

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 22nd Aug, 2014

Present:

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON**

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 279 of 2013

**Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007 (Gujarat)**

.....Appellant

Versus

- 1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower, Ashram Road
Ahmadabad – 380009 (Gujarat)**
- 1. Madhya Gujarat Vij Company Ltd
Corporate Office, Race Course Circle,
Vadodara-390 007 (Gujarat)**
- 3. Uttar Gujarat Vij Company Ltd
Corporate Office, Visnagar Road,
Mehsana-384 001 (Gujarat)**
- 2. Paschim Gujarat Vij Company Ltd
Corporate Office, Nana Mawa Road,
Rajkot-360 004 (Gujarat)**
- 5. Dakshin Gujarat Vij Company Ltd
Corporate Office, Kapodara Road,
Surat-395006 (Gujarat)**

- 6. Energy & Petrochemicals Department,
Government of Gujarat,
5th Floor, Block No.5,
Sachivalaya, Gandhinagar-382 010 (Gujarat)**
- 7. ACME Solar Technology (Gujarat) Pvt. Ltd.
Plot No:2, Sector -34, EHTP,
Gurgaon – 122001 (Haryana)**
- 8. Adani Enterprises Ltd.
8-A, Sambhav Building,
Judges Bungalow Road,
Bodakdev, Ahmedabad-380054**
- 9. AES Solar Energy Gujarat Pvt. Ltd.
2nd Floor, Unit No: 202-203,
Suncity Business Tower, Sector-54,
Golf Course Road, Gurgaon - 122 002 (Haryana)**
- 10. Astonfield Solar (Gujarat) Pvt. Limited
29, Free Press House, 215, FP Journal Marg,
Nariman Point, Mumbai-400 021**
- 11. Azure Power (Gujarat) Pvt. Limited
802, Shapath – II, Opp. Rajpath Club,
S G Highway Road, Ahmedabad- 380 015**
- 12. Azure Power (Haryana) Pvt. Limited
8, Ground Floor, Local Shopping Complex,
Pushpa Vihar, Madangir, New Delhi-110062**
- 13. CBC Solar Technology Private Limited
201, Kailash Plaza, Plot No: A-12, Opp.
Laxmi Industrial Estate, Lind Road,
Andheri (W), Mumbai – 400 053**

14. **Dreisatz MySolar24 (P) Limited**
8E, Hansalaya, 15, Barakhambha Road,
Connaught Place, New Delhi – 110001
15. **ESP Urja Pvt. Limited**
306, Galleria, Hiranandani Gardens,
Powai, Mumbai 400 076
16. **Euro Solar Power Pvt. Limited**
G-2 Neelam Aptt., 88, Sampatrao Colony,
R C Dutt Road, Vadodara-390 005
17. **Lanco Infratech Ltd.**
Plot # 4, Software Units Layout,
HITEC City, Madhapur, Hyderabad-500 081
18. **MI MySolar24 (P) Limited**
8E, Hansalaya, 15, Barakhambha Road,
Connaught Place, New Delhi-110001
19. **Millennium Synergy (Gujarat) Pvt. Limited**
No: 16, 3rd Main Road, Sakamma Garden,
Basavanagudi, Bangalore -560 004
20. **Moserbaer Energy & Development Limited**
235, OKhla Industrial Estate, Phase III,
New Delhi -110020
21. **Palace Solar Energy Pvt. Limited**
D-2, Nyloc House Ground Floor 254,
Dr Annie Besant Road, Worli,
Mumbai-400030
22. **PLG Photovoltaics Ltd**
Unit - 5, Ground Floor, JMD Pacific Square,
Sector-15/11, Gurgaon-122001 (Haryana)

- 23. Precious Energy Services Pvt. Limited**
235, Okhla Industrial Estate,
Phase-III, New Delhi-110 020
- 24. Solar Semiconductor Power Company (India) Pvt. Limited**
608, Span Trade Centre, Ashram Road,
Paldi, Opp. Kocharab Ashram,
Ahmedabad-380 006
- 25. Solitaire Energies Pvt. Limited**
235, Okhla Industrial Estate,
Phase-III, New Delhi-110 020
- 26. Sunborne Energy Gujarat One Pvt. Limited**
1st Floor, Technopolis, DLF Gold Club Road,
Sector-54, Gurgaon-122 002
- 27. Sunkon Energy Pvt. Limited**
407, Rajhans Complex,
Near Civil Char Rasta, Ring Road,
Surat-395 002 (Gujarat)
- 28. Unity Power Private Limited**
Forty House, 2nd Floor, 221,
Dr. D.N. Road, Fort, Mumbai-400 001
- 29. Waa Solar Pvt. Limited**
B-101, Gatyatri Appt,
74, Alkapuri Society,
Vadodara-390 005

- 30. Welspun Urja Gujarat Pvt. Limited**
Trade World, 'B' Wing, 9th Floor,
Kamala Mills Compound,
Senapati Bapat Marg Lower Parel,
Mumbai-400 013
- 31. Aatash Power Pvt. Limited**
213, Devarc Commercial Complex,
Nr. Iscon Circle, S.G. Highway,
Ahmedabad- 380 059
- 32. Abellon CleanEnergy Limited**
10th Floor, Sangeeta Complex,
Nr. Parimal Railway Crossing,
Ahmedabad- 380 006
- 33. Alex Astral Power Pvt. Limited**
Suite#402, 4th Floor, Vardann Market,
25A, Camac Street, Kolkata-700016
- 34. APCA Power Pvt. Limited**
Spaze Itech Park, #1058,
Tower B1, Sector - 49, Sohna Road,
Gurgaon - 122001 (Haryana)
- 35. Aravali Infrapower Limited**
G-29, 3rd floor, Vardhman Tower,
Community Centre, Vikas Puri,
New Delhi -110 018
- 36. Backbone Enterprises Limited**
Backbone House, M-43,
Gujarat Housing Board, Kalawad Road,
Rajkot- 360 001

- 37. Chattel Constructions Private Limited**
Monnet House, 11 Masjid Moth,
Greater Kailash Part-II,
New Delhi-110 048
- 38. Claris Lifesciences Ltd.**
Claris Corporate Headquarters,
Near Parimal Railway Crossing,
Ellisbridge, Ahmedabad- 380 006
- 39. EI Technologies Pvt. Limited**
1149, 26th Main Jayanagar,
4th 'T' Block, Bangalore-560 041
- 40. Emami Cement Limited**
687, Anandpur, EM Bypass,
Kolkata-700 107
- 41. EMCO Limited**
Plot No: F -5, Road No: 28,
Wagle Industrial Estate, Thane-400604
- 42. Essar Power Limited**
Essar Technopark, Old Swan Mill Compound,
L.B.S. Marg, Kurla (West) Mumbai- 400 070
- 43. Ganeshvani Merchandise Pvt. Limited**
48, S.N. Roy Road, Behala,
Kolkata-700 038

