

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**I.A. NO. 753 OF 2017 IN
APPEAL NO. 291 OF 2017**

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**I.A. NO. 754 OF 2017 IN
APPEAL NO. 292 OF 2017**

Dated: 26th October, 2017

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**M/s HINDALCO INDUSTRIES)
LIMITED)
Having its registered office at:)
Ahura Centre, 1st Floor, B Wing,)
Mahakali Caves Road, Andheri (East))
Mumbai – 400093)**

... Appellant

AND

**1. THE UTTAR PRADESH POWER)
CORPORATION LIMITED (UPPCL))
Represented through its Managing)
Director,)
Shakti Bhawan,)
14-Ashok Marg,)
Lucknow (UP) - 226001)**

**2. PURVANCHAL VIDYUT VITRAN)
NIGAM LIMITED)
Represented through its Managing)
Director,)
132 KV Sub-Station,)
Bhikaripur Vidyut Nagar,)
Varanasi (U.P.) – 221004)**

3. **THE UTTAR PRADESH)
ELECTRICITY REGULATORY)
COMMISSION)**
Represented through its Secretary)
Kisan Mandi Bhawan, II Floor,)
Gomti Nagar,)
Lucknow – 226010)

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Syed Shahid Husain Rizvi

Counsel for the Respondent(s) : Mr. C. K. Rai
Mr. Umesh Prasad
Mr. Mohit Rai for **R-1**

Mr. Amit Kapur
Mr. Vishal Anand
Mr. Akshat Jain
Ms. Aparajita Upadhyay for
R-2

ORDER

1. These two applications can be disposed of by a common order as they arise out of two companion appeals where the facts and issues involved are similar and wherein the same order dated 22/08/2017 passed by Respondent No.3, the Uttar Pradesh Electricity Regulatory Commission (“**the State Commission**”) is challenged.

2. Gist of the facts as stated by the Appellant needs to be noted. The Appellant company is engaged in manufacturing of Aluminium having its factory at Renusagar in State of Uttar Pradesh. The Appellant has set up its captive thermal power plant of 801 MW capacity at Renusagar to cater to the manufacturing process of Aluminium. The Appellant has constructed and maintained its own transmission lines. Respondent No.1 is Uttar Pradesh Power Corporation Ltd.(“**UPPCL**”). UPPCL is responsible for planning and managing the sector through its subsidiaries for transmission, distribution and supply of electricity in the State of Uttar Pradesh. Respondent No.2 Purvanchal Vidyut Vitaran Nigam Limited(“**PVVNL**”) is subsidiary company of UPPCL, responsible for supply and distribution of electricity business and other related activities.

3. We need to give the background of the case. The Appellant and UPPCL entered into PPA dated 12/02/2002 which *inter alia* included the terms and conditions for sale and banking of power supply from the Appellant to UPPCL and for supply of power to the Appellant from UPPCL. The said PPA was for the period from

30/06/1995 to 31/03/2004, with no limitation of adjustment of power withdrawal during peak hours against banked energy.

4. After expiry of the period of PPA dated 12/02/2002 the Appellant and UPPCL entered into PPA dated 13/05/2005 for the period from 01/04/2004 to 31/03/2009. The Appellant was continued to allow power supply upto 60,000 KW to UPPCL on 50% banking and 50% sale basis with no limitation on power withdrawal during peak hours.

5. On 13/11/2005, UPPCL and its subsidiary PVVNL filed Petition No.294 of 2005 in the State Commission for approval of PPA dated 13/05/2005. The State Commission vide its order dated 25/11/2005 disposed of the petition. The State Commission noted that there were shortcomings in the PPAs dated 12/02/2002 and 13/05/2005, but also observed that no grievance was seen between the parties. The State Commission approved PPA dated 13/05/2005 till 27/07/2005. The State Commission directed the parties to submit revised draft within two weeks in accordance with the provisions of the Electricity Act, 2003 ("**the said Act**"), the State Commission's orders and

observations. The Appellant as well as UPPCL filed review petitions. The State Commission vide its order dated 31/03/2006 allowed the Appellant and UPPCL to continue PPA dated 13/05/2005 upto 31/03/2009 to safeguard the interest of the consumers.

