IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 308 OF 2024 & IA NO. 893 OF 2024

Dated: 30th August, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

1. UTTAR PRADESH POWER CORPORATION LIMITED
Through its Managing Director (Power Purchase Agreements),
14th Floor, Shakti Bhawan Extension,
14-Ashok Marg, Lucknow,
Uttar Pradesh – 226 001. … Appellant No. 1

2. PASCHIMANCHAL VIDYUT VITRAN NIGAM LIMITED
Through its Managing Director,
Urja Bhawan, Victoria Park,
Meerut, Uttar Pradesh – 250 001. … Appellant No. 2

3. PURVANCHAL VIDYUT VITRAN NIGAM LIMITED
Through its Managing Director,
DLW Bhikaripur, Varanasi,
Uttar Pradesh – 221004. … Appellant No.3

4. MADHYANCHAL VIDYUT VITRAN NIGAM LIMITED
Through its Managing Director,
4-A, Gokhale Marg, Block I,
Gokhale Vihar, Butler Colony,
Lucknow, Uttar Pradesh – 226001. … Appellant No. 4

VERSUS

1. UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
Through its Secretary,

Vidyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar,
Lucknow, Uttar Pradesh – 226010. ... Respondent No.1

2. INOX AIR PRODUCTS PRIVATE LIMITED
Through its Chairman,
A-2, TTC Industrial Area,
Off Thane Belapur Road,
Pawane Navi Mumbai, Thane – 400710
Maharashtra. ... Respondent No.2

3. UTTAR PRADESH STATE LOAD DESPATCH CENTRE
Through its Director,
Phase-II, Vibhuti Khand
Lucknow – 226010, Uttar Pradesh. ... Respondent No.3

4. NOIDA POWER COMPANY LIMITED
Through its Director,
Electric Subv-Station, Knowledge Park-IV,
Park – IV, Greater Noida,
Gautam Buddha Nagar,
Uttar Pradesh – 201310. ... Respondent No.4

Counsel on record for the Appellant(s)	:	Shankh Sengupta Abhishek Kumar Nived Veerapaneni Sujoy Sur Vedant Kumar Karan Arora Shubham Mudgil for Appellant 1 to 4
Counsel on record for the Respondent(s)	:	C. K. Rail for Res.1 Dipali Sheth Shubham Mehta for Res.2 Divyanshu Bhatt Shashwat Singh Savyasachi Saumitra for Res.3

J U D G M E N T

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

The present appeal is filed by the Uttar Pradesh Power Corporation Limited (“UPPCL” for short), and the distribution licensees in the State of UP, questioning the legality and validity of the impugned order passed by the UPERC in Petition No. 1994 of 2023 dated 11.03.2024.

I. CONTENTS OF THE IMPUGNED ORDER PASSED BY THE UPERC: (ORDER IN PETITION NO. 1994 OF 2023 DATED 11.03.2024)

The 2nd Respondent herein, ie M/s. Inox Air Products Pvt. Ltd, filed Petition No. 1994 of 2023 before the UPERC seeking the following reliefs: (a) to direct UPPCL to sign a banking agreement for allowing 100% banking for the Petitioner's Project; and (b) to direct UPPCL/PVVNL to give credit of energy in the bills of the Petitioner facility based on the energy account maintained in respect of the power generated from the project from the date of commissioning and upto the date of signing of the banking agreement for the power injected by the Project, and not consumed by the Petitioner's Facility.

In the impugned order dated 17.10.2023, the UPERC held that the principal issue involved in the present Petition was the restriction imposed on the Petitioner's utilization of the banking facility to only up to 25% of the energy generated, and the prohibition on drawl of such banked energy for the Petitioner's energy consumption; and the Petitioner had referred to Regulation 31 of the 2019 Regulations.

The UPERC observed that, while evolving a framework for banking, the provisions of the 2019 Regulations needed to be understood against the conjoint fulcrum of twin legal maxims viz. *"CONTEMPORANEA EXPOSITO EST OPTIMA ET FORTISSIMA IN LEGE."* Viz The best and surest mode of construing an instrument is to read it in the sense in which it would have been applied when it was drawn up, and *"VERBA GENERALIA RESTRINGUNTER AD HABILITATEM REI VEL PERSONAE"* viz General

words may be aptly restrained according to the matter or person to which they relate; the import of clause 31(a) (ii) of the 2019 Regulations, which permitted upto 100% banking to renewable energy plants, needed to be examined in juxta-position of the maxim "CONTEMPORANEA EXPOSITO EST OPTIMA ET FORTISSIMA IN LEGE" thereby clarifying that, while drawing and finalizing these Regulations, the term "permitting of 100% banking" was used for each time block of 15 minutes, which is the basic measuring block of the energy, and which gets reflected in clause 31(a)(i) of the 2019 Regulations, which is just the preceding clause of Regulation 31(a)(ii) which permits 100% banking to renewable energy plants; the legal maxim "EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA INTERPRETATIO" viz A passage is best interpreted by reference to what precedes and what follows it, makes it abundantly clear that the surest way of interpreting Regulation 31(a)(ii) of the 2019 Regulations has to be derived in the context of clause 31(a)(i) of the same Regulations; otherwise also for a renewable generating source, with intermittent generation depending on various geographical and climatic conditions, unless 100% banking is allowed in a time frame of 15 minutes, the very raison-d'etre of banking is lost; accordingly, it is clear that 100% banking will be allowed on a 15 minute time block, and this right of the renewable energy generating stations cannot be unilaterally taken away by UPPCL on any pretext barring technical considerations; the Commission, in its detailed Order dated 16.11.2021 in Petition No. 1761 of 2021 and in petitions in the same/similar matter, had already clarified that, for the purposes of Regulation 31(a)(iii) of the 2019 Regulations, there has to be only two TOD slots i.e. peak and off-peak hours; and the Commission has also clarified that, for the purposes of banking and withdrawal of energy, peak period will be taken as 18:00 to 00:00 hours (midnight), and off peak hours as 00:00 to 018:00 hours.

The UPERC further observed that, while the concept of 100% banking of the energy generated would have to be applied to each time block of 15 minutes, the computation of banked energy would have to be made for the complete peak/ off-peak period of the day; thus, net energy banked during say the off-peak period of a day will be the total energy generated during the off-peak period minus the total energy consumed during the off-peak period of that day; a similar prescription will apply to peak period of the day also; however, banking charges would have to be paid, as per the 2019 Regulations, even if the energy banked during a time block of 15 minutes in an off-peak/ peak period is utilised within another time block of 15 minutes during the off-peak/ peak period in the same day; accordingly, the banking charges shall be applicable on withdrawal of banked energy irrespective of the timeframe i.e whether on 15 minute time block, daily or quarterly basis; and, accordingly, the procedure for banking and withdrawal of energy, in terms of the 2019 Regulations may be clarified thus: (a) the banking of energy will be allowed for upto 100% of the energy generated in each 15 minute time block. The total energy so banked in a day shall be adjusted against the consumption of electricity from the distribution licensee during the same day on TOD basis. The balance energy, if any, at the end of the day, shall remain banked with the distribution licensee. (b) banking charges will have to be paid, as per the 2019 Regulations even if the energy banked, during a time block of 15 minutes in an off-peak/ peak period, is utilized within another time block of 15 minutes during the off-peak period in the same day Accordingly, the banking charges shall be applicable on withdrawal of banked energy irrespective of the timeframe i.e whether on 15 minute time block, daily or quarterly basis; (c) the total of such energy banked in a quarter shall not exceed 49% of the energy generated. Banked energy, in excess of 49% of the energy generated, shall stand lapsed at the end of the quarter; (d) the captive users shall be allowed to withdraw this energy that has been

banked with the distribution licensee by the end of (Q+2)th quarter as per Regulation 31(a)(iii) of the 2019 Regulations; and (e) the quantum of banked energy that remains unutilised after (Q+2)th quarter shall be treated and settled as per Regulations 31(a)(v) of the 2019 Regulations.

The UPERC approved the above dispensation, in regard to banking and withdrawal of energy, for all renewable energy based captive generating plants, under Regulation 31(a) of the 2019 Regulations. It further observed that, in cases where the licensee has already signed banking agreement for less than 49%, if the captive generating plant approaches the licensee and demonstrates its requirement for banking beyond the agreed quantum, it shall be allowed banking upto the limit of 49% on quarterly basis. However, the banking percentage so revised on quarterly basis shall apply prospectively only. With regards the treatment for the lapsed energy till the signing of the banking agreement, the UPERC was of the view that it would not be appropriate to burden the Discoms by giving credit for such energy in the bills which had already lapsed; and they decided to address the matter by allowing financial settlement of lapsed energy from 26.05.2023 (i.e. the date of filing of the Petition) till the date of signing of the banking agreement as per Regulation 31(a)(v) of the 2019 Regulations, i.e. at Rs. 2 per unit.

II. RIVAL SUBMISSIONS:

Elaborate submissions, both oral and written, were put forth by Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the appellant, Sri Parag Tripathi, Learned Senior Counsel appearing on behalf of the UPERC, and Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent. It is convenient to examine the rival submissions under different heads.

III. REGULATION 31(a)(ii) OF 2019 REGULATIONS : ITS SCOPE:

A. SUBMISSIONS OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, in the State of Uttar Pradesh, banking of electricity by Renewable Energy based Captive Generating Plants is governed by the UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019 ("the 2019 Regulations" for short); such banking is subject to the conditions stipulated in Regulation 31(a) of the 2019 Regulations; one such condition, as contained in Regulation 31(a)(ii) stipulates that banking upto 100%. as agreed between the RE CGPs and distribution licensees. would be allowed subject to technical feasibility regarding evacuation; initially, by order in Petition No. 1832 of 2022 dated 13.12.2022, the UPERC interpreted Regulation 31(a)(ii) of the 2019 Regulations to mean that 100% banking ought to be mandatorily provided by the distribution licensees to RE CGPs unless there is technical non-feasibility with respect to evacuation; in effect, the words "upto" and "as agreed" were omitted from Regulation 31(a)(ii) of the 2019 Regulations to perforce thrust an obligation for banking 100% qua RE CGPs notwithstanding absence of agreement and consent of the Appellant; aggrieved thereby, the Appellants filed an Appeal in ***Uttar Pradesh Power Corporation Limited & Ors. v. Amplus Green Power Private Limited & Ors.*** **(**Appeal No. 91 of 2023) before this Tribunal; by order dated 31.01.2023, this Tribunal set-aside the order of the UPERC dated 31.12.2022 holding that its interpretation of Regulation 31(a)(ii) of the 2019 Regulations was unsound; this Tribunal finally settled the interpretation of Regulation 31(a)(ii) of the 2019 Regulations stating that a plain and literal interpretation of Regulation 31(a)(ii) of the 2019 Regulations requires an agreement between the Appellants and RE CGPs for banking up to 100%; particularly the interpretation of the UPERC that, notwithstanding absence of an agreement between the parties, the Appellants were obligated to bank 100% was held to be unsound; and the Judgment of this Tribunal has

attained finality as, on date, none of the parties have approached the Supreme Court challenging the said judgement.

