

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

APPEAL NOS. 368, 369, 370, 371, 372 & 373 OF 2019

Dated : 27th February , 2020

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTERS OF :

APPEAL NO. 368 OF 2019

Ayana Ananthapuramu Solar Private Limited

3rd Floor, Sheraton Grand Hotel,
Brigade Gateway Campus,
26/1, Dr. Rajkumar Road,
Malleswaram (West),
Bangalore – 560 055.

.... **APPELLANT**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
Through Secretary
11-4-660, 4th Floor, Singareni Bhavan,
Red Hills Road, Khairatabad,
Hyderabad, Telangana – 500 004.

2. **Southern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
19-13-65/A, Srinivasapuram

Tiruchanoor Road, Tirupati – 517 503.

**3. Eastern Power Distribution Company of
Andhra Pradesh Limited**

Through Chairperson / Managing Director
P & T Colony, Seethammadhara,
Visakhapatnam,
Andhra Pradesh – 530 013.

4. NTPC Limited

Through Chairperson / Managing Director
7, Institutional Area, Core – 7,
SCOPE Complex, Lodhi Road,
New Delhi – 110 003.

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Nived Veerapaneni
Mr. Apoorva Misra
Mr. Nitish Gupta
Mr. Aditya K. Singh
Ms. Jyotsna Khatri
Ms. Parichita Chowdhury
Mr. Samart Kashyap
Mr. Shreshth Sharma
Ms. Puja Priyadarshini
Ms. Molshree Bhatnagar
Ms. Anukriti Jain
Ms. Soumya Prakash

Counsel for the Respondent(s) : Mr. Rakesh Kumar Sharma
for R-2 & 3

Mr. M. G. Ramachandran, Sr. Adv.
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Ms. Tanya Sareen
Mr. Arvind Kumar Dubey **for R-4**

APPEAL NO. 369 OF 2019

SB Energy Solar Private Limited

1st Floor, Worldmark-2, Asset Area-8,
Hospitality District, Aerocity,
NH-8, New Delhi – 110037.

.... **APPELLANT**

Versus

1. Andhra Pradesh Electricity Regulatory Commission,

Through Secretary
11-4-660, 4th Floor, Singareni Bhavan,
Red Hills Road, Khairatabad,
Hyderabad, Telangana – 500 004.

**2. Southern Power Distribution Company of
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Through Chairperson / Managing Director
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Ms. Molshree Bhatnagar
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Ms. Poorva Saigal
Ms. Anushree Bardhan
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Ms. Tanya Sareen
Mr. Arvind Kumar Dubey **for R-4**

APPEAL NO. 370 OF 2019

SB Energy Solar Private Limited

Through Authorised Signatory,
1st Floor, Worldmark-2, Asset Area-8,
Hospitality District, Aerocity,
NH-8, New Delhi – 110037.

.... **APPELLANT**

Versus

- 1. Andhra Pradesh Electricity Regulatory Commission,**
Through Secretary
11-4-660, 4th Floor, Singareni Bhavan,
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Hyderabad, Telangana – 500 004.
- 2. Southern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati – 517 503.
- 3. Eastern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
P & T Colony, Seethammadhara,
Visakhapatnam,

Andhra Pradesh – 530 013.

4. Solar Energy Corporation of India Limited (SECI)

Through Managing Director
1st Floor, A-Wing, D-3,
District Centre, Saket,
New Delhi – 110017.

.... **RESPONDENTS**

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Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Arvind Kumar Dubey **for R-4**

APPEAL NO. 371 OF 2019

Ayana Kadapa Renewable Power Private Limited

3rd Floor, Sheraton Grand Hotel,
Brigade Gateway Campus, 26/1,
Dr. Rajkumar Road, Malleswaram (West),
Bangalore, Karnataka – 560055.

.... **APPELLANT**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
Through Secretary
11-4-660, 4th Floor, Singareni Bhavan,
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Hyderabad, Telangana – 500 004.
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Andhra Pradesh Limited**
Through Chairperson / Managing Director
19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati – 517 503.
3. **Eastern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
P & T Colony, Seethammadhara,
Visakhapatnam,
Andhra Pradesh – 530 013.
4. **Solar Energy Corporation of India Limited**
Through Managing Director
1st Floor, A-Wing, D-3,
District Centre, Saket,
New Delhi – 110017.

.... **RESPONDENTS**

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Mr. Aditya K. Singh
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Mr. Samart Kashyap
Mr. Shreshth Sharma
Ms. Puja Priyadarshini
Ms. Molshree Bhatnagar
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Ms. Soumya Prakash

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Mr. M. G. Ramachandran, Sr. Adv.

Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Ms. Tanya Sareen **for R-4**

APPEAL NO. 372 OF 2019

Spring Agnitra Private Limited

Unit No. FF-48 A, First Floor,
Omaxe Square, Plot No. 14,
Jasola District Centre,
New Delhi.

.... **APPELLANT**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
Through Secretary
11-4-660, 4th Floor, Singareni Bhavan,
Red Hills Road, Khairatabad,
Hyderabad, Telangana – 500 004.

2. **Southern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
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Tiruchanoor Road, Tirupati – 517 503.

3. **Eastern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
P & T Colony, Seethammadhara,
Visakhapatnam,
Andhra Pradesh – 530 013.

4. **NTPC Limited**
Through Chairperson / Managing Director
7, Institutional Area, Core – 7,
SCOPE Complex, Lodhi Road,
New Delhi – 110 003.

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Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Nived Veerapaneni
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Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Arvind Kumar Dubey
Ms. Tanya Sareen **for R-4**

APPEAL NO. 373 OF 2019

Spring Soura Kiran Vidyut Private Limited

Unit No. FF-48 A, First Floor,
Omaxe Square, Plot No. 14,
Jasola District Centre,
New Delhi.

.... **APPELLANT**

Versus

- 1. Andhra Pradesh Electricity Regulatory Commission,**
Through Secretary
11-4-660, 4th Floor, Singareni Bhavan,
Red Hills Road, Khairatabad,
Hyderabad, Telangana – 500 004.
- 2. Southern Power Distribution Company of
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Through Chairperson / Managing Director
19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati – 517 503.
- 3. Eastern Power Distribution Company of
Andhra Pradesh Limited**
Through Chairperson / Managing Director
P & T Colony, Seethammadhara,

Visakhapatnam,
Andhra Pradesh – 530 013.

4. **Solar Energy Corporation of India Limited,**
Through Managing Director
1st Floor, A-Wing, D-3,
District Centre, Saket,
New Delhi – 110017.

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Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
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Mr. Apoorva Misra
Mr. Nitish Gupta
Mr. Aditya K. Singh

Counsel for the Respondent(s) : Mr. Rakesh Kumar Sharma
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Mr. M. G. Ramachandran, Sr. Adv.
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Ms. Tanya Sareen **for R-4**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. These Appeals are filed by the solar power plants challenging impugned order dated 05.10.2019 passed by Andhra Pradesh Electricity Regulatory Commission (for short hereinafter referred to as “**APERC**” or “**State Commission**”). The petitions pending before APERC was for

approval for procurement of power by Southern Power Distribution Company of Andhra Pradesh Limited and Eastern Power Distribution Company of Andhra Pradesh Limited, which are hereinafter referred to as “**AP Discoms**”, at the tariff competitively determined.

2. As a matter of fact, in the present Appeals, the entire order of 05.10.2019 is not the subject matter, but it is limited only pertaining to direction issued by APERC indicating that there would be consideration of amendments to the Power Purchase Agreement (for short “**PPA**”) / Power Sale Agreement (for short “**PSA**”) forming part of the bidding documents which were prepared, according to Appellants, in line with the guidelines issued by Ministry of Power (for short “**MoP**”) for tariff based competitive bidding process in respect of procurement of power from Grid connected solar power projects. This was in tune with the guidelines dated 03.08.2017. A common order came to be issued in the matters pending before the State Commission wherein approval of the projects under PSAs executed by Respondents-Discoms with 4th Respondents-NTPC Limited (for short “**NTPC**”) and Solar Energy Corporation of India Limited (for short “**SECI**”) in respect of solar power projects established at NP Kunta, Anantpur District and Kadapa Ultra Mega Solar Park in the State of Andhra Pradesh.

3. Appellants contend that the proceedings pending before APERC being initiated only for procurement of power by AP Discoms through tariff based competitive bidding process under Section 63 of the Electricity Act, 2003 (for short hereinafter referred to as “**the Act**”). It is further contended that the bidding process and the bidding documents are in strict compliance with the MoP guidelines which was in fact admitted and accepted in the impugned order by the State Commission. There is categorical statement by the State Commission that no material is forthcoming indicating that the guidelines issued by Government of India pertaining to the issue in question were violated in the bidding process undertaken by NTPC or SECI in any of the matters pertaining to these Appeals. Therefore, the Appellants contend that there was no occasion or legal basis for the State Commission to direct the parties to consider any amendments to the bidding documents prepared in line with MoP guidelines.

4. According to Appellants, the State Commission is bound by the provisions of the Act which provides two different routes which could be adopted by distribution licensee for procurement of power i.e., through bilateral/negotiated PPAs, where the agreement is subject to prudence check, regulatory approval of tariff under Section 62 and procurement of power, subject to approval under Section 86 (1) (b), which could be

referred to as “**MoU Route**”. The other route is through transparent competitive bidding process which has to be conducted in terms of guidelines issued by Central Government and in this route, appropriate Commission is required only to adopt the tariff discovered, so also to see whether the guidelines for bidding process was properly adopted or not, This could be referred to as “**Bidding Route**”. Therefore, Appellants contend that if MoU Route is the issue pending before the State Commission, the State Commission shall proceed under Section 62 of Act read with regulatory powers encompassed under Section 86 (1) (b) of the Act. In this scenario, a State Commission has full powers to interfere in terms of capacity, tariff and agreement proposed to be entered into between the parties. It can even reduce the capacity or the tariff placed before it while approving the PPA etc.

5. Appellants further contend that Under Section 63 scenario, in terms of settled law declared by the Hon’ble Supreme Court as well as this Tribunal, exercise to be discharged by the State Commission is very limited i.e., to verify whether bidding process was held in a transparent manner and in accordance with MoP guidelines or not. If it finds that such compliance does not exist, then the petition for approval of the tariff can be rejected. If process of bidding is found to be in accordance with MoP guidelines issued by Central Government in a transparent manner, then

the Commission proceeds to adopt the tariff, and it binds the Commission as such tariff is a bid tariff. Therefore, according to Appellants, application of general regulatory powers contemplated under Section 86 (1) (b) cannot be undertaken in adoption of tariff petition under Section 63.

6. According to Appellants, it is not open for the State Commission to make changes to the terms or conditions of PPA which forms part of bidding document in a tariff based competitive bidding. Therefore, the directions now issued in the impugned order i.e., subjecting the approval of procurement of power and adoption of tariff to the proposed amendments/objections or suggestions that have been raised during public hearing are outside the scope of the petition filed before the State Commission.

7. They further contend that specifically this Tribunal in OP No. 1 of 2019 directed the State Commission to dispense with the requirement of public hearing, but still APERC in the impugned order did entertain public objections and directed the parties to submit comments on the amendments proposed by the objectors. The Appellant therefore, is before this Tribunal seeking the following reliefs:

“(a) to allow the present Appeal,

(b) Expunge the directions of APERC in the impugned order at Paragraph No. 26 at page 32 of the impugned order dated 05.10.2019 in as much as they require the AP Discoms, NTPC, SECI and Appellant to consider amendments of the terms of the PPA/PSA, suggested by objectors at the public hearing conducted by APERC and such directions are contrary to the orders of this Tribunal i.e.,

“subject to the amendments to the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively suggested by Sri M. Venugopala Rao and Sri A. Punna Rao, learned objectors being considered by the Distribution Companies of Andhra Pradesh, M/s. NTPC, M/s. SECI and the Solar Power Developers and their reporting back to the Commission within two (2) months from now their respective views on the proposed amendments. The Commission will examine the proposed amendments and views of the stakeholders received and after hearing in accordance with law, order incorporation of any amendments in the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively considered relevant and necessary by the Commission.”

(c) Pass any such other and further orders as this Tribunal may deem fit in the interest of justice and equity.”

Per Contra, contention of Respondent Nos. 2 & 3 – AP Discoms, in brief, is as under:

8. The relief sought by the Appellant seeking expungement of a portion of direction of the 1st Respondent-State Commission in the order dated 05.10.2019 by asking to consider amendments to PPA and PSA as suggested by objectors on the issue of reduction of trading margin from Rs.0.07 paise per unit to Rs.0.02 paise per unit and report back to the State Commission within two months for examination of proposed amendments by the State Commission is actually stayed by the orders of this Tribunal in Original Petitions as well as in the above Appeals. They contend that in the light of the stay order, the answering Respondents did not initiate any negotiations with NTPC and other parties based on the observations of the 1st Respondent-State Commission in the impugned order which is stayed on the aspect of trading margin.

9. They further contend that the necessity to negotiate for reduction of value of trading margin component arises not only in the light of financial burden but also in public interest. As a matter of fact, there was no cause of action to file the above Appeals, since contemplated reduction or otherwise, will not have any impact on the interest of the Appellant. It is the 4th Respondent-NTPC which is entitled for trading margin, if any, would be aggrieved by orders dated 05.10.2019 passed by the 1st Respondent-State Commission.

10. Respondent No. 2 & 3 - AP Discoms further contend that the Appellants have miserably failed to achieve the progress in establishment of the project within the period stipulated in terms of PPA and PSA. In the light of completion of the project in time as per the definition of 'Schedule Date' i.e., 13 months from the effective date, the Appellant will not be able to commission the project. Therefore, the Appellant may face the consequences of payment of liquidated damages in terms of PPA i.e., Clause 4.6. Till date, nothing is placed on record i.e., the reasons which come in the way of achieving commissioning of the project.

11. They further contend that though the tariff and the PPA was approved by the order dated 05.10.2019, till date, NTPC has not furnished bank guarantees to the answering Respondents nor the NTPC did furnish the Performance Bank Guarantee for the delay caused by the power plants. The terms of PSA does envisage such benefit of encashment of Performance Bank Guarantee by NTPC. Till date, there is no specific assertion/claim that the project would be commissioned within 25 months from the effective date. If the commissioning of the project within the time frame is delayed, the tariff of the project would be different and the same would be as prevalent on the date of such delayed commissioning of the project. Hence, the tariff now claimed in the PPA/PSA cannot be paid. There is no delay on the part of the Respondent-State Commission. Even

if such delay was to extend, it cannot be in terms of PPA. Discoms are not at fault for delay of the project is the stand of the answering Respondents.

12. According to AP Discoms, in the course of time, tariff for procurement of solar power across the country is further reduced to Rs.2.44 per unit. Therefore, the tariff that would be applicable is the one prevalent when the project was ready for supplying power.

13. They further contend that under Section 63 of the Act, it is the tariff that alone, which was discovered in a competitive bidding process, is to be adopted by the Regulatory Commission. So far as the issue of trading margin component payable by Discoms, there is no Regulation of APERC specifying the Rs.0.07 per unit payable as trading margin. Therefore, the objectors have raised the said objection and this aspect is governed by Section 86 (1) (i) of the Act. Therefore, the State Commission can look into this issue, since the trading margin at Rs.0.07 paise per unit would be an unjustified burden on the end consumers. Central Electricity Regulatory Commission (for short “**CERC**”) also in its recent order dated 20.11.2019 has opined, pertaining to intra-state matter, that since no trading margin value is specified in the concerned regulation, the parties may mutually agree on this aspect; hence, the objections raised by

objectors are justified. Therefore, Respondent Nos. 2 & 3 have sought for dismissal of the Appeal.

4th Respondent-NTPC filed reply, in brief, as under:

14. The impugned order which is sought to be challenged is only to the extent that the State Commission after having granted approval to the procurement of power by AP Discoms, had made the approval subject to amendments to the PPA and PSA as proposed by the objectors which are to be considered by NTPC, AP Discoms and Solar Power Developers (for short “**SPDs**”) within a period of two months which again shall be examined by the State Commission. This observation of the State Commission in the impugned order dealing with amendments to PPA and PSA is an error and are liable to be set aside, since they are outside the scope of the Petition considering approval to the procurement of power.

15. 4th Respondent further contends that the renewable source of energy requires to be promoted in terms of Section 61 (h) and 86 (1) (e) of the Act. That apart, it is a Bid Route since tariff is discovered in a competitive bidding process in terms of Section 63 of the Act. Therefore, according to 4th Respondent, jurisdiction of the State Commission is confined to only to consider procurement of power taking into account the obligation under Section 61 (h) and 86 (1) (e) of the Act as stated above.

16. They also contend that the scope of the Petition before the State Commission was to approve the power procurement at the tariff discovered and the trading margin provided in the bidding documents by taking into consideration the then necessity of the power and the reasonableness of the cost. Once approval is granted to the power procurement, the State Commission cannot reserve onto itself any right to consider the proposed amendments/modifications to the PPA and PSA, since such documents are in accordance with the guidelines notified by the Central Government. Once the tariff is based on competitive bidding process, the State Commission cannot undertake the exercise of determination of tariff contemplated under Section 62 of the Act. Therefore, the question of re-visiting the terms of PPA and PSA does not arise.

17. According to 4th Respondent-NTPC, competitive bidding process if held in terms of guidelines, it does not require the approval of the Regulatory Commission so far as the terms and conditions of bidding documents; only if it is a case of deviation from such guidelines, approval of appropriate Commission is required. Therefore, that portion of the impugned order which proposes amendments/modifications to the PPA/PSA after signing of the documents between the parties on such proposed modifications is quite contrary to the settled position in law. This

is nothing but imposing conditions after completion of bidding process wherein successful bidder is selected.

18. 4th Respondent further contends that this Tribunal in Original Petitions at the instance of the very same Appellants had dispensed with the requirement of public hearing before the State Commission. In spite of such dispensation, direction to entertain amendments and objections to the PPA and PSA is nothing but directly contravening the orders passed by the Tribunal.

19. With these submissions, 4th Respondent-NTPC sought for allowing the Appeal to the limited extent of directing deletion of extraneous covenants/conditions imposed at Para 26 of the impugned order.

**Appellant filed rejoinder to the reply of Respondent Nos. 2 & 3 -
AP Discoms, in brief, as under:**

20. In the reply, Appellant contends that the reply of AP Discoms is devoid of merits, since it attempts to raise issues which were not raised by AP Discoms during the proceedings before the Commission; therefore, they cannot be allowed to take inconsistent plea before the Tribunal.

21. Appellant contends that the Appellant is a person aggrieved within the meaning of Section 111 of the Act, since that portion of the impugned order which is subject matter of the Appeal refers to consideration of the proposed amendments by the objectors with regard to tariff and the same prejudices the right and interest of the Appellant. Further, without any legal basis, the process of adoption of tariff is subjected to conditions which are under challenge before the Tribunal. Therefore, the Appellant is an aggrieved person. Since PSA and PPA between the parties are back to back agreements, they are to be considered as part of one single transaction; therefore, the interest of the Appellant is jeopardised.

22. Appellant further contends that subjecting the adoption of tariff to consideration of amendments/modification proposed by objectors, it cannot be adoption of tariff and till such subjectivity introducing illegality is set aside, there is no finality to tariff adoption. Even such apprehension is communicated to the Appellants by the lenders of the Appellants; therefore, Appellants have sought for early disposal of the Appeal. Since the lenders of the Appellants have strong objections for disbursement of loan amounts till such time the tariff orders attains finality, the Appellants are put to difficulties and hardship.

23. They also contend that AP Discoms have erroneously alleged the so-called delay in achieving the Scheduled Commercial Operation Date (for short “**SCOD**”) of the Project, so also its entitlement to claim liquidated damages as a consequence of alleged delay. Such allegation of delay in achieving SCOD is factually incorrect and cannot be sustained in law. The effective date which is referred to or described at Article 2.1 of the PPA would be the date when APERC passes orders after approval of procurement of power and adoption of tariff. In the light of APERC’s order which is causing obstacles for implication and complication because of conditional order, question of computing time for SCOD does not arise. Further, the original two months date at Article 2.1.2 of PPA was substituted with 30.04.2019 and consequentially Supplementary PPA and PSA were entered into. Therefore, the so-called delay, if any, is not attributable to the Appellant. On the other hand, NTPC has extended the scheduled commissioning date of the project to 04.09.2020 by a letter dated 29.11.2019 and the same is consented by the Appellant by letter dated 13.12.2019; therefore, the extension of time is up to 04.09.2020.

24. The *inter se* obligations between the parties in terms of PPA including commissioning of the project could trigger only when finality of adoption of tariff is reached. Such opinion was expressed by this Tribunal on various occasions holding that the effective date would be the date on

which the PPA becomes unconditionally applicable. Since the subjectivity introduced in the impugned order has not been decided, the adoption of tariff has to be considered as a conditional one. Therefore, the Appellants do not have a free hand to execute the project.

25. According to the Appellant, the opinion of AP Discoms that the Appellants ought to have raised and invested funds and commissioned the project within 13 months from the date of execution of PPA in spite of adoption of tariff not reaching finality is unfair and not a legitimate claim of the Discoms. Once adoption order reaches finality in terms of Article 2.1.2 of PPA, the question of completion of the project within time in terms of PPA would come into force. Therefore, the delay, even if occurs, cannot be attributed to the Appellants, since the Appellants legally can seek suitable extension of SCOD under the PPA.

26. The Appellant contends that AP Discoms, having approached the State Commission seeking *inter alia* adoption of tariff along with trading margin of Rs.0.07 per kWh payable to NTPC as agreed by AP Discoms, now cannot question the trading margin contesting the same before this Tribunal. On the other hand, the Appellants before the State Commission have accepted to pay trading margin of Rs. 0.07 per kWh and the said position is very clear from the material before the State Commission. So

also, reference to CERC order dated 20.11.2019 by AP Discoms is misplaced, since on mutual agreement, trading margin of Rs.0.07 per kWh can be arrived at.

27. Appellant further contends that the delay caused is only on account of AP Discoms not meeting their obligations in terms of PPA in time. The AP Discoms are trying to mislead the Tribunal by stating that the tariff payable for the power from the solar plants of the Appellant shall be the tariff as would be prevailing during that period when the project is ready for supplying power. Since it is a tariff discovered under competitive bidding process, such claim of the Discoms deserves to be denied.

28. They also contend that the trading margin forms part of bidding and at this stage, AP Discoms should not be allowed to raise any issue pertaining to trading margin. During the course of hearing of tariff adoption proceedings, when a third party raised objection pertaining to the issue of trading margin contemplated in the bidding process, AP Discoms actually supported trading margin and the tariff found in the bid process as the most competitive one at the relevant point of time.

29. They further contend that the Tribunal must allow SCOD of the project to be extended by 11 months from the date of the judgment of the Tribunal.

30. With these submissions, Appellants sought for allowing the Appeal.

4th Respondent-NTPC filed submissions in response to the reply of Respondent Nos. 3 & 4, in brief, as under:

31. The conditional order passed by the State Commission while approving the procurement of power and adoption of tariff is unsustainable in law. AP Discoms now cannot raise extraneous issues beyond the scope of the Appeal especially when they did not choose to file any Appeal against the impugned order. 4th Respondent-NTPC also has filed Appeals questioning that portion of the impugned order which prejudices their rights vis-a-vis the proposed amendments/modifications. That portion of the impugned order has created uncertainty in the implementation of PPA. The allegation of AP Discoms with regard to delay to establish the project is unsustainable, since no such ground was raised by AP Discoms before the State Commission, therefore, it is beyond the scope of the Appeal.

32. 4th Respondent-NTPC also contends that Article 2.1.2 of PPA clearly indicate the responsibility of AP Discoms to obtain adoption of tariff order

from the State Commission within the time prescribed. Now because of conditional order of adoption of tariff and procurement of power, there is no certainty with regard to adoption of tariff. AP Discoms cannot take advantage of their own mistakes. Therefore, such ground cannot be entertained.

33. According to 4th Respondent-NTPC, the tariff payable for the power should be in terms of tariff discovered under bid process which was fructified into PPA and PSA terms. Now AP Discoms cannot allege that the tariff payable for the power should be equal to the latest discovered tariff as prevalent at the time of commissioning of the project. Such was never the contention of AP Discoms, and it is beyond the scope of the grounds of the Appeal. No such contention was raised by AP Discoms before the State Commission and further, it is contrary to terms of bid documents. On the other hand, before the State Commission at various stages, they have defended the bidding tariff of Rs.2.72 per kWh plus the trading margin of 7 paise. Now AP Discoms cannot unilaterally seek reduction in the applicable tariff which is contrary to the scheme of bid documents, PPA and PSA.

34. They further contend that so far as trading margin is concerned, AP Discoms having said that there is no regulation regulating/specifying the

trading margin; therefore, it does not fall under Section 63 and it is subject to Section 86 (1) (j) of the Act, is incorrect. The said allegation is beyond the scope of the Appeal factually and legally. The trading margin is clearly mentioned in the guidelines, Request for Selection (for short “**RfS**”), PPA and PSA. Further, in the reply filed before the Commission objecting the objections of the objectors, AP Discoms have categorically accepted the trading margin payable at Rs.0.07 per kWh, now they cannot make a u-turn contending that the State Commission has jurisdiction to entertain the issue of trading margin. Similarly, the AP Discoms have wrongly placed reliance on the orders of CERC dated 20.11.2019. Trading margin of 7 paise is fixed under the present scheme of sale of solar power by NTPC to the distribution licensees namely, AP Discoms which was mutually agreed under the PSA. Now it cannot contend in deviation of express provisions of the RfS document, PPA and PSA. Further, having admitted by AP Discoms that the APERC (Intra-State Electricity Trading) Regulations, 2005 do not provide for any trading margin for long term transaction, it is clear that there is no such Regulation which governs the document. Therefore, it is up to the contracting parties to mutually agree upon the trading margin, which is the situation in the present case.

35. With these submissions, 4th Respondent-NTPC sought for rejecting the contention raised by AP Discoms and allowing the Appeal as prayed for.

36. The point that would arise for our consideration is:

“whether these appeals deserve to be allowed or what order?”

37. The above appeals pertain to solar power projects to be implemented by different Appellants in respect of solar parks at Ananthapuramu and so also Kadapa. It is also not in dispute that it is a joint endeavour between Solar Energy Corporation of India Limited on behalf of Government of India and the Government of AP, which had accorded approval under MNRE Solar Park Scheme of 2014 so also Andhra Pradesh Solar Policy of 2015 read with JNNSM Guidelines of 2016. Admittedly, Ministry of Power by notification dated 03.08.2017 issued Guidelines for tariff based competitive bidding process for procurement of power from Grid connected to solar power project. In continuation of the effort to develop solar park at Ananthapuramu, NTPC/SECI at the instance of Discoms initiated competitive bidding process for selection of solar power developer who could set up solar power project in the said district of Ananthapuramu and Kadapa in the state of Andhra Pradesh. Request for selection came to be issued for solar

power developers for development of 3 x 250 MW in Ananthapuramu district and so also for development of 3 x 250 MW in the District of Kadapa of state of Andhra Pradesh. These were Ultra Mega Solar Parks being developed by Andhra Pradesh Solar Park Corporation Limited, which is referred to as "APSPCL". As part of bidding documents, draft PPA/PSA, Implementation Support Agreement and Land Lease Agreements were made available to the solar power developers. Reverse auction came to be conducted by the nodal agency i.e., 4th Respondent in these Appeals, who is intermediary procurer of power from solar power plant developers.

38. Appellants were declared as successful bidders against the RFS issued by NTPC. The supply of power to AP Discoms was at Rs.2.73 per kWh. Apparently, AP Discoms entered into Power Sale Agreement with NTPC/SECI for procurement of solar power. Back to back basis PPA was also entered into between NTPC/SECI and the Appellants herein. Appellants, apparently, executed Implementation and Support Agreements so also Land Lease Agreements with APSPCL on different dates.

39. It is not in dispute that AP Discoms were required to obtain the order of APERC within two months from the effective date of PPA for adopting the tariff along with trading margin of NTPC/SECI and approving the

procurement of the contracted capacity based on terms and conditions referred to in PPA read with terms and conditions of PSA.

40. The proceedings were initiated at the instance of AP Discoms on 02.02.2018, but APERC issued formal public hearing notice on 23.03.2019 inviting suggestions/comments of the stake holders on the PSA executed between AP Discoms and NTPC/SECI.

41. As seen from the records, in the course of said public hearing, two objectors, namely, Sri M. Venugopala Rao and Sri A. Punna Rao raised objections before APERC by suggesting certain amendments to the PPA/PSA. This was strongly objected to not only by the Appellants but also by AP Discoms by contending that PPA and PSA were executed as per MoP Guidelines.

42. These Appellants, at this relevant point of time, filed O.P. Nos. 1 to 6 of 2019 contending that the APERC ought not to have adopted the course of public hearing, since the process undertaken by AP Discoms was for adoption of tariff and approval of procurement of power through competitive bidding process as envisaged under Section 63 of the Act in terms of Guidelines of Government of India. This Tribunal, on 29.07.2019/30.07.2019 passed this interim order:

“In that view of the matter, we issue ex-parte Ad-interim direction against Respondent – DISCOM and State Regulatory Commission not to initiate any precipitative/coercive action against the Petitioner including cancellation or termination or deemed/automatic termination of PPA and PSA till such time the Andhra Pradesh State Regulatory Commission decides/issues order pertaining to adoption of tariff, trading margin and approval of procurement of contracted capacity.”

43. Subsequent to this interim order in the above Original Petitions, Appellants brought to the notice of APERC the interim orders passed by this Tribunal. However, the State Commission chose public hearings. Since proceedings before the APERC were under Section 63 proceedings which dispenses with public hearing, Appellants sought intervention. These facts were brought on record by way of affidavit of the Appellants. AP Discoms also made their submissions after obtaining instructions. On 24.08.2019, record of proceedings before the APERC clearly indicate why the matter was adjourned i.e., at the request of AP Discoms to secure instructions from Government of AP.

44. On 29.08.2019, during the course of hearing of Original Petition Nos. 1 to 6 of 2019, the Petitioners, in OP who are the Appellants in the above Appeals, public hearing process was adopted by APERC for adoption of tariff and the same would amount to contravening settled

principles of law. Then, after hearing all the parties, this Tribunal in Original Petitions made the following order:

“9. In the light of the above proceedings, we fail to understand how public hearing is initiated in the adoption tariff, which is an outcome of competitive bidding process. At this stage, we are of the opinion if the PSA read with PPA are pending for consideration before the Respondent-Commission in terms of Section 86(1)(b), the proceedings have to be taken up by the Respondent Commission in accordance with the Act and the Regulations with reference to settled law pertaining to competitive bidding process under Section 63 of the Act. Respondent-Commission shall not permit the Respondent-DISCOMS to withdraw the said petition at this stage. We also direct the Respondent Commission not to hold public hearing since the proceedings pertain to adoption of tariff in a competitive bidding process.”

45. It is seen that after perusing the orders of this Tribunal dated 29.08.2019, on 31.08.2019, the APERC observed that it has to proceed with the proceedings to comply with the directions of the Tribunal. Relevant portions of the record of proceedings dated 31.08.2019 read as under:

“Orders of the Hon’ble Appellate Tribunal for Electricity in O.P.No.5 of 2019 and I.A.Nos.1423 & 1424 of 2019 dated 29-08-2019 have been received by the Commission in which the Hon’ble Appellate Tribunal for Electricity

directed that the proceedings have to be taken up by this Commission in accordance with the Act and the Regulations with reference to settled law pertaining to competitive bidding process under Section 63 of the Act and shall not permit the respondent/Discoms to withdraw the said petition at this stage. This Commission was also directed not to hold public hearing since the proceedings pertain to adoption of tariff in a competitive bidding process.

Heard Sri Hemant Sahai, learned counsel for three developers i.e., (i) Ayana Ananthapuramu Solar Power Private Limited (ii) Sprng Anitra Private Limited and (iii) SB Energy Solar Private Limited on the manner of compliance with the directions of Hon'ble Appellate Tribunal for Electricity by this Commission.

Sri P. Shiva Rao, learned Standing Counsel for the utilities requested for time for submission of his arguments on the manner in which this Commission has to proceed for complying with the directions of the Hon'ble Appellate Tribunal for Electricity. Hence, the matter is posted to 07-09-2019.”

46. The matter came up before this Tribunal from time to time. Both the parties submitted arguments. On 16.09.2019 when AP Discoms sought modification of interim order dated 29.08.2019, after hearing the Appellants in furtherance of previous interim directions, this Tribunal made the following order:

“We make it clear that Respondent Commission should proceed with the Petitions (Public hearing in the matter of approval of Power Sale Agreement (PSA) signed by APDISCOMSs with M/s. NTPC and regulation of price under Section 86(1) (b) of the Electricity Act, 2003 for purchase of power from 750 MW (Phase-II) Solar Park at NP Kuntra, Anantapur District) and (Public hearing in the matter of approval of Power Sale Agreement (PSA) signed by APDISCOMSs with M/s. SECI and regulation of price under Section 86(1) (b) of the Electricity Act, 2003 for purchase of power from 750 MW Kadapa Ultra Mega Solar Park) disposing of proceedings pending before them based on the letters issued by Respondent/DISCOM on merits and those orders which shall be passed will be subject to orders of this Tribunal in the appeal, as expeditiously as possible but not later than 05.10.2019.”

47. Subsequently, after hearing all the parties, the State Commission disposed of the Petitions on 05.10.2019 by approving procurement of power by AP Discoms and adoption of tariff subject to certain conditions which are expressed in the following order, which reads as under:

“Therefore, all the three matters under public hearing under consideration herein are ordered approving the procurement of solar power by Southern Power Distribution Company of Andhra Pradesh (APSPDCL) and Eastern Power Distribution Company of Andhra Pradesh (APEPDCL) respectively from M/s National Thermal Power Corporation Limited (NTPC) and M/s Solar Energy Corporation of India Limited (SECI) of a quantum of 750

*MW, 250 MW and 750 MW respectively at the specified Solar Parks under the Power Sale Agreements (PSAs)/ Power Purchase Agreements (PPAs) respectively at the tariffs discovered through competitive bidding process, as per the guidelines issued by the Government of India, which stand adopted by the Commission under Section 63 of the Electricity Act, 2003, **subject to the amendments to the Power Sale Agreements (PSAs)/ Power Purchase Agreements (PPAs) respectively suggested by Sri M Venugopala Rao and Sri A. Punna Rao, learned objectors being considered by the Distribution Companies of Andhra Pradesh, M/s NTPC, M/s SECI and the Solar Power Developers and their reporting back to the Commission within two (2) months from now their respective views on the proposed amendments. The Commission will examine the proposed amendments and view of the stakeholders received and after hearing in accordance with law, order incorporation of any amendments in the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively considered relevant and necessary by the Commission.***”

48. This impugned order was brought to the notice of this Tribunal and sought interim directions by the Petitioners in O.P. Nos. 1 to 6 of 2019. On 23.10.2019, this tribunal passed the following order:

“Appellants placed on record order dated 05.10.2019 subsequent to orders of this Tribunal dated 29.08.2019 and 16.09.2019.

There was a clear direction not to hold public hearing since it was a petition for adoption of tariff under Section 63 of Electricity Act, 2003 read with Section 86 (i) (b) of Electricity Act, 2003, the competitive bidding process.

Now, the above mentioned order of Commission dated 05.10.2019 indicates that in fact the objectors (part of Public Hearing) were entertained indirectly by passing the following order :

*“Therefore, all the three matters under public hearing under consideration herein are ordered approving the procurement of solar power by Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) and Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL) respectively from M/s. National Thermal Power Corporation Limited (NTPC) and M/s. Solar Energy Corporation of India Limited (SECI) of a total quantum of 750 MW, 250 MW and 750 MW respectively at the specified Solar Parks under the Power Sale Agreements (PSAs)/ Power Purchase Agreements (PPAs) respectively at the tariff discovered through competitive bidding process, as per the guidelines issued by the Government of India, which stand adopted by the Commission under Section 63 of the Electricity Act, 2003, **subject to the amendments to the Power Sale Agreements (PSAs)/Power Purchase Agreements (PPAs) respectively suggested by Sri M. Venugopala Rao and Sri A. Punna Rao, learned objectors being considered by the Distribution Companies of Andhra Pradesh, M/s. NTPC, M/s. SECI and the Solar***

Power Developers and their reporting back to the Commission within two (2) months from now their respective views on the proposed amendments. The Commission will examine the proposed amendments and views of the stakeholders received and after hearing in accordance with law, order incorporation of any amendments in the Power Sale Agreements (PSAs)/ Power Purchase Agreements (PPAs) respectively considered relevant and necessary by the Commission.”

This virtually means the process that DISCOM has to follow would be subject to objections raised by objectors which is quite contrary to our directions dated 29.08.2019 and 16.09.2019.

However, learned Sr. Counsel, Mr. M. G. Ramachandran appear for NTPC and SECI submits that they are challenging the above said order by filing an appeal.

List the matter on 16.12.2019.”

49. Aggrieved by the said conditional order (impugned order dated 05.10.2019), the above Appeals are filed before this Tribunal.

50. It is an undisputed fact that APERC being a creation of a Statute i.e., provisions of the Act, is expected to exercise its functions in consonance with the provisions of the Act. In other words, it cannot act contrary to the provisions of the Act. It is well settled by various judgments of the Hon'ble Supreme Court that if the authority which is created by enactment has jurisdiction, it is to act only in accordance with the provisions of the

enactment under which it is created. It is also well settled that once a procedure is contemplated in a Statute to do a particular thing in a particular manner, it must be done in accordance with such procedure/manner only.

51. In that view of the matter, was APERC justified to open up public hearing calling for suggestions/objections to the Petition filed for approval of procurement of power and adoption of tariff? No doubt, Section 86 (1) (b) confers regulatory powers on a State Commission to act in accordance with the procedure. But this is general regulatory powers; therefore, if Section 63 of the Act covers the field, it has to be strictly in compliance with the provisions of Section 63.

52. If tariff is discovered in a Bidding Route under Section 63 of the Act, the appropriate Commission is required to adopt the tariff discovered and applicability of Section 86 (1) (b) is limited to consider the merits of the case vis-à-vis the guidelines. This was made clear in the decision of ***Energy Watchdog v. CERC's case [2017 14 SCC 80 paragraph 20]*** which read as under:

“20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that

when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-

State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

53. Therefore, it is clear that the general regulatory powers which could be exercised by the State Commission comes into picture only if in a given situation, there are no guidelines framed at all or where the guidelines do not provide a procedure to deal with. Therefore, in the light of the guidelines prescribed by MoP for a specific procedure to be followed in the procurement of solar power in question, there was no scope for the State Commission to hold public hearing calling up for objections/suggestions from public. The only requirement of the State Commission in such situation would be to see whether the bidding process initiated was in accordance with MoP guidelines and whether it was complied with strictly adhering to MoP guidelines. As a matter of fact, MoP guidelines clearly indicated that mere intimation to the State Commission about the initiation

of the bidding process is required in terms of Clause 3.1.1 and there is no complaint/allegation that the same was not complied with. On the other hand, Appellants specifically contend that such intimation about bidding process being initiated was done.

54. The impugned order dated 05.10.2019 passed by the State Commission, in fact clearly indicate that all the three matters under public hearing were considered and ordered approving procurement of solar power by AP Discoms from M/s. National Thermal Power Corporation Limited (NTPC) and M/s. Solar Energy Corporation of India Limited (SECI) for a total quantum of 750 MW, 250 MW and 750 MW respectively at the specified solar parks under the PSAs and PPAs respectively at the tariff discovered through competitive bidding process conducted as per the guidelines issued by the Government of India, which stand adopted by the Commission under Section 63 of the Act. However, this was subject to consideration of the proposed amendments raised by two persons - Sri M. Venugopala Rao and Sri A. Punna Rao by the Solar Developers, Discoms as well as NTPC and SECI and to approach the Respondent-State Commission, if necessary. Therefore, the public hearing and proceeding further with entertaining the proposed suggestions/amendments to the PPAs and PSAs between the parties were outside the scope of exercise of regulatory powers, since it was considering approval for procurement of

solar power and adoption of tariff which were done in accordance with MoP guidelines. It is nobody's case that MoP guidelines were not followed by the concerned stakeholders and such observation is not forthcoming from the orders of approval for procurement of solar power, though it is a conditional order. Therefore, the process to discover tariff in a competitive bidding process adopted by the concerned authorities must be held in accordance with MoP guidelines.

55. In the objections filed by AP Discoms before this Tribunal pertaining to maintainability of the Appeal by the Appellants, since the aggrieved party, according to Respondent-Discoms was NTPC, we now proceed to see the provisions pertaining to procurement of power in terms of guidelines.

56. RfS document, PPA and PSA at 2.1.1 of guidelines on 'Intermediary procurer' & 'End Procurer' which reads as under:

"2.1.1

c)- 'Intermediary procurer' & 'End Procurer'

ii. The intermediary Procurer shall enter into a PPA with the Solar Power Generator and also enter into a Power Sale Agreement (PSA) with the End Procurer. The PSA shall contain the relevant provisions of the PPA on a back to back basis. The trading margin, as notified by the Appropriate Commission (or in the

absence of such notification, as mutually decided between the intermediary Procurer and the End Procurer), shall be payable by the End Procurer to the Intermediary Procurer.”

57. Admittedly, the solar power developers have entered into PPAs with Intermediary procurer i.e., NTPC/SECI as the case may be, and PSAs between the intermediary procurer and end procurer i.e., NTPC/SECI with AP Discoms. These PSAs and PPAs between the parties are back to back agreements. Therefore, they are not separate transactions; they are part and parcel of once single transaction even in accordance with the provisions of PPAs. Therefore, once the process of procurement of power and adoption of tariff is subjected to conditions, as stated above in the impugned order dated 05.10.2019, the parties whose interest and rights are prejudiced with the impugned order become aggrieved person. Therefore, the Appeals filed by the Appellants are maintainable, since with the impugned order, there is no finality to adoption of tariff. This stand of the Appellants is further strengthened by the fact that lenders of the Appellants also expressed that there is no finality to tariff adoption. In fact, intermediary procurer – NTPC has also filed Appeals, since the subjectivity to adoption of tariff introduced in the impugned order to objections raised by two objectors affect procurement of power at a particular tariff, so also trading margin of 0.07 paise per kWh. Therefore, both the Solar Power

Developers and Intermediary Procurers are the affected parties by virtue of the impugned order.

58. The Respondent-AP Discoms in their stand before this Tribunal contended that there is delay in achieving the SCOD of the project; therefore, the solar developers may have to pay liquidated damages as a consequence of delay to NTPC who in turn has to pay such damages to AP Discoms. This stand of the Discoms is categorically denied and opposed by both the SPDs as well as intermediary procurer i.e., NTPC etc. First and foremost, on this issue of delay, one has to consider whether the stand of the AP Discoms before the Tribunal was similar on the issue of delay. For this we also have to consider the time frame in terms of agreements between the parties. Article 2 of PPA and PSA refers to this which reads as under:

PPA

“ARTICLE 2: TERM OF AGREEMENT

2.1 Effective Date and Condition Precedent

2.1.1 This Agreement shall come into effect from signing of this PPA by both the parties i.e. 5th July 2018 and such date shall be the Effective Date for the purpose of this Agreement.

2.1.2. Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that within two (2) months from the Effective Date, the AP Discoms shall duly obtain the order of the Andhra Pradesh Electricity Regulatory Commission adopting the Tariff and the trading margin of NTPC and approving the procurement of the contracted capacity, on the terms and conditions contained in this Agreement read with the terms and conditions contained in the Power Sale Agreement entered into between NTPC and the AP Discom(s).”

PSA

“II. Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that within two (2) months from the Effective Date, the Andhra Discoms shall duly obtain the order of the Andhra Electricity Regulatory Commission adopting the Tariff and the trading margin of NTPC and approving the procurement of the contracted capacity on the terms and conditions contained in this Agreement entered into between NTPC and Andhra Discom(s) read with the terms and conditions contained in the PPA to be entered into between NTPC and the SPD.”

59. It was not the stand of the Discoms before the Commission that there was delay on the part of the intermediary procurer or SPDs. In terms of Article 2.1 which deals with effective date and condition precedent, the effective date of signing of the PPA between both the parties is 05.07.2018. It was incumbent upon the AP Discoms to get the approval of the State Commission adopting the tariff and trading margin of NTPC/SECI, so also approval of procurement of power. The condition precedent for enforcement of obligation of either party against the other under these agreements i.e., PPA and PSA is two months. From the date of such approval, the project in question must start within the prescribed time. Therefore, there was no responsibility on the part of the Appellants to obtain adoption tariff order from the State Commission as it was the responsibility of the AP Discoms. Though AP Discoms have initiated proceedings for approval of procurement of power and adoption of tariff before the Commission, on account of conditional order passed by the State Commission as indicated in the impugned order subjecting the approval to objections/suggestions raised by objectors, there is no finality with regard to approval of procurement of power and adoption of tariff. Now AP Discoms cannot take advantage of their own mistakes or delay. Such ground cannot be entertained.

60. The objections of AP Discoms before the State Commission filed on 03.05.2019 pertaining to terms and conditions of PPA, so also tariff and trading margin are as under:

“ 750 MW NTPC

<i>Obje ctor</i>	<i>Object ions</i>	<i>Replies of APDISCOMs</i>
<i>Sri. M. VenuGopata Rao</i>		
<i>2.</i>		<ul style="list-style-type: none"> • <i>APSPDCL Vide letter dated 07.06.2018 submitted the Power Sale Agreements (PSAs) signed by APDISCOMs with M/s NTPC on 04.06.2018 to the Hon'ble Commission and requested to grant approval for the long-term PSAs and Regulation of <u>Price for purchase of Solar Power generated from the Proposed 750 MW (Phase-II) Solar Park at a tariff of Rs. 2.72 /kWh (for 250 MW) & Rs. 2.73 / (kWh (for 500 MW) in addition to a trading margin of 7 paise/kWh.</u></i> • <i>APDISCOMs entered the Supplementary PSAs (3 Nos) to the Original Power Sale Agreements (3 Nos.) with SECI duly extending the existing timelines up to 31.07.2019.</i>
<i>5.</i>		<ul style="list-style-type: none"> • <i>The said PSAs were entered as per the model power supply agreement issued by Ministry of Power, Gol and subject to the approval of Hon'ble Commission.</i> • <i>It is to submit that NTPC is only an intermediary agency between SPD and APDISCOMs facilitating the execution of PPA and scheduling of Power.</i> • <i>In case of liquidated damages for delay in commissioning, as per clause 4.6 of the PPA between NTPC and SPD, penalty is collected by NTPC from SPD and shall be passed on to APDISCOMs. In case of default by the SPD, NTPC can encash the performance bank guarantee submitted by the SPD and pass on the payment to APDISCOMs.</i> • <i>NTPC also committed very clearly that the Liquidated Damages that are levied and collected form the SPD will be passed on to APDISCOMs in case of default. NTPC being a central government</i>

		<p>agency is dependable on this aspect. Moreover, this PSA with NTPC is on back to back basis, all the terms and conditions of PPA between NTPC and SPD are deemed to be incorporated in the PSA and SPD is responsible to pay Liquidated Damages to DISCOMs.</p>												
8.		<ul style="list-style-type: none"> • It is to submit that tariff discovered through a bidding process depends upon various factors such as solar radiation at a particular site, infrastructure development, cost of land, logistics, cost of funding, prevailing prices of solar cells/modules at a particular time, transmission charges, counter party risk, related policies of the State-Government etc. • The tariff discovered for a particular project through competitive bidding process cannot be compared with the tariffs determined for any other project. • <u>The tariff Rs. 2.44/kWh discovered through competitive bidding is depending on various parameters as explained above and was discovered in the tenders floated in the Rajasthan. This cannot be compared with the present tariff discovered in Andhra Pradesh since many parameters like solar insolation, cost of land etc are different.</u> For example, the CUF in Rajasthan is 26.5% where as in AP it is 25%. This will result in 8% increase in tariff apart from other parameters. • Moreover, this is the lowest ever tariff discovered in competitive bidding across the country at that point of time. The solar prices are very dynamic in nature and tend to vary significantly with time depending upon so many factors. • Even MNRE acknowledged this variation and has given a direction that the above rate should be treated as benchmark for any other bids. <p>The following table depicts tariffs discovered in different states in the recent tenders.</p> <table border="1" data-bbox="587 1823 1433 2024"> <thead> <tr> <th>Sl. No.</th> <th>Month/Year of reverse auction</th> <th>Tariff Discovered (Rs./kWh)</th> <th>Tendering agency</th> <th>Project/State</th> <th>Remarks</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	Sl. No.	Month/Year of reverse auction	Tariff Discovered (Rs./kWh)	Tendering agency	Project/State	Remarks						
Sl. No.	Month/Year of reverse auction	Tariff Discovered (Rs./kWh)	Tendering agency	Project/State	Remarks									

		1.	December, 2016	3.57	APGEN CO	Ananthapuramu-II Solar Park	Bidding was done for EPC cost
		2.	April, 2017	3.15	NTPC	Kadapa Solar Park Ph-I, 250 MW	Lowest ever tariff at that time
		3.	May, 2017	2.44	SECI	Bhadla Solar Park, Rajasthan	Highest Solar Radiation, steep fall in import solar panels
		4.	Feb, 2018	2.94 to 3.34	KREDL	Karnataka	Tariff in upward trend due to rise in solar panel prices, rupee depreciation, rising interest rates, fears of safeguard duty etc.
		5.	May, 2018	2.72 to 2.73	NTPC	Ananthapuramu Solar Park	
		6.	July, 2018	2.70 to 2.71	SECI	Kadapa Solar Park Ph-2, 750 MW	
		7.	Dec, 2018	3.04 to 3.08	Up New and	Uttar Pradesh	

				Renewable Energy Development Agency		
		8.	Jan, 2019	2.84 to 2.89	GUVNL	Gujarat
		<p><u>Note:</u> Solar irradiation in Rajasthan is 5.85/kWh/m²/day (annual average direct normal irradiance) Solar Irradiation in Andhra Pradesh is 5.55 kWh/m²/day Exchange Rate Variation: USS-Rs.64.2 (May 2017); Rs. 68.4 (July 2018)</p> <ul style="list-style-type: none"> The Project capacity is 250 MW which cannot be evacuated at 33 KV level and technically, it is not feasible. The generation is located far away from load centres and it is recommended to transmit power at higher voltage levels to reduce the transmission losses. <u>The trading margin of 7 paise is fixed by MNRE and is being followed by all other state utilities as a standard procedure.</u> Secondly, the DISCOMS are not very regular in payments as observed recently because of severe financial constraints. Hence, NTPC is taking responsibility for payment of bills to solar power developers in spite of delay in making payments by DISCOMs thereby ensuring uninterrupted power supply to DISCOMs from solar power developers. In fact, in case of 1000 MW Gani, Kurnool Solar Pak, though APDISCOMs have delayed the payments for more than 6 months, M/s NTPC made payments to solar power developers on its own ensuring uninterrupted power supply from solar power developers. 				
14.		<ul style="list-style-type: none"> MNRE sanctioned the 1000 MW Solar park at NP Kunta, Anantapur dist to AP State along with other solar Parks, out of 1000 MW, as a first phase NTPC have commissioned 250 MW solar project. For the balance capacity of 750 MW, GoAP vide letter Dt: 05.12.2017 has given permission to NTPC to initiate the tendering process and to proceed 				

		<p>with the implementation of aforesaid solar PV project in case tariff discovered is less than the ceiling tariff of Rs. 3.00/kWh (including trading Margin).</p> <ul style="list-style-type: none"> • As per the directions of GoAP, NTPC conducted the Competitive Bidding duly following the MoP notified guidelines issued in August & December 2017 for tariff based competitive bidding process for procurement grid connected solar and discovered a tariff of Rs. 2.72/kWh for 250 MW & Rs. 2.73 /kWh for 500 MW, which is less than the Ceiling Tariff of Rs. 3.00 per kWh. • Accordingly, APDISCOMs have signed long term Power Sale Agreements (PSAs) with NTPC for purchase of solar power generated from the proposed 750 MW (Phase-II) solar park at NP kunta, Anantapur Dist under the Scheme of the Jawaharlal Nehru National Solar Mission (JNNSM) of GoI, <u>at a tariff of Rs. 2.72 /kWh (for 250 MW) & Rs. 2.73 /kWh (for 500 MW) in addition to a trading margin of 7 paise/kWh.</u>
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(Emphasis supplied)

61. Over and above this, it is seen that there were Supplementary PSAs to the original PSAs with intermediary procurer extending the existing timelines up to 31.07.2019. The time is further extended by intermediary procurer. To commission the project within the timeframe when approval of procurement of power and adoption of tariff reach finality, that would be the starting of time to reach the completion of project in terms of agreements i.e., PPA between the solar developer and intermediary procurer-NTPC/SECI, would come into play. Therefore, the contention of

the Respondent-AP Discoms that there is delay or going to be delay to achieve SCOD is rejected.

62. That apart, if delay is caused on account of laches on the part of the AP Discoms, they cannot take advantage of their own mistakes. On this issue, settled law is as under:

a) In Kushweshwar Prasad Singh Vs. State of Bihar (2007) 11 SCC 14

“14. In this connection, our attention has been invited by the learned Counsel for the appellant to a decision of this Court in Mrutunjay Pani and Anr. vs. Narmada Bala Sasmal and Anr. [1962 (1) SCR Pg. 290], wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim ‘Commodum ex injuria sua nemo habere debet’ (No party can take undue advantage of his own wrong).

15. In Union of India & Ors.v. Major General Madan Lal Yadav (Retd.), (1996) 4 SCC 127, the accused-army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was essential condition for the commencement of trial and when the accused did not make himself available, he could

not be allowed to raise a contention that proceedings were time-barred. This Court referred to Broom's Legal Maxims (10th Edn.) P. 191 it is stated;

"..... it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure".

16. *It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrong doer ought not to be permitted to make a profit out of his own wrong".*

b) In U.P. SEB -v- Shiv Mohan Singh, (2004) 8 SCC 402, the Hon'ble Supreme Court held as under:

"116. *It is one thing to say that a contract is illegal being opposed to public policy so as to render the same void in terms of Section 23 of the Indian Contract Act but it is another thing to say that by reason of breaches of the terms and conditions thereof by one of the parties it becomes voidable at the instance of the other party to the contract. If a contract is valid in law the breaches thereof would not render it invalid but the same may only enable a party thereto, who had suffered by reason of such breach, to avoid the contract. Unless the terms and conditions of a contract are avoided by a party thereto the*

contract remains valid and all consequences flowing therefrom would ensure to the benefit of the parties thereto.”

- c) In B. M. Malani-v-Commissioner of Income Tax and Anr. 2008 (10) SCC 617, the Hon'ble Supreme Court observed in as under:

18. For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case, but we may take note of few precedents operating in the field to highlight the aforementioned proposition of law. See Priyanka Overseas Pvt. Ltd. and Anr. vs. Union of India and Ors. [1991 Suppl. (1) SCC 102, para 39]; Union of India and Ors. vs. Major General Madan Lal Yadav (Retd.) [1996 (3) SCR 785]; Ashok Kapil vs. Sana Ullah (dead) and Ors. [1996 (6) SCC 342]; Sushil Kumar vs. Rakesh Kumar [AIR (2004) SC 230]; first sentence, Kushweshwar Prasad Singh vs. State of Bihar and Ors. SCC at pp 451-52, paras 13, 14 and 16”.

- d) Nirmala Anand-v-Advent Corporation (P) Ltd (2002) 5 SCC 481

45. “The appellant has always been ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own wrong. The appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The respondents cannot take advantage of their own wrong and then plead that the grant of decree of

specific performance would amount to an unfair advantage to the appellant.”

63. Then, coming to contention of the AP Discoms that the tariff must be reduced to Rs.2.44 per unit, since there is going to be delay in commissioning the project, so also seeking reduction of trading margin of Rs.0.07 per unit to Rs.0.02 per unit, we proceed to see the stands of the parties and the provisions applicable.

64. The objections filed before the State Commission by AP Discoms dated 03.05.2019 referred to above not only refers to different provisions of PPAs and PSAs at column 8 as stated above, but also refers to tariff discovered. The highlighted portion of the objections makes the stand of AP Discoms very clear that the tariff discovered through competitive bidding process depends on various parameters referred to at column 9 and because of parameters like solar installation, cost of land etc. which are different place to place. On the other hand, they defend the discovered tariff by saying that this is the lowest ever tariff discovered in a competitive bidding process across the country at that point of time. They also placed on record different tariffs discovered in different States at relevant point of time. Now it is not open to AP Discoms to contend that the tariff that is payable would be the one prevalent when the project was ready for supplying power. The tariff which is discovered under

competitive bidding process which is adopted by the State Regulatory Commission has to be the tariff which is payable.

65. Then coming to trading margin component, which seems to be the bone of contention before this Tribunal as spelt in the affidavit filed by AP Discoms on 03.02.2020. We also note the earlier arguments by learned counsel for AP Discoms that they have no objections so far as tariff is concerned, but they have objections pertaining to trading margin of Rs.0.07 per unit. It is noticed that AP Discoms never raised any grievance, so far as trading margin is concerned, before the State Commission when they filed Petitions, initiated through proceedings for approval of procurement of power and adoption of tariff discovered under competitive bidding process. The documents pertaining to the controversy in issue which referred to trading margin are as under:

Guidelines

“2.1.1

c)- ‘Intermediary procurer’ & ‘End Procurer’

ii. The intermediary Procurer shall enter into a PPA with the Solar Power Generator and also enter into a Power Sale Agreement (PSA) with the End Procurer. The PSA shall contain the relevant provisions of the PPA on a back to back basis. The trading margin, as notified by the Appropriate Commission (or in the absence of such notification, as mutually decided between the intermediary

Procurer and the End Procurer), shall be payable by the End Procurer to the Intermediary Procurer.”

Request for Selection Document

“2.0 Definitions

“Trading Margin” shall mean margin payable towards the services provided by NTPC for sale of power to Discom(s) or any other entity, which shall be Rs. 0.07/kWh.”

PPA

“ARTICLE 1: DEFINITIONS AND INTERPRETATION

<i>“Trading Margin”</i>	:	<i>Shall mean margin payable towards the services provided by NTPC/NVVN for sale of solar power to AP Discom(s) or any other entity, which shall be Rs. 0.07/kWh.”</i>
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PSA

“Article 1. APPLICABLE TARIFF

1.1 The tariff applicable for the sale of Solar Power by NTPC to the AP DISCOM(s) under this Agreement shall be the Tariff @ Rs. 2.72/Unit for payment by NTPC to SPD under the terms of the Power Purchase Agreement between NTPC and the SPD and in addition thereto a trading margin of 7 paise/kWh payable by the AP Discom(s) to NTPC which NTPC shall be entitled to appropriate as its income.”

66. AP Discoms referred to the Order dated 20.11.2019 passed by CERC in Petition No. 204/AT/2019 relying upon Para 29, which reads as under:

*“29.....
Trading Margin Regulations do not provide for any Trading Margin for long term transactions and, therefore, it is upto the contracting parties to mutually agree on Trading Margin, if any, in such cases. In any case, the Commission does not fix Trading Margin on case to case basis. The spirit of the Act read with the Trading Margin Regulations gives freedom and choice to the contracting parties to mutually agree on Trading Margin for any kind of trading transaction, subject to the ceiling Trading Margin, whenever applicable.”*

67. It is seen that there was no objection when parties executed PSA which refers to trading margin. The relevant extracts of PSA are as under:

“F The SPD has agreed to establish a Solar Power PV Power Project with an installed capacity of 250 MW on built, owned and operate basis located in the Solar Park at NP Kunta, Anthapuramu, Andhra Pradesh and agreed to sell the power generated from the project to NTPC to enable onward sale to the distribution licensees of Andhra Pradesh i.e. AP Discom(s) on the terms and conditions contained in the PPA, finalized and initialled between NTPC and SPD, (hereinafter referred to as ‘NTPC – SPD PPA’) a copy of the said PPA is attached hereto and marked as Schedule ‘A’ to this PSA.

G. *AP Discom(s) have examined the entire process by which SPD was selected, the Letter of Intent was issued by NPC to the SPD and the PPA has come to be initialled between NTPC and the SPD and to be entered into providing for the purchase of electricity generated at the project and resale of the same to AP Discom(s) including the terms and conditions for such purchase, rights and obligations assumed by NTPC and the SPD under the PPA and the consequences of the default by either of parties to the PPA.”*

68. AP Discoms have voluntarily agreed to pay the applicable tariff in terms of Article 1 of PSA i.e., tariff at Rs.2.72 per kWh for payment by NTPC/SECI to SPD in terms of PPA and in addition to that, a trading margin of Rs.0.07 per unit is payable by AP Discoms to NTPC/SECI. This trading margin was described as income of NTPC/SECI. Now is it open to AP Discoms to back out or resile from their undertaking under PSA? Are they permitted to approbate and re-approbate? On fact, once a party enters into an agreement with the other party with clear understanding of terms and conditions, they cannot take advantage of some terms and conditions of the same contract and challenge or retract/repudiate other terms and conditions of the same contract. This is well settled principle. For this we rely upon **(1981) 1 SCC 537** in the case of ***M/s New New Bihar Biri Leaves Co. & Ors. v. State of Bihar & Ors.***, Para 48. Therefore, AP Discoms cannot selectively rely upon some terms of PSA i.e., the tariff they are agreed to pay at Rs.2.72 per kWh but refusing to

pay trading margin of Rs.0.07 per kWh along with the tariff in terms of Article 1 of PSA.

69. Objections of AP Discoms filed as reply to objections raised by Sri M. Venugopala Rao and Sri A. Punna Rao as stated above. The trading margin of 7 paise is fixed under the present scheme on sale of solar power in terms of MNRE guidelines. Subsequently, it was mutually agreed upon under the PSA between AP Discoms and NTPC/SECI. Therefore, at this stage unilaterally AP discoms cannot seek reduction of trading margin to 0.02 paise which is in deviation of express provisions of RfS document, PPA and PSA.

70. It is also seen from the reply of AP Discoms that APERC (Intra-State Electricity Trading) Regulations of 2005 have not provided any trading margin for long term transactions. The Judgment of CERC dated 20.11.2019 above, actually says that trading margin regulation gives freedom and choice to the contracting parties to mutually agree on trading margin for any kind of trading transaction, subject to the ceiling whenever applicable. There are no trading margin regulations of the State of Andhra Pradesh Regulatory Commission for long term transactions. Therefore, the only reliance that can be placed is on the mutually agreed upon terms which are spelt out as rights and obligations of the parties under PSA.

Therefore, in the light of the PSA indicating Rs.0.07 as trading margin and in the absence of any Regulations that are applicable to the case on hand, we are of the opinion that trading margin of 7 paise per kWh has to be paid. The PSA between AP Discoms and NTPC/SECI is the final binding document which speaks about tariff and also trading margin on the transaction of sale of power to AP Discoms.

71. In the proceedings dealing with Bidding Route, there cannot be deviation in the contents of PPA was the finding of this Tribunal in Judgment dated 07.10.2013 in Appeal No. 80 of 2012 which reads as under:

“67

ii) The present case is a case of procurement of power by Distribution Licensees under Section 63 of the Act and is distinct from the procurement of power under Section 62 of the Act. There is no requirement of approval of the PPA by the State Commission in procurement of power by a distribution licensee under Section 63 of the Act if the PPA is according to the model PPA as per the Government of India guidelines. No deviation in the content of the PPA with respect to the model PPA has been pointed out by the Appellants. The only requirement of adoption of the tariff after examining the process of procurement of power through competitive bidding process under Section 63 has been completed by the State Commission by granting approval by

letter dated 7.10.2008. This approval of the State Commission was not challenged by the Appellants. On the other hand the Appellants acted upon the same by entering into the PPA with the distribution licensees on 27.2.2009. It is now not open to the Appellants to find fault with the PPA and the procedure followed. No material or substantive deviation in procedure has been pointed out by the Appellants and the deviations pointed out by the Appellant are technical deviations in procedure which are not relevant after the approval granted by the State Commission under Section 63 of the Act which was not challenged. In view of above we have held that the PPA is valid & binding on the parties.”

72. Since PSA and PPA are back to back agreements which form part of one transaction, we are of the opinion that the State Commission ought not to have passed conditional order dated 05.10.2019 subjecting the approval of procurement of power and adoption of tariff to amendments/modifications suggested by two objectors, since the procedure under Section 63 does not contemplate public hearing calling for objections. The procedure to be adopted is only to see whether guidelines providing for competitive bidding process was followed or not. Therefore, any contravention of this procedure cannot be appreciated. The very entertainment of public hearing is quite contrary to the spirit of Section 63 of the Act.

73. The impugned order though approves procurement of power and adoption of tariff, but subject to amendments/modifications on account of objections raised in a public hearing by two objectors - Sri M. Venugopala Rao and Sri A. Punna Rao, cannot be sustained. Therefore, we allow the Appeals setting aside the highlighted portion of the impugned order which reads as under:

*“Therefore, all the three matters under public hearing under consideration herein are ordered approving the procurement of solar power by Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) and Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL) respectively from M/s. National Thermal Power Corporation Limited (NTPC) and M/s. Solar Energy Corporation of India Limited (SECI) of a total quantum of 750 MW, 250 MW and 750 MW respectively at the specified Solar Parks under the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively at the tariffs discovered through competitive bidding process, as per the guidelines issued by the Government of India, which stand adopted by the Commission under Section 63 of the Electricity Act, 2003, **subject to the amendments to the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively suggested by Sri M. Venugopala Rao and Sri A. Punna Rao, learned objectors being considered by the Distribution Companies of Andhra Pradesh, M/s. NTPC, M/s. SECI and the Solar Power Developers and their reporting back to the Commission within two (2) months from now their respective views on the proposed amendments. The***

Commission will examine the proposed amendments and views of the stakeholders received and after hearing in accordance with law, order incorporation of any amendments in the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively considered relevant and necessary by the Commission.”

74. The tariff payable is at Rs.2.72 per kWh along with trading margin of 7 paise per unit in these Petitions.

75. Accordingly, the Appeals are disposed of. Consequently, pending IAs, if any, shall stand disposed of.

76. No order as to costs.

77. Pronounced in the Open Court on this the 27th day of February, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓
REPORTABLE / NON-REPORTABLE

tpd/ts