA dated 20.12.2010, CESC should not be allowed to avail the benefits of the two-part tariff system for the interim period of three months, between March to June, 2015. Further, 'reversion' to single-part tariff should be read retrospectively since such an interpretation favours business efficacy and makes the PSA workable. It is submitted that the ruling of the Hon'ble Supreme Court of India in Satya Jain (Dead) through LRs and ORs. Vs Anis Ahmed Rushdie (Dead) through LRs and Ors. (2013) B SCC 131 relying on the Moorcock test expounded by Bowen, L.J. in Moorcock (1889) LR 14 PD 64 (CA), must be applied where the principle of business efficacy was considered. In the case of Nabha Power Limited Vs PSPCL dated 05.10.2017 in Civil Appeal no. 179 of 2017, the same principle of bureaucracy was applied by the Hon'ble Supreme Court. Further, it is submitted that a prospective interpretation to 'reversion' would allow CESC benefits for the interim period from 01.03.2015 to 03.06.2015 inspite of not complying with the directions of the commission in the First Tariff Order.</p>
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			<p>g) Since single-part tariff is in effect, WBSEDCL has rightly raised the Revised Bills in terms of the rates specified in paragraph 6.5.3. Further, the Commission vide its letter dated 11.08.2015 has emphasized on the applicability of Paragraphs 8.14 and 6.5.3 of the First Tariff Order and WBSEDCL has accordingly raised the Revised Bills.</p> <p>h) The Second Tariff Order only amends the power procurement arrangement between CESC and WBSEDCL to the extent of reduction in quantum of power being supplied to CESC from 330 MW to 100 MW and the resultant impact on the ARR of WBSEDCL. The Second Tariff Order neither refers to nor modifies Paragraphs 6.5.3 and 8.14 of the First Tariff Order dated 04.03.2015. In fact, subsequent correspondence dated 11.08.2015 from the Commission reinforces the fact that the pre-condition of submission of draft power sale agreement in terms of the First Tariff Order remains in effect. Therefore, CESC's contention that WBSEDCL is contesting the tariff orders passed by the Commission is incorrect. In fact, WBSEDCL's claim is premised on the said tariff orders as detailed above. Further, WBSEDCL is not challenging the Hon'ble Commission's letter dated 17.11.2015 as contended by CESC. It is submitted that computation of bills raised pursuant to two-part tariff will be in accordance with the tariff order dated 10.08.2015. However, the applicability of two-part</p>
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			<p>tariff was determined by the First Tariff Order itself, the requirement for the same being the submission of the Draft PSA.</p> <p>14.0 WBSEDCL also submitted their contentions against the queries raised by the Commission during the hearing held on 18.10.2017 which are given hereinbelow:</p> <p>a) It is submitted that as per the First Tariff Order, two-part tariff was applicable from March, 2015. In terms of paragraph 6.5.3 of the First Tariff Order, power purchase price on single-part basis was determined for the period prior to March, 2015, being 571 paise/kWh for April, 2014 to February, 2015. Further. The single-part tariff for 2015-2016 was also determined vide the said First Tariff Order as 236.67 paise /kWh. Accordingly, it is pertinent to note that the First Tariff order does not specify the single part tariff for the month of March, 2015. WBSEDCL has accordingly raised bill for power purchase by CESC for the month of March, 2015 on the basis of two part tariff. Since there was no single-part tariff specified for March, 2015' a supplementary bill on the basis of single part tariff couldn't possibly have been raised for the month of March 2015 in order to abide by the provisions of First Tariff Order.</p> <p>b) As per request of CESC for reduction of maximum demand, WBSEDCL approached GoWB for its approval for reduction in capacity of drawal of CESC from WBSEDCL on 01.06.2015 by forwarding CESC's</p>
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			<p>proposal dated 29.05.2015, prior to the expiry of deadline to submit the Draft PSA i.e.04.06.2015 and GoWB accorded their approval on 05.06.2015. In any event, it is submitted that the request for reduction in capacity of drawal of CESC and subsequent issuance of Second Tariff Order, is a separate event. It is submitted that WBSEDCL had anticipated that CESC would file the Draft PSA by the deadline of 03.06.2015.</p> <p>It is submitted that CESC sent a separate proposal for the reduction in capacity for a two-month period from 04.06.2015 on a two-part tariff basis. The GoWB accorded approval to the same vide GoWB Approval dated 05.06.2015 and directed WBSEDCL to approach the Commission for tariff determination. The Commission has accordingly issued Second Tariff Order on 10.08.2015 where the Commission revised the power purchase requirement and cost as well as revenue income from sale to CESC (paragraph 2.6 of Second Tariff Order) and communicated the decision of the Commission on the specific proposal of CESC on 11.08.2015 i.e. after issue of Second Tariff Order dated 10.08.2015.</p> <p>It is submitted that WBSEDCL acted upon a separate procurement proposal of CESC for the short period of two-months after the deadline of signing the PSA and it does not imply that WBSEDCL agreed to extend the period for submitting the Draft PSA between CESC and</p>
