

**THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO.126 OF 2016
AND
I.A. NO.282 OF 2016**

Dated : 06th April, 2017.

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

IN THE MATTER OF:-

**ODISHA POWER GENERATION)
CORPORATION LIMITED)
Zone-A, 7th Floor)
Fortune Towers, Chandrasekharapur)
Bhubaneswar - 751023) ... **Appellant(s)****

AND

- 1. ODISHA ELECTRICITY)
REGULATORY COMMISSION)
Bidyut Niyamak Bhavan, Unit-VIII)
Bhubaneswar – 751023.)**
- 2. GRIDCO LIMITED)
Bhoi Nagar, Janpath)
Bhubaneswar - 751022.)**
- 3. PRINCIPAL SECRETARY,)
Department of Energy,)
Government of Odisha)
Odisha Secretariat)
Bhubaneswar – 751 001.)**
- 4. WORLD INSTITUTE OF)
SUSTAINABLE ENERGY)
Plot No.44, Hindustan Estates, Road)
No.2, Kalyani Nagar, Pune-411 006.)**

5. **SHRI G.N. AGRAWAL**)
 Convenor-cum-Gen.Secy,)
 Sambalpur District Consumers)
 Federation)
 Balaji Mandir Bhawan)
 Khetrajpur)
 Sambalpur-768003.)
6. **SHRI PRASHANTA KUMAR DAS**)
 President, State Public Interest)
 Protection Council)
 204, Sunamoni Apartments)
 Telenga Bazar,)
 Cuttack-753009.)
7. **SHRI RAMESH CH. SATPATHY**)
 Secretary, National Institute of)
 Indian Labour, Plot No.302(B),)
 Beherasahi, Nayapalli,)
 Bhubaneswar-751012.)
8. **SHRI R.P. MAHAPATRA**)
 Retd. Chief Engineer &)
 Member(Gen.OSEB,Plot No.775(Pt.),)
 Lane-3,)
 Jayadev Vihar,)
 Bhubaneswar-751013.)
9. **SHRI ANANDA KUMAR**)
MOHAPATRA)
 Power Analyst)
 Plot NO.L-II/68, SRIT Colony,)
 Budharaja, PS-Ainthapali,)
 Dist-Sambalpur-768004.) **... Respondent(s)**

Counsel for the Appellant(s)

Mr. J.J. Bhatt, Sr. Adv.
 Mr. Sitesh Mukherjee
 Mr. Gautam Chawla
 Mr. Deep Rao

3. The Appellant was incorporated as a wholly owned Government Company of the State of Odisha with the main objective of establishing, operating and maintaining thermal power generating stations. According to the Appellant further to Power Sector Reforms undertaken in the State of Odisha in 1997, 49% of the shareholding in the Appellant was divested in favour of AES Corporation, USA with the balance 51% held by the Government of Odisha (**“GoO”**).

4. The Appellant and Respondent No.2 executed a Bulk Power Supply Agreement dated 13/08/1996 effective from 01/01/1995 (**“PPA”**) for the sale of entire quantum of power from the Appellant’s generating station to Respondent No.2 on the terms and conditions contained therein. The PPA dated 13/08/1996 was approved by GoO in exercise of its powers conferred under Section 43 of the Electricity (Supply) Act 1948 on 24/12/1996. Respondent No.2 in turn was to sell the power purchased from the Appellant to the distribution companies of Odisha through appropriate power sale arrangements.

5. According to the Appellant in tune with the Power Sector Reforms Programme to secure energy security for consumers in order to facilitate the divestment process Respondent No.2 and GoO executed a Tripartite Agreement dated 18/10/1998 providing for amendments to the PPA dated 13/08/1996 including freezing the tariff norms in the PPA for its entire term and agreeing to establish Units 3 and 4 of the Appellant's generating station ("**Tripartite Agreement**"). According to the Appellant the basis of the investment in the agreement was that the tariff norms for Units 1 and 2 would be frozen. Thereafter an Escrow and Security Agreement was executed between the Appellant, Respondent No.2 and the Union Bank of India on 30/11/1998 to secure the payment of tariff ("**Escrow Agreement**").

6. Disputes arose between the parties in respect of the enforcement of the Escrow Agreement. The Appellant invoked the writ jurisdiction of the Orissa High Court in OJC No.13338 of 2001 seeking a direction to Respondent No.2 and Central Electricity Supply Utility of Odisha ("**CESCO**") to comply with its *inter se* escrow arrangement with Respondent No.2. The

Appellant also raised a ground that the State Commission had no jurisdiction to approve the Escrow Agreement or the PPA dated 13/08/1996. In the meanwhile Respondent No.2 approached the State Commission in Case No.13 of 2002 seeking approval of the PPA dated 13/08/1996 and the Escrow Agreement which was opposed by the Appellant on the ground that the State Commission had no jurisdiction to do so. In its order dated 22/02/2005 in OJC No.13338 of 2001 the Orissa High Court held *inter alia* that the State Commission had jurisdiction to approve the PPA dated 13/08/1996 and determine the tariff for the Appellant's generating station. The Appellant challenged the said order in the Supreme Court being SLP No.6812-13 of 2005 and prayed for a stay of the Orissa High Court's order and tariff determination proceedings. The Supreme Court by its order dated 29/04/2005 stayed the tariff determination proceedings pending before the State Commission.

7. In the meanwhile, the Appellant, Respondent No.2 and GoO entered into discussions to resolve the disputes. With a view to resolving the disputes GoO constituted a task force chaired by the Chief Secretary, GoO and other top ranking officials. Based

on the recommendations of the said task force, the Department of Energy, GoO issued Notification No.7216 dated 21/06/2008 and Notification No.10061 dated 12/10/2009 to resolve all disputes between the parties *inter alia* on the condition that the PPA dated 13/08/1996 would be amended to state that the terms, conditions and norms of tariff set out at Schedule-II of the said PPA would stand frozen for its entire term. The said notification also stipulated that the Appellant and Respondent No.2 would file the amended PPA before the State Commission for its approval and withdraw the SLP pending before the Supreme Court. As a part of the settlement the Appellant agreed to invest and finance the setting up of the expansion project.