B. SUBMISSIONS OF UPERC:

Mr. Parag Tripathi, Learned Senior Counsel appearing on behalf of the UPERC, would submit that Regulation 31(a)(ii) of the 2019 Regulations stipulates that "Banking of energy upto 100% as agreed between the Renewable Energy Generating Power Plants (except for SHP and MSW plants) and the Distribution Licensee, shall be allowed subject to technical feasibility regarding evacuation"; it was the Commission's respectful understanding that :- (a) No 100% banking of energy could be allowed automatically; (b) there had to be some basis or justification as to why Distribution Companies could insist on a lower percentage of banking; (c) there had to be a balancing of the interests of the Renewable Energy Generating Plants and Distribution Companies, wherein generation of electricity from Renewable source of Energy is required to be promoted; therefore the Commission in the present case, in its bona fide exercise of regulatory authority, limited the banking arrangement to 49%, thereby also balancing the interests of the parties involved; and this decision was made in the sincere belief that, by not imposing a 100% banking agreement, the Commission was adhering to the regulatory framework and the law laid down by the Superior Courts.

C. SUBMISSIONS OF THE 2ND RESPONDENT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that Regulation 31 of the 2019 Regulations deals with Banking of power, inter alia, in the context of renewable energy source and captive RE; sub-clauses (ii), (iii), (iv), (v) and (vi) deal with specific aspects of Banking; it is not the case of the 2nd Respondent that there is no requirement for Agreement between the RE

Generator and the Appellants; however, it cannot be that the Regulation has given an absolute right to the Appellants, to agree or not agree to banking or the extent as the Appellants may entirely, at their discretion, decide; banking of energy, particularly in the case of Solar Power which is intermittent generation, has been held to be a necessity in the decisions of this Tribunal in: (a) **Tamil Nadu State Electricity Board v. Tamil Nadu Electricity Regulatory Commission and Others (Order in Appeal No. 98 of 2010 dated 18.03.2011**) ; (b) **Fortune Five Hydel Projects Private Limited v. Karnataka Electricity Regulatory Commission and Others, (Order in Appeal No. 42 of 2018 and batch dated 29.03.2019);** (c) **Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission, (Order in Appeal No. 59 of 2013 dated 01.08.2014);** and (d)__ **Roha Dyechem Private Limited v. Maharashtra Electricity Regulatory Commission & Others (Order in Appeal Nos. 319 of 2018, 288 of 2019, 377 of 2019 & 378 of 2019 dated 27.04.2021);** the above decisions explain the nature and effect of banking to enable the generation to be utilized properly, considering solar power generation in peak hours, peak season, etc; Regulation 31(a)(ii) of the 2019 Regulations, is to be considered in the above context; non-agreement cannot be at the whim of UPPCL; and, in the case of Re Generation, it is part of their duty provided under Sections 42 and 43 of the Electricity Act, 2003.

Sri M.G. Ramachandran, Learned Senior Counsel, would further submit that Regulation 31(a)(ii) of the 2019 Regulations itself provides the contours of the agreement referred to in the said Regulations; the Agreement referred to in the opening part of Regulation 31(a)(ii), in so far as the Distribution Licensee is concerned, is circumscribed by the last part, dealing with technical feasibility regarding evacuation; there cannot be any decision by the distribution Licensee, on any other considerations, namely, either for extraneous reasons and certainly not on its whims and fancies; if Regulation

31(a)(ii), is interpreted otherwise, giving the right to a licensee, to decide in its discretion, as to the extent of banking to which it can agree, the licensee can render the above provisions as well as the necessity of providing banking redundant and purposeless; in such an interpretation, *the Regulation stating subject to technical feasibility regarding evacuation, is irrelevant and superfluous;* such an interpretation may not be consistent with the objective sought to be achieved; the feasibility of evacuation, in terms of the last part of Regulation 31(a)(ii), would vary from place to place, in the area of the Discom/State; such feasibility has to be considered as and when banking is sought by the Applicant with reference to the place of consumption or with reference to the place of injection; Regulations 31(a)(ii) of the 2019 Regulations does not provide for any other aspect for which there could be refusal to give banking; Regulation, having provided for the aspect of technical feasibility and no other aspect, it is not open to the Distribution Licensee to deny banking at its discretion; and such denial of banking at the discretion or for any other reason would be contrary to the scheme, objective and purpose of the Act, and more particularly the promotion of renewable generation as provided in Section 61(h) and Section 86(1)(e) of the Act.

Sri M.G. Ramachandran, Learned Senior Counsel, would also submit that the Agreement, envisaged in Regulation 31(a)(ii), is a result of an offer to be made by the Renewable energy generator/Consumer seeking banking to a specified extent; the expression used is upto 100%, which means that it is for the applicant to decide, whether they want banking upto 30% or 50% or 60% or 70% or 80% or 100% (depending on his needs) and the verification to be done by the licensee on the technical feasibility of allowing banking to the extent sought; if such technical feasibility does not exist at all, certainly banking can be refused; If such technically feasibility exists only for a part of the capacity proposed, then banking should be allowed to such extent; in the latter case, the Distribution Licensee accepts the proposal, resulting in an

Agreement as envisaged in Regulation 31(a)(ii), to the extent of such percentage; and, accordingly, if banking is sought by the Renewable Energy Generator, to the full extent of 100% and the Distribution Licensee finds that there is no problem of technical feasibility regarding evacuation, there is no reason whatsoever for the licensee not to agree and grant banking upto 100%.

D. REGULATION 31(a) OF THE 2019 REGULATIONS: ITS CONTENTS:

In exercise of powers conferred under Section 181 read with Sections 9, 61, 86(1)(a), 86(1)(b) and 86(1)(e) of the Electricity Act, 2003, and all other powers enabling in this behalf, the Uttar Pradesh Electricity Regulatory Commission made the UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019 ("the 2019 Regulations) which came into force from 1st April, 2019 and was to remain in force up to 31st March, 2024 unless reviewed earlier or extended by the Commission.

Regulation 31(a) of the 2019 Regulations reads thus:

"31. Banking of Power:

a) Renewable Energy source based Generation and Co-Generation Plants/ Captive RE:

The Renewable Energy Generating Power Plants may be allowed to bank power subject to the following conditions:

(i) All Renewable Energy Generating Power Plants (except for SHP and MISW planta) shall be under ABT mechanism, and procedure as mentioned in these Regulations shall apply to them. The Renewable Energy Generating Power Plants (except for SHP and MSW plants) shall provide ABT compliant SEMs, capable of

energy accounting for each block of 15 minutes, or as amended from time.

(ii) Banking of energy up to 100%, as agreed between the Renewable Energy Generating Power Plants (except for SHP and MSW plants) and the Distribution Licensee, shall be allowed subject to technical feasibility regarding evacuation.

(iii) Withdrawal of banked power shall be allowed only as per TOD system ie. withdrawal of power in the peak/off-peak hours shall not be more than the power banked in that respective TOD slot.

(iv) The Banking as well as withdrawal of banked energy shall be subject to day ahead scheduling. The power withdrawn by Renewable Energy Generating Power Plants (except for SHP and MSW plants), as ascertained by SEMs readings, which is not against the banked power, shall be considered as power purchased by the plant

In that case the balance energy withdrawn by the RE banking Plant from the Distribution Licensee shall be billed at tariff specified by the Commission, from time to time, in appropriate rate schedule of retail tariff.

(v) Renewable Energy Generating Power Plant (except for SHP and MSW plants) shall be allowed to withdraw power that was banked during a particular quarter within two subsequent quarters i.e. power banked in Qth quarter shall be allowed to withdraw within (Q+2)th quarter. The banked power remaining unutilized on the expiry of the period defined herein would be treated as sale and the financial settlement shall be made at Rs. 2 per unit or the rate approved in the PPA entered with the Distribution Licensee,

whichever is less. However, banking charges shall be deducted from such unutilized banked energy.

(vi) Banking charges shall be 12% of the energy banked except for Solar and Wind Power for which it shall be 6% of the energy banked and should be adjusted against the banked energy before withdrawal."

E. JUDGEMENTS RELIED ON BEHALF OF THE 2ND RESPONDENT:

In **Tamil Nadu State Electricity Board v. Tamil Nadu Electricity Regulatory Commission and Others (Order in Appeal No. 98 of 2010 dated 18.03.2011),** this Tribunal held that electricity is a commodity which cannot be stored; it is to be consumed at the very instant it is produced; generation by Wind Energy Generators solely depends upon availability of wind at a particular velocity; in other words it is periodical in nature; its generation is not constant even during a period of 24 hours of a day; it could be possible that it generates electricity when captive user does not require it; in such a case energy generator banks it with the distribution licensee who supplies this energy to its consumers at the applicable tariff; however, for returning the banked energy, the licensee may have to procure additional electricity from other sources.

In **Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission (Order in Appeal No. 59 of 2013 dated 01.08.2014)**, this Tribunal held that, from the impugned order, they found that the State Commission, in various orders, had been directing continuation of banking facility by the Distribution Licensees.

In **Roha Dyechem Private Limited v. Maharashtra Electricity Regulatory Commission & Others (Order in Appeal Nos. 319 of 2018, 288 of 2019, 377 of 2019 & 378 of 2019 dated 27.04.2021)**, this Tribunal

held that, in the case of conventional plants (Non renewable Energy Sources) i.e., coal-fired, gas-fired etc, the generation follows the load which means the generation of electricity is in accordance with the requirement of the load; if the load is more, generation is increased to match with the load and when the load is less, then the generation is reduced to match with the load; this is achieved by controlling the fuel injection as per the load requirement; however, in case of renewable energy sources, the situation is different as the generation depends on the availability of wind and solar which means that the RE Generators generates only when adequate wind and sunlight is available is such that the RE Generator generates electricity during periods when it is not required by the captive user; the electricity has to be consumed as and when it is generated; although there are technologies where the electricity can be stored in a small quantum, however the technology for storing electricity on a large-scale on a commercial basis is still under development; and it is for this reason that the provision of banking of energy generated by the RE Generators has been made.