6. Since the term of Agreement dated 13/05/2005 was coming to an end on 31/03/2009, the Appellant vide its representation dated 03/01/2009 requested UPPCL to renew it. UPPCL vide its letter dated 28/03/2009 agreed with the Appellant. This PPA had the provision of 50% banking and 50% sale.

7. On 13/07/2009 the Appellant and UPPCL entered into another PPA dated 13/07/2009 for a further period of 5 years (i.e. from 01/04/2009 to 31/03/2014). Clause 22(A) thereof stated that the Appellant can consume 75% of banked energy of current financial year at any time during current financial year, as it requires. Balance 25% banked energy of current financial year will be consumed during subsequent financial years. There was no substantial difference between the terms and conditions

of PPA dated 13/05/2005 and PPA dated 13/07/2009 except the percentage of banking of energy.

8. The UPERC (Terms and Conditions for Supply of Power and Fixation of Tariff for sale of power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and other Non-Conventional Sources of Energy based Plants to a Distribution Licensee) Regulations 2005 (“**CNCE Regulations 2005**”) were still effective when the PPA dated 13/07/2009 was executed. The State Commission vide notification dated 22/03/2010 notified the UPERC (Captive and Non-Conventional Energy Generating Plants) Regulations, 2009 (“**CNCE Regulations 2009**”) w.e.f. 01/10/2009. Even under CNCE Regulations 2009 there was no change in the provisions regarding banking and withdrawal of energy.

9. There were deviations in the PPA dated 13/07/2009 from CNCE Regulations 2009 in respect of banking of energy, quantum and timings of withdrawal and carry forward of energy. In this regard Clause 5 of CNCE Regulations 2009 is material. It reads as under:

‘5. *Approval of Power Purchase Agreement:*

The Distribution Licensee shall make an application for approval of Power Purchase Agreement entered into with the Generating Plant in such forms and such manner as prescribed in these Regulations and UPERC (Conduct of Business) Regulations notified by the Commission from time to time.....”

10. It is the case of the Appellant that under Clause 5 quoted above the responsibility of getting the aforesaid deviations approved by the State Commission was that of UPPCL. However, in compliance of its duty under Clause 13(5) of CNCE Regulations 2009, the Appellant had written many letters to UPPCL requesting UPPCL to file the PPA before the State Commission, but it was not filed. The parties however continued to adhere to PPA dated 13/07/2009. It is the case of the Appellant that when the dispute arose in December, 2013, the Appellant filed PPA dated 13/07/2009 before the State Commission. Thus during the currency of PPA dated 13/07/2009 when CNCE Regulations 2009 were in force the State Commission had PPA dated 13/07/2009 before it.

11. It is pointed out by the Appellant that after having acted upon the PPA dated 13/07/2009 for about 50 months on 24/09/2013 the Appellant received letter dated 24/09/2013 from Executive Engineer, PVVNL the subsidiary of UPPCL enclosing therewith bills without adjustment of peak hour energy consumed by the Appellant against banked energy of the Appellant for the period of January, 2011 to August, 2013. The said letter was based on the report of the Auditor of the Comptroller and Auditor General of India ("**CAG**") issued in September, 2013. The Appellant denied the correctness of this bill. However, UPPCL continued to raise similar bills. The Appellant therefore filed Petition No.925 of 2013 before the State Commission challenging the said bills and raising of demands by UPPCL on the basis of instructions of the CAG.

12. UPPCL and PVVNL raised issue of maintainability of the petition. While the petition was pending the Appellant filed Petition No.1030 of 2015 before the State Commission on 27/07/2015 for approval of PPA dated 13/07/2009. The State Commission heard Petition No.925 of 2013 and Petition No.1030 of 2015 together and by the impugned order disposed them of.

The State Commission refused to grant the Appellant's prayer for approval of the PPA. The State Commission referred the dispute regarding impugned bills to arbitration under Section 86(1)(f) of the said Act.

13. IA No.753 of 2017 is filed in Appeal No.291 of 2017 arising out of Petition No.925 of 2013 filed by the Appellant. In this application the Appellant is seeking *inter alia* stay of the impugned order dated 22/08/2017 and stay of the impugned demand dated 25/08/2017. IA No.754 of 2017 is filed in Appeal No.292 of 2017 arising out of Petition No.1030 of 2015 filed by the Appellant, in which the Appellant has sought similar interim relief.