- 44. Ganges Green Energy Pvt. Limited**
2nd Floor, Satyadeve Plaza, Off New Link Road,
Andheri (West), Mumbai-400053
- 45. GHI Energy Pvt. Limited (SPV of Refex)**
201, Mahakosh House, 7/5 South Tukoganj,
Nath Mandir Road, Indore-452 001
- 46. GMR Gujarat Solar Power Pvt. Limited**
Skip House, 25/1, Museum Road,
Bagalore-560 025
- 47. Green Infra Solar Energy Limited**
NBCC Plaza, Tower II, 2nd Floor,
Pushp Vihar, Sector-V, Saket,
New Delhi- 110 017
- 48. GSPC Pipavav Power Company Limited**
2nd Floor, FF Shred Nos. A/78/3-8,
Besides Patni Computers (iGATE)
GIDC Electronic Estate, Sector- 25
Gandhinagar - 382 016
- 49. Gujarat Industries Power Company Limited**
P.O. Petrochemical, Vadodara-391 346
Gujarat
- 50. Gujarat Mineral Development Company Ltd.**
‘Khanij Bhavan’, Near Manav Mandir Char Rasta,
Off. 132, Ring Road, Vastrapur,
Ahmedabad-380 053

- 51. Gujarat Power Corporation Ltd**
Block No: 6 & 8, 6th Floor,
Udyog bhava, Sector – 11, Gandhinagar – 382011
- 52. Gujarat State Electricity Corporation Limited**
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara – 390007
- 53. Harsha Engineers Limited**
Sarkhej- Gandhinagar Highway,
P.O. Changodar Ahmedabad – 382213
- 54. Hiraco Renewable Energy Pvt. Ltd**
401, Swamini Complex, Opp. Drive-In cinema,
Drive-In Road, Bodakdev,
Ahmedabad – 380054
- 55. Integrated Coal Mining Limited**
6, Church Lane, 1st Floor,
Kolkata – 700001
- 56. Jaihind Projects Limited,**
3rd Floor, Venus Atlantis Corporate Park,
Nr. Prahladnagar AUDA Garden,
Anandnagar Road, Satellite,
Ahmedabad – 380015
- 57. Konark Gujarat PV Pvt. Ltd**
7, Mittal Industrial Estate, Saki Naka,
Andheri- Kurla Road, Andhri (E),
Mumbai – 400059
- 58. Louroux Bio Energies Limited**
21, Satyam 318, Linking Road,
Khar (West) Mumbai – 400052
- 59. MBH Power Pvt. Ltd**
“B” Tower, Indraprasth Complex,
Ellor Park, Vadodara- 390007

- 60. Mono Steel (India) Limited
202, Prithvi Complex, Kalanala,
Bhavnagar – 364001**
- 61. NKG Infrastructure Limited
120, Mangal Murti Complex, Opp City Gold Cinema,
Ashram Road, Ahmedabad - 380009**
- 62. Pandit Deendayal petroleum University
Nr Koba Circle, Gandhinagar
Ahmedabad - 382007**
- 63. Rajesh Power Services Pvt. Ltd
380/3, Sidhhi House, Opp, Lal Bunglows,
B/H- Sasuji Dinning Hall, Off C.G. Road,
Navarangpura, Ahmedabad – 380006**
- 64. Rasna Marketing Services LLP
A/10.3, Tirthraj Complex,
Ellisbridge, Ahmedabad - 380006**
- 65. Responsive Sutip Ltd.
Gut No. 120, Betegaon, Boisar,
Tal: Palghar, Dist: Thane – 401501**
- 66. Roha Dyechem Pvt. Ltd
A-44 & 45, Road No:2,
MIDC, Andheri (E), Mumbai – 400093**
- 67. S J Green Park Energy Pvt. Ltd
1, Vikram Society, Gotri Road,
Opp Yash Complex, Vadodara – 390021**
- 68. Sandland Real Estate Pvt. Ltd.
Flat No. 201, H Wing, Sukh Angan, Opp.I St. Bus Depot
Nilemore, Nallasopara (W), Thane,
Maharashtra – 401203**

69. **SEI Solar Power Gujarat Pvt. Ltd**
403-404, Enus Altalnits, Prahalad Nagar,
Anand Nagar Road, Ahmedabad – 380015
70. **Solarfield Energy Private Limited**
3, Advani Chambers, August Kranti Marg,
Mumbai – 400036
71. **Som Shiva (Impex) Ltd**
301, Iscon Mall, Above Star India Bazar,
Satellite Road, Ahmedabad – 380015
72. **Sun Clean Renewable Power Pvt. Ltd.**
9th Floor, Meridian Tower, 10- Windser Place,
New Delhi – 110001
73. **Surana telecom & Power Limited**
5th Floor, Surya Towers,
Sardar Patel Road, Secunderabad – 500003
74. **TATA Power Renewable Energy Limited**
C/o The TATA Power Company Limited,
Corporate Centre, A Block, 34 Sant Tukaram Road,
Carnac Bunder, Mumbai – 400009
75. **Universal Solar System**
A-15, Om Surya Apartment,
Gulbai Tekra., Ellisbridge, Ahmedabad – 380006
76. **Visual Percept Solar Projects Pvt. Ltd**
813, Bilamal Towers, Nariman Point,
Mumbai – 400021
77. **Yantra eSolar India Pvt. Ltd**
Office No.401 (PART), 403 & 404, 4th Floor,
Block B, Roxana Towers,
Begumpet, Hyderabad – 500016

78. ZF Steering Gear(India) Pvt. Ltd
601-602, "A" Wing, 6th Floor, MCCIA Tower,
International Convention Centre,
403-A, Senapati Bapat Road, Pune – 411016
79. Avatar Solar Pvt. Ltd
Plot No: 152, Sector – 25,
Gandhinagar – 382025
80. Taxus Infrastructure & Power Projects Pvt. Ltd
305-306, Tower-A, Spazedge, Sec-47,
Gurgaon-Sohna Expressway,
Gurgaon – 122022 (Haryana)
81. Ujjawala Power Private Limited
H-23A, 204 Kamal Tower, Near Sai Mandir,
Vikas Marg, Laxmi Nagar, New Delhi – 110092