8. Pursuant to the above, the Appellant agreed to amend the PPA dated 13/08/1996 and the Tripartite Agreement in terms of Notification No.7216 dated 21/06/2008 and Notification No.10061 dated 12/10/2009. Consequently the Appellant and Respondent No.2 also executed a Supplementary Agreement dated 6/09/2012 to the Tripartite Agreement. The Appellant and Respondent No.2 also executed a Supplementary Agreement dated 19/12/2012 to the PPA dated 13/08/1996 which *inter alia*

provided that the tariff norms would be frozen for the entire remaining period of the PPA dated 13/08/1996. The relevant excerpts of the Supplemental Agreement to Tripartite Agreement which encapsulates the settlement arrived at between the Appellant, Respondent No.2 and GoO, are as under:

“... ”

(ix) The Task Force constituted by the Government of Odisha made recommendations for overall settlement of the disputes and differences and the Govt. of Odisha based on the recommendation of the Task Force, issued Notification No.7216, dt. 21.06.2008 for resolving all such disputes on terms and conditions contained therein, in regard to units 1 & 2 and also in regard to setting up of units 3 & 4, as an overall settlement of all such disputes and differences (copy of which has been annexed as Annexure-II)

...

(x) Subsequently, in consideration of the representations made by OPGC, Govt. of Odisha issued Notification No. 10061, dt. 12.10.2009 (the Second Notification, copy of which has been annexed as Annexure-III) amending the above notification dt. 21.06.2008 to further clarify specifically on the adoption of supercritical technology and sharing of power from the proposed units 3 & 4 thereof.

...

(xii) OPGC has also agreed to amend the PPA in term of the Govt. Notification dtd.21.06.2008 and amend the Tripartite Agreement after taking into consideration inter alia the Govt. Notifications dtd.21st June 2008 and dtd. 12.10.2009.

...

(xiv) The parties agree that with the execution of this Agreement the parties have settled all the pending differences between them and OPGC shall withdraw SLP No.6812-6813 of 2005 pending before the Hon'ble Supreme court of India.

1) *That Clause 8 of the Tripartite Agreement shall be substituted to read as follows:-*

“8 (a) OPGC shall take expeditious steps within its powers and control to commission Units-3&4 with adoption of super critical Technology, each having gross installed capacity of not less than 660 MW and in aggregate not less than gross installed capacity of 1320 MW and half of the generation capacity of units-3&4 shall at all times stand allocated to GRIDCO...”

9. Relevant excerpts of the Supplementary Agreement dated 19/12/2012 to the PPA dated 13/08/1996 are as under:

“(ix) The Task Force constituted by the Government of Odisha made recommendations for overall settlement of the disputes and differences and the Govt. of Odisha based on the recommendation of the Task Force, issued Notification No.7216, dt. 21.06.2008 for resolving all such disputes on terms and conditions contained therein, in regard to units 1 & 2 and also in regard to setting up of units 3 & 4, as an overall settlement of all such disputes and differences (copy of which has been annexed as Annexure-II)

...

(xi) OPGC has also agreed to amend the Existing PPA and the Tripartite Agreement after taking into consideration, inter alia, the Government of Odisha Notification dtd. the 21st June 2008

...

(xiii) The parties agree that with the execution of this Agreement the parties have settled all the pending differences between them and OPGC shall withdraw the SLP bearing No.6812-6813 of 2005 pending before the Hon'ble Supreme Court of India.

D) that for Clause 12.0 of Schedule II of the Existing PPA following clause shall be substituted, namely:-

“12.0 Revision of Tariff:

“ In order to avoid any ambiguity with regard to tariff norms and parameters for unit 1 & 2, all terms and parameters for determination of tariff for units 1&2 shall be as per this PPA as amended upto dated. All tariff parameters will stand frozen till validity of this PPA as amended upto date notwithstanding modification in tariff norms by the CERC from time to time. Accordingly all references in other provisions of this PPA to change in tariff parameters in future shall be deemed to have been deleted. The tariff shall however be subject to revision at the time of renewal, replacement or extension of this Supplementary agreement or on further enhancement of the generation capacity of units 1 and / or 2, if any”

...”

Thus all the stakeholders agreed that the tariff norms in the PPA would remain frozen for its entire term. According to the Appellant it was an incentive for the Appellant to proceed with the expansion project. It is the Appellant's case that on the basis of the agreement between the parties the Appellant withdrew its

Special Leave Petition (“**SLP**”) pending before the Supreme Court on 14/02/2013. The relevant portion of the Supreme Court’s order dated 14/02/2013 reads as under:

“Needless to say that on filing of the amended Power Purchase Agreement between the appellant – Orissa Power Generation Corporation Limited and respondent No.2 – Grid Corporation of Orissa Limited and Tripartite Agreement before the respondent No.1 – Orissa Electricity Regulatory (Commission) the Commission shall consider the same appropriately in accordance with law”.

10. In the meanwhile on 10/10/2014 the State Commission promulgated OERC (Terms and Conditions for Determination of Generation Tariff) Regulations 2014 (“**OERC Regulations**”) for control period of FY 2014-19 which provided for the tariff norms to be applied for the determination of tariff of generating stations operating in Odisha. According to the Appellant the State Commission in the OERC Regulations retained the power to determine project specific tariff for the Appellant’s generating stations.

11. On 26/02/2014 the Appellant and Respondent No.2 jointly filed the PPA dated 13/08/1996 as amended on 19/12/2012 before the State Commission for approval. By its order dated 27/04/2015 (“**the PPA Order dated 27/04/2015**”) the State

Commission accorded its approval to the PPA dated 13/08/1996 (as amended on 19/12/2012) and the amendments.

12. In the PPA order dated 27/04/2015 with regard to the tariff for FY 2014-15 and FY 2015-16, the State Commission noted that it had already approved the tariff for the Appellant's generating station as part of Respondent No.2's Annual Revenue Requirement ("**ARR**") and that there was no need to re-open the same under the OERC Regulations. After approving the PPA dated 13/08/1996 and its amendments, the State Commission directed the Appellant to file an application for tariff determination for rest of the control period starting from FY 2016-17 onwards since the tariff for the FY 2014-15 and 2015-16 has already been approved by the State Commission in the ARR of Respondent No.2 for the said year based on the submission of Respondent No.2.

13. In compliance with the PPA order dated 27/04/2015 the Appellant approached the State Commission for the determination of its generation tariff for FY 2016-17 vide its application dated 05/12/2016 on the basis of norms set down in

the approved PPA. According to the Appellant by the impugned order, the State Commission wrongly determined the tariff for the Appellants' generating stations applying the tariff norms stipulated in the OERC Regulations.