14. Mr. Sen learned counsel for the Appellant submitted that this is a fit case for grant of stay of the impugned order. The written submissions are filed on behalf of the Appellant. Gist of the submissions is as under:

- (a) The Appellant banks more energy in peak hours than it draws. It helps the State licensee to meet

peak demand shortage and reduces the cost of procurement of power during peak hours.

- (b) The Appellant is not engaged in sale of power. Drawl of power only takes place, in a shutdown of generation to the extent of loss of captive capacity due to shutting down.
- (c) The Appellant is making payment of demand charges of approximately Rs.12 Crores per annum although it is only using the banked power and not the power procured by UPPCL for other consumers.
- (d) The entire case of UPPCL is based on the fact that there are deviations from the regulations. Since there were deviations from the regulations the State Commission had exercised its power to relax such deviations. Failure of the State Commission in exercising the said power is challenged in this appeal.
- (e) For 50 months before CAG report UPPCL had not raised any bills and as such had accepted the

deviations. After taking advantage of the banking arrangement UPPCL cannot now take a stand that because of deviations from the regulations one portion of the PPA cannot be given effect to.

- (f) In any event, since the State Commission has sent the matter for adjudication UPPCL cannot make demand pending adjudication.
- (g) There is no dispute about the proposition laid down by the Constitution Bench of the Supreme Court in **PTC India Ltd. v. CERC**¹ that regulations override contracts. But non exercise of power to relax is the core issue in this case.
- (h) The dictionary meaning of the word 'approval' includes ratifying of the action, ratification can be given ex-post facto approval (**Bajaj Hindustan Ltd. v. State of U.P & Ors**)².
- (i) As on date about 260 MUs of electricity is banked with UPPCL at no cost and is being

¹ (2010) 4 SCC 603

² (2016) 12 SCC 613

utilised by UPPCL. The value of this energy is about 180 crores, much more than the demand currently raised. UPPCL has greatly benefited from the banking arrangement including free power to the extent of 12.5% of the injection made by the Appellant. For this reason also the stay application deserves to be allowed.

15. Mr. Kapur learned counsel appearing for Respondent No.2 submitted that no case is made out by the Appellant for grant of interim relief. Written submissions have been filed by him. Gist of the submissions is as under:

- (a) The bills disputed by the Appellant have been raised by the contesting Respondents in accordance with CNCE Regulations 2005 and CNCE Regulations 2009. It is settled law that in case of conflict between the PPA and the regulations notified under the said Act the regulations notified under the said Act would

prevail. (**PTC India Ltd. v. CERC, Odisha Power Generation Corporation Ltd. v. OERC & Ors**³).

- (b) When the PPA dated 13/07/2009 was executed the applicable regulations were the CNCE Regulations 2005. Regulations 13(11) read with Regulation 17(1) thereof mandated the captive generating plant (the Appellant) to get the PPA approved from the State Commission in case of any deviation from the model PPA. CNCE Regulations 2005 were applicable till 22/03/2010 when the CNCE Regulations 2009 were notified by the State Commission. From 13/07/2009 till 22/03/2010 the Appellant did not get the PPA approved.
- (c) Regulation 13(5) read with Regulation 17(1) of the CNCE Regulations 2009 notified on 22/03/2010 required the Appellant to ensure that the distribution licensee submits the PPA for approval before the State Commission. However, the Appellant did not address a single letter to

³ 2017 ELR APTEL 538

UPPCL requesting it to get the PPA approved. The Appellant filed Petition No.1030 of 2015 before the State Commission on 27/07/2015 seeking approval of the PPA, recognising its obligation to get the PPA approved.

(d) Unless the PPA is approved by the State Commission it would not become a binding contract.

(i) **Tamil Nadu Generation and Distribution Corporation Ltd. v. Penna Electricity Ltd.**⁴

(ii) **Rithwik Energy Generation Pvt. Ltd. v. KPTCL**⁵.

(e) Both, CNCE Regulations 2005 and CNCE Regulations 2009 provided that the energy withdrawn by captive generating plant during the peak hours will be considered as power purchased by the captive generating plant from the distribution licensee.

⁴ 2013 ELR (APTEL) 1196.