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			<p>WBSEDCL beyond three (3) months in regard to the mandate given as a condition in the extant tariff order dated 04.03.2015 for implementation of two part tariff .</p> <p>Further, it is pertinent to note that CESC has never communicated that in light of the aforesaid revised purchase plan, no revised PSA to be submitted nor was an extension for submitting Draft PSA for the Commission approval sought. It is submitted that even in its letter dated 29.08.2017, CESC has not stated anything regarding the submission of the Draft PSA.</p> <p>It is pertinent to note that the said separate procurement proposal of CESC for the period of two-months also clearly affirmed that on drawal beyond 100 MW, single-part tariff will be applicable. Hence, CESC itself recognized that this proposal was separate and the terms were limited to supply of 100 MW.</p> <p>c) It is submitted that in terms of the commission's letter dated 11.08.2015, the applicable tariff will be in accordance with the directions of First Tariff order. Further, it is submitted that WBSEDCL could not have challenged the Second Tariff Order dated 10.08.2015 for the year 2015-16, since the commission had communicated vide its letter dated 11.08.2015, that the applicable tariff for the year 2015-16 would be as per the First Tariff Order.</p>
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			<p>It is submitted that while the Second Tariff order has determined the tariff on the basis of two-part tariff system, the pre-requisite being that CESC was required to submit the Draft PSA for approval before the Commission, had not changed or negated. As a result, the Second Tariff Order is applicable to the extent that parties have been able to agree to move to two- part tariff system by submitting the Draft PSA. Otherwise, the consequence of failure to submit the Draft PSA, being reversion to single-part tariff is in effect. In light of the same, CESC's contention that the letter dated 17.11.2015 confirms that the tariff for months of April-July is as per Second Tariff Order is also misplaced. It is submitted that the rates of Second Tariff Order will only apply if the parties had submitted a Draft PSA in that regard.</p> <p>It is submitted that in terms of CESC's letter dated 29.05.2015, CESC had also recognized that the proposal for reduced capacity was always subject to the conditions of the First Tariff order. It is submitted that neither CESC nor WBSEDCL can amend or modify the conditions set out by this Hon'ble Commission in its First Tariff Order.</p> <p>Furthermore, it is submitted that CESC's Tariff Order for 2015-2016 dated 10.08.2015 has not amended the First Tariff Order and the conditions set out in Paragraph 6.5.3 and paragraph 8.14 of the said First Tariff Order.</p> <p>It is submitted that WBSEDCL has been supplying power to CESC in exigency conditions and the rate for the power</p>
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			<p>is also in Single part tariff as per First Tariff Order of the Commission dated 04.03.2015. It is submitted that CESC has never raised any objection and has been making payment for the same. Thus, by such conduct, CESC has admitted that Single Part tariff is the applicable tariff in case the Draft PSA is not submitted within stipulated period of 3 (three) months.</p> <p>15.0 Finally, WBSEDCL has submitted that since CESC Limited has failed to fulfil the conditions as laid down in the order dated 04.03.2015 passed by the Commission, CESC Limited is liable to pay single-part tariff as claimed by WBSEDCL.</p> <p>16.0 In view of above, WBSEDCL has prayed before the Commission for directions by the Commission to CESC Limited for paying a sum of Rs. 82,42,87,534.00 (Rupees eighty two crore forty two lakh eighty seven thousand five hundred thirty four only) to WBSEDCL against the revised bills raised under single part tariff at the rate of 736.67 paise per kWh for the months from April, 2015 to July, 2015 in terms of the tariff order dated 04.03.2015 passed by the Commission in respect of WBSEDCL.</p> <p>17.0 CESC has also made their submission as follows:</p> <p>a) It is liable and has rightly paid at the two part tariff as per the Tariff Order dated 04.03.2015 read with the subsequent Tariff Order dated 10.08.2015. The two-part tariff is the applicable tariff for the aforesaid</p>
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			<p>period and the same was duly acknowledged and accepted by WBSEDCL and the Government of West Bengal. WBSEDCL had approached the Hon'ble Commission, for its final decision for tariff determination after approval of the Government of West Bengal, and the Hon'ble Commission had passed the Tariff Order dated 10.08.2015 based thereon. Accordingly the claim raised in the Petition is devoid of any merit and is an afterthought on the part of WBSEDCL.</p> <p>b) The agreement dated 20.12.2010 read with supplementary agreement dated 21.09.2011 between CESC and WBSEDCL being the Power Supply Agreement (hereinafter referred to as the "PSA"), provides that the tariff for supply to CESC by WBSEDCL shall be determined by the Commission from time to time. Further, WBSEDCL shall tender bills in accordance with such tariff as determined by the Commission. Since tariff has been determined by the Commission through its Tariff Order dated 10.08.2015 for the year 2015-16, WBSEDCL had to raise its bills as per such determined tariff in accordance with the said PSA (Clauses 7 and 8 of the PSA).</p> <p>c) The Commission has determined both revenue and tariff, under the Electricity Act, 2003 as well as the applicable regulatory framework, for CESC and WBSEDCL for the year 2015-16 vide its two Tariff</p>