14. We must now go to the rival contentions. We have heard Mr. Bhat, learned senior counsel appearing for the Appellant. We have perused the written submissions filed by him. Gist of the submissions is as under:

- a) The impugned order is completely at variance with the State Commission's own PPA order dated 27/04/2015 approving the Bulk Power Supply Agreement dated 13/08/1996 as amended by Supplementary Agreement dated 19/12/2012, whereby the terms and conditions of the Appellant's tariff were frozen for the entire term of the PPA i.e. till 30/06/2026.
- b) Despite unconditionally approving the terms and conditions of the Appellant's tariff in the PPA, the State Commission proceeded to apply a different set of terms and conditions of tariff under the OERC Regulations.

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- c) Respondent No.2 and GoO have submitted that they agree with the terms and conditions of tariff prescribed under the PPA.
- d) In the PPA order dated 27/04/2015, the State Commission has directed that the parties should settle the power purchase process for the period prior to implementation of the OERC Regulations taking into account the original PPA and its supplemental one as approved by it. This cannot be interpreted to mean that the PPA and the terms and conditions of tariff as set out therein were approved only for the period prior to 31/03/2016 but could only imply that the tariff for such period would not be reopened by the State Commission.
- e) The determination of terms and conditions of tariff is an exercise which is different from actual tariff determination. (See: **PTC India Ltd. v. Central Electricity Regulatory Commission**¹.)
- f) In paragraph 11, the State Commission notices Regulations 1-4 of the OERC Regulations and concludes that it need not reopen the actual tariff in respect of periods prior to the

¹ (2010) 4 SCC 603

approval of the PPA i.e. from F.Y. 1996-97 to 2015-16. There is no observation in paragraph 11 that the PPA and the specified terms and conditions of tariff therein are not being approved for future periods. Thus, paragraph 11 pertains only to the tariff for past periods and nothing more.

- g) If the OERC Regulations were to be rightly interpreted, it would have been possible for the State Commission to direct the Appellant to file an application for tariff determination for F.Y. 2014-15 and F.Y. 2015-16 as well. The State Commission did not embark on this exercise. Therefore, it relied on its power under Regulation 2.13 by exempting the parties from approaching the State Commission in F.Y. 2014-15 or F.Y. 2015-16. However, the State Commission has directed the Appellant to make an application for tariff determination each future year as per the approved PPA.
- h) The clauses in the PPA make it clear that the parties had agreed to file a one-time joint application praying for the approval of PPA. Accordingly a joint application was filed by them. It culminated in the PPA Order dated

27/04/2015, which approved the PPA with a specific clause that the terms and conditions of the Appellant's tariff would remain frozen for the entire term. The State Commission accepted the prayer made by the Appellant for determination of tariff as per the approved PPA.

- i) The applicability of the terms and conditions of tariff in the PPA would mean that terms and conditions of tariff would remain constant, but not the tariff. The tariff would be subject to prudence check.
- j) When a Commission accords its approval to a PPA, all terms of the PPA are declared to be reasonable and enforceable (See: **Tata Power Co. Ltd. v. Reliance Energy Ltd. & Ors.**²) Therefore, it is not possible to hold that PPA was only approved in respect of past periods.
- k) It is incumbent on the State Commission to record reasons as to why its previously approved terms and conditions require alteration.
- l) The OERC Regulations contain certain carve outs for the Appellant's generating station. Therefore, the PPA order

² (2009) 16 SCC 659

dated 27/04/2015 was passed in exercise of the State Commission's power under the OERC Regulations approving separate norms for the Appellant's generating station. However, by the impugned order, the State Commission has sought to overturn the PPA order dated 27/04/2015.

- m) The State Commission had the benefit of the OERC Regulations while considering the joint application for approval of PPA. It exercised its power to approve a separate set of norms. The State Commission cannot do away with the Appellant's PPA by stating that the OERC Regulations override the PPA.
- n) The State Commission exercised its power under the OERC Regulations to fix specific tariff norms for the Appellant by approving the tariff norms set out in the PPA and freezing the same for the entire term upto 30/06/2026. The State Commission was therefore *functus officio* under the OERC Regulations to apply any other tariff norms. (See: **Tata**

Power Trading Co. Ltd. v. Maharashtra Electricity Regulatory Commission & Ors.³⁾

- (o) In the alternative, it is submitted that Electricity Regulatory Commissions are vested with the power to re-determine tariff (See: Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd.⁴⁾). The State Commission may exercise its power to re-determine tariff, if there is a change of circumstances which gives rise to overarching public interest. The State Commission has not stated how public interest would be better served if the terms and conditions of tariff under PPA were rejected.
- (p) The OERC Regulations were available even prior to the passing of the PPA order dated 27/04/2015. If the tariff norms under the OERC Regulations were more efficient as alleged, there was no need to approve the PPA with the specified terms and conditions of tariff. So the argument that public interest will be served by having norms prescribed under the OERC Regulations is misconceived.

³ Order dated 26/08/2011 in Appeal No.87 of 2010

⁴ 2016-8-SCC 743

- (q) The impugned order does not say how public interest will be served if the terms and conditions of tariff under the PPA are disregarded. Cheaper tariff is in public interest is a complete misunderstanding of the provisions of the said Act. A large number of efficiency and commercial considerations have to be borne in mind while determining tariff. If the submission that every instance of reduction in tariff would serve public interest is accepted, the rights of all generating companies would be set at naught.
- (r) In view of the above submissions the appeal deserves to be allowed.

15. We have heard Mr. Sen learned counsel appearing for the State Commission. We have perused the written submissions filed by him. Gist of the submissions is as under:

- (a) The Appellant by insisting that two parties can enter into a contract freezing the terms and conditions of the contract is in effect contending that it is immune from any regulatory interference in terms and conditions of the contract. This submission is contrary to Section 86 of the said Act and Regulation 2.7 of the OERC Regulations, which vest the

power to review agreements in the State Commission. Parties cannot contract against the statutory provisions (see: **AVM Sales Corpn. V. Anuradha Chemicals Pvt. Ltd.**⁵, **IRCON International Ltd. v. National Building Construction Corpn. Ltd.**⁶).

- (b) Regulations are akin to statutes (**St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Anr.**⁷).
- (c) Regulation 2.1 of the OERC Regulations gives overriding power to the State Commission. It can review even an approved PPA.
- (d) The State Commission is bound by its regulations. It has no discretion left. (**PTC India Ltd.**)⁸
- (e) The State Commission is not bound by any agreement between the parties as it is a statutory body. There is no policy direction issued by the Government under Section 108 of the said Act. In any case the State Commission has to ensure that the said Act and the regulations made

⁵ (2012) 2 SCC 315

⁶ MANU/DE/223/2008

⁷ (2003)3 SCC 721

⁸ (2010) 4 SCC 603

thereunder are not violated. (**Tamil Nadu Electricity Consumer's Association v. Tamil Nadu Electricity Regulatory Commission**)⁹

- (f) The approval dated 27/04/2015 was only for the past transactions for the period prior to the implementation of the OERC Regulations. The State Commission did have the power to interfere even with the past transactions but it chose to accept the transactions as encapsulated in the PPA. The approved PPA contained a requirement of consent/approval from the State Commission. Assuming that as per the approved PPA, the tariff parameters were frozen for 25 years, even then it had the power to review its own orders from time to time as per Regulation 2.7.
- (g) In **Gujarat Urja Vikas Nigam**¹⁰ the Supreme Court has held that the courts must lean in favour of flexibility and not read inviolability in terms of the PPA.
- (h) An agreement involving a private party and the Government authorities cannot bind the State Commission.