⁵ 2011 ELR (APTEL) 1651

(f) The bills for withdrawal of energy during peak hours were inadvertently not raised by the contesting Respondents. However, as soon as the discrepancy was pointed out by the auditors/CAG, the bills were regularised as per the applicable statutory framework. In this connection reliance is placed on the following:

- i) **Rototex Polyester & Anr. v. Administrator, Administration of Dadar and Nagar Haveli (U.T.) Electricity Department, Silvassa & Ors.**⁶
- ii) **Ajmer Vidyut Vitaran Nigam Ltd. v. M/s Sisodia Marble and Granites Pvt. Ltd & Ors.**⁷
- iii) **RICO Auto Industries Ltd. v. Haryana Electricity Regulatory Commission & Ors**⁸
- iv) **North Delhi Power Ltd v. Delhi Bottling Co. Ltd.**⁹

⁶ MANU/MH/0760/2009

⁷ (Judgment dated 14/11/06 passed by this Tribunal in Appeal Nos 202 & 203 of 2006)

⁸ 2007 ELR (APTEL) 1250

⁹ ILR (2009) Supp.2 DELHI 537

(g) Under Section 86(1)(f) of the said Act the State Commission has the discretion to decide as to whether the dispute should be adjudicated by itself or should be referred to an adjudicator . The State Commission has referred the billing dispute to arbitration. The Appellant cannot interfere with the discretion exercised by the State Commission.

i) **GUVNL v. Essar Power Ltd.**¹⁰

ii) **TNEB v. Neyveli Lignite Corporation**¹¹

(h) The judgement of the Supreme Court in **Bajaj Hindustan Ltd.** is not applicable to this case as facts and law involved in both the cases differ.

(i) The Appellant has failed to make out any prima facie case. Balance of convenience lies in favour of the contesting Respondents. In case stay is granted the contesting Respondents would suffer irreparable loss. Hence, the application be rejected.

¹⁰ (2008) 4 SCC 755

¹¹ 2010 ELR(APTEL) 1073

16. Mr. Rai learned counsel for the State Commission supported the State Commission's order.

17. Admittedly, the dispute involved in this appeal is for the period from 01/04/2009 till 31/03/2014. The PPA for the aforesaid period is dated 13/07/2009 executed between the Appellant and UPPCL. It is also not in dispute that for more than 50 months i.e. till September 23, 2013 the Appellant was receiving power bills monthly from PVVNL as per the terms and conditions of the PPA after adjustment of energy consumed by the Appellant (including peak hours) against banked energy of the Appellant. The Appellant made the payment regularly. It is not in dispute that PVVNL had raised monthly bills in accordance with the PPA dated 13/07/2009 and had received payment without raising any objection.

18. Admittedly, PPA dated 13/05/2005 was approved by the State Commission vide its order dated 25/11/2005 with no limitation of adjustment of power withdrawal during peak hours against banked energy. The Appellant and UPPCL signed PPA dated 13/7/2009 for a further period from 01//04/2009 to

31/03/2014 in continuation of the earlier PPA. This PPA included Clause 22 under which power could be withdrawn at any time. There is no substantial difference between PPA dated 13/05/2005 and PPA dated 13/07/2009.

19. In September 2013 the CAG issued its report for the invoicing done by UPPCL as per CNCE Regulations 2009. The material portion of the said report could be quoted:

“We noticed (December 2012) the following shortcomings in the agreement made with the Hindalco and in the billing to Hindalco by PuVVNL:

- (i) While there is no specific clause in the Agreement regarding the drawl of energy by Hindalco during peak hours, the entire Agreement is governed by CNCE Regulations of UPERC which specifically provides that Energy drawn by the Plants during Peak Hours will not be adjusted against the Banked Energy and will be considered as power purchase by Plants.*
- (ii) Energy drawn by the Hindalco during peak hours was not ascertained by PuVVNL although TOD meter was installed.*
- (iii) The PuVVNL supplied 173804001 kVAh(156423600.90 kWh) of energy to Hindalco between January 2011to December 2012, which was entirely adjusted against Banked Energy.*
- (iv) Out of above 32588250 kWh of energy was supplied to Hindalco during peak hours. This*

should have been treated as sale of energy by PuVVNL to Hindalco as per CNCE Regulations and accordingly bills should have been raised by PuVVNL. The same was not done and adjustment of this energy against the Banked Energy was wrongly permitted. The value of such energy is Rs.9.14 crore as detailed in **Annexure-I**.