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			<p>Orders both dated 10.08.2015. Power purchase rate was finalized and revenue requirement was adjusted in the Tariff Orders dated 10.08.2015 following due statutory procedure. The Tariff Orders dated 10.08.2015 were not challenged by WBSEDCL following the process laid down in the statute. The present Petition of WBSEDCL, termed as a "Petition under Section 86", is endeavoring to revise the aforementioned Tariff Orders. If the contention of WBSEDCL is accepted, it would change the revenue requirement and tariff of both the parties and due processes followed for issue of the tariff orders under Section 62 and Section 86 of the Electricity Act, 2003 would be given a go by, without following the review process or the appellate provisions under Section 111 of the Electricity Act, 2003. WBSEDCL have categorically stated that they are not challenging the tariff orders passed by the Hon'ble Commission (refer rejoinder dated 4 August 2017) but its submissions in the original Petition regarding retrospective single-part tariff applicability do not harmonize with such rejoinder on a concurrent reading.</p> <p>d) Further, the period under dispute falls in 2015-16. The Tariff Order dated 10.08.2015 is the relevant and applicable Tariff Order of the Commission for the said year where the revenue from sale of power by WBSEDCL to CESC has been expressly determined, for the period under consideration and overall revenue</p>
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			<p>of WBSEDCL has been suitably adjusted. Any contention of WBSEDCL regarding claims for the above mentioned period challenges the said Tariff Order, which was not done earlier following the statutory process.</p> <p>e) As already submitted through our communication dated 04.04.2015 to the Hon'ble Commission, which contained pertinent interactions between CESC and WBSEDCL, CESC was throughout in discussion with WBSEDCL. Some letters dated 11.02.2015, 18.03.2015 and 31.03.2015 may be of relevance. It may be noted that there were other interactions between CESC and WBSEDCL / Government of West Bengal on the matter.</p> <p>f) In terms of the above and upon passing of the Tariff Orders dated 04.03.2015 for WBSEDCL and CESC, there were discussions and correspondences exchanged between WBSEDCL, CESC, Government of West Bengal and the Commission which evidences the decided course. CESC craves leave to furnish the same at a later stage, as may become necessary.</p> <p>g) In the background of several correspondences between WBSEDCL, CESC, Government of West Bengal and the Commission, the Commission proceeded to pass the Tariff Order dated 10.08.2015 taking into account the definitive course of action adopted by the parties, namely, WBSEDCL and</p>
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			<p>CESC, with the approval of the Government of West Bengal. Thus, the “final decision” which was to be made by the Hon’ble Commission in terms of the Government of West Bengal’s letter dated 05.06.2015, was made by the Commission vide its Tariff Order dated 10.08.2015 thereby concluding the matter. The PSA between the parties explicitly mentions about adoption of tariff as determined by the Hon’ble Commission.</p> <p>h) Therefore, a perusal of the correspondence between the parties as well as the Government of West Bengal and the letter written by WBSEDCL to the Hon’ble Commission clearly establish the following:</p> <p>i. The parties had agreed to continue with bulk supply of electricity by WBSEDCL to CESC up to 03.08.2015;</p> <p>ii. The tariff for the specified quantum of power (330 MW / 100 MW, as applicable) would be two-part tariff determined by the Commission in the Tariff Order dated 04.03.2015. However, if CESC draws power in excess of 100 MW (for 04.06.2015 to 03.08.2015), the additional quantum will be at single-part tariff. This clearly implies that the single-part tariff is not applicable to the specified quantum;</p> <p>iii. WBSEDCL had agreed to the above scheme</p>
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			<p>which was also duly approved by the Government of West Bengal; and</p> <p>iv. This arrangement was approved / finalized by the Commission by its Tariff Order dated 10.08.2015 through adjustment of revenue requirement of WBSEDCL.</p> <p>i) The contents of the Tariff Order dated 10.08.2015 – paragraphs 2.4 and 2.5 clearly show that firstly, the Government of West Bengal had approved a specific power sale plan of WBSEDCL to CESC and secondly, that the Government of West Bengal, WBSEDCL and CESC had agreed to two-part tariff for the period until 03.08.2015. Pertinently, pursuant to CESC’s proposal dated 29.05.2015, WBSEDCL’s letter to the Government of West Bengal apparently does not contain any reference to single-part tariff for power supply for the months of April to August, 2015. Notably, the PSA does not specify single-part / two-part tariff but requires adoption of tariff determined by the Hon’ble Commission.</p> <p>j) If the intention of the parties was that single-part tariff should have applied, WBSEDCL and the Government of West Bengal would have raised the same in the communications mentioned above, in particular in the letters written to the Commission. No such issue was raised in any proceeding before the Commission</p>