F. ANALYSIS:

The primary rule of interpretation to be applied, in construing the scope of Regulation 31(a)(ii) of the 2019 Regulationsm is the literal interpretation of the said provision.

i. LITERAL INTERPRETATION:

It is a cardinal principle of interpretation of statutes/ Rules/ Regulations that the words used therein must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute/Rule/Regulation must, prima facie, be given their ordinary meaning. It is yet another rule of construction that

when the words of the statute/Rule/Regulation are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver (**Gurudevdatta VKSSS Maryadit v. State of Maharashtra, (2001) 4 SCC 534**). The intention of the legislature/regulation making authority is primarily to be gathered from the language used in the statute/Regulation. When the words used are not ambiguous, a literal meaning has to be applied. **(*Dental Council of India* v. *Hari Prakash*, (2001) 8 SCC 61).** Where the language of an enactment/Regulation is susceptible to only one meaning, then, ordinarily, that meaning should be given by the Court. In such a case the task of interpretation can hardly arise. **(*Union of India* v. *Sankalchand Himatlal Sheth* (1977) 4 SCC 193).** The duty of the Court is to give effect to the intention of the legislature/Regulation making authority, as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. **(*Banarsi Debi* v. *I.T. Officer* AIR 1964 SC 1742; *Attorney-General* v. *Carlton Bank* [1899] 2 Q.B. 158).**

The primary rule of construction is that the intention of the Legislation/Regulation must be found in the words used by the Legislature/Regulation making authority itself. **(*Unique Butyle Tube Industries Pvt. Ltd.* v. *Uttar Pradesh Financial Corporation* (2003) 2 SCC 455).** The legislature/Regulation making authority is deemed to intend and mean what it says. The need for interpretation arises only when the words used in the statute/Regulation are, on their own terms, ambivalent and do not manifest the intention of the legislature. **(*ITC Ltd.* v. *Commissioner of Central Excise, New Delhi* (2004) 7 SCC 591).** The language employed in the statute/Regulation is the determinative factor of legislative intent. **(*Raghunath Rai Bareja* v. *Punjab National Bank* (2007) 2 SCC 230; *Shiv Shakti Coop. Housing Society* v. *Swaraj Developers* (2003) 6 SCC 659 :**

AIR 2003 SC 2434; *Raghunath Rai Bareja (2007) 2 SCC 230*; *Hiralal Ratanlal* v. *STO* (1973) 1 SCC 216; *Kanai Lal Sur* v. *Paramnidhi Sadhukhan* AIR 1957 SC 90; *C.I.T.* v. *T.V. Sundaram Iyengar (P) Ltd. (1976) 1 SCC 77*; Sunita Pandey v. State of Uttarakhand, 2020 SCC OnLine Utt 330)

The construction must not be strained to include cases plainly omitted from the natural meaning of the words. **(*State of U.P.* v. *Dr. Vijay Anand Maharaj,* (1963) 1 SCR 1 : AIR 1963 SC 946).** A liberal construction does not justify an extension of the statute's/Regulation's scope beyond the contemplation of the legislature/Regulation making authority. **(*Dr. Vijay Anand Maharaj,* (1963) 1 SCR 1 : AIR 1963 SC 946; Deccan Chronicle Holdings Limited v. Indiabulls Housing Finance Ltd., 2018 SCC OnLine Hyd 439).** The proper rule, for construing statutes/Regulations, is to adhere to its words strictly. **(*Shahadara (Delhi) Saharanpur Light Railway Co. Ltd.* (1969) 2 SCR 131 : AIR 1969 SC 513; *Latham* v. *Lafone Martin B, (1867) L.R. 2 Ex 115, 121*).** When a language is plain and unambiguous and admits of only one meaning, no question of construction of a statute/Regulation arises, for the Act/Regulation speaks for itself. (***Dr. Vijay Anand Maharaj,* (1963) 1 SCR 1 : AIR 1963 SC 946).** If the words of a statute/Regulation are precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such a case best declaring the intention of the legislature/Regulation making authority. **(*Shri Ram* v. *State of Maharashtra,* AIR 1961 SC 674).**

When the meaning of the words are plain, it is not the duty of the Courts to busy themselves with supposed intentions, as the words themselves declare the intention of the Legislature/Regulation making authority. The words mean just what they say. **(*Pakala Narayana Swami* v. *Emperor, AIR 1939 PC 47*).** Where the grammatical construction is clear and manifest and

without doubt, that construction ought to prevail unless there are some strong and obvious reasons to the contrary, **(*Doypack Systems (P) Ltd.* v. *Union of India, (1988) 2 SCC 299*; *Chandavarkar S.R. Rao* v. *Ashalata, (1986) 4 SCC 447*; *Halsbury's Laws of England*, 4th Edn., para 856 at page 552; *Nokes* v. *Doncaster Amalgamated Collieries Limited, (1940) Appeal Cases 1014 at 1022*),** or there be something in the context, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. **(*Corporation of the City of Victoria* v. *Bishop of Vancouver Island, AIR 1921 Privy Council 240*).**

It is only where the words, according to their literal meaning, produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, the Court would be justified in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear. **(*Sankalchand Himatlal Sheth* (1977) 4 SCC 193 : AIR 1977 SC 2328; *River Wear Commissioners* v. *Willam Adamson[1876-77] 2 A.C. 743*)**. It must be borne in mind that a provision is not ambiguous merely because it contains a word which, in different contexts, is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is ambiguous only if it contains a word or phrase which, in that particular context, is capable of having more than one meaning. ***(Kirkness (Inspector of Taxes)* v. *John Hudson & Co., Ltd. (1955) 2 All ER 345*; Sunita Pandey v. State of Uttarakhand, 2020 SCC OnLine Utt 330).**

ii. LITERAL INTERPRETATION OF REGULATION 31(a)(ii):

Bearing the afore-said tests in mind, let us examine what Regulation 31(a)(ii) of the 2019 Regulations provides on a literal interpretation thereof, and whether the said provision is so ambiguous as to necessitate our having to resort to other modes of interpretation.

Regulation 31 of the 2019 Regulations relates to banking of power, and clause (a) thereunder relates to renewable energy source based generation and co-generation plants/ captive RE. In terms of Regulation 31(a)(ii), renewable energy generating power plants can be allowed to bank power, subject to technical feasibility of evacuation, up to 100%, as agreed between the renewable energy power plants and the distribution licensee. It is for the parties (ie the RE generation power plants and the distribution licensee) to agree on the quantum of energy to be banked. They can, if they so choose, agree to bank the entire quantum of energy i.e. upto 100%. The only restriction on the freedom of parties to so agree is its technical feasibility regarding evacuation of power. Save such a restriction, the UPERC thought it fit to leave it to the parties to agree on whether, and if so the extent to which, energy generated by the RE generating power plant should be banked with the distribution licensee. While making it clear that the entire energy i.e upto 100% can be banked, if the parties so agree, the only fetter placed by the UPERC, for such an agreement to be entered into, is if evacuation of such power is technically not feasible. In other words, notwithstanding the agreement between the afore-said parties, banking of power is permissible only if it is technically feasible to evacuate the quantum of power agreed to be banked. In case there are technical constraints in evacuation of power then, notwithstanding the quantum agreed between the REgenerator and the distribution licensees, banking of energy would be subject to such technical constraints regarding evacuation. This can be better explained by way of an illustration. For example, in a given case, the RE generator and the distribution licensee agree to bank energy upto, say

90%. if, because of technical constraints, only 50% can be evacuated, then, notwithstanding the agreement between the parties to bank 90% of the energy generated, only 50% can be permitted to be banked in view of such technical constraints.

Use of the words *"agreed"* and *"upto"* in Regulation 31(a)(ii) of the 2019 Regulations is of significance. The word *"upto"* means as far as, or as indicating a maximum amount. The word *"agreed"* means "discussed or negotiated and then accepted by all the parties", ie an acceptance resulting in an agreement. Advanced Law Lexicon: P Ramanatha Aiyar (3rd Edition, 2005- Book 1, Page 186) defines "Agreement" to mean every promise and every set of promises, forming the consideration for each other (Section 2(e) of the Indian Contract Act (9 of 1872); "An agreement, as the Courts have said, 'is nothing more than a manifestation of mutual assent' by two or more parties legally competent persons to one another. Agreement is in some respects a broader term than contract or even than a bargain or a promise. It covers executed sales, gifts and other transfers of property." (SAMUEL WILLISTON, A Treatise on the Law of Contracts S. 2, at 6 WALTER H.E. JAEGER Edn., 3 Edn., 1957).

Black's Law Dictionary, Eighth Edition, Bryan A. Garner (Page 74) defines "agreement" to mean a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. "The term 'agreement', although frequently used as synonymous with the word 'contract', is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term 'agreement' would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. "An agreement, as the courts

have said, 'is nothing more than a manifestation of mutual assent' by two or more legally competent persons to one another. Agreement is in some respects a broader term than contract. It covers executed sales, gifts, and other transfers of property." (Samuel Williston, A. Treatise on the Law of Contracts S. 2 at 6 (wallter H.E. Jeager ed., 3rd ed. 1957).

Section 10 of the Indian Contract Act stipulates that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

The words *"agreed between the RE generator and the distribution licensees",* in Regulation 31(a)(ii), would require the acceptance/consent of both the parties (ie the RE Generator and the Distribution Licensee) for banking of power. As banking of energy, in the case of renewable energy generation which is intermittent in nature, may well be a necessity, the UPERC, in the exercise of its functions under Section 86(1)(e) of the Electricity Act, can promote co-generation and generation of electricity from renewable sources of energy. Such promotion can be undertaken by the Commission either by exercising its regulatory power or by framing Regulations under Section 181 of the Electricity Act. In the present case, the 2019 Regulations made by the UPERC permit parties i.e. the RE generator and the distribution licensees to agree on the quantum of energy to be banked, save where the said agreement to bank energy may be hampered as a result of evacuation of such banked energy becoming technically unfeasible. In other words, the UPERC has chosen to leave it to the wisdom of the parties to decide on the quantum of energy to be banked without its having to regulate such banking of power, except in cases where evacuation of power, pursuant to such an agreement, is not technically feasible.

As the grammatical construction of Regulation 31(a)(ii) is clear, and manifests the intention of the Regulation making authority without doubt, such a construction merits acceptance, more so as there is nothing in the context, or in the object of the said Regulation in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a sense different from their ordinary grammatical sense. As the words used in Regulation 31(a)(ii), according to their literal meaning, do not produce any inconsistency, or an absurdity or inconvenience so great as to convince us that the intention could not have been to use them in their ordinary signification, we may not be justified in putting on them some other meaning than what they literally mean.