- (v) The rate of power purchased for Hindalco ranged from Rs.2.02 per kWh to Rs.2.22 per kWh during 2010-11 to 2012-13, against which the rate for energy supplied by PuVVNL was between Rs.4.31 per kVAh (up to October 2012) and Rs.6.21 per kVAh (from November 2012 onwards) as approved by UPERC.
- (vi) As per clause 39(B) (ii) (a) of the CNCE Regulations, 2009 and para 22(A) of the Agreement, out of total energy supplied by the Hindalco 75 per cent of energy was to be treated as Banked Energy and balance 25 per cent was to be treated as energy sold by Hindalco to UPPCL. As against the above provisions, PuVVNL treated 100 per cent of energy supplied by Hindalco at Banked Energy in each month during the period January 2011 to December 2012.
- (vii) As per clause 39 (B) (vii) the CNCE Regulations, the Banked Energy remaining unutilised on the expiry of the following financial year was to be treated as sale to the Distribution Licensee. However, PUVVNL allowed the Hindalco to accumulate the Banked Energy every year. The Banked Energy of 9.33 crore kVAh in the month of January 2011 increased to 20.52 crore kVAh in December 2012 in spite of the adjustment of 17.38 crore kVAh of energy during this period.

Thus, due to non adherence to the provisions of CNCE Regulations, PuVVNL failed to raise the bills to Hindalco for energy supplied during peak hours which has resulted in short billing and loss of Rs.9.14 crore.

20. Based on the CAG report PVVNL for the first time raised bills from September 2013 for the period 01/04/2009 to August, 2013 and for subsequent period till 31/03/2014. The validity of the said bills was challenged by the Appellant before the State Commission.

21. The Appellant's main contentions are that PPA dated 13/05/2005 also did not provide for any limitation on withdrawal of energy during peak hours; that by its order dated 25/11/2005, the State Commission had approved the same though there was deviation from the existing CNCE Regulations; that PPA dated 13/07/2009 is not a new PPA but is merely a renewal of PPA dated 13/05/2005; that PPA dated 13/07/2009 also does not provide for any limitation on withdrawal of energy during peak hours; that therefore the approval dated 25/11/2005 would ipso facto apply to PPA dated 13/07/2009; that the State Commission should have relaxed the deviation; that post facto approval can be granted to PPA dated 13/07/2009 and that revised bills were raised by UPPCL only after CAG Audit and report though for 50 months prior thereto UPPCL had raised bills as per the applicable PPAs after adjustment of energy

consumed by the Appellant (including peak hours) against banked energy of the Appellant.

22. Before we proceed further we must note that the counsel for the Appellant has not disputed the binding nature of regulations. The law laid down by the Constitution Bench of the Supreme Court in ***PTC India Ltd v. CERC*** that regulations framed by a statutory authority will override the provisions of the agreement between the parties; that the parties cannot give a go by to the provisions of the regulations and such regulations intervene and even override the existing contracts between regulated entities inasmuch as they cast a statutory obligation on regulated entities to align their existing and future contracts with such regulations cannot be disputed. It is now necessary to quote Regulation 39(B) of the CNCE Regulations 2005 as well as of CNCE Regulations 2009:

<i>CNCE Regulations 2005</i>	<i>CNCE Regulations 2009</i>
<p><i>“39. Banking of Power</i></p> <p>...</p> <p><i>(B) Captive generating plants:</i></p> <p><i>Captive generating plants shall be allowed banking subject to following conditions:</i></p>	<p><i>“39. Banking of power</i></p> <p>...</p> <p><i>(B) Captive generating plants:</i></p> <p><i>Captive generating plants shall be allowed banking subject to following conditions:</i></p>