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			<p>either.</p> <p>k) The correspondences indicate that the discussions and deliberations between the parties as well as the efforts made by CESC to conclude the PSA with WBSEDCL. However, despite efforts made by CESC, the PSA could not be finalized. The correspondences indicate that CESC had raised valid issues for certain terms to be incorporated in the PSA which were not acceded to by WBSEDCL.</p> <p>l) The correspondences also indicate that the parties were also deliberating on the aspect of discontinuation of arrangement for regular supply of power in bulk by WBSEDCL to CESC. The arrangement was also placed before the Hon'ble Commission. This arrangement got implemented and approved by the Hon'ble Commission in its Tariff Order dated 10.08.2015. From 04.08.2015, CESC has been procuring power only to meet emergency needs in terms of the Tariff Order dated 10.08.2015.</p> <p>m) In view of the above developments, namely, the arrangement reached between the parties that there shall be discontinuation of regular supply of electricity in bulk by WBSEDCL to CESC after 03.08.2015, there was no question of the parties executing the revised PSA which was envisaged in Para 6.5.3 read with Para 8.14 of the Tariff Order dated 04.03.2015. The revised PSA was contemplated in the Tariff Order</p>
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			<p>dated 04.03.2015 in the context of continued supply of electricity in bulk by WBSEDCL during the financial years 2015-16 and 2016-17. However, when the supply was not to be made as envisaged in the said Tariff Order dated 04.03.2015, there was no occasion for the parties to execute the revised PSA.</p> <p>n) Pertinently, the covering letters for the bills raised by WBSEDCL for the months of April to July, 2015 dated 02.05.2015, 01.06.2015, 01.07.2015 and 01.08.2015 respectively, clearly record that "The energy bill has been preferred on the basis of the scheduled energy at the different times of the day considering purchase price of electricity by CESC Ltd. from WBSEDCL as indicated in the tariff order of Hon'ble WBERC in respect of CESC Ltd. for 2014-15 on Provisional basis. This is subject to finalization upon issue of certificate by SLDC". The said noting clearly indicates that the energy bills were provisional only to the extent of finalization upon issuance of certificate of SLDC. The said bills did not contemplate any revision thereof due to change in regime from two-part to single-part tariff. Further, the correspondence does indicate clearly that the parties agreed to a different arrangement in regard to the supply of power.</p> <p>o) The parties proceeded on the clear basis that the two-part tariff will be the applicable tariff till 03.08.2015 i.e. till when WBSEDCL will supply bulk power to CESC. Such understanding of the parties can be gleaned</p>
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			<p>from the letters dated 05.06.2015, 08.06.2015 and 07.08.2015.</p> <p>p) Eventually, this position was affirmed by the Hon'ble Commission vide its Tariff Order dated 10.08.2015, wherein the Commission was pleased to allow the proposal of CESC for reducing the demand from 330 MW to 100 MW for two months for the period from 04.06.2015 to 03.08.2015. Further, the Commission vide its Tariff Order dated 10.08.2015, unequivocally provided the tariff for the months of April to 03.08.2015 on two-part tariff by clearly spelling out the 'Fixed Charge' and 'Energy Charge' for each month (as quoted in Para 25 of these submissions). The PSA between the parties does not provide any specific contracted drawal by CESC from WBSEDCL. The demand as determined by the Hon'ble Commission in its order dated 10.08.2015 was therefore binding on the parties and continued with the PSA.</p> <p>q) Thus, the parties had specifically agreed in regard to tariff namely, that WBSEDCL will be entitled to receive from CESC the two-part tariff for bulk power supplied till 03.08.2015 and subsequently CESC will procure power on emergency on single-part tariff basis. The same is consistent with the settled principles of contract law that the parties can mutually agree to the changed terms and conditions of performance than what was originally envisaged or</p>