Accepting the submission, urged on behalf of the 2nd Respondent, would require us not only to deviate from the rule of literal construction, but also to ignore a portion of Regulation 31(a), for the said Regulation would then be required to be read as *"banking of 100% of energy shall be allowed subject to technical feasibility regarding evacuation."* Such a construction would require us to ignore the following words in Regulation 31(a)(ii) i.e. *"as agreed between the Renewable Energy Generating Power Plants (except for SHP and MSW plants) and the Distribution Licensee."* and *"upto".* It would also require Regulation 31(a)(ii) to be read as allowing the RE generating plant to unilaterally decide on the quantum of energy, generated by it, to be banked, subject to technical feasibility regarding evacuation, and as the distribution licensee having no say in the matter.

iii. INAPPOSITE SURPLUSAGE

Such a construction would require us ignore the words *"as agreed between the renewable energy generating power plants (except for SHP and MSW plants) and the distribution licensees"* and *"upto"* as used in Regulation 31(a)(ii) or to treat these words as inapposite surplusage.

It is settled law that efforts should be made to give meaning to each and every word used by the legislature/Regulation making authority, and it is not a sound principle of construction to brush aside words in a statute/Regulation as being inapposite surplusage, if they can have a proper application in circumstances conceivable within the contemplation of the Statute/Regulation. **(*Gurudevdatta* v. *State(2001) 4 SCC 534 : AIR 2001 SC 1980*; *Justice Chandrashekaraiah* v. *Janejere (2013) 3 SCC 117*).** The legislature is presumed to have made no mistake, and to have intended to say what it has said. Assuming there is a defect in the words used by the legislature/Regulation making authority, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result **(*Raghunath Rai Bareja* (2007) 2 SCC 230; *Ombalika Das* v. *Hulisa Shaw* (2002) 4 SCC 539; *CIT* v. *Sodra Devi* AIR 1957 SC 832; *Prakash Nath Khanna* v. *CIT* (2004) 9 SCC 686; *and Delhi Financial Corpn.* v. *Rajiv Anand* (2004) 11 SCC 625).** It would be impermissible to call in aid any external aid of construction to find out the hidden meaning. **(*D.D. Joshi* v. *Union of India* (1983) 2 SCC 235)**.

No construction, which requires the words of a statutory regulation to be ignored or construed as inapposite surplusage, is permissible. (**Gurudevdatta VKSSS Maryadit v. State of Maharashtra AIR 2001 SC 1980, Manohar Lal v. Vinesh Anand (2001) 5 SCC 407).** The legislative intent, found specific mention and expression in the provisions of the Act/Regulation itself, cannot be whittled down or curtailed and rendered nugatory. (**Bharathidasan University v. All India Council for Technical Education (2001) 8 SCC 676)**. Effect should be given to the provision, and a construction that reduces a part thereof to a "dead letter" must be avoided. (**Anwar Hasan Khan v. Mohd. Shafi (2001) 8 SCC 540; KMK Event Management Ltd. v. CCT, 2014 SCC OnLine Hyd 1101).** As it is impermissible to interpret a statutory provision in a manner which would

require several words therein to be ignored, the construction, placed on the said Regulation by both the Respondents, does not merit acceptance.

A literal construction of Regulation 31(a)(ii) would only mean that both the parties should agree on the quantum of energy to be banked, from out of the total energy generated by RE generating power plant, subject, of course, to technical feasibility regarding evacuation. The words as *"between the Generating Power Plants and the Distribution Licensee",* in Regulation 31(a)(ii), would undoubtedly require both the parties to agree on the quantum of energy to be banked.

iv. DIFFERENT WORDS, USED IN DIFFERENT PROVISIONS IN STATUTORY REGULATIONS, MUST BE CONSTRUED AS CARRYING DIFFERENT MEANING:

It is also relevant to note the distinction between Regulation 31(a)(ii) and Regulation 31(b)(ii) of the 2019 Regulations. Absence of the words "*as agreed between the Renewable Energy Generating Power Plants (except for SHP and MSW plants) and the Distribution Licensee:* in Regulation 31(b)(ii)*,* contrary to what is stipulated in Regulation 31(a)(ii), is significant. When two different words are used by the same statute/Regulation, one has to construe these different words as carrying different meanings. (**Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd; KURAPATI BANGARAIAH AND 17 OTHERS VS GOVT OF A.P. (2014) SCC ONLINE HYD 1294: (2015 5 ALD 622)**. Use of different words in two provisions of a statute or a statutory regulation is for a purpose. If the field of the two provisions were to be the same, the same words would have been used. (**B.R. Enterprises v. State of U.P; KURAPATI BANGARAIAH AND 17 OTHERS VS GOVT OF A.P. (2014) SCC ONLINE HYD 1294: (2015 5 ALD 622**). When two words of different import are used in a statute/Regulation, in two consecutive provisions, it would be difficult to

maintain that they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. (**Member, Board of Revenue v. Arthur Paul Benthall**; **KURAPATI BANGARAIAH AND 17 OTHERS VS GOVT OF A.P. (2014) SCC ONLINE HYD 1294: (2015 5 ALD 622**). When the legislature/Regulation making authority has taken care of using different phrases in different sections/regulations, normally different meaning is required to be assigned to the language used. If, in relation to the same subject-matter, different words of different import are used in the same statute/Regulation, there is a presumption that they are not used in the same sense. (**Arthur Paul Benthall[67]; Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala; KURAPATI BANGARAIAH AND 17 OTHERS VS GOVT OF A.P. (2014) SCC ONLINE HYD 1294: (2015 5 ALD 622)**. If the intention was not to distinguish, there would have been no necessity of expressing the position differently. When the situation has been differently expressed, the legislature/Regulation making authority must be taken to have intended to express a different intention. (**CIT v. East West Import and Export (P) Ltd; KURAPATI BANGARAIAH AND 17 OTHERS VS GOVT OF A.P. (2014) SCC ONLINE HYD 1294: (2015 5 ALD 622**).

As noted hereinabove, Regulation 31(a) relates to banking of power by renewable energy source based generation and co-generation plants/ captive RE, and Regulation 31(b) relates to banking of power by captive plants (non-RE). Regulation 31(b)(ii) provides that captive plants (non-RE) may be allowed banking of energy upto 100%, subject to technical feasibility regarding evacuation. Unlike Section 31(a)(ii) where the quantum of energy to be banked is in terms of an agreement between the RE generator and the distribution licensee, in the case of captive plants (non-RE), Regulation 31(b)(ii) requires approval of the UPERC for banking of energy upto 100% as it, unlike Regulation 31(a)(ii), does not provide for parties to agree on the quantum for which energy should be banked. The power conferred on the

Commission to allow banking of energy under Section 31(b)(ii) is also subject to the technical feasibility regarding evacuation.

It is evident, therefore, that the UPERC, in framing Regulation 31(a)(ii) of the 2019 Regulations, has thought it fit to leave it to the parties concerned to agree on the quantum of energy to be banked in case of renewable energy sources based generation and co-generation plants/ captive RE, but to continue to exercise its regulatory power over captive plants (non-RE) permitting them, under Regulation 31(b)(ii), to bank energy, upto 100%, only with the approval of the Commission and subject to technical feasibility regarding evacuation.

Let us now examine whether the UPERC was justified in its conclusion that, on a reading of Regulation 31(a)(i) with Regulation 31(a)(ii), 100% banking was sought to be permitted for each time block of 15 minutes, which is the basic measuring block of energy, and which is reflected in Regulation 31(a)(i), a clause preceding Regulation 31(a)(ii) which permits 100 % banking of energy to renewable energy plants; and whether an interpretation of Regulation 31(a)(ii) should be derived in the context of Regulation 31(a)(i).

It is true that Regulation 31(a)(i) precedes Regulation 31(a)(ii), both of which relate to banking of power for renewable energy source based generation and co-generation plants/ captive RE. All that Regulation 31(a)(i) provides is that (a) renewable energy generating power plants shall be under ABT mechanism, (b) the procedure mentioned in the 2019 Regulations shall apply to them, and (c) the renewable energy generating plants shall provide ABT compliant SEMs capable of energy accounting for each block of 15 minutes. The second limb of Regulation 31(a)(i) itself makes it clear that the procedure, as mentioned in the 2019 Regulations (in this context, Regulation 31(a)(ii)), shall apply to them. On a conjoint reading of clauses (i) and (ii) of Regulation 31(a), it is evident that it is only on the basis of what the renewable energy generating power plant and the distribution licensee have

agreed to, can banking of energy, for a maximum quantum of 100 %, be allowed. There is nothing in clause (i) of Regulation 31(a) to indicate that the agreement, stipulated in clause (ii) thereof, was to be given a go by.

The understanding of the UPERC that 100% banking of energy could not be allowed automatically and there has to be some justification as to why the distribution companies could insist on a lower percentage for banking is evidently flawed, as such an understanding falls foul of the express stipulation of Regulation 31(a)(ii) of the 2019 Regulations which is binding on the UPERC. It is unnecessary for us to examine whether the Appellant is required to justify as to why it insisted on a lower percentage of banking since, in the present case, the Appellant has applied the criteria, of 25% banking, uniformly across the board, post the coming into force of the 2019 Regulations. What the UPERC has sought to do is to give a go by to the 2019 Regulations, and to take upon itself the task of determining the quantum of energy which should be permitted to be banked, notwithstanding the Regulations having left it to the parties concerned to agree on the quantum of energy to be banked.

While making of a Regulation under Section 181 is not a pre-condition for the Commission exercising its regulatory functions under Section 86, and a regulatory order can be passed by the Commission even in the absence of a Regulation under Section 181 of the Electricity Act, If there is a Regulation in force, then the functions to be discharged by the Commission under Section 86 should be in conformity with such Regulations made under Section 181. (***PTC India Ltd.* v. *Central Electricity Regulatory Commission* : (2010) 4 SCC 603; Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14).** As Regulation 31(a)(ii) of the 2019 Regulations leaves it to the parties to agree on the quantum of energy to be banked, it is not open to the UPERC to exercise its regulatory power to

determine the quantum, or to fix it at 49%, as long as 2019 Regulations continues to remain in force.