.....Respondents

- Counsel for the Appellant(s): Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Poorva Saigal
Mr. Anushree Bardhan
- Counsel for the Respondent(s): Mr. Sanjay Sen, Sr Advocate
Mr. S R Pandey
Mr. Rajiv Yadava for R-1
Mr. Sanjeev Kumar,
Mr. A Bhattacharya R-2,
Mr. Buddy A Ranganathan
Mr. Vnanco D'Corta
Mr. Raunak Jain
Mr. Udayan Yadav R-7
Mr. Sanjeev Gupta
Mr. Sirtesh Mukherjee
Mr. Anket Prasoon,
Ms. Mandakini Ghosh for R-9
Mr. Sekhar P Jha
Mr. Vikrant Bhardwaj,
Mr. Gaurav Mathur for R-11,15,19,61,69&77

Mr. A Bhattacharya,
Mr. Udayan Yadav,
Mr. Sanjeev Kumar,
Mr. Anirban,
Mr. Sameer Vyas for R-12,21,30 & 47
Ms. Marleen R-14,22,29 & R-67
Ms. Marfatia for R-16,22, 29, 67 & 78
Mr. Deepak Khurana
Mr. Vikas Mishra for R-17 & 45
Mr. Deepak Khurana
Mr. Sashwat Tripathi
Mr. Vikas Mishra for R-17 & 45
Mr. Vikas Singh, Sr Advocate
Mr. S Venkatesh for R-20
Mr. Vikas Singh, Sr Advocate
Mr. Hemant Sahai
Mr. Mazag Andrabi
Mr. Anurabi,
Mr. S Venkatesh for R-20, 23 & 26
Mr. Anurabi for R-26
Mr. Buddy A Ranganadhan
Mr. Anirban,
Mr. Udayan Yadav
Mr. Sanjeev Kumar
Mr. Shailendra for R-30 & 47
Mr. S M Sharma
Ms. Manisha T Karia for R-39
Mr. Shamik Bhatt for R-40
Mr. Hemant Singh
Mr. Ruth Elwin for R-42
Mr. Nishant Katoch
Ms. Malavika Lal
Mr. Rajeev Kumar for R-40,57 & 60
Ms. Nupur Kanungo
Ms. Jesal Wahi for R-50
Ms. Sushmita Das
Ms. Amy gupta for R-54
Mr. Saman Ahsan
Mr. Ashwini Chawla
Mr. Ashish Gupta for R-55
Mr. Puneet Desai
Mr. Tejas Shah
Mr. Piyush Joshi
Ms. Amy Gupta
Mr. Jaydeep Bhambhomi

Mr. Anuj Gupta for R-57 & 60
Ms. Amy Gupta
Mr. Piyush Joshi for R-57
Ms. Amy Gupta
Mr. Piyush Joshi
Mr. Chitwan Sethi R-58
Mr. Tejas Shah for R-59 & R-60
Mr. Parth Contractor
Mr. M Andrabi for R-71
Mr. Buddy A Rantanadhan
Mr. Rupesh Kumar
Mr. Aditya Kumar
Mr. Pravesh Bahuguna for R-73
Mr. Amit Kapur
Ms. Poonam Verma
Mr. Gaurav Dudiya
Mr. Akshat Jain for R-76
Mr. S Gaurav Mathur
Mr. Vikrant Bhardwaj
Mr. Shekhar P Jha
Mr. Sunil Puri for R-77
Mr. Shekhar P Jha
Mr. Gaurav S Mathur for R-79

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Gujarat Urja Vikas Nigam Limited (Gujarat Urja) is the Appellant herein. Gujarat State Commission is the 1st Respondent. Other Respondents are Solar Energy Project Developers.
2. The Appellant filed a Petition before the Gujarat State Commission praying for the revision of the Tariff for the

Solar Energy Project determined in the earlier Tariff Order dated 29.1.2010. The State Commission, after hearing the parties, dismissed the Petition as not maintainable by the Order dated 8.8.2013.

3. Aggrieved by this Impugned Order dated 8.8.2013, the Appellant has presented this Appeal.
4. The relevant facts in short, leading to filing of this Appeal are as follows:

(a) Gujarat Urja, the Appellant is a Government of Gujarat undertaking. It has succeeded to discharge some of the functions of the erstwhile Gujarat Electricity Board and is also holding company of all the State Power Utilities in the State of Gujarat.

(b) The Appellant is a Bulk Purchaser of electricity from the Generating Companies on behalf of the Distribution Companies in the State.

(c) The Appellant arranges for the purchase of power from various power producers including Solar Projects in the State and makes available such power to the said Distribution Licensees in the State.

(d) The Government of Gujarat notified the Solar Power Policy, 2009 on 6.1.2009 for development of Solar Power Projects in the State of Gujarat. In the

said policy, the Government of Gujarat had proposed for the sale of energy from the Solar Power Projects to the Distribution Licensees in the State at a levelized tariff.

(e) Subsequently, in exercise of the powers u/s 61 (h), 62 and 86 of the Electricity Act, 2003, the State Commission initiated a Consultative Process proceeding for determination of tariff for procurement of power from Solar Power Projects.

(f) In the said proceedings, the State Commission proposed to invite the suggestions from various stake holders and to conduct public hearings and thereafter, to decide on the price at which the power generated from the Solar Power Project could be procured by the Gujarat Urja for the Distribution Licensees in the State for meeting the Renewable Power Purchase Obligations.

(g) The State Commission had accordingly, prepared a draft order and gave publicity to the same by placing it on its Website for inviting comments before holding hearings. In pursuance of the same, the comments and suggestions were sent to the State Commission.

(h) After receipt of the said comments, the State Commission held the Public hearing on 3.12.2009.

(i) In the said proceedings before the State Commission for determination of Solar Tariff, there were various representations by several Solar Power Project Developers pointing out that the Capital Cost involved in setting-up of Solar Projects would be in excess of Rs.16.50 Crores per MW and the financing for such projects being non conventional, would require equity deployment of not less than 30% of the total project cost.

(j) The State Commission, after considering the views of various stake holders Solar Power Developers and Gujarat Urja, the Appellant as well as various suggestions made by Gujarat Energy Development Agency, finalised and issued the Tariff Order on 29.1.2010 determining the Tariff for procurement of Power from the Solar Energy Developers by the Distribution Licensees and others.

(k) The main findings of the Order dated 29.1.2010 are as follows:

(i) There shall be a single part generic levelised Tariff notwithstanding the technology that the

Developer selects for development of Solar Power Plant;

(ii) The Tariff determined for 25 years was based upon the Capital Cost of Rs.16.50 Crores per MW and Debt Equity ratio of 70:30, (i) Rs.15 per unit for first 12 years and (ii) Rs.5 per unit for the balance 13 years thereafter.