<p><i>(i) The withdrawal of banked energy, subject to deduction of banking charges of 12.5%, shall be allowed during the period other than 17.00 Hrs to 22.00 Hrs., specified as peak hours.</i></p> <p><i>(ii) The plant shall provide ABT compliant special energy meters and the monthly settlement of energy shall be in the following manner;</i></p> <p><i>(a) A maximum of 50% as agreed between such plants and the distribution licensee, of the energy supplied to the licensee during the day shall be considered as banked energy and the remaining as energy sold to the licensee,</i></p> <p><i>(b) Withdrawal of banked energy shall be subject to deduction of 12.5% of the banked energy as banking charges payable to the licensee,</i></p> <p>...</p> <p><i>(d) The withdrawal of banked energy shall be adjusted against the energy purchased from the distribution licensee during period other than 17 Hrs. to 22 Hrs. The balanced energy supplied by the distribution licensee shall be billed at rate of energy charges specified by the Commission, from time to time, in appropriate rate schedule of retail tariff.</i></p> <p>...</p> <p><i>(iv) The energy withdrawn by the plant, during 17.00 Hr to 22.00 Hrs, as ascertained by energy meter readings shall be considered as power purchased</i></p>	<p><i>(i) The withdrawal of banked energy, subject to deduction of banking charges of 12.5%, shall be allowed during the period other than 17.00 Hrs to 22.00 Hrs., specified as peak hours.</i></p> <p><i>(ii) The plant shall provide ABT compliant special energy meters and the monthly settlement of energy shall be in the following manner;</i></p> <p><i>(a) A maximum of 50% as agreed between such plants and the distribution licensee, of the energy supplied to the licensee during the day shall be considered as banked energy and the remaining as energy sold to the licensee,</i></p> <p><i>(b) Withdrawal of banked energy shall be subject to deduction of 12.5% of the banked energy as banking charges payable to the licensee,</i></p> <p>...</p> <p><i>(d) The withdrawal of banked energy shall be adjusted against the energy purchased from the distribution licensee during period other than 17.00 Hrs. to 22.00 Hrs. The balance energy supplied by the Distribution Licensee shall be billed at rate of energy charges specified by the Commission, from time to time, in appropriate rate schedule of retail tariff.</i></p> <p>...</p> <p><i>(iv) The energy withdrawn by the plant, during 17.00 Hr to 22.00 Hrs, as ascertained by energy meter readings shall be considered as power purchased</i></p>
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<p><i>by the plant from the licensee.</i> ...</p> <p><i>(vi) The captive plant shall be allowed to withdraw power that was banked during a particular financial year either in the same year or during the following financial year.”</i></p>	<p><i>by the plant from the licensee.</i> ...</p> <p><i>(vi) The captive plant shall be allowed to withdraw power that was banked during a particular financial year either in the same year or during the following financial year.”</i></p>
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23. The period in questions is covered by CNCE Regulations 2009. It is clear from the above quoted provisions that under both the Regulations it was specifically provided that the energy withdrawn by captive generating plant during the peak hours i.e. 17.00 hrs to 22.00 hrs will be considered as power purchased by the captive generating plant from the distribution licensee. It appears that after the CAG report it came to light that the contesting Respondents had failed to raise the bills to the Appellant for the energy supplied during peak hours as required by CNCE Regulations 2009 and hence demand dated 24/09/2013 was raised. Prima facie we feel that PVVNL was justified in sending the revised bills because CNCE Regulations 2009 will override the PPA.

24. It is submitted that PPA dated 13/05/2005 which contained similar Clause as contained in PPA dated 13/07/2009 was

approved by the State Commission vide its order dated 25/11/2005 though it similarly deviated from CNCE Regulations 2005. The State Commission should have therefore exercised the power to relax and relaxed the deviation and approved PPA dated 13/07/2009.

25. We find from order dated 25/11/2005 that the State Commission was carried away by the fact that both sides were agreeable to the existing arrangement. Prima facie we feel that such a view is not proper because the said arrangement was contrary to the relevant regulations. In our prima facie view deviation of this nature would not merit relaxation. It is important to note however that the State Commission did observe that PPA dated 13/05/2005 was not in line with the provisions made under the law. The State Commission in the circumstances granted limited approval upto 27/07/2005 and observed that thereafter the PPA be put for its approval and it shall be made in accordance with the said Act. The parties were directed to submit revised draft of the PPA for the State Commission's approval. Subsequently in review petitions filed by the parties the State Commission continued PPA dated 13/05/2005 upto 31/03/2009

to safeguard the interest of consumers. We reiterate that prima facie this approach of the State Commission does not meet with our approval. In any case the present dispute relates to PPA dated 13/07/2009. The Appellant in our prima facie opinion, in the circumstances of the case cannot draw any mileage from the fact that PPA dated 13/05/2005 was approved by the State Commission.