The interpretation sought to be placed on Regulation 31(a)(ii), by the Learned Senior Counsel appearing on behalf of the second Respondent, does not also merit acceptance. It is true that the opening part of Regulation 31(a)(ii) is circumscribed by the last limb of the said provision, in that any agreement between the renewable energy generating power plant and the distribution licensee, for banking of energy upto 100%, can only be allowed subject to technical feasibility regarding evacuation. That does not, however, mean that, even if evacuation of banked power is technically feasible, the requirement, of the distribution licensee agreeing to the quantum of energy to be banked, should be given a go by. The submission, that the Regulation cannot be understood as conferring unilateral power on the distribution licensee to decide on the quantum of energy to be banked, ignores the fact that the said Regulation requires both parties, ie (1) the renewable generating plant and (2) the distribution licensee, to agree on the quantum of power to be banked. If either one of them do not agree, then energy upto 100% cannot be permitted to be banked.

As held hereinabove, a literal interpretation of Regulation 31(a)(ii) requires both the parties to agree on the quantum of energy to be banked. In case the second Respondent were have to any grievance with respect to the validity of such a prescription in the 2019 Regulations, or with respect to the action of the Appellant UPPCL (a State Government utility and an instrumentality of the State) in refusing to bank 100% power, its remedy was either to challenge the vires of the Regulations or the action of the UPPCL in judicial review proceedings. As long as the 2019 Regulations continue to remain in force, both the UPERC and this Tribunal are bound by what the

said Regulations stipulate, and a construction which would violate the plain and literal meaning of the provision is impermissible.

It is true, as submitted on behalf of the 2nd Respondent, that the agreement envisaged in Regulation 31(a)(ii) may be based on the offer made by the generators seeking banking of power. The fact, however, remains that an agreement comes into existence only if such an offer is accepted by the distribution licensee. The language of Regulation 31(a)(ii) does not permit the generator to unilaterally determine the quantum of energy to be banked, even if evacuation of such a quantum is technically feasible. It specifically refers to an agreement between the generator and the distribution licensee.

Section 42 of the Electricity Act relates to duties of a distribution licensee and open access, and Section 43 relates to the duty of the distribution licensee to supply power on request. There is nothing in the language of Sections 42 and 43 of the Electricity Act which would require us to hold that Regulation 31(a)(ii), on a literal interpretation thereof, confers power on the Commission to determine the quantum of power, generated by an RE Generator, to be permitted to be banked. In any event, a challenge to the vires of Regulation 31(a)(ii), as falling foul of Sections 42 and 43 of the Electricity Act, can only be mounted in judicial review proceedings, and not in appellate proceedings before this Tribunal under Section 111 of the Electricity Act.

IV. STATEMENT OF REASONS FOR FRAMING THE 2019 REGULATIONS:

A. SUBMISSIONS OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that even the UPERC's own interpretation, at the time of framing Regulation 31(a)(ii) of the 2019 Regulations, was that the quantum of banking would be subject to agreement between the RE CGPs

and the distribution licensees; when the draft 2019 Regulations were published, certain generators had submitted that the phrase "*as agreed*" ought to be deleted from Regulation 31(a)(ii) which was numbered as Regulation 39(1)(b) under the draft 2019 Regulations; and, rejecting such submissions, the UPERC itself held that banking is purely a commercial decision and either party should take a decision in this regard based on their own specific requirements at different periods of the year.

B. SUBMISSIONS OF THE SECOND RESPONDENT:

On the other hand, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the Statement of Reasons refer to the commercial aspects; the Commercial aspects are dealt with in Regulation 31(a)(iii) onwards, namely (i) withdrawal of banked power as per TOD system and prohibiting of banking of power in off peak hours and withdrawing in peak hours, (ii) banked power will be first utilized on day to day consumption, (iii) at quarter ending, not only exceeding 49% to be banked for the remaining period (to be consumed by the Q+2th quarter); and, further, the commercial reason referred to is to enable the Renewable generator to decide up to what percentage they require the banking percentage.

C. CONTENTS OF THE STATEMENT OF REASONS TO THE EXTENT RELEVANT:

In the matter of UPERC (Captive and renewable energy generating plants) Regulations, 2019, the UPERC issued the Statement of Reasons dated 15.07.2019, the relevant portion of which reads as under:-

"Particulars	*Comment of the stakeholders*	*Commissioner's View*

Banking of Power	*6. Sun source energy Pvt. Ltd has requested the Commission for removing the phrase "as agreed with distribution licensee from Regulation 39(1)(b) of the Draft CRE* *Regulations 2019 and direct the distribution licensee for providing 100% Banking Facility as prescribed in the draft Regulations. It also requested to issue a standard Wheeling and Banking Agreement that is to be followed across the state.* *It also submitted that day ahead scheduling for Banking as well as withdrawal of banked energy is highly unreasonable and not even remotely essential as far as scheduling of energy is concerned.* *It further submitted that a RE plant, under Regulation 39(1), is restricted from withdrawing power only as per TOD System, however there is no restriction for a CPP (Non-RE) under Regulation 39(2), and it is allowed to withdraw power irrespective of TOD system.* *7. Amplus Energy Solutions Pvt. Ltd. has requested to provide clarity on the key aspects associated with the*	*7. With regard to the following clause of the Regulations:* *"Banking of energy upto 100%, ας agreed between the plant and the Distribution Licensee, shall be allowed."* *As Banking of power is purely a commercial decision and either party should take a decision in this regard based on its own specific requirements at different period of the year. So, the Commission finds it appropriate to retain the Regulations. provisions of draft* *8. With regard to the submission of UPPCL that has sought clarification regarding banking of energy up to 100% of what is allowed, the Commission has made*

	facility of banking like the clarity on term for which the period of banking would be available, priority of settlement, issuance of detailed procedure setting out the steps and processes required to avail the facility of banking; issuance of the standard wheeling and banking agreement which the Discoms will sign with the renewable energy projects etc. *It has further submitted that solar power projects are already covered under the Deviation Settlement Mechanism (DSM) Regulations and the said projects are going to schedule power in terms of the aforesaid regulations. As far as the* *requirement of providing schedule of power to be banked and for the withdrawal of banked power is concerned, the same is very difficult as the generating company will not be able to forecast as to when there would be a decline in the consumption*	*amendment in the Regulations 32 (a) (ii) as shown below:* *"Banking of energy GS agreed between the plant and the Distribution Licensee, shall be allowed"*

	of power from its consumers and therefore, the same cannot be accurately predicted. So, it requested that the Commission may be pleased to drop the requirement of day ahead scheduling for the energy to be banked and the amount of banked energy to be withdrawn be it the following day in the final CRE Regulations, 2019. *It has further requested the Commission to specifically provides that the withdrawal of banked energy is allowed for both captive consumption and for third-party sale.* *It has further submitted that the draft regulations has the following provisions:* *"Banking of energy upto 100%, as agreed between the plant and the Distribution Licensee, shall be allowed."* *However, the extent of banking cannot be made subject to the agreement with the distribution*		

	licensee as it would unnecessarily bring in complexities/contingencies in the process of banking which is pivotal for the development of solar power market in the State of UP. SC, it requested the Commission to kindly remove the aforesaid restriction of subject the extent of banking to an agreement with the distribution licensee/company in the final CRE Regulations."	

D. ANALYSIS:

As is evident, from the afore extracted part of the Statement of Reasons dated 15.07.2019, certain RE generators had sought deletion of the words *"as agreed with distribution licensees"* in the 2019 Regulations, and had sought that the distribution licensees should be directed to provide 100% banking facilities. In response to these objections, the Commission's view was that banking of power was purely a commercial decision, and either party should take a decision in this regard based on its own specific requirements at different periods of the year, and it was of the view that such provisions, in the draft Regulations, should be retained.

Reference to the Statement of Reasons can be made only if a literal interpretation of Regulation 31(a)(ii) would result in an absurdity and, as held hereinabove, a literal construction of the said provision does not give rise to any such result. Even otherwise, reliance can be placed on the Statement of Objects and Reasons only in limited circumstances.

i. STATEMENT OF OBJECT AND REASONS AS AN AID TO INTERPRETATION:

The Statement of Objects and Reasons for introduction of a bill can be usefully referred to for the limited purpose of ascertaining the conditions prevailing at the time the bill was introduced, and the purpose for which the provision was made. (**Kavalappara Kottarathil Kochuni vs State of Madras: AIR 1960 SC 1080)** The statement of objects and reasons can be legitimately used for ascertaining the object which the legislature had in mind. (**Sanghvi Jeevraj Ghewar Chand vs. Secretary, Madras Chillies,Grains and Kirana Merchants & Workers Union: AIR 1969 SC 530).** The Statement of Objects and Reasons can be pressed into service for the limited purpose of understanding the object which the statute/ statutory regulation seeks to achieve. (**Tata Engineering and Locomotive Co. v. Gram Panchayat, Bhaiji v. Sub-Divisional Officer and Kumar Jagdeesh Chandra Sinha v. Eileen K Patricia D' Roziareh; Viyyat Power Pvt. Limited v. Kerala State Electricity Board Limited, 2018 SCC OnLine APTEL 87**). The Objects and Reasons of the Act may be taken into consideration in interpreting the provisions of the statute/Regulation in case of doubt. (**Doypack Systems (P) Ltd. v. Union of India, (1988) 2 SCC 299)**. The Statement of Objects and Reasons can be referred to only if there is some ambiguity in the Regulations, and reference to the Statement of Objects and Reasons would help in accepting one of the two interpretations possible from clauses of the Regulation. (**Babua Ram v. State of UP, (1995) 2 SCC 689; Madhya Gujarat Vij Company Limited v. Ankur Scientific Energy Technologies Pvt. Ltd., 2015 SCC OnLine APTEL 154).**

The Regulations, framed by a State Commission under Section 181 of the Electricity Act. following a mandatory consultative process with the stakeholders, is, ordinarily, accompanied by a Statement of Reasons recording the objections raised by the Stakeholders, and the reasons for

which the Commission has either accepted or rejected such objections. Even if we were to proceed, in the present case, on the premise that resort should be had to the external aid, of the Statement of Objects and Reasons, in interpreting Regulation 31(a)(ii), it is evident therefrom that the Commission intended it to be left to the concerned parties to mutually agree on the quantum of energy to be banked, as it was purely a commercial decision.

Reliance placed on behalf of the 2nd Respondent, on Regulation 31(a)(iii) to (vi), is misplaced. All that these Regulations stipulate are the conditions subject to which banking of energy and its withdrawal should be permitted. it is only after the parties, i.e. the RE generator and the distribution licensees, have agreed on the quantum up to which energy should be banked in terms of Regulation 31(a)(ii), would the provisions, stipulating the manner in which banking and its withdrawal should be permitted, apply. In cases where parties have not arrived at an agreement. in terms of Regulation 31(a)(ii), clauses (iii) to (vi) of Regulation 31(a) would not apply. It is difficult for us, therefore, to hold that the distribution licensees have no choice but to agree on the quantum of energy to be banked either as sought by the generator or as directed by the Commission.