(iii) This Tariff would apply only to the projects commissioned up to 28.1.2012 i.e. within two years from the date of the Tariff Order dated 29.1.2010.

(iv) Solar PV PPA will be for a period of 25 years with the Tariff determined by this Order.

(l) In terms of the above order dated 29.1.2010, the PPAs were entered into between the parties. Most of the Solar Power Projects were commissioned during the period from December, 2011 to January, 2012.

(m) On 27.2.2010, the Government of India issued Notification reducing the Custom Duty and also exempting Excise Duty of the Solar Power Projects.

(n) On 17.4.2010, the Gujarat Commission notified GERC (Procurement of Energy from Renewable Sources) Regulations, 2010.

(o) As per these Regulations, Gujarat Urja was obliged to procure minimum of 1% of its consumption from Solar Energy for the year 2012-13.

(p) In the year 2013, the Appellant received information that many of the Solar Power Projects had incurred a Capital Cost only in the region of Rs.11 Crores to 14 Crores per MW as against Rs.16.50 Crores per MW assumed by the State Commission in the earlier Tariff Order dated 29.1.2010 and further deployed much less equity as compared to 30% assumed by the State Commission.

(q) In the above scenario, the Appellant Gujarat Urja, on 28.5.2013 filed a Petition No.1320 of 2013 before the State Commission seeking for initiating proceedings for the re-determination of the appropriate Capital Cost and the tariff which was fixed in the earlier Order dated 29.1.2010, by exercising the Regulatory powers.

(r) Since, the State Commission entertained some doubt over the maintainability of the Petition even before the admission of the Petition, it issued notice to the Solar Developers shown as Respondents in the Petition to make their submissions with regard to the

Maintainability of the Petition for deciding the question as to whether it could be admitted.

(s) Accordingly, a number of Solar Energy Developers appeared before the State Commission and filed reply raising the objection to the Maintainability of the Petition contending that this Petition was not maintainable in the light of the various grounds.

(t) Both the parties were heard by the State Commission with regard to the said question.

(u) Ultimately, the State Commission by the Impugned Order dated 8.8.2013 upholding the objection raised by Solar Developers, dismissed the Petition filed by the Appellant holding that it was not maintainable on the basis of the grounds urged by the Respondents.

(v) Challenging this Impugned Order dated 8.8.2013; the Appellant has presented this Appeal.

5. The learned Counsel for the Appellant has made the following submissions assailing the Impugned Order:

(a) The State Commission dismissed the Petition filed by the Appellant praying for the re-determination of the Tariff determined in the earlier tariff order dated

29.1.2010 by exercising the Regulatory powers. The dismissal of the Petition by the State Commission was on the wrong ground that the Petition filed by the Appellant was a Review of the earlier order filed after considerable lapse of time which was not maintainable. In fact, the Petition filed by the Appellant before the State Commission u/s 86 of the Electricity Act was for revising Tariff determined in the Order dated 29.1.2010 and not for Review. The Regulatory powers by the State Commission to revise the tariff from time to time exercised for balancing the interest of consumers and utilities. In fact, the interest of the consumers is inherent in the Regulatory jurisdiction and it cannot be termed as an exercise of the Review jurisdiction.

(b) The State Commission has committed a grave error in rejecting the Petition filed by the Appellant at the initial stage without admitting the same particularly when the Appellant raised various serious issues on the excessive profit being derived by the Solar Power Developers. The scope of consideration of maintainability of the Petition at the preliminary stage should be confined only to the basic aspects such as patent lack of jurisdiction, etc. It is a settled law that the maintainability of the Petition should be decided

on the basis of the contents of the Petition alone without referring to the reply or defence raised by the other side. In the present case, the State Commission has violated this well laid down principle.

(c) The nature of Regulatory powers is wide. Revising the tariff in public interest in exercise of the Regulatory powers is not the same as that of the Review of the tariff Order invoking the Review Powers u/s 94 of the Electricity Act, 2003.

(d) The State Commission has got the powers to re-open the PPAs particularly when in the public interest thereby not allowing the consumers to bear the burden whereas, the Solar Project developers as a regulated entity should not be allowed to secure unintended windfall gains. The State Commission has proceeded on a fundamental wrong premise that the Regulatory Powers cannot be exercised for Tariff determination and therefore, the Tariff determined earlier, would not be re-opened in exercise of the regulatory powers. This conclusion is contrary to the various decisions of this Tribunal on the scope of the Regulatory powers.

(e) At the time of passing the earlier Tariff Order, the State Commission assumed the project cost at

Rs.16.50 Crores based on the representations made by the Solar Developers whereas the actual project cost incurred by many of the Solar Developers was much less than Rs.16.50 Crores per MW i.e. in the region of Rs.11 Crores to Rs.13 Crores per MW. As such, there is good ground for revising or revisiting the tariff payable by the Appellant to the Solar Power Developers. But, the State Commission has not taken into consideration this main point.

(f) The basic intent and purpose of the Electricity Act, 2003 is to protect the interest of the consumers. The objective of promoting the non conventional energy such as Solar Power project and giving the promotional tariff cannot be to provide windfall profit prejudicing the interest of the consumers at large. As per the provisions of Section 61 (d) of the Act, the consumer's interests should be safeguarded while determining the tariff. Therefore, the provisions have to be interpreted in such a way, that the interest of the consumers are protected and applied accordingly. The refusal to consider various vital issues by rejecting the Petition, through the Impugned Order is against the basic intent of the Electricity Act, 2003.

(g) The State Commission while passing the Impugned Order has elaborately gone into the various aspects such as Res-judicata, Promissory Estoppel, and Legitimate Expectations, etc; even before admission of the Petition. These aspects could be considered only when the merits are dealt with in the final disposal after admission and cannot be gone into at the initial stage. The findings on these aspects cannot be construed to be the grounds for rejecting the Petition as not maintainable at the threshold.

6. On these grounds, the learned Counsel for the Appellant argued at length and prayed for setting aside the Impugned Order and for issuing consequential directions.
7. The learned Counsel for the Appellant has cited a number of authorities in support of the grounds as referred to above. He has also filed Written Submissions.
8. In reply to the above grounds, a number of lawyers appearing for various Respondents have argued extensively in defending the Impugned Order. They also filed their respective Written Submissions.
9. The crux of the replies from oral submissions as well as the written submissions filed by the Respondents are as follows:

(a) The State Commission has the power to dismiss the Petition at the admission stage itself, if it deems that the dismissal is appropriate. Such a dismissal may either be on the basis of the contents of the Petition or on the basis of the preliminary objections raised by the opposite parties summoned by the State Commission to be heard for admission. Regulation 39 of the GERC Conduct of Business Regulations, 2004 confers such a power to the State Commission to dismiss the Petition at the admission stage itself particularly when the Respondents raised the preliminary objection demonstrating that the contents of the Petition did not disclose the cause of action.