26. Another issue which arises in this case is regarding obligation of getting the PPA approved. It is submitted by UPPCL and PVVNL that when PPA dated 13/07/2009 was executed, the CNCE Regulations 2005 were applicable. Under Regulations 13(11) read with Regulation 17(1) of the CNCE Regulations 2005 the Appellant had to get the PPA approved from the State Commission in case of any deviation from the model PPA. It is submitted that CNCE Regulations 2005 were applicable till 22/03/2010 when CNCE Regulations 2009 were notified by the State Commission. From 13/07/2009 till 22/03/2010 the Appellant did not take any steps to get PPA dated 13/07/2009 approved. The Appellant merely wrote letters dated 15/09/2009 and 09/12/2009 to UPPCL to arrange for the approval of the PPA.

It is further submitted by PVVNL that under Regulation 13(5) read with Regulation 17(1) of the CNCE Regulations 2009, the Appellant had to ensure that the distribution licensee has submitted the PPA for approval before the State Commission. However, the Appellant did not send a single letter to UPPCL requesting it to get the PPA approved from the State Commission.

27. We are surprised and also distressed at this submission. It prima facie appears to us that both parties were aware that the PPA had to be approved by the State Commission. The appellant wrote letters dated 15/09/2009 and 09/12/2009 to UPPCL to arrange for approval of the PPA when it could have itself carried out the obligation which rested with it till 22/03/2010. It appears that as per CNCE Regulations 2009 the distribution licensee has to get the PPA approved. Instead of carrying out this obligation, UPPCL and PVVNL have made a grievance that the Appellant did not send a single letter to UPPCL requesting it to get the PPA approved. Prima facie we are at a loss to understand why UPPCL should wait for a request letter from the Appellant when it was aware of its obligation to get the PPA approved.

Both sides prima facie appear to have ignored their respective obligation.

28. It is a settled position in law that the PPA would not become a binding contract till it is approved by the Appropriate Commission. Judgments of this Tribunal in **Tamil Nadu Generation and Rithwik** can be advantageously relied upon in this connection. In the absence of any approved PPA for any power banked by the Appellant CNCE Regulations 2005 and CNCE Regulations 2009 would be applicable. Prima facie the submission of UPPCL, that inadvertently it failed to raise the bills for the energy supplied during peak hours does not appeal to us. In any case any exercise which is contrary to regulations cannot be condoned. We are prima facie of the view that in the facts of the case and considering the nature of deviation the State Commission rightly did not exercise the power to relax. In our opinion judgement of the Supreme Court in **Bajaj Hindustan Ltd.** is not applicable to this case. In that case the Supreme Court was dealing with provisions of the U.P Sugarcane (Purchase Tax) Act 1961 (“**U.P. Act**”) Sub Section (5) of Section 3-A of the UP Act stated that if the quantity of sugar is removed in violation

of Sub Section (1) of Section 3-A, there can be a penalty not exceeding 100 per cent of the sum, so paid as tax. The ex-post facto approval was allowed on the basis that there is a difference between 'approval' and 'permission'. It was held that in case of 'approval' the action holds until it is disapproved while in the other case until permission is obtained. In the present case the provisions of CNCE Regulations 2005 and CNCE Regulations 2009 notified as per the said Act are involved. The said regulations state that any changes in the Model PPA shall be subject to approval of the State Commission. Thus the facts and provisions of law in both the cases are completely different. Besides the PPA was not approved because the term of the PPA and regulations governing the PPA had expired and not only because the approval was being sought retrospectively.

29. By the impugned order the State Commission has while refusing the prayer for approval of the PPA has referred the dispute relating to impugned bills for arbitration under Section 86(1)(f) of the said Act. Prima facie we do not find any infirmity in the exercise of discretion to refer the dispute to arbitration.

30. We are informed that as per the demand raised by PVVNL about Rs. 80,81,38,721/- is payable by the Appellant. Having regard to the provisions of CNCE Regulations 2005 and CNCE Regulations 2009 and having regard to the Constitution Bench judgment in **PTC India Ltd. v. CERC**, it is not possible for us to stay the impugned order. In the circumstances the applications for stay are rejected. We however make it clear that all observations made by us in this order are prima facie observations made for the purpose of disposal of interim applications.

31. List the main appeals on **15/01/2018**.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]