V. INTERPRETATION PLACED ON THE 2019 REGULATIONS BY THIS TRIBUNAL: IS THE UPERC ENTITLED TO TAKE A DIFFERENT VIEW THERE FROM?

A. SUBMISSIONS OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the 2nd Respondent approached the Appellants, vide letter dated 01.05.2023, for execution of a banking agreement in terms of the 2019 Regulations; by their letter dated 20.05.2023, UPPCL proposed 25% banking; such a proposal for 25% banking was in line with the proposal made by UPPCL to all RE CGPs in the State across the board; in response, by way of their letter dated 24.05.2023, the 2nd Respondent

sought 100% banking; soon thereafter, the 2nd Respondent approached UPERC by way of Petition No. 1994 of 2023 seeking directions for 100% banking; in the proceedings before the UPERC, this Tribunal's Amplus Judgment was cited to submit that, in terms of Regulation 31(a)(ii) of the 2019 Regulations, in the absence of mutual agreement between the parties and without their consent, 100% banking cannot be thrust upon them; however, disregarding the interpretation of Regulation 31(a)(ii) of the 2019 Regulations by this Tribunal, the UPERC again held that 100% banking should be allowed on a 15 minute time block, and this right of renewable energy generating stations cannot be unilaterally taken away by UPPCL on any pretext barring technical considerations; in effect, the very same interpretation given by the UPERC under its earlier order dated 13.12.2022, which has been held by this Tribunal to be unsound in the Amplus Judgment, has been reiterated by the UPERC under the Impugned Order in defiance of this Tribunal's judgment; and, on this short point alone, the Impugned Order should be set-aside.

Sri B.P. Patil, Learned Senior Counsel, would further submit that, once this Tribunal has interpreted Regulation 31(a)(ii) of the 2019 Regulations to mean that 100% banking cannot be thrust upon the Appellants in the absence of an agreement, i.e., without their consent, it was legally impermissible for the UPERC to disregard this Tribunal's judgment to hold that the Appellants are obligated to bank 100% on a 15-minutes time block basis notwithstanding absence of an agreement; such findings of the UPERC are in the teeth of this Tribunal's judgment; the verbal jugglery resorted to in the Impugned Order cannot mask the Commission's defiance of this Tribunal's Amplus Judgment; the principle of *stare decisis* binds the UPERC, and obligates it to abide by the law laid down by this Tribunal; to achieve consistency in judicial pronouncements, courts have evolved the rule of precedents and the principle of *stare decisis*; these rules and

principles are based on public policy and, if they are not followed, there will be chaos in the administration of justice; a subordinate court is bound by the enunciation of law made by superior courts (**Govt. of A.P. v. A.P. Jaiswal**, **(2001) 1 SCC 748**); lower courts/tribunals in the hierarchy must abide by the law declared by the Appellate Court/Tribunal, save a judgement of the Superior Courts to the contrary (**Dental Council of India v. Dr. Hedgewar Smruti Rugna Seva Mandal Hingoli & Ors., (2017) 13 SCC 115)**; in its judgment in **Karnataka Power Transmission Corporation Limited v. KERC (** Appeal No. 97 of 2020 dated 05.10.2020), this Tribunal held that the regulatory authority at the bottom of the rung cannot take liberty to ignore binding directives and act contrary to principles judicially settled; otherwise, legal remedies would be set at naught leading to anarchy and endangering rule of law; this Tribunal is empowered not only to pass orders "*confirming, modifying or setting aside*" the orders of commissions, but to also perform the role of superintendence and control by exercising the jurisdiction conferred by Section 121 of the Electricity Act, 2003; this Tribunal is at a tier immediately below the Supreme Court; it has powers to execute its orders and to compel and secure compliance; in the light of the judgment in ***BSES Rajdhani Power Limited v. DERC***, **2013 SCC OnLine APTEL 137,** refusal by the commission to implement this Tribunal's judgment amounts to judicial indiscipline, and this Tribunal is empowered to take suitable action by imposing a fine or costs on the commission; wilful disobedience of a binding direction of a superior authority at the appellate level, *prima facie*, has been held to amount to civil contempt, and any designed obstruction to administration of justice, with the seeming objective of skirting around or by-passing binding decisions, has been held to be demonstrative of injudicious conduct; and it was therefore not open to the UPERC to bypass the binding interpretation of Regulation 31(a)(ii) of the 2019 Regulations by this Tribunal

to compel the Appellants to provide 100% banking notwithstanding absence of their agreement.

B. SUBMISSIONS OF UPERC:

Mr. Parag Tripathi, Learned Senior Counsel appearing on behalf of the UPERC, would submit that this Tribunal, in its order dated 31.01.2023 passed in **Amplus Green Power Pvt. Ltd. vs. UPPCL& Ors.,** had pithily noted that the Appellant therein had entered into agreements with the first respondent therein to bank 100% power with respect to 10 of its 13 captive users, and as to why the Appellant chose to place a fetter on banking upto 25%, only with respect to the other 3, was not known; it was in this context that this Tribunal had rendered its finding; the matter was thereafter remanded by this Tribunal to the Commission for its consideration afresh on the submissions of the Appellant justifying their action in deviating from the earlier agreements entered into with the first Respondent in relation to 10 of its captive users to bank 100% energy, and why they chose to restrict banking, to the other 3 captive users, only to 25%; and, during the interim period of pendency of the proceeding before the Commission, this Tribunal further directed that the Appellant would continue to bank 100% power injected by the first respondent in to the grid, with respect to the remaining three captive users also, till the Commission considers the matter and passes an order afresh.

C. SUBMISSIONS OF THE 2ND RESPONDENT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that, in the present case, in the proceedings before the State Commission, it was placed on record that there is no issue of any technical feasibility; UPPCL never disputed the above, in its submissions; UPPCL has only pleaded aspects such as the Distribution Licensee is not obligated to provide 100% banking to all captive RE

Generators in the State; the Central Government stipulating 30% as the minimum quantum for banking for the promotion of Renewable energy generation in Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022, withdrawal of banking as per Time of Day System, are wholly irrelevant, in the context of technical feasibility which is dealt with in Regulation 31(a)(ii); further, “15 minutes time block” introduced by UPPCL was not part of the 2019 Regulations or the present practice; while the banking agreement dated August 23, 2023 executed between INOXAP and UPPPCL provides for banking on 15 minutes time block basis, UPPCL had considered Monthly TOD data for June, 2023 and Daily TOD data for July, 2023 to justify that banking of 100% is not required; in view of such different adjustments made and interpretations given, there was requirement for the State Commission viz., the UPERC to clarify and interpret the 2019 Regulations and resolve the dispute; and the State Commission passed the Impugned Order clarifying the 2019 Regulations, more specifically the issues with respect to reasoning and aspects to be considered for banking.

D. ANALYSIS:

M/s.Amplus Green Power Private Limited had filed Petition No. 1832 of 2022 before the UPERC under Section 86(1)(f) of the Electricity Act, 2003, read with Regulation 2(viii) and 7 of the 2019 Regulations, seeking a direction that they be allowed to bank 100% of the energy generated, as well as utilize the banking facility in terms of drawal of such banked energy for their auxiliary energy consumption ie for their use in accordance with the 2019 Regulations.

In its order, in Petition No. 1832 of 2022 dated 30.12.2022, the UPERC framed two issues. Issue No. 1 was with respect to a direction to UPPCL to enter into an Banking Agreement with M/s. Amplus Green Power Private Limited, allowing M/s. Amplus to utilize the banking facility for 100% of the

power generated. On issue No.1 the UPERC found no justification in denying 100% banking of captive RE to M/s. Amplus. It, therefore, held that M/s. Amplus should be allowed the facility of banking upto 100% in accordance with the 2019 Regulations; 100% banked power shall be attributed to meet UPPCL's RPO obligations; the benefit of renewable energy, at the time of withdrawal of banked energy, shall be available to captive consumers to the extent of RPO achieved by UPPCL/Discoms in the corresponding year in which energy was withdrawn; if captive consumers want 100% green attribute from the withdrawn energy of such banked energy, then they will have to pay an additional premium for the green energy tariff, as notified by the Commission for the quantum over and above the RPO achieved by UPPCL/Discoms in the corresponding year; and the benefit of concession in transmission and wheeling charges shall continue to be available to the captive consumers. Aggrieved thereby the UPPCL carried the matter in appeal to this Tribunal.

In its order, in **UPPCL Vs M/s. Amplus Green Power Private Limited (Order in Appeal No. 91 of 2023 dated 30.01.2023)**, this Tribunal noted that M/s. Amplus Green Power Private Limited, a renewable energy captive generating plant, supplied power to 13 captive users; while agreements were entered into between UPPCL and M/s. Amplus Green Power Private Limited, with respect to banking 100% of the power injected by them into the grid, in relation to 10 of the 13 captive users, for the other 3, UPPCL had restricted banking facility only to 25%.

After taking note of the contents of Regulation 31(a)(ii) of the 2019 Regulations, this Tribunal observed that, in terms of sub-clause (ii), banking of energy up to 100% was permissible as agreed between the renewable energy generating plant and the distribution licensee; a plain and literal reading of Regulation 31(a)(ii) did seem to indicate, as a pre-requisite, an

agreement between UPPCL and M/s. Amplus Green Power Private Limited for banking of energy upto 100%; UPERC had, however, interpreted the said Regulation to mean that, notwithstanding absence of an agreement between them and M/s. Amplus Green, UPPCL was nonetheless obligated to bank 100% of the energy injected by M/s. Amplus Green into the grid; and this construction, on a literal interpretation of sub clause (ii), did not appear to be sound, and may necessitate the order under appeal being set aside on this score.

Having so held, this Tribunal then noted that UPPCL had entered into agreements with M/s. Amplus Green to bank 100% power with respect to 10 of its 13 captive users; and it was not known as to why UPPCL chose to place a fetter on banking upto 25%, only with respect to the other 3. This Tribunal then noted the submissions urged on behalf of UPPCL that the justification for this deviation was required to be placed by UPPCL before the UPERC, and it was primarily because the UPERC had misconstrued the applicable Regulations, that UPPCL had come in appeal before this Tribunal. Finding force in this submission urged on behalf UPPCL, this Tribunal expressed its inclination to remand the matter back to UPERC to enable UPPCL to put forth their submissions justifying their deviation from their agreements, entered into with M/s. Amplus Green Power Private Limited, in relation to 10 of its captive users, with respect to the other 3.