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			<p>proposed in view of the changed circumstances.</p> <p>r) The above arrangement was done with the due sanction of the Government of West Bengal and was also duly placed before the Commission as detailed above. In terms of the above, the Hon'ble Commission vide order dated 10.08.2015 considered the financials of WBSEDCL including and in particular on the aspect of revenue recoverable by WBSEDCL for the supply of electricity in bulk to CESC for the period from 01.04.2015 to 03.08.2015. Moreover, overall revenue requirement of WBSEDCL was duly adjusted.</p> <p>s) In the context of paragraphs 1.8 and 2.4 to 2.14 of the tariff order dated 10.08.2015, the intention of the Tariff Order dated 04.03.2015 is unequivocal and clear and was understood by all the parties as stated below:</p> <p>i) The two-part tariff for supply of electricity in bulk by WBSEDCL to CESC stood implemented effective from March 2015. It was not a case where the implementation and coming into force of the two-part tariff was postponed till the execution of the revised PSA. It is also not a case where the two-part tariff was provisional in nature and the tariff was to be applied on a regular basis only after the execution of the revised PSA;</p> <p>ii) Thus, as per the Tariff Order dated 04.03.2015,</p>
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			<p>the two-part tariff will be valid and enforceable for a period of three months irrespective of whether revised PSA is finalized and executed between WBSEDCL and CESC or not. The only consequence as per the Order dated 04.03.2015 would be that reversion to single-part tariff would only be effective on a prospective basis. The qualification added in Para 6.5.3 of the Tariff Order dated 04.03.2015 'subject to' is only in regard to reverting to single part tariff post three months. This position has been reconfirmed by the Hon'ble Commission through its Tariff Order dated 10.08.2015 with detailed calculations of revenue impact;</p> <p>iii) The conduct of the parties also clearly fortifies the above. At the time when in May/June, 2015 the parties had discussed about the supply of 100 MW during the period from 04.06.2015 to 03.08.2015 there was not even a whisper by WBSEDCL entitling it to receive the tariff on single-part basis. WBSEDCL had billed and received the tariff as two-part tariff and had appropriated the sum. By this time it was clear that the PSA will not be executed in view of the new arrangement whereby CESC will draw only emergency power after 03.08.2015. If the intention was to apply single-part tariff for the supply of power in the absence of a revised PSA, WBSEDCL would have duly raised the same at the time of agreeing to extend the</p>
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			<p>supply till 03.08.2015 specifically based on two-part tariff;</p> <p>iv) The fact that WBSEDCL had clearly agreed to two-part tariff as applicable tariff till 03.08.2015 is clear from its own letter addressed to the Government of West Bengal wherein there is a specific reference to two-part tariff, the approval granted by the Government of West Bengal and the communication sent to the Commission based thereon. There is no whisper of any single-part tariff applicable;</p> <p>v) It was on the above basis that the Commission has passed the Tariff Order dated 10.08.2015 specifically noting that the revenue requirements etc. of the WBSEDCL as well as CESC has been adjusted based thereon;</p> <p>vi) In the proceedings before the Hon'ble Commission leading to the passing of the Order dated 10.08.2015, WBSEDCL did not raise any issue on the applicability of single-part tariff for the above period;</p> <p>vii) The Tariff Order dated 10.08.2015 passed by the Commission taking note of the entire developments and deciding on two-part tariff for the period till 03.08.2015 for 330 MW/100 MW is final. There was no review petition or appeal filed against the said order. WBSEDCL cannot now</p>
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			<p>plead anything contrary to the Tariff Order dated 10.08.2015; and</p> <p>viii) The claim made by WBSEDCL that it is enforcing the Tariff Order dated 04.03.2015 and is not challenging the Tariff Order dated 10.08.2015 is devoid of any merit and is liable to be rejected <i>in limine</i>. When the Tariff Order dated 10.08.2015 specifically adjusts the revenue requirement of WBSEDCL based on the applicability of the two-part tariff for the quantum of 330/100 MW supplied till 03.08.2015, it is clearly a subsequent order modifying the order dated 04.03.2015 to that extent. The subsequent order taking cognizance of the settlement reached between WBSEDCL and CESC with the approval of Government of West Bengal, will be the applicable order.</p> <p>t) Further, the reliance placed by WBSEDCL on the letter dated 11.08.2015 issued by the Secretary of the Hon'ble Commission is incorrect. The letter has to be read in the context of issue of the Tariff Order dated 10.08.2015. The letter cannot provide for anything contrary to the decision of this Hon'ble Commission in the Tariff Order dated 10.08.2015. The position has also been clarified by the Secretary of the Hon'ble Commission in the subsequent letter dated 17.11.2015.</p> <p>u) In view of the foregoing, it is clear that all the concerned parties had full understanding of the</p>