(b) The Petition filed before the State Commission is nothing but a Review Petition disguised as a Petition for re-determination/re-visitation of tariff. The generic tariff order dated 29.1.2010 did not contemplate any re-visitation or re-determination during the term of 25 years on account of any variations of actual from any of the normative parameters.

(c) The generic tariff can be called in question only by way of Review u/s 94 (1) of the Electricity Act, 2003 read with Order 47 Rule-1 of CPC and

Regulation 72 of the GERC (Conduct of the Business) Regulations, 2004 within the period of limitation. The party aggrieved, if chooses, could file an Appeal u/s 111 of the Electricity Act before this Tribunal. But, in this Petition filed before the State Commission, the Appellant is virtually seeking for Review of the tariff order passed on 29.1.2010, at the belated stage which is barred by limitation. In fact, the grounds raised by the Appellant in the Petition for re-determination of the tariff are effective grounds for the Appeal and not for Review.

(d) Re-determination of tariff and re-opening of PPAs under Regulatory Powers sought by the Appellant is neither valid nor warranted especially when the Tariff Order 2010 was passed u/s 86 (1) (a) of the Electricity Act, 2003. Once the Capital Cost and Debt Equity ratio have already been decided by the State Commission on normative basis through the earlier Tariff Order and when such a generic tariff had been accepted and acted upon by the parties, the Appellant cannot now raise any dispute with reference to such Tariff.

(e) When a Court has decided an issue one way or other at an earlier stage and when such a decision has attained finality as there was no

challenge, the parties will not be allowed to agitate the matter at a subsequent stage, since the principle of Res-judicata would apply.

(f) The Government of Gujarat through its Solar Power Policy, 2009 as amended in 2010 in fact promised to pay the tariff as determined by the State Commission through the Tariff Order, 2010. On the basis of those promises, the Developers entered into PPAs with Gujarat Urja, the Appellant. As such, the Appellant is estopped from seeking re-determination at a subsequent stage either on the ground of public interest or on the ground of tariff not being beneficial to it as it would amount to promissory estoppel.

(g) The Solar Power Developers entered into PPAs with the Appellant which is a State within the meaning of Article 12 of the Constitution on the basis of the Tariff Order, 2010 and the Solar Power Policy issued by the State Government. In view of the above, the project developers have the right to seek enforcement of the said representation through the PPA on the basis of the Doctrine of Legitimate Expectation.

(h) Each of the grounds referred to in the Impugned Order by the State Commission for dismissing the Petition are valid and legally sustainable particularly when the facts contained in the Petition did not disclose any cause of action. There is no cause of action whatsoever for admitting the matter or putting the Respondent Developers through the rigorous of defending a legal proceedings which are completely unsustainable.

(i) Section 86(1) (a) of the Act only confers the powers to determine the tariff and not for regulating the tariff of the Generating Companies. The State Commissions do not have the powers to regulate the Tariff of the Generating Companies. On the other hand, the Central Commission alone, has the power u/s 79 (1) (a) and (b) to regulate the Tariff of the Generating Companies. This distinction made by the legislature is deliberate. Therefore, the State Commission while exercising the power to determine the tariff for generating companies cannot exercise the power to regulate the tariff.

(j) The argument of the Appellant that public interest lies in reduction of consumer's tariff is not only one sided but also unsustainable on legal and

commercial principles. The National Electricity Policy as well as the National Tariff Policy provide for ensuring financial viability of the Sector by taking into consideration all the developer's interests.

(k) The Appellant has contended that there was a sufficient reduction in capital cost on account of exemption in Excise Duty and Customs duty through the Notification dated 27.2.2010 subsequent to the Impugned Order and as such the State Commission is bound to take note of the subsequent developments for revising the tariff order. This argument is wrong and misleading. Even on the date of the Tariff Order dated 29.1.2010, the Solar Models were already exempted from Excise Duty. The Notification dated 27.2.2010, relied upon by the Appellant had marginal impact on the capital cost of Solar PV Project to the extent of 4% only. This Notification reduced custom duty only in respect of certain components that constitute less than 20% of the Capital Cost. On the other hand, as against the marginal impact of reduced custom duties, the increase in the Dollar/Rupee exchange rate, substantially has actually enhanced the project cost much more than the reduction by these exemptions.

Therefore, the contentions of the Appellant on this point have no basis.

10. In support of these submissions made by all the Respondents, they have cited a number of authorities.
11. We shall consider those authorities cited by both the Appellants and the Respondents at the appropriate stage.
12. In the light of the above rival contentions, three issues would arise for consideration:

(a) Whether the State Commission at the admission stage, could decide the question of maintainability of the Petition as a preliminary issue on the basis of the contents of the Petition alone or on the basis of the reply and defence by the other side also?

(b) Whether the claim made by the Appellant in the Petition for re-determination of tariff on account of subsequent development would amount to Review of the earlier tariff order dated 29.1.2010 as held by the State Commission?

(c) Whether the State Commission is right in rejecting the Petition on various other grounds such as lack of Regulatory Power to revise the

tariff, principles of Res-judicata, Promissory Estoppels and Legitimate Expectations, etc ?

13. Before dealing with the questions framed above, we would refer to the gist of the findings rendered by the State Commission in the Impugned Order for dismissing the Petition filed by the Appellant as not maintainable.

14. The crux of the findings rendered by the State Commission in the Impugned Order, is as follows:
 - (a) Gujarat Urja, the Petitioner is virtually seeking Review of the Tariff Order dated 29.1.2010 after considerable lapse of time. The Limitation Period for filing the Review is 60 days. The Petition is not maintainable since it has been filed with a delay of over three years even without giving any explanation through the Application for condonation of delay. The remedy of the Petitioner is to file either Petition for Review in time or if there was any delay to file the Review along with condonation of delay before the State Commission or to file an Appeal before the Tribunal as against the Tariff Order dated 29.1.2010. Without availing this remedy, the Petitioner has filed this petition praying for the Review under the garb of Re-determination. Hence, this Petition is not maintainable.

(b) The earlier Tariff order dated 29.1.2010 in which the generic tariff for supply of electricity by Solar Power Plants to the Distribution Licensees was determined, did not contemplate any re-visitation or re-determination of the Tariff during the term of 25 years on account of any variations of actual from any of the normative parameters.