While considering the interim arrangement to be put in place, during the pendency of proceedings before the UPERC consequent on remand, this Tribunal observed that it was not necessary for it to consider the appropriate interim arrangement to be made, as both the counsel for UPPCL and the counsel for M/s. Amplus Green had agreed that UPPCL would continue to bank 100% of the power injected by M/s. Amplus Green into the grid, with

respect to the remaining three captive users also, till the UPERC considered the matter and passes an order afresh.

It is only because parties on either side had themselves agreed, on the interim arrangement to be put in place, that this Tribunal had recorded their submissions and, as a result, UPPCL continued to bank 100% power, with respect to the other three units of M/s Amplus Green also, during the pendency of remand proceedings before the UPERC. The understanding of UPERC that this Tribunal had directed 100% power, injected by M/s. Amplus Green to be banked during the pendency of proceedings before the UPERC, may not be in conformity with the afore-said order passed by this Tribunal.

In the case on hand, the 2nd Respondent, vide letter dated 01.05.2023, submitted certain documents for execution of a wheeling and banking agreement. In reply thereto, the Appellant, by letter dated 20.05.2023, informed them that, at present, they have decided to sign banking agreements at 25% of the energy injected, and the 2nd Respondent should depute their authorized representative and sign the banking agreement at 25% for the captive consumer. It was the specific case of the Appellant, in Petition No. 1994 of 2023 filed by the 2nd Respondent before the UPERC, that, once the dispensation of peak and off-peak hours was changed by the Commission, the Appellant proposed 25% banking across the board for all generators as a norm; and such proposal for 25% banking was made for banking of electricity both on a MW basis during a quarter, and on electricity injected in MUs basis in a 15-minute time block. It is not as if the Appellant had proposed 25% banking only with respect to the 2nd Respondent herein. On the contrary, they had applied such a limit across the board for all RE generators, after the 2019 Regulations came into force. The contention of the Appellant, as recorded by the Commission in Para 10 of the Impugned Order, reads as under:

"10. It is also submitted that in order dated 13.12.2022 in Petition No. 1832 of 2022 in the case of Amplus Green Power Private Limited v. Uttar Pradesh Power Corporation Limited, the Commission interpreted the aforesaid Regulation 31(a)(ii) of CRE Regulations to hold that unless there is technical non-feasibility with respect to evacuation, 100% banking cannot be denied on purely commercial grounds. In order dated 31.01.2023 in Appeal No. 91 of 2023 in the case of Uttar Pradesh Power Corporation Limited & Ors. v. Amplus Green Power Private Limited & Ors. the Hon'ble APTEL remanded the matter back to the Commission observing that 100% banking can neither be unilaterally demanded by the generator nor directed by the Commission as the CRE Regulations, which are binding on everyone, categorically subject the quantum of banking to agreement between the parties. Therefore, insofar as the regulations are concerned, there is no illegality if UPPCL, based on its techno-commercial concerns, proposes to bank 25% electricity for Inox."

Despite the order of this Tribunal in Appeal No. 91 of 2023 dated 31.01.2023 being brought to its notice, UPERC has nonetheless chosen to issue a clarification, regarding the scope and purport of the 2019 Regulations, to the contrary, and has observed, in the impugned order, as under:

27. Accordingly, the procedure for banking and withdrawal of energy, in terms of the UPERC CRE Regulations, 2019, may be clarified as below:

(a) The banking of energy will be allowed for upto 100% of the energy generated in each 15 minute time block. The total energy so banked in a day shall be adjusted against the

consumption of electricity from the distribution licensee during the same day on TOD basis. The balance energy, if any, at the end of the day, shall remain banked with the distribution licensee.

(b) Banking charges will have to be paid, as per CRE Regulations, 2019 even if the energy banked during a time block of 15 minutes in an off-peak/ peak period is utilized within another time block of 15 minutes during the off-peak/ peak period in the same day. Accordingly, the banking charges shall be applicable on withdrawal of banked energy irrespective of the timeframe i.e whether on 15 minute time block, daily or quarterly basis.

(c) The total of such energy banked in a quarter shall not exceed 49% of the energy generated. Banked energy in excess of 49% of the energy generated shall stand lapsed at the end of the quarter.

(d) The captive users shall be allowed to withdraw this energy that has been banked with distribution licensee by the end of (Q+2)th quarter as per regulation 31(a)(iii) of the CRE Regulations 2019.

(e) The quantum of banked energy that remain unutilised after (Q+2)th quarter shall be treated and settled as per regulations no. 31(a)(v) of the CRE Regulations 2019."

The UPERC further observed that, in cases where the licensee has already signed the banking agreement up to 49%, and if the captive generating plant approaches the licensee and demonstrates its requirement for banking beyond the agreed quantum, it should be allowed. The afore-said conclusions of the UPERC, in the order impugned in this Appeal, runs

contrary to the law declared by this Tribunal in its order in Appeal No. 91 of 2023 dated 31.01.2023. We find it difficult to believe that the UPERC was of the bonafide view that the judgment of this Tribunal provided otherwise, and it seems to us that the UPERC has deliberately chosen to take a view different from the law declared in the aforesaid judgement of this Tribunal.

This Tribunal exercises appellate jurisdiction over orders passed by the Appropriate Commission under Section 111 of the Electricity Act. A subordinate court is bound by the enunciation of law made by the Superior Court. **(SUB-INSPECTOR ROOPLAL V. LT. GOVERNOR: (2000) 1 SCC 644; GOVT. OF A.P. V. A.P. JAISWAL, (2001) 1 SCC 748).** Whatever be its view, the Commission, which is lower in hierarchy, and against whose orders an appeal lies to this Tribunal, is bound to follow the law laid down by this Tribunal in a judgment which has attained finality. Save in cases where judgements of the Supreme Court or the High Courts have held to the contrary, the law declared by this Tribunal necessitate strict adherence, and must necessarily be followed by the Commission.

Consistency is the cornerstone of the administration of justice which creates confidence in the system. it is with a view to achieve consistency in judicial pronouncements, that courts have evolved the rule of precedents, principle of stare decisis etc. (**GOVT. OF A.P. V. A.P. JAISWAL, (2001) 1 SCC 748).** Precedents. which enunciate rules of law, form the foundation of administration of justice. This is a fundamental principle which every judicial/quasi-judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. **(SUB-INSPECTOR ROOPLAL V. LT. GOVERNOR: (2000) 1 SCC 644; GOVT. OF A.P. V. A.P. JAISWAL, (2001) 1 SCC 748).**

Regulatory authorities (such as the UPERC), which are at the bottom of the rung, cannot take the liberty of ignoring binding directives, and to act

contrary to settled judicial principles. (**Karnataka Power Transmission Corporation Ltd vs KSERC (Judgement of Aptel in Appeal No. 97 of 2020 dated 05.10.2020).** Refusal by Regulatory Commissions to follow/implement the judgments of the Appellate Tribunal would amount to judicial indiscipline. (**BSES VS DERC: Judgement of Aptel in O.P. Nos. 1 & 2 of 2012 dated 14.11.2013).**

Judicial discipline would require the UPERC, whatever be its view, to follow the law declared by this Tribunal on the interpretation to be placed on, and on the scope and purport of, Regulation 31(a)(ii) of the 2019 Regulations. While it was always open to the 1st Respondent in Appeal No. 91 of 2023, if it were of the view that the order passed by this Tribunal in the said Appeal on 31.01.2023, did not accord with law, to subject the said order to challenge before the Supreme Court under Section 125 of the Electricity Act, it is not in dispute that no such challenge was mounted thereto, and the order of this Tribunal, in Appeal No. 91 of 2023 dated 31.01.2023, has attained finality. Consequently, the UPERC was obligated in law to follow the law declared by this Tribunal on the interpretation to be placed on Regulation 31(a)(ii) of the 2019 Regulations. Its taking a different view, despite its attention being drawn to the judgment of this Tribunal in Appeal No. 91 of 2023 dated 31.01.2023, amounts to judicial indiscipline on its part. The “grammar of humility in law”, in the hierarchical system, basically means to abide by precedents unless distinguishable, but not to ignore them and pass orders because of an individual notion or perception. Adjudication, in accordance with precedents, is the cultivation of humility. **(DENTAL COUNCIL OF INDIA V. DR HEDGEWAR SMRUTI RUGNA SEVA MANDAL, (2017) 13 SCC 115; PRIYA GUPTA V. STATE OF CHHATTISGARH, (2012) 7 SCC 433).**

We conclude our analysis under this head, holding that it is only in view of the request of Mr. Parag Tripathi, learned Senior Counsel appearing on behalf of UPERC, that this Tribunal may clarify the scope of Regulation 31(a)(ii), that we have further elaborated on the scope and purport of Regulation 31(a)(II) in the order now passed by us. While the conduct of the UPERC, in deliberately flouting the judgement of this Tribunal, leaves much to be desired, judicial propriety requires us to refrain from saying anything more.

Suffice it to make it clear that, as long as Regulation 31(a)(ii) of the 2019 Regulations stands un-amended, banking of energy can only be permitted in terms of an agreement between the renewable energy generator and the distribution licensee. Unilateral determination by the Commission at the behest of the generator, without the distribution licensee's agreement, on the quantum of energy to be banked, is impermissible.

VI. HAS THE UPERC SOUGHT TO CIRCUMVENT OR AMEND ITS REGULATIONS BY WAY OF THE IMPUGNED ORDER?

A. SUBMISSIONS OF THE APPELLANT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the petition, leading up to the issuance of the Impugned Order, was filed by M/s Inox under Section 86(1)(f) of the Act which pertains to the adjudicatory functions of the UPERC; at no point in time did the UPERC issue a public notice or alter the nature of proceedings; indisputably, the *inter-se* proceedings between the appellants and the 2nd Respondent were purely adjudicatory in nature; in such proceedings, the UPERC could not have substantially amended the regulations by issuing an order; in **Madhya Pradesh Power Generation Company Limited v. MPERC**, **2011 ELR (APTEL)1041)**, this Tribunal held that the Commission has manifold powers namely, administrative, supervisory, legislative and

adjudicatory, but each power must be exercised in the appropriate field and simply because the commission has many powers, it cannot be said that, while exercising one power, it oversteps its limit in that power and assumes another jurisdiction; in ***PTC India Limited v. CERC***, **(2010)4 SCC 603**, the Supreme Court held that the measures taken by the Commission under Sections 79 and 86 have to be in conformity with the regulations framed under Sections 179 and 181 of the Act, wherever applicable; the regulations framed by the commission stand on a higher pedestal vis-à-vis an order in the sense that the order has to be in conformity with the regulations; however, contrary to settled principles of law, the statutory regulations are sought to be negated by issuance of the Impugned Order.