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			<p>arrangement at the material point of time. The Commission had considered the approval of Government of West Bengal dated 05.06.2015 and submissions of WBSEDCL vide letters dated 08.06.2015 and 20.07.2015. Thereafter, revenue requirement, power purchase cost including the quantum of energy purchased by CESC from WBSEDCL for 01.04.2015 till 03.08.2015 etc. have been determined and finalized by the Commission vide speaking orders dated 10.08.2015 following due legal procedure. Any alternate contention is equivalent to challenging the statutory tariff orders, circumventing the legal process laid down in the statutes. Notably, the approval of Government of West Bengal has been considered as a “policy directive” by WBSEDCL in the letter dated 08.06.2015.</p> <p>18.0 Regarding the query raised by the Commission in the hearing held on 18.10.2017 in respect of reduction of quantum of bulk power supply from WBSEDCL, it is stated by CESC that CESC and WBSEDCL were in discussion to reduce the off-take of power from WBSEDCL, which was also duly placed before the Commission by way of CESC’s covering letter dated 04.04.2015. In this regard, further reliance is placed on the CESC’s written reply submitted on 11.04.2014 in response to WBSEDCL’s multi-year tariff petition for the years 2014-15, 2015-16 and 2016-17, wherein CESC had clearly brought out that the commissioning of the Haldia</p>
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			<p>power plant will lead to decrease in power requirement of CESC from WBSEDCL. Also, the correspondences between the parties and the submissions of CESC on WBSEDCL's tariff petition adequately demonstrate that CESC kept WBSEDCL apprised about the status of the upcoming generating station at Haldia and its consequential impact on drawal from WBSEDCL. Documentary evidence is available in the records of all concerned, viz. WBSEDCL, West Bengal State Electricity Transmission Company Limited, West Bengal State Load Despatch Centre, Eastern Regional Power Committee etc. about status of the generating station at Haldia.</p> <p>Pertinently, CESC vide its letter dated 31.03.2015 as well as through a number of letters (Attachment-2) had clearly indicated that dispatch schedule of CESC will be governed by the prevalent Regulations governing the merit order dispatch. Two-part and single-part tariff have different operational regimes. Retrospective application of single-part tariff is not in consonance with the regulations on merit order dispatch protocol, as a source despatched under the two-part structure, might not have qualified for despatch under single-part structure at all. West Bengal Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2011, West Bengal Electricity Regulatory Commission (State Electricity Grid Code) Regulations, 2007 etc. may be referred to in this context. Retrospective application, if allowed would also be inconsistent with the directions given by the Hon'ble Commission vide its Tariff Order dated 04.03.2015 to</p>
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			<p>CESC. Relevant excerpts are produced below:</p> <p><i>“8.16 Regarding purchase of power from different sources the following steps should be undertaken by CESC Ltd. in order to control retail tariff of the consumers of CESC Ltd.</i></p> <p><i>CESC Ltd. is to consider for arranging of purchase of power from different sources (s) (including from exchanges) other than the existing sources having supply pattern and cost involvement / economics more favourable for consumers of CESC Ltd.</i></p> <p><i>.....”</i></p> <p>It is a settled legal principle that a statutory Tariff Order needs to be read in totality with harmonious construction of the directives. Further, CESC vide its submission on multi-year tariff petition of WBSEDCL raised the issue of two-part tariff implementation and prayed that implementation of two-part tariff should be on prospective basis. In terms of the Regulations specified by this Hon’ble Commission, single-part / two-part tariff structure has direct bearing on despatchability of energy sources and power purchase cost. The Commission also took cognizance of this submission while issuing the speaking tariff order of WBSEDCL dated 04.03.2015.</p> <p>In view of the foregoing, it cannot be inferred that CESC concealed its intention to not take power supply from WBSEDCL and especially in consideration of the aspect</p>
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			<p>that CESC is entitled to take the view that sourcing of electricity from WBSEDCL at single-part tariff or on the terms and conditions proposed by WBSEDCL is not conducive to its consumers' interest. CESC is required to take from time to time a prudent practice of procuring economical sources of power. Accordingly, CESC is entitled to assess from time to time as to whether the procurement of power in bulk from WBSEDCL at the rate offered by it is economical as compared to getting electricity from other sources. CESC is in a position to satisfy the Commission that in the facts and circumstances mentioned above, it is not in the interest of the consumers of CESC to procure power from WBSEDCL and that too at a single-part tariff.</p> <p>19.0 To conclude, CESC submitted that given the entirety of facts and circumstances, the claim of WBSEDCL that CESC is required to pay single-part tariff for the supply of electricity from 01.04.2015 onwards is clearly an afterthought to make CESC to pay an exorbitant amount of Rs. 82 Crores (Rs.82,42,87,534) which would seriously and adversely affect the consumers of CESC. The arbitrary action of WBSEDCL is clear from the fact that it has not claimed any single-part tariff for the period from 04.03.2015 to 31.03.2015 or for the period from 01.08.2015 to 03.08.2015. Further, there is no explanation for WBSEDCL of not raising the issue at any time prior to the passing of the Tariff Order dated 10.08.2015. On the other hand, there is a clear admission</p>