⁹ 2014 SCC on line APTEL 15

¹⁰ (2016 Online SC 659)

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- (i) The Appellant has placed erroneous, interpretation on Regulation 2.7. Regulation 2.7 is interpreted to mean that the State Commission can act de hors the regulations. This interpretation is wrong because the State Commission being a creature of the statute is required to act within the four corners of the statute (see: **V.K. Ashokan v. Asstt. Excise Commission and Ors**)¹¹. This regulation gives a power to the State Commission to review.
- (j) The OERC Regulations are based on empirical studies of Central Electricity Authority (“**CEA**”) and Central Electricity Regulatory Commission (“**CERC**”). They set norms to bring about certainty and efficiency in fixation of tariff.
- (k) If the Appellants contentions are accepted, it would have an additional tariff impact of about Rs.25.36 crores (9.82 paise per unit) which would have to be recovered from Respondent No.2 and consequently from the consumers of the State.
- (l) The Appellant enjoys an average profit of 35% of the turnover. Through this appeal the Appellant is attempting to resist inclusion of parameters which would incentivize

¹¹ (2009)-14 SCC 85

efficiency in the plant and which would also be in public interest.

- (m) The tariff in the present case is cost plus tariff. The actual cost and parameters have not been disputed by the Appellant. The Appellant cannot therefore claim more than the return on equity permissible under the PPA/Notification dated 30/03/1992. It is not the Appellant's case that by the impugned tariff it will not get the permissible return on equity.
- (n) In view of the above there is no merit in the appeal and hence the appeal be dismissed.

16. We have heard Mr. Mehta learned counsel appearing for Respondent No.2. We have perused the written submissions filed by him. Gist of the submissions is as under:

- (a) On the basis of the impugned Generation Tariff Order dated 21/03/2016, the State Commission has passed the Bulk Supply Price as well as Retail Supply Tariff Orders of the same date for FY 2016-17. All the orders have been in operation for more than half of the

Financial Year 2016-17. Though the impugned order was passed on 21/03/2016, the appeal was filed on 16/05/2016. Any interference with the impugned order will have a cascading effect on the said orders. Those orders will become unworkable.

- (b) From the PPA order dated 27/04/2017 it is clear that for the period upto FY 2015-16 the power purchase had to be settled between the parties as per the approved PPA.
- (c) In accordance with the OERC Regulations for the period from FY 2016-17 the Appellant had to file an application for determination of tariff as per the approved PPA.
- (d) The Appellant can either rely on the PPA or on the regulations as a whole. The Appellant cannot pick and choose the provisions of the PPA and regulations which are favourable to it.
- (e) The Appellant has relied on Regulation 3.40 – Additional Capitalisation after cut-off date, Regulation 4.26 and 4.27 – Interest on Working Capital and Regulation 4.34 – Computation of landed cost of fuel on the plea that

there are no specific provisions in the approved PPA regarding the items covered by the said regulations. This is incorrect.

- (f) As far as Interest on Working Capital and Computation of landed cost of fuel is concerned, each year the Appellant is claiming the same as per the Tariff Format in line with the PPA and the same is being acknowledged by Respondent No.2.
- (g) Tariff Regulations framed by the State/Central Commission from time to time for Generators under the Cost Plus Tariff, do have the provision of Additional Capitalisation along with stringent Operating Norms to maintain a balance between the cost incurred in Thermal Units and benefits availed by the ultimate consumers.
- (h) PPA dated 13/08/1996 was signed in line with the MoP Notification dated 30/03/1992, wherein relaxed norms were fixed and there was no scope for Additional Capitalisation. However, for tariff determination

purpose, actual or normative operational parameters whichever was lower was to be considered.

- (i) The Appellant has to choose either the PPA or the regulations and not the best of both. If the Appellant decides to go by the provisions of the PPA only, it shall have to withdraw all its claims made on Respondent No.2 till date under any other regulations, laws, rules etc and the Appellant cannot make any such claims on Respondent No.2 in future till validity of the PPA.
- (j) Clause 12 of the PPA only excludes the applicability of the CERC norms. It does not exclude the OERC Regulations. Since the OERC Regulations came into force in 2014, in PPA Order dated 27/04/2015 the State Commission directed that in view of the regulations with effect from 2016-17, the Appellant will file application for determination of tariff every year.
- (k) The OERC Regulations came into force on 10/10/2014. The PPA was approved by the State Commission on 27/04/2015. The PPA had not been approved prior to enforcement of the OERC Regulations. As per

Regulation 1.4 and 1.5 of the OERC Regulations terms and conditions of the said regulations shall be applicable for determination of tariff of the Appellant.

- (l) It is wrong to suggest that as a consequence of the impugned order the Appellant will suffer annual loss of Rs.73 crore. As per the Annual Report of the Appellant for FY 2014-15 the Appellant had a net profit of Rs.150 crore after tax. The equity of the Appellant being Rs.450 crore, the Return on Equity comes to 33% which is far in excess of 16% Return on Equity provided under the PPA/Notification dated 30/03/1992.
- (m) The submission that the Appellant supplies cheapest Thermal Power in Odisha is misconceived as there are other sources of power cheaper than the Appellant.
- (n) Without prejudice to the above it is stated that the lower tariff of the Appellant is for the reason that the loan component of the Project cost has already been paid by Respondent No.2 and the entire depreciation of the Fixed Assets has already been recovered. Moreover, the

Appellant is getting the required quantity of coal at a cheaper rate.

- (o) Tariff in the present case is a Cost Plus tariff. The actual cost and parameters have not been disputed by the Appellant. The Appellant cannot, therefore, claim anything more than the RoE permissible under the PPA/Notification dated 30/03/92/Regulation. It is not the Appellant's case that by the impugned tariff the Appellant will not get the permissible RoE.
- (p) In view of the above there is no substance in the appeal. The appeal be therefore dismissed.