Sri B.P. Patil, Learned Senior Counsel, would further submit that the Impugned Order also runs contrary to Section 181(3) of the Act and the Electricity (Procedure for Previous Publication) Rules, 2005 ("the 2005 Rules" for short); Section 181(3) provides that all regulations made by the UPERC are subject to the condition of previous publication; Rule 3 of the 2005 Rules stipulates the procedure to be followed for previous publication; substantial re-writing of Regulation 31(a) of the 2019 Regulations, under the Impugned Order, has been done without previous publication, much less following the procedure set out under the 2005 Rules; the 2nd Respondent had approached the UPERC in adjudicatory proceedings under Section 86(1)(f) of the Act, and the Impugned Order nowhere states that the UPERC is not exercising powers under Section 86(1)(f) of the Act, but regulatory powers or delegated legislative powers are being exercised; in inter-se adjudicatory proceedings between the 2nd Respondent and the Appellants, without any previous publication, Regulation 31(a) of the 2019 Regulations has been substantially re-written under the garb of clarification.

B. SUBMISSIONS OF THE 2ND RESPONDENT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the 2nd Respondent filed the Petition before the State Commission under Regulation 2(viii) of the 2019 Regulations, i.e., power to remove difficulty read with Section 86(1)(f) of the Act for adjudication of the dispute between the parties; the State Commission in the impugned order, after giving opportunity to both the parties, decided the extent of banking as 49% whilst exercising its power to adjudicate; vide the Impugned Order, the State Commission has ensured that the interest of the distribution licensee as well as generation companies are protected, and has strived to balance consumer rights and grid stability; and the necessity of providing such clarifications was on account of flawed interpretation of the Appellants, discriminatory approach in granting banking, and curtailment of banking without any justification.

C. THE 2019 REGULATIONS HAVE STATUTORY FORCE:

Section 181(3) of the Electricity Act stipulates that all Regulations, made by the State Commission under the said Act, shall be subject to the condition of previous publication. In exercise of the powers conferred by sub-section (1) and clause (z) of sub-section (2) of Section 176 of the Electricity Act, 2003, the Central Government made the Electricity (Procedure for Previous Publication) Rules, 2005 (hereinafter called the “2005 Rules”), which came into force on its publication in the official gazette on 09.06.2005. Rule 3 of the 2005 Rules prescribes the procedure of previous publication and stipulates that, for the purpose of previous publication of the Regulations under sub-section (3) of Section 177, sub-section (3) of Section 178 and sub-section (3) of Section 181 of the Act, the following procedure shall apply : (1) the Authority or the Appropriate Commission shall, before making regulations, publish a draft of the regulations for the information of persons

likely to be affected thereby; (2) the publication shall be made in such manner as the Authority or the Appropriate Commission deems to be sufficient; (3) there shall be published, with the draft regulations, a notice specifying a date on or after which the draft regulations will be taken into consideration; and (4) the Authority or the Appropriate Commission, having powers to make regulations, shall consider any objection or suggestion which may be received by the Authority or the Appropriate Commission from any person with respect to the draft before the date so specified. **(Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14)**

The requirement of previous publication, inviting objections and suggestions is not an empty formality, but is with an intention to enable persons likely to be affected to be informed, so that they may put forth their objections/suggestions thereto, which are required to be taken into consideration by the authorities before issuing a final notification. (**Avinash Ramkrishna Kashiwar (Dr.) v. State of Maharashtra, 2014 SCC OnLine Bom 1834; State of Punjab v. Tehal Singh : (2002) 2 SCC 7**). The provision regarding previous publication necessitates strict compliance as it vitally affects those who have the valuable right to object to the Regulations when its draft is published. **(*Ramakrishna Vivekananda Mission* v. *State of W.B.*, (2005) 9 SCC 53; (Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14).**

It is only after the Commission has published a draft of the Regulations for the information of persons likely to be affected thereby, a notice is published specifying a date on or after which the draft Regulations will be taken into consideration, and the Commission has considered the objection or suggestion received from any person with respect to the draft before the date so specified, can the process of previous publication be said to have been complied with, after which alone would the Regulations come into

force. **(Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14).**

D. REGULATION CONFERRING POWER ON THE COMMISSION TO REMOVE DIFFICULTIES: ITS SCOPE:

Regulation 2 of the 2019 Regulations relates to the scope and extent of the 2019 Regulations. Regulation *2(viii)* stipulates that, if any difficulty arises in giving effect to the 2019 Regulations, the Commission may, on its own motion or otherwise, by an Order and after giving a reasonable opportunity to those likely to be affected by such Order, make such provisions, as may appear to be necessary, for removal of the difficulty so arisen

In order to obviate the necessity of amending the Regulations for removal of every difficulty, howsoever trivial, encountered in the enforcement of a Regulation by going through the time-consuming amendatory process, the Regulations, sometimes, invest the Commission with a very limited power to make minor adaptations and peripheral adjustments in the Regulations, for making its implementation effective, without touching its substance. That is why the "removal of difficulty clause", once frowned upon and nick-named as the "Henry VIII clause" in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance, as a practical necessity, in several Indian statutes/Rules/Regulations of the post- independence era. **(Madeva Upendra Sinai v. Union of India (1975) 3 SCC 765; GVPR Engineers Ltd. v. State of Telangana, 2016 SCC OnLine Hyd 846).**

E. ANALYSIS:

The power, conferred by Regulation 2(viii), of the 2019 Regulations, is neither uncontrolled nor unfettered. It is circumscribed, and its use is

conditioned and restricted. The existence or arising of a "difficulty" is the sine qua non for the exercise of the power, and the "difficulty" contemplated by the said provision is a difficulty arising in giving effect to the provisions of the Regulations, and not an extraneous difficulty. Exercise the power thereunder is limited to the extent it is necessary for applying or giving effect to the Regulations. In the exercise of such power, the Commission cannot change, disfigure or do violence to the Regulations itself.

While it is true that Regulation 2(viii) of the 2019 Regulations confers power on the UPERC to remove difficulties, its scope is extremely limited The UPERC cannot give a go-by to the Regulations, or seek to amend it, in the guise of exercising its power to remove difficulties. The procedure to make Regulations under Section 181(3) read with the applicable Rules, would apply equally to an amendment of the said Regulations, and the power to remove difficulties is not available to be exercised to amend Statutory Regulations.

Regulations made by the Commission, in the exercise of its powers under Section 181 of the Electricity Act, is binding on it while exercising either its regulatory or its adjudicatory powers under Section 86 of the Electricity Act. The erroneous interpretation placed by the UPERC on Regulation 31(a)(ii) of the 2019 Regulations, contrary to the judgment of this Tribunal in Appeal No. 91 of 2023 dated 31.01.2023, does not merit acceptance. Consequently, the interpretation placed on Regulation 31(a)(ii) of the 2019 Regulations by this Tribunal is binding on the UPERC, and a view contrary thereto could not have been taken by it in the order under appeal.

VII. CLARIFICATIONS SOUGHT ON BEHALF OF UPERC:

Mr. Parag Tripathi, Learned Senior Counsel appearing on behalf of the UPERC, would submit that, If restriction is imposed on banking on 15 minute time block basis, the very purpose of providing banking to generating plants

where generation is intermittent is defeated; thus in the above background it became essential for the State Commission to address the issue of 15 minute time block as introduced by UPPCL by misconstruing the 2019 Regulations, and therefore in the impugned order the Commission has provided clarifications; in terms of the 2019 Regulations; the Commission deliberated on the quantum of energy to be banked; the parties were unable to provide any justification for the banking requirement that would be sufficient, and were even unable to provide any rationale for restricting banking to 25% or higher; in order to resolve the dispute, and to arrive at a quantum of banking that not only balances parties commercial interests but also in compliance with the statutory provisions of the Act, the Rules and the decision of APTEL, the impugned order was passed taking into consideration all the above, and the banking quantum has been decided; although the Commission decided on the limit of quantum of energy to be banked i.e. 49% of energy generated in a quarter, it was also decided that in cases where the licensee has already signed the banking agreement for less than 49%, if the captive generating plant approaches the licensee and demonstrates its requirement for banking beyond the agreed quantum, it shall be allowed banking upto the limit of 49% on quarterly basis; thus, the Commission complied with the orders of APTEL of not revising the quantum of banking for existing agreements; and it has made it open for both the parties to mutually decide, but such mutual agreement on banking quantum shall not be more than 49%.

Mr. Parag Tripathi, Learned Senior Counsel, would further submit that the UPERC, with the deepest humility for judicial hierarchy and propriety, was of the view that the order was not intended to ignore the findings of this Tribunal; the Commission respectfully seeks the following clarifications with respect to interpretation of Regulation 31(a) (ii) of the 2019 Regulations; (a) no banking of power will take place without an agreement, irrespective of the

percentage in question; (b) UPPCL/Licensee is given absolute authority to decide the percentage of Banking, and the Commission would have no say and jurisdiction to interfere with that authority of the UPPCL; needless to state that the UPERC has the power conferred on it by Section 181, read with Sections 9, 42, 86 and other enabling provisions of the Electricity Act 2003, to make any amendments/addenda to the 2019 Regulations 2019, provided they are not inconsistent with the provisions of the Electricity Act, 2003, or even exercise the power to Remove Difficulties under Regulation 2 (viii) of the UPERC (Captive and Renewable Energy Generating Plants) Regulations 2019.

ANALYSIS:

We see no reason to delve into the justification furnished on behalf of the UPERC for the view it had taken, since Regulation 31(a)(ii) of the 2019 Regulations is clear and unambiguous. It requires an agreement between the RE generating plant and the distribution licensee for banking of power upto 100%, and it is impermissible either for the generator or for the Commission to insist on the distribution licensee banking such quantum of energy to which it has not agreed to. As long as Regulation 31(a)(ii) of the 2019 Regulations remains in force, UPPCL cannot be forced to bank energy beyond the quantum for which it has agreed to. As detailed hereinabove, the scope of the power to remove difficulties, conferred on the UPERC by Regulation 2(viii) of the 2019 Regulations, is extremely limited and, in the guise of exercising such power, it is not open to the UPERC to pass orders contrary to the express stipulation in Regulation 31(a)(ii) of the 2019 Regulations.

VIII. CONCLUSION:

For the reasons afore-mentioned, the impugned order passed by the UPERC must be, and is accordingly, set aside. The Appeal is allowed and all the I.As therein shall stand disposed of.

Pronounced in the open court on this the **30th day of August, 2024**.

(Seema Gupta) Technical Member (Electricity)	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~