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			<p><i>inter alia</i> in the letters dated 08.06.2015, 20.07.2015, 07.08.2015 as well as covering letters of bills raised during the period that WBSEDCL is entitled to two-part tariff for the quantum of 330/100 MW.</p> <p>20.0 On going through the submission made by both CESC and WBSEDCL, the Commission observed the followings:</p> <p>a) In terms of the paragraphs 6.5.3 and 8.14 of the tariff order dated 04.03.2015 issued by the Commission in respect of WBSEDCL for the year 2014 – 2015, single part tariff shall be applicable for the period from 01.04.2014 to 28.02.2015 and two part tariff shall be applicable from 01.03.2015 onwards subject to the submission of draft PSA agreed by the parties, to the Commission within three months from the date of publication of the order failing which there would be a reversion to single part tariff for the aforesaid period. The above tariff order specified single part tariff for the financial years 2015 – 2016 and 2016 – 2017 at 736.67 paise / kWh and 757.30 paise / kWh respectively.</p> <p>b) It is evident from the documents that WBSEDCL, in order to comply with the direction of the Commission vide paragraph 8.14 of the tariff order dated 04.03.2015, prepared and forwarded one draft PSA to CESC on 11.05.2015, but CESC has failed to finalize the PSA within three months which was mandatory to have effect of two part tariff. It reveals that CESC has</p>
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			<p>not even put that much effort required for executing the PSA. It is also observed by the Commission that CESC neither tried to settle the matter of execution of the draft PSA submitted by WBSEDCL to CESC nor approached the Commission informing any difficulties being faced by them in executing the draft PSA, nor they have requested the Commission for extension of time for finalization of draft PSA and submission of the same to the Commission.</p> <p>c) It reveals that both CESC and WBSEDCL failed to comply with direction given in the tariff order dated 04.03.2015 in regard to submission of agreed draft PSA within the stipulated time i.e., 03.06.2015.</p> <p>d) On the other hand, both CESC & WBSEDCL mutually agreed to an arrangement which was also approved by the Department of Power & NES, Government of West Bengal vide their letter no. 124-PO/O/C-111/3R-05/2014 dated 05.06.2015 whereby CESC will purchase power from WBSEDCL to the tune of 100 MW for two months from 04.06.2015 to 03.08.2015 on two part tariff, instead of 330 MW. It transpires that this arrangement was agreed and approved after the stipulated three months from the date of issue of the order dated 04.03.2015.</p> <p>e) The Commission has approved the revised power purchase plan of CESC from WBSEDCL to the extent of 100 MW from 330 MW for the period of two months with effect from 04.06.2015 to 03.08.2015 vide its</p>
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			<p>order dated 10.08.2015.</p> <p>f) The tariff order dated 04.03.2015 specified both single part and two part tariff for 2015 – 2016 and 2016 – 2017 and mandated that for continuation with two part tariff, mutually agreed PSA categorically agreeing for continuation of two part tariff has to be submitted before the Commission within 3 months i.e., 03.06.2015. The single part tariff for the month of March, 2015 was not categorically mentioned in that order as the single part tariff for 2014 – 2015 as determined by the Commission as 571.00 paise / kWh giving an effect upto February, 2015 with a contention that two part tariff will be operative from 01.03.2015. But as the mandatory condition was not fulfilled, the Commission decides that single part tariff shall be effective for March, 2015 with the tariff as already determined for 2014 – 2015, i.e., 571 paise / kWh. The tariff order dated 10.08.2015 has never repealed the order dated 04.03.2015. Rather, it approved the revised power purchase plan on two part basis which can only be effective from 04.06.2015.</p> <p>CESC in their subsequent written submission on the query raised by the Commission has intimated that they have made number of correspondence with WBSEDCL relating to Power Supply Agreement (PSA). While going through the record it has been found that in a letter dated 23rd May, 2015 WBSEDCL has intimated that CESC has not communicated their</p>
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			<p>conditional acceptance / rejection about the draft PSA which was forwarded by WBSEDCL vide their letter dated 11.05.2015. Though there was a meeting between CMD, WBSEDCL and MD, CESC on 20.05.2015 on power drawal by CESC, as revealed from the communication of CESC to Chief Engineer (PTR) & Ex Director (RT) (Offtg.), WBSEDCL (vide their letter dated 29.05.2015), but in the said meeting there was no discussion on the draft PSA which was sent by WBSEDCL on 11.05.2015 to CESC. However in the above meeting the following was agreed upon as communicated by the above mentioned letter dated 29.05.2015.</p> <p>“Quote:</p> <p>In accordance with the decisions taken therein, CESC confirms its willingness to purchase 100 MW power (reduced from 330 MW) from WBSEDCL for a period of two months from 4 June 2015 at the following terms/ rate(s), computed in line with the order issued by the Hon'ble Commission in Case No. TP-56/13-14 for CESC Limited.</p> <ol style="list-style-type: none">An Energy Charge of 252 paise/kWh,A Fixed Charge of Rs. 771.21 lakh per month (Rs. 2545 Lakh ÷ 330 MW x 100 MW),In the event of power drawal beyond 100