(c) The averments contained in the Petition would amount to alleging that the State Commission had erred in the decision dated 29.2.2010 on the Capital Cost as well as the Equity Component. As such, the grounds raised for re-determination of tariff are the appropriate grounds for Appeal and these grounds cannot be raised in the present Petition. Re-determination of tariff and re-opening of PPAs under Regulatory Power is neither valid nor warranted.

(d) Once Capital Cost and Debt Equity Ratio have been decided by the State Commission on the normative basis and the Tariff was determined on normative parameters which have been accepted and acted upon by the Gujarat Urja, it was not open to the Petitioner to seek for re-opening of the same.

(e) The Tariff Order dated 29.1.2010 has provided for re-determination of project specific tariff only where they do not get accelerated depreciation. Further, the Power Purchase Agreement can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives.

(f) The principle of Res-judicata would apply in this case. The judicial decision has already been arrived at by the State Commission on the issue between the two parties in the earlier proceedings and as such, the said judicial decision has attained finality. Hence, both the parties would not be allowed to canvass the issue again in future proceedings between the same parties.

(g) The Tariff was determined in 2010 order on the basis of the Solar Power Policy, 2009 issued by the Government of Gujarat. This has been incorporated in the PPAs. Being the party to the PPAs and having signed and acted upon, the Gujarat Urja must abide by the same. The prayer seeking for re-determination of tariff would not be valid in view of the promissory estoppel.

(h) The Solar Power Developers i.e. private parties have invested huge amount in the projects pursuant to the Order dated 29.1.2010 on the basis of the State Government Policy and the PPA entered into with Gujarat Urja. In that view, the Solar Power Developers have a legitimate expectation to be dealt with regulatory certainty.

(i) The public interest sought to be claimed by the Petitioner has to be taken care of by the subsidy to be granted by the State Government, not by resorting to Revision of Tariff.

15. On these findings, the Petition filed by the Appellant before the State Commission was dismissed.
16. Let us now deal with the issues framed above.
17. **The First Issue is as to Whether the State Commission, at the admission stage could decide the maintainability of the Petition as a Preliminary Issue on the basis of the contents of the Petition alone or on the basis of the reply and defence pleaded by the other side also?**
18. On this issue, the learned Counsel for the Appellant has submitted that the issue of the maintainability of the Petition cannot be decided at the admission stage on the basis of the merits of the case and once there is a jurisdiction and the Petition shows some case for consideration, the State

Commission cannot reject the Petition on the question of maintainability at the threshold and for the purpose of considering maintainability at the preliminary stage, the State Commission has to consider the contents of the Petition alone and not the defence pleaded by other side.

- 19.** It is also submitted that the principles for dealing with the maintainability of the Petition at the preliminary stage has been prescribed in Order 7 Rule-11 of the CPC for dealing with the rejection of the plaint but, contrary to the said principles, the State Commission had decided the question of maintainability on the basis of the reply filed by the Respondents and as such, the Impugned Order suffers from infirmity and therefore, the same has to be set aside and remanded to the State Commission for fresh consideration.
- 20.** In reply to the above submissions, the learned Counsel for the Respondents submitted that Order-7 Rule-11 of the CPC is only one of the procedures that may be adopted by the Court to consider the maintainability of the Petition by going through the contents of the plaint for the purpose of considering the maintainability of the Petition but, the court can go further and frame a preliminary issue under Order 14 Rule-2 of the CPC which provides that the Court could consider the maintainability not only on the basis of the contents of the plaint, but also on the contents of the

defence and therefore, the State Commission has correctly considered the reply filed by the Respondents for deciding the preliminary issue arising out of the question of law and finally held that the Petition was not maintainable and as such, the submission on this point made by the Appellant is not sustainable in law.

- 21.** We have considered both the submissions on this point.
- 22.** At the outset, it is to be pointed out that the strict Rules of the Civil Procedure Code do not apply to the proceedings before the State Commission and the State Commission is free to decide on its own procedure which satisfies two aspects i.e. (i) Principles of Natural Justice and (2) Transparency.
- 23.** The Electricity Act is an exclusive Code which is not bound by the procedures contemplated under the Civil Procedure Code. The State Commission is well within its rights to adopt the procedure, which would satisfy the above two elements. Therefore, the State Commission decided to issue notice to other parties when it entertained doubt about the maintainability of the Petition at the admission stage itself.
- 24.** This procedure cannot be said to be illegal merely because some of the procedure contemplated under CPC have not been followed.

- 25.** As already indicated, the State Commission would follow its own procedures irrespective of the procedures referred to in the CPC either under Order-7 Rule-11 or Order 14 Rule-2 of the CPC. As long as the procedure adopted by the State Commission satisfies the said two requirements namely principle of natural justice and transparency, such procedures could not be called in question in this Appeal.
- 26.** In view of the above, there is no infirmity in the procedure adopted by the State Commission in issuing notice to the other side before admission. In order to decide the question of maintainability of the Petition, the State Commission when it entertains the doubt with regard to the maintainability, has got the jurisdiction to get a clarification over the position of law by issuing notice to the other side.
- 27.** Once the State Commission decided to issue notice to other side to give opportunity to the other side to make submissions with regard to the question relating to the maintainability of the Petition before admission, it means that the State Commission wants to decide the question of maintainability only after hearing both the parties on the basis of their respective pleas in the Petition filed by the Petitioner as well as the reply filed by the Respondents.
- 28.** Therefore, the procedure adopted by the State Commission in this case by issuing notice to the other side for deciding

the question of maintainability of Petition would show that the State Commission followed both principles of natural justice and the transparency to pass the appropriate order on the issue of the maintainability of the Petition before admission.

- 29.** It is not the case of the Appellant that the State Commission has no powers to issue such notice to the other side even before the admission. Admittedly, this order issuing notice to the other side to give opportunity to the other side for hearing with regard to the maintainability before admission has not been challenged either before the State Commission or before this Tribunal. When that being so, the Appellant cannot now complain that the State Commission should have decided about the maintainability only on the basis of their Petition and not on the basis of the reply filed by the Respondent on receipt of Notice.
- 30.** While the State Commission itself has got a doubt with regard to the maintainability, it is the bounden duty of the State Commission to hear both the parties and to consider the plea contained both in the Petition and the reply before deciding the matter.
- 31.** From what is stated above, it is evident that the State Commission as a preliminary issue felt that it is necessary to hear both the parties over the question of maintainability

of Petition and then to decide the issue on the basis of the submissions made by both the parties.