17. Additional written submissions have been filed by the Appellant. Its gist is as under:

- (a) The Appellant is not trying to oust the jurisdiction of the State Commission. The Appellant had itself submitted to the jurisdiction of the State Commission. The State Commission approved the PPA after the promulgation of the OERC Regulations. The PPA Order dated 27/04/2015 was passed under the OERC Regulations to approve separate

norms for the Appellant. By proceeding to apply the OERC Regulations the State Commission has rendered the PPA Order dated 27/04/2015 a nullity.

- (b) The Appellant is subject to the State Commissions prudence check. It is not immune from the State Commission's regulatory jurisdiction.
- (c) GoO constituted a task force to resolve the dispute between the parties. It issued notifications for the same purpose. Pursuant thereto, the parties entered into agreements and the State Commission unconditionally approved the PPA. GoO even made a statement before the State Commission that it would be prudent to preserve the terms of the settlement. All this makes it clear that GoO had given a policy direction under Section 108 of the said Act to honour the terms of the PPA in public interest.
- (d) The operative direction in paragraph 11 of the PPA Order dated 27/04/2015 was to the parties to settle their tariff accounts in contradistinction to the State Commission exercising its power to actually determine the tariff for F.Y. 2014-15 and F.Y. 2015-16.

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- (e) In **Bangalore Electricity Supply Co. Ltd. v. Konark Power Projects Ltd. & Ors.**¹², the Supreme Court has held that the terms agreed to by the parties in the PPA would remain in force without any alteration for the period set out therein. In this case, the State Commission deemed it reasonable to approve the project specific terms and conditions of the PPA as opposed to rejecting them and simply applying the terms and conditions of tariff under the OERC Regulations.
- (f) Regulation 2.7 does not deal with power of the State Commission to review agreements which will in turn determine tariff.
- (g) The impugned order does not speak about how public interest will be served if the terms and conditions of tariff under the PPA are disregarded.
- (h) Implementation of tariff norms under the PPA is in public interest. The Appellant is ranked amongst the top performing plants in the country.
- (i) The Appellant's RoE is 13.3% which is much lesser than the normative 16% return on equity. The Appellant's RoE for

¹² (2015) SCC Online SC 1089

2013-14 was only 8.7% and that of 2015-16 (provisional) is 9.6%. With the current trend of increased O&M costs and expenditure with this RoE, it will be difficult to meet even the cost of generation in coming years. Hence, the appeal deserves to be allowed.

18. GoO has adopted the submissions advanced by Respondent No.2.

19. We have narrated the facts of this case in great detail. We have also reproduced the relevant extracts from the Supplementary Agreement dated 19/12/2012 and the PPA dated 13/08/1996. These documents reveal following facts which are crucial to this case.

- (a) On 13/08/1996, Bulk Supply Agreement effective from 01/01/1995 was executed between the Appellant and Respondent No.2.
- (b) On 18/10/1998, the Appellant, Respondent No.2 and GoO executed a Tripartite Agreement providing for amendment of PPA dated 13/08/1996, including the freezing of the tariff norms in the PPA for its entire term.

- (c) Dispute arose between the parties. The Appellant filed SLP in the Supreme Court.
- (d) On 07/05/2007, GoO issued a resolution by which a Task Force was constituted to resolve the disputes.
- (e) On 21/06/2008 and 12/10/2009, the GoO issued notifications to resolve the disputes. The notifications stated that PPA dated 13/08/1996 would be amended to state that the terms, conditions and norms of tariff set out at Schedule II of the said PPA would stand frozen for its entire term; the Appellant and Respondent No.2 would file amended PPA before the State Commission for its approval and the Appellant would withdraw the SLP filed in the Supreme Court.
- (f) On 06/09/2012, the Appellant, Respondent No.2 and GoO executed a Supplemental Agreement dated 06/09/2012 to the Tripartite Agreement dated 18/10/1998 which stated that the Appellant had agreed to amend the PPA and the Tripartite Agreement in terms of the notifications.

- (g) On 19/12/2012, pursuant to the above notifications, Respondent No.2 and the Appellant executed a Supplementary Agreement dated 19/12/2012 to the PPA dated 13/08/1996 which inter alia provided that the tariff norms would be frozen for the entire remaining period of the PPA dated 13/08/1996.
- (h) On 14/02/2013, pursuant to the agreement between the parties, the Appellant withdraw the SLP filed in the Supreme Court.
- (i) On 26/02/2014, the Appellant and Respondent No.2 filed a joint application before the State Commission seeking inter alia the State Commission's approval for the PPA dated 13/08/1996 and the amending Supplementary Agreement dated 19/12/2012. The Appellant also prayed that on approval of the said agreements, the Annual Tariff in respect of Unit 1 and 2 of the Appellant may be determined as per the terms of the approved PPA.
- (j) On 10/10/2014, the State Commission promulgated the OERC Regulations for the control period of F.Y. 2014-19. The OERC Regulations provided for the tariff norms to be

applied for the determination of tariff of generating stations operating in Odisha.

20. The PPA Order dated 27/04/2015 passed on the joint application filed by the Appellant and Respondent No.2 *inter alia* for approval of PPA dated 13/08/1996, as amended on 19/12/2012 has a great relevance to the issues involved in this case and hence needs to be discussed in depth. In this order, the State Commission noted that the PPA provided for settlement of issues if any which may arise due to implementation of the PPA in future on the basis of mutual discussion keeping intent and objects of the PPA intact and, hence, it has no objection to approve the PPA including its amendments for purchase of power from Unit 1 and 2 of the Appellants generating station.

21. The State Commission noted that it has published the OERC Regulations on 10/10/2014 for control period of F.Y. 2014-19 which were to remain in force till 31/03/2019 unless reviewed earlier or extended by the State Commission.

22. The State Commission noted Regulation 1.4. Proviso thereof states that where the State Commission has, at any time,

prior to the notification of the OERC Regulations approved a PPA or arrangement between a generating company and a beneficiary or has adopted the tariff contained therein for supply of electricity from an existing generating station then the tariff for supply of electricity by the generating company to the distribution licensee shall be in accordance with such PPA or arrangement for such period as may be so approved or adopted by the State Commission to the extent of existing Installed Capacity as contained in the PPA. After quoting Regulation 1.4, the State Commission observed that since the power purchase by Respondent No.2 from Unit 1 and 2 of the Thermal Power Station has been continuing as per mutual agreement without approved PPA and the State Commission has approved the same in the ARR of Respondent No.2 for the concerned year, there is no need to reopen the same as per Regulation 1.4. The State Commission observed that the parties should, therefore, settle the power purchase process for the period prior to implementation of the OERC Regulations i.e. prior to 10/10/2014, taking into account the original PPA and its supplemental PPA as approved.

22. The State Commission then referred to Regulation 2.7 of the OERC Regulations which *inter alia* provides that the existing

generation plants of the Appellants may make an application as per the Format prescribed by the State Commission for redetermination of tariff in respect of the units of the generating station completed or projected to be completed within six months from the date of completion. In light of Regulation 2.7 read with Regulation 7.13, the State Commission observed that the Appellant shall make an application before the State Commission as per the approved PPA each year for determination of tariff for the rest of the control period starting from F.Y. 2016-17 onwards since the tariff for F.Y. 2014-15 and 2015-16 has already been approved by the State Commission in the ARR of Respondent No.2 for the said year based on the submission of Respondent No.2.

24. Pursuant to the PPA Order dated 27/04/2015, the Appellant filed application for determination of generation tariff of its 2x210 MW power stations for the financial year 2016-17 under Sections 62 and 86 of the said Act read with the OERC Regulations, which was numbered as Case No.53 of 2015. The Appellant sought determination of tariff as per the PPA dated 13/08/1996 as amended on 19/12/2012, approved by the State

Commission vide PPA Order dated 27/04/2015 and not as per the OERC Regulations.

25. By the impugned order, the State Commission determined the tariff applying the norms stipulated in the OERC Regulations and not as per the norms of the approved PPA. It is now necessary to have a look at the State Commission's reasoning in the impugned order. The impugned order states that Respondent No.2 as well as the objectors submitted that the OERC Regulations have universal applicability and greater legal force than the PPA executed between the Appellant and Respondent No.2. It was pointed out that similar PPAs were also executed between Respondent No.2 and other Thermal Power Station and Power Station of OHPC earlier, but after promulgation of the said Act, and consequential regulations all such parameters mentioned in the respective PPAs were modified as per the rules and regulations framed in pursuance of the said Act and therefore departure from the regulations is unjustified. The State Commission while accepting this submission reiterated what it has said in its order dated 27/4/2015. The State Commission's reasoning could be summarised as under:

- (a) The norms followed in the OERC Regulations are set on the basis of empirical studies by CEA and CERC etc and on the basis of views of different stakeholders.
- (b) The norms are set to bring about certainty and efficiency in the fixation of tariff which is ultimately passed on to the consumers.
- (c) Any bilateral agreement which is beyond the scrutiny through regulations by the beneficiaries who are the consumers of the State cannot be accepted by the Commission since it violates Section 61(b), (c) and (d) of the said Act.
- (d) The said Act is a comprehensive piece of legislation. Cherry picking of the provisions of the said Act would lead to chaos in the Regulatory regime.
- (e) When a cost plus tariff is determined under a particular provision of the said Act and its related policies it is not possible to overlook other provisions of the said Act to the advantage of the Appellant.

- (f) Agreements cannot override statutory provisions. The Appellant cannot take shelter of the agreement to insulate itself from the statutory norms.
- (g) The notification of the Government dated 21/06/2008 also favours tariff fixation in line with the CERC Regulations in absence of any regulations by the State Commission.
- (h) Since in the meantime the OERC Regulations have come into force the State Commission has to be guided by them.

26. The moot question that arises in this case is whether the State Commission was required to fix the tariff in accordance with the terms and conditions set out in the approved PPA or in accordance with the norms set out in the OERC Regulations.

27. We must begin with the relevant judgments of the Supreme Court. The OERC Regulations have been framed by the State Commission under Section 181 of the said Act. They are made under the authority of delegated legislation. In **PTC India Ltd.** the Constitution Bench of the Supreme Court has discussed the nature and scope of regulations made by the Appropriate

Commission. The Supreme Court clarified that when there is a regulation in the field the Appropriate Commission is bound by it and it has no discretion left in the matter. In that case the Supreme Court was dealing with regulations made by the Central Commission under Section 178 of the said Act. Needless to say that the observations of the Supreme Court will be applicable to the regulations made under Section 181 of the said Act also. Relevant paragraphs of the said judgment could be advantageously quoted:

“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition 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.....

56. 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 regulations under Section 178.

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58. *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 recognised for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation made 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).”*

28. From the above paragraphs following propositions can be deduced:

- (a) While exercising the power to frame the terms and conditions for determination of tariff under Section 178 or 181 of the said Act the Central Commission or the State Commission has to be guided by the factors specified in Section 61. If a regulation is made under Section 178 or 181 of the said Act, 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 or 181 of the said Act.

(b) A regulation under Section 178 or 181 of the said Act has the effect of interfering with and overriding the existing contractual relationship.

(c) A regulation under Section 178 or 181 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contract including PPAs which have got to be aligned with the said regulation.

29. We may also usefully refer to the following observations of the Supreme Court in **St. Johns Teachers Training Institute**, where the Supreme Court has held that the regulations are akin to a statute:

“10. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the Rule, after coming in to force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and Regulations made by reason of the specific power conferred by the Statutes to make Rules and Regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the

Statute. The process of legislation by departmental Regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of Rules and Regulations is conferred by parliament. The main justification for delegated legislation is that the legislature being over burdened and the needs of the modern day society being complex it cannot possibly foresee every administrative difficulty that may arise after the Statute has begun to operate. Delegated legislation fills those needs. The Regulations made under power conferred by the Statute are supporting legislation and have the force and affect, if validly made, as the Act passed by the competent legislature.”

30. In light of the above law laid down by the Supreme Court we have no hesitation in observing that the OERC Regulations are binding on the State Commission. Once they occupy the field framing of the terms and conditions for determination of tariff under Section 61 of the said Act has to be in consonance with them. Tariff determination has to be in accordance with such terms and conditions. In this connection it is necessary to refer to Regulation 2.1 of the OERC Regulations. It reads thus:

“2.1 Notwithstanding anything contained in these Regulations, the Commission shall at all times have the authority either on suo motu basis or on a Petition filed by the applicant, to determine the tariff, including terms and conditions thereof, of any generating company.”

Regulation 2.1 as can be seen is the plenary power of the State Commission which can be exercised notwithstanding anything contained in the OERC Regulations. The State Commission has therefore overriding power. Keeping this in mind we shall proceed further.

31. As we have already noted the Appellant, Respondent No.2 and GoO arrived at a consensus. The disputes between the Appellant and Respondent No.2 were settled. GoO played a major role in that by constituting a task force and issuing notifications pursuant to the recommendations of the task force. The Appellant, Respondent No.2 and GoO executed an amendment to the Tripartite Agreement based on the said notifications. The Appellant executed a supplementary agreement dated 19/12/2012 to the PPA dated 13/08/1996 amending PPA dated 13/08/1996. By this amendment *inter alia* it was provided that the tariff norms would be frozen for the remaining period of the PPA dated 13/08/1996. Pursuant to this the Appellant withdrew its SLP in the Supreme Court.

32. From the above events it is clear that the freezing of the tariff norms was an important term of the settlement between the Appellant and Respondent No.2. The State Commission had no role to play in it. It would not be possible for us to hold that such private agreements bind the State Commission. On 26/02/2014 the Appellant and Respondent No.2 filed a joint application before the State Commission for approval of the amended PPA. The State Commission approved the amended PPA by PPA order dated 27/04/2015. Till then it was not in the loop. The Appellant's contention is that because the amended PPA was approved by the State Commission and the Appellant was directed to make application for determination of tariff as per the approved PPA, the State Commission ought to have applied the tariff norms prescribed under the PPA. We are unable to accept this submission. Because the State Commission approved the amended PPA, the Appellant does not acquire immunity from regulatory interference in the terms and conditions of the amended PPA. We shall soon refer to **Tarini** which will substantiate this conclusion. Besides it bears repetition to state that the OERC Regulations framed by the State Commission under the authority of delegated legislation must be followed once

they are in the field. Any approach contrary to this will be in the teeth of **PTC India** and cannot be countenanced.

33. It was submitted by the Appellant that the Appellant is not contracting out of statute. The Appellant remains subject to the prudence check of the State Commission in every tariff determination cycle. It is submitted that tariff shall not remain constant only the terms and conditions for determination of tariff shall remain constant. We are not impressed by this submission. The insistence of the Appellant that terms and conditions of the tariff contained in the PPA cannot be changed and shall remain frozen for the rest of the period of the PPA itself, establishes that the Appellant wants to stay outside the regulatory framework of the State Commission. The Appellant is pleading inviolability in terms of the PPA. The said contention was expressly rejected by the Supreme Court in **Tarini**. Following are the relevant paragraphs of the said judgment.

“16. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of the PPA in the case of Junagadh. That part, modification of the

tariff on account of air cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory.

17.As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in Sri Venkata Setaramanjaneya Rice & Oil Mills v. State of A.P. (supra). K. Ramanathan v. State of T.N.(supra) and D.K. Trivedi & Sons v. State of Gujarat (supra) the power of regulation is indeed of wide import. The following extracts from the reports in the above cases would illuminate the issue.

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21. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898.....”

34. The Appellant has relied on the judgment of the Supreme Court in **Bangalore Electric Supply Co.Ltd v. Konark Power**

Projects Ltd.¹³ where the Supreme Court has held, in the facts of that case, that the State Commission has no authority to vary the tariff agreed between the parties under the approved PPA. The said judgment, in our opinion, is not applicable to the present case as it turns on its own facts. Pertinently, in **Tarini** while leaning in favour of flexibility of the terms of the PPA the Supreme Court distinguished **Konark Power** and observed that it is necessary to note the context in which the bar of a review of the terms of a PPA was found by the Supreme Court. The Supreme Court clarified that in that case it had held that it was beyond the power of the State Commission to vary the tariff fixed under the approved PPA in view of the specific provisions in the relevant regulations which specifically excluded PPA concluded prior to the date of notification of the said regulations. It is clear therefore that **Konark Power** does not help the Appellant. In view of the authoritative pronouncement of the Supreme Court in **Tarini** it is not possible for us to hold that the State Commission had become *functus officio* after approving the amended PPA vide the PPA order dated 27/04/2015. The State Commission's regulatory jurisdiction cannot be avoided in this

¹³ (2016) 13 SCC 515

manner. The State Commission always retains its control over the PPA and can vary its terms and conditions if public interest so demands.

35. It is submitted that in **Tarini** the Supreme Court leaned in favour of flexibility in terms of the PPA on the ground of public interest. It is submitted that public interest is not pleaded and not even referred to by the State Commission. It is true that the State Commission has not in so many words cited public interest as the reason for following the norms set out in the OERC Regulations. But it has said that the norms followed in the OERC Regulations are based on the empirical studies conducted by the CEA, the CERC and views of different stakeholders. The State Commission has further observed that these norms are set to bring about certainty and efficiency in the fixation of tariff which is ultimately passed on to the consumers. These are very meaningful observations. Consumer interest has weighed with the State Commission which is but a facet of public interest.

36. It is contended by the Appellant that task force recommendations, GoO Notifications and GoO's stand in different

tariff proceedings make it clear that GoO has given a policy direction to the State Commission under Section 108 of the said Act to honour the terms of the PPA. The State Commission is bound by the said policy direction. We are unable to read any policy direction in the agreements or notifications issued by the GoO. In any case Section 108 (1) states that in 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 it to it in writing. Thus the directions issued by the State Government in matters of policy involving public interest have a guiding force. Undoubtedly the State Commission should follow them. But it is the duty of the State Commission to see that the provisions of the said Act and the regulations issued by it which are binding on it are followed. Any policy direction which transgresses or overrides the same cannot have guiding force. In this case the State Commission is bound by the OERC Regulations and has preferred the norms set out therein for the reason that they are based on studies of CEA and CERC and are bound to introduce certainty and efficiency in tariff fixation which is ultimately passed on to the consumers. In our opinion the State Commission has thus indicated that following

the said norms is in public interest and has followed them. We cannot fault the State Commission for it.

37. The Appellant is heavily relying on the PPA order dated 27/04/2015. The submission that by the PPA order dated 27/04/2015, the State Commission approved the amended PPA and directed that the Appellant shall make an application before the State Commission as per the approved PPA for determination of tariff implies that the approval was for the entire period of the PPA and therefore for the entire period of the PPA the terms and conditions specified in the PPA would be applicable for tariff determination deserves to be rejected. The PPA order dated 27/04/2015 is very clear. The State Commission has observed that since the power purchase by Respondent No.2 from Unit 1 & 2 of the Thermal Plant of the Appellant had been continuing as per mutual agreement without approved PPA and the State Commission had approved the same in the ARR of Respondent No.2 for the concerned year, there is no need to reopen the same. The State Commission has further observed that the parties should settle the power purchase process for the period prior to implementation of the OERC Regulations taking into account the

original PPA and its supplemental PPA as approved. Thus specifically power purchase prior to the coming into force of the OERC Regulations was kept outside the purview of the OERC Regulations. This direction makes it clear that the amended PPA approved by the State Commission vide the PPA order dated 27/04/2015 was applicable to the period prior to the coming into force of the OERC Regulation. Power purchase transactions covered by this period were to be settled as per the terms and conditions of the approved PPA. It is implicit in this that for the rest of the period different treatment was warranted and that different treatment is reflected in the impugned order. There is no variance between the PPA order dated 27/04/2015 and the impugned order as alleged.

38. The Appellant is trying to draw support from the direction issued by the State Commission in the PPA order dated 27/04/2015, that the Appellant should make an application to the State Commission as per the approved PPA. It is submitted that the term “as per the approved PPA” makes it clear that the terms and conditions stipulated in the approved PPA were to apply for determination of tariff. It is not possible to accept this

submission. The PPA is subject to the regulatory jurisdiction of the State Commission. It is in this context that the said observation appears to have been made. There is no categorical assertion that the application was to be filed as per the terms and conditions of the PPA or that the said terms and conditions were to apply for tariff determination. In any case, in view of **PTC India** and **Tarini** it is not open to the Appellant to contend that after passing of the PPA order dated 27/04/2015, the State Commission became *functus officio* and could not have intervened in exercise of its regulatory jurisdiction in the tariff determination process in consumer interest. We concur with the observation of the State Commission that any bilateral agreement which is beyond the scrutiny through regulation by the beneficiaries who are consumers of the State cannot be accepted by the State Commission, since it violates Section 61(b), (c) and (d) of the said Act.

39. It is the Appellant's contention that if the OERC Regulations were to be rigidly interpreted then it would have been possible for the Appellant to file an application for tariff determination for F.Y. 2014-15 and F.Y. 2015-16 as well. However, the State

Commission relied on its power under Regulation 7.13 to relax the stipulation under Regulation 2.7 which requires the generating plants to make an application as per Format prescribed for determination of tariff as per annual schedule. The State Commission exempted the parties from approaching the State Commission for F.Y. 2014-15 and F.Y. 2015-16. For the future period, the State Commission directed the parties to make an application for tariff determination for future years as per the approved PPA. It is contended that the State Commission has therefore relaxed the OERC Tariff Regulations. We do not find any substance in this submission. It is true that technically the State Commission could have reopened the tariff for F.Y. 2014-15 – F.Y. 2015-16 if the OERC Regulations were rigidly interpreted. But the State Commission has given a valid reason why it did not do so. It has taken into consideration the fact that since power purchase by Respondent No.2 from Unit 1 and 2 of the Thermal Power Station has been continuing as per mutual agreement without approved PPA and since the State Commission has approved the same in the ARR of Respondent No.2 for the concerned year there was no need to reopen the same as per Regulation 1.4. On this valid reason, for this period,

the State Commission appears to have used its power under Regulation 7.13. So far as the rest of the control period is concerned, the State Commission has rightly directed the Appellant to make an application as per Regulation 2.7. There is no relaxation of the OERC Regulations for this period.

40. Respondent No.1 has at the time of hearing as well as in its written submissions highlighted the aspect of 'public interest'. It is stated that the Appellant is getting RoE of 35% which is far above RoE of 16% as envisaged in the Notification dated 30/06/1992. Respondent No.1 has produced the following profit table from the Profit and Loss Accounts of Appellant for the years 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16.

(Rs. Crore)

Financial Year	Turnover	PBT	PAT	PBT Ratio (%)	PAT Ratio (%)
2010-11	504.14	166.44	115.04	33.01	22.82
2011-12	572.78	206.29	137.09	36.02	23.93
2012-13	636.03	250.24	167.43	39.34	26.32
2013-14	622.64	183.82	127.57	29.52	20.49
2014-15	630.00	229.63	150.57	36.45	23.90
2015-16	705.95	178.16	114.83	25.24	16.27
Average	611.92	202.43	135.42	33.08	22.13

41. It is stated that RoE of 16% is a national norm. It is further stated that an additional burden of Rs.25 crores would fall on the consumers if the PPA is implemented in the manner contended by the Appellant. It is stated that neither the GoO nor Respondent No.2 is willing to bear this additional burden.

42. The Appellant has denied this submission. Following is the relevant extract of its written submission.

“7.5 The contention regarding the 35% return on equity is based on an erroneous calculation methodology – and the methodology has been submitted for the first time by the Ld. Commission in the Closing Submissions. As stated and explained in the Appellant’s Rejoinder to GRIDCO’s reply filed on 01.08.2016, the Appellant’s return on equity is 13.3% which is much lesser than the normative 16% return of equity. The Appellant’s return on equity for 2013-14 was only 8.7% and that of 2015-16 (provisional) is 9.6%. With the current trend of increased O&M costs and expenditure, with this return on equity it will be difficult to meet even the cost of generation in coming years.”

43. It is also stated in the written submissions of the Appellant that to state that cheaper tariff is in public interest is a complete misunderstanding of the provisions of the said Act, particularly Section 61, where a large number of efficiency and commercial

considerations have to be borne in mind while determining the tariff. It is submitted that the argument that every instance of simplicitor reduction in tariff would automatically serve public interest were to be accepted, the right of all generating companies in the sector would be set at naught because it will become an universal answer to any tariff claim that lower tariff at the expense of generating companies will serve public interest.

44. We are mindful of the guidelines contained in Section 61 of the said Act which the Appropriate Commission has to follow while determining tariff. It is true that a large number of efficiency and commercial considerations have to be taken into account while determining tariff. The State Commission has to ensure that interest of all stakeholders is balanced. Consumer interest has to be safeguarded at the same time cost of electricity has to be recovered in a reasonable manner. In the facts of this case, if we were to form an opinion that due to the impugned order, the interest of the Appellant would be set at naught as contended by the Appellant, we would have certainly intervened. But, we are unable to come to such a conclusion. In fact, the Appellant has not specifically denied Respondent No.1's case that

additional burden of Rs.25 crores would fall on the consumers if the PPA is implemented in the manner suggested by the Appellant.

45. In view of the above, we are of the opinion that the impugned order which determines the tariff on the basis of the norms stipulated in the OERC Regulations deserves to be confirmed. Needless to repeat that when regulations are in the field, they have to be followed in entirety and this will also apply to the OERC Regulations. The State Commission's view is supported by legal provisions and the law laid down by the Supreme Court in the judgments referred to by us. The appeal will have to be therefore, dismissed and, is accordingly dismissed. Needless to say that the interim application shall also stand dismissed.

46. Pronounced in the Open Court on this **06th day of April, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/NON-REPORTABLE**