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			<p>MW under exigency, a single-part tariff of Rs. 736.68 paise/kWh for the excess energy drawn (corresponding to excess power drawn over 100 MW) will be applicable,</p> <p>d. Other conditions would continue to be in terms of the aforesaid Order issued by the Hon'ble Commission.</p> <p style="text-align: right;">Unquote”</p> <p>It has also been observed that based on the above meeting dated 20.05.2015 both of them approached Department of Power, Government of West Bengal for the above arrangement and based on that Govt. of West Bengal communicated their consent by letter dated 5th June, 2015 and accordingly WBSEDCL intimated WBERC vide letter dated 08.06.2015 for kind perusal and final decision as far as the tariff determination concern.</p> <p>Now from the above it has been observed that there was lack of interest from CESC side for execution of PSA on two part tariff based on the directive of the Commission.</p> <p>Sale of Power between two licensees is beyond the purview of the Commission. However the rate for purchase of power by the licensees needs the consent of the Commission. So as such if there is no mutually agreed document like power supply agreement which has been agreed by both the parties, such agreement</p>
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Further Order in Re application submitted by West Bengal State Electricity Distribution Company Limited under section 86 of the Electricity Act, 2003 seeking direction to CESC Limited for making a payment of Rs. 82,42,87,534 arisen out of revised bills under single part tariff, at Rs. 7.3667/kWh for the months from April 2015 To July 2015 in terms of the Tariff Order dated 04.03.2015.

			<p>for two part tariff become infructuous which is also reflected in the Commission's order dated 04.03.2015. So CESC's claim for application of two part tariff based on Commission's order dated 04.03.2015 can only be implemented once the mutual agreed PSA is signed.</p> <p>However, as per mutually agreed arrangement as approved by the Government of West Bengal, two part tariff is to be considered to be effective from 04.06.2015 to 03.08.2015 and for drawal of energy in excess of 100 MW during 04.06.2015 to 03.08.2015, single part tariff as determined by the Commission in its order dated 04.03.2015 shall be applicable as it has been mutually agreed by both the parties and is in line with Commission's order dated 10.08.2015.</p> <p>21.0 With the above observations, the Commission directs the following:</p> <p>a) WBSEDCL shall raise bill to CESC for the quantum of energy sold to CESC by WBSEDCL for the month of March, 2015 on the basis of single part tariff as has been determined by the Commission in its order dated 04.03.2015 in respect of WBSEDCL for the year 2014 – 2015 upto February, 2015. The same shall be applicable for the full year i.e., upto March 2015 as well.</p> <p>b) From 01.04.2015 to 03.06.2015, WBSEDCL shall raise the bill for supplied quantity of energy to CESC for the respective year on single part basis</p>
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Further Order in Re application submitted by West Bengal State Electricity Distribution Company Limited under section 86 of the Electricity Act, 2003 seeking direction to CESC Limited for making a payment of Rs. 82,42,87,534 arisen out of revised bills under single part tariff, at Rs. 7.3667/kWh for the months from April 2015 To July 2015 in terms of the Tariff Order dated 04.03.2015.

			<p>considering the rates approved in the tariff order dated 04.03.2015 issued by the Commission in respect of WBSEDCL.</p> <p>c) From 04.06.2015 to 03.08.2015, the bills shall be raised on two part basis for the connected load of 100 MW as per the rate admitted in the tariff order dated 10.08.2015 for the year 2015 – 2016.</p> <p>d) From 04.06.2015 to 03.08.2015, bill for any additional drawal beyond 100 MW by CESC from WBSEDCL under exigency, shall be made on single part tariff as per the rate admitted in the tariff order dated 04.03.2015 for the year 2015 – 2016.</p> <p>e) WBSEDCL shall issue a fresh bill to CESC based on the directions given in (a), (b) (c) and (d) above, after adjusting the payment already made by CESC on this account, mentioning due date of payment as per the prevailing PPA, within 15 days from the date of issue of this order.</p> <p>f) CESC shall be liable to make payment of the bill duly adjusted within the time frame mentioned in the revised bill to be issued by WBSEDCL.</p> <p>22.0 With the above direction, the case is disposed of.</p> <p>23.0 Let a copy of this order be served upon WBSEDCL and CESC Limited.</p> <p style="text-align: center;">Sd/- (AMITAVA BISWAS) MEMBER</p> <p style="text-align: center;">Sd/- (RABINDRANATH SEN) CHAIRPERSON</p> <p>Dated : 11.12.2017</p>
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