- 32.** It is pointed out by the learned Counsel appearing for one of the Respondents that the Delhi High Court while dealing with the procedures with regard to the question as to the maintainability of the suit under Civil Procedure Code even at the preliminary stage, has held that if it is a question of law, the court can decide the matter on hearing both the parties on the preliminary issues.
- 33.** The said principle has been referred to in the decision in 63 (1996) DLT 971 in the case of State Trading Corporation of India Limited Vs Government of the People Republic of Bangladesh (DB) as follows:

“

(d) It may be disputed question of fact or law or both whether Court has jurisdiction over the suit or not. Such a question if it be a pure question of law, it can be decided on hearing the parties on a preliminary issue. Such a challenge to the jurisdiction of the Court to entertain the suit being laid by the defendant as a pure question of law, it is incumbent upon the Judge to determine that question as a preliminary issue before making absolute the rule issued earlier”.

- 34.** So, in view of the laid down procedure, even under the relevant provision of the CPC, we feel that the State Commission is well within its rights to hear both the parties before admission of the Petition and decide about the

maintainability of the Petition on the basis of the question of law raised by the other party as a preliminary objection and ultimately to reject the Petition at the admission stage itself.

- 35.** That apart, the learned Counsel for the Respondents brought to our notice that Regulation 39 of the GERC (Conduct of Business Regulations), 2004 would also provide for such a procedure by which the State Commission has got the powers to dismiss the Petition at the admission stage itself on the basis of the contents of the Petition as well as the preliminary objections raised by the other party. It is contended by the Respondents that the Respondents filed a reply raising only preliminary objection as to maintainability and not on merits.
- 36.** The learned Counsel for the Respondent further states that if the allegations in the Petition did not disclose the cause of action it can be pointed out by the Respondents in the reply and on that ground the Petition could be dismissed at the admission stage itself. He has cited the judgment of Hon'ble Supreme Court in the case of D.Ramachandran Vs R V Janakiraman (1999) 3 SCC 267. The relevant observation is as follows:

“For the purpose of considering a preliminary objection, the averments in the Petition should be assumed to be true and the Court has to find out whether those averments disclose the cause of action on trivial issues as such.”

- 37.** These principles which have been laid down would clearly indicate that the State Commission has got the powers to call upon the other side to decide the question as to whether the contents of the Petition disclose the cause of action so as to maintain the Petition. Hence, the other side on receipt of notice, can very well assist the State Commission in order to arrive at a conclusion with reference to the question as to whether the contents of the Petition discloses a cause of action at all.
- 38.** When it is pleaded in the form of reply by other side raising a question of law in the form of a preliminary objection, the State Commission has to necessarily look into the contents of the reply and decide the maintainability question after hearing both the parties.
- 39.** In the present case, the opportunity had been given to both the parties with reference to the question of maintainability of the Petition without going into the merits of the matter. Accordingly, the State Commission considered the said question on the basis of the averments of the Petition filed by the Appellant as well as the reply raising the preliminary objection filed by the Respondent and rejected the Petition at the admission stage itself as not maintainable by giving its reasonings.

40. In view of what is stated above, the first question is decided accordingly in favour of the Respondents holding that the State Commission is well within its rights to decide about the maintainability of the Petition not only on considering the contents of the Petition but also the contents of the objections raised by other side through their reply and to reject the Petition at the admission stage itself.
41. Now let us come to the **Second Question** as to **whether the claim made by the Appellant in the Petition for re-determination of tariff on account of subsequent development would amount to Review of the earlier tariff order dated 29.1.2010 as held by the State Commission?**
42. In regard to the second issue, the main contention urged by the Appellant is that that it was seeking for re-determination of Tariff on the ground of subsequent development and not seeking a Review of the generic tariff order earlier passed.
43. Before dealing with this question, it is better to refer to the relevant findings on this issue by the State Commission:

“6.6 We note that the tariff determined under Order No. 2 of 2010 dated 29.1.2010 passed by the Commission can be altered only if it is challenged under Section 94 (1) (f) of the Electricity Act, 2003 read with Order 47, Rule 1 of the Civil Procedure Code, 1908, and Regulation 72 of the GERC (Conduct of the Business) Regulations, 2004 notified by the Commission, or an appeal filed under Section 111 of the Electricity Act,

2003 before the Hon'ble Appellate Tribunal for Electricity. The Petitioner has filed a petition for re-determination of tariff for the Solar Power Projects with a plea that the Solar Power Project Developers have incurred costs lower than the those considered by the Commission. Moreover, they have also invested equity less than 30% decided in the tariff order by the Commission. As the Petitioner has filed a petition for re-determination of tariff before the Commission on the above ground, it falls in the category of review petition. Hence, it is necessary for the petitioner to show the fulfillment of the ingredients provided for a review petition. In the present case, the Petition is filed by the Petitioner after more than 3 years. As per Regulation 72 of the GERC (Conduct of Business) Regulations, 2004 notified by the Commission, a petition for review of an Order/ Judgement is permissible within 60 days. For any delay in filing a review petition the same is required to be filed with delay condonation application. In such a case, the Commission has to first decide the issue regarding condonation of delay. The petition can be heard on merits, only if the Commission decides to condone the delay. In the present case, the petitioner has not filed any condonation of delay application. Hence, there is no question of condonation of delay. On this ground, the present petition is not maintainable.

.....

6.19. The PPA executed by the Petitioner and the Respondents and their conduct of acting upon such agreement over a long period bind them to the rights and obligations stated in the Agreement. The parties have adhered to the Terms & Conditions after signing the PPA up till now. Conditions of the Contract cannot be altered/ avoided on presumption or assumption of the parties. The parties to the contract are not at liberty to amend/alter the terms of contract saying that the terms of contract may not be beneficial to them at a subsequent stage. They would have to abide by the

existing facts, correctness of which, they can hardly deny.

6.20. The PPA had no renewal/ revision/review clause empowering the Commission to revise the tariff except for the exception mentioned and that too at the behest of the Project Developer who had not got the benefit of Accelerated Depreciation under the Income Tax Act, 1961. The Hon'ble Appellate Tribunal in passing the judgment in Appeal No. 75 of 2012 has expressly held that the Project wise tariff determination will not be permitted for Solar Developers developing the projects pursuant to the Original Tariff Order. It is pertinent to mention herein that The Tribunal in the Judgment in Appeal No. 75 of 2012 has categorically held that the normative Tariff determined by the Commission in its Original Tariff Order will be binding on all Solar Power Developers and they cannot seek project wise Tariff Determination. The relevant extracts of the Judgment of the Hon'ble APTEL are reproduced as follows:

.....

In view of above finding of the Hon'ble Tribunal it is abundantly clear that the prayer of the Petitioner to re-open the PPAs with Solar Power Developers who have commissioned their projects subsequent to the original Tariff Order No. 2 of 2010 dated 29.1.2010 is not permissible”

- 44.** On the basis of the findings of the State Commission in the Impugned Order, the Respondents submit that the Appellant through the present proceeding is in fact seeking the Review of the Original Tariff Order and the same is not permissible under law that too after three years which is barred by limitation.

45. We have heard the Appellant who argued at length on this point.

46. The crux of the submissions made by the Appellant on this issue is as follows:

(a) The State Commission has rendered the findings on this point the gist of which is given below:

“The Appellant filed a Petition before the State Commission seeking for re-determination or revision in tariff earlier determined for Solar Power Project by the Order dated 29.1.2010 on account of reduced capital cost and less deployment of equity. The allegations contained in the Petition would amount to stating that the State Commission had erred in its decision dated 29.1.2010 on the capital cost as well as the equity component. In view of the allegation questioning the Order seeking for revision of the Tariff, the Petition has to be treated as a Petition for Review of the Order dated 29.1.2010 and as such, the same is not maintainable as barred by limitation”.

(b) The above finding is totally wrong. The Appellant in the Petition filed before the State Commission only prayed for initiating the proceedings

for re-determination of the appropriate capital cost for the Solar Power Projects and revisit the capital cost earlier approved and other norms of parameters in view of the subsequent developments. The significant reduction in the capital cost has been on account of the Notifications issued by the Central Government exempting the Excise Duty and Custom Duty on the equipments of Solar Power Projects. These Notifications were subsequent to the Tariff determination process in the order dated 29.1.2010. The Appellant is not challenging the Order dated 29.1.2010. The Appellant's case is clear that the tariff order dated 29.1.2010 proceeded on the basis of the projected capital expenditure on estimated basis. The actual expenditure subsequent to the Tariff Order shows considerable reduction. This calls for re-determination of Tariff under the exercise of Regulatory powers. The Appellant has produced evidence before the State Commission to show the project developers have incurred capital cost only in the region of Rs.11 Crores to Rs.13 Crores per MW in stead of 16.50 MW as referred to in the Tariff Order. There is also an evidence of the exemption from excise duty and custom duty which reduces the project cost.

(c) These subsequent developments could be considered by the State Commission to revise the tariff determined earlier by the Order dated 29.1.2010. As such, the Petition filed before the State Commission is not a Review Petition and is only for a prayer for re-determination on subsequent developments. Hence, the finding given by the State Commission that the Petition has to be treated as a Review Petition under the guise of Petition for re-determination is wrong”.

47. These submissions made by the Appellant are refuted by the learned Counsel for the Respondents. The same is as follows:

“The Appellant through the present proceedings is in fact, seeking the Review of the Original Tariff Order. The State Commission through its original tariff order had fixed the Tariff for purchase by the Appellant of Power from any Solar Power Generation plant to be set-up by the Developers pursuant to the said order. The said tariff was determined by the State Commission by applying the normative principles to each of the components of the tariff as detailed in the Original Tariff Order. The Appellant has been paying invoices of the developers under the PPAs on the basis of the tariff determined under the original Tariff

order. Therefore, there can be no amendment to the terms of the PPA including the Tariff specified therein without the expressed consent of the parties. The Appellant has wrongly used the expression “Re-determination or Revision” of tariff but the same is in fact, the Petition for the Review of original Tariff Order. This Petition has been filed in order to overcome a difficulty due to the bar of limitation. Hence, the findings rendered by the State Commission on this point are perfectly justified”.

- 48.** We have carefully considered the submissions and also perused the relevant records.
- 49.** According to the State Commission, the averments contained in the Petition filed by the Appellant would amount to challenging the Tariff Order dated 29.1.2010 on the capital cost as well as the equity components and hence the Appellant is virtually seeking for Review of the order dated 29.1.2010.
- 50.** In the context of this observation made by the State Commission in the Impugned Order, we shall refer to the relevant paragraphs contained in the Petition filed by the Appellant before the State Commission in order to find out whether any challenge has been made as against the Tariff Order dated 29.1.2010.

51. The relevant paragraphs are Para 15 to 19 of the Petition which are as under:

- “(15) In terms of the above where the equity investment is less than 30 percent the servicing by return on equity has to be restricted to actual deployment of equity. Accordingly the return of 14 percent post tax need to be allowed for actual deployment of equity or 30 percent of capital cost, whichever is lower and the remaining capital cost need to be serviced as debt on reducing balance. The servicing of equity is therefore to be considered project specific for those projects where the equity deployment is less than 30 percent of the capital cost.*
- (16) In the above circumstances of servicing of the project cost of Rs 16.50 Crores/MW as against the actual prudent and reasonable cost of Rs 11 Crores/MW or thereabout as established by the actual investment made by many of the developers results in excessive tariff payment namely servicing of additional 50 percent return on equity which has not been actually incurred by some of the project developers and which ought not to have been incurred by others. The above would mean that the project developers are receiving the levelised tariff of Rs 12.54 per unit as against Rs 9.0 per unit which is the reasonable and prudent tariff. The increased tariff of Rs. 3.54 per unit is a direct burden on the consumers of the State and is an unwanted, unjustified and windfall gain to the project developers.*
- (17) In addition to the above, in the case of projects where the deployment of equity is less than 30 percent of the project cost the return in equity should be restricted to the actual deployment of equity as per the statement in annual accounts. The project developers are not entitled to claim such return on funds deployed other than as equity. The consumers in the state cannot be required to service notional equity and servicing of notional equity is consistently rejected by all the regulatory commissions*
- (18) The statement of project cost actually deployed also establish that there is no justification for front loading of tariff in the first 12 years to increase the cash flow of the project developers. The actual repayment of the loan by the project developers of the debt capital taking into*

account the depreciation and other benefits clearly shows that the front loading of tariff to the extent of Rs 15 per unit is unnecessary. The burden of excessive cash flow is in reality to the distribution licensees rather than a justified requirement of the project developers.

- (19) *In the facts and circumstances mentioned above there is a justified cause for reopening the tariff terms contained in the order dated 29.1.2010 and terms incorporated in the Power Purchase Agreements signed in pursuance of the above order of the Hon'ble Commission in public interest. GUVNL submits that while the interest of the project developers to the legitimate extent need to be protected and the non conventional projects are to be promoted with promotional tariff as they cannot compete with conventional projects, such promotion cannot be extended to result in excessive tariff and windfall gain to the project developers at the cost of public interest."*

52. On the basis of these averments contained in the Petition,, the Appellant has made the following prayers:

"26. It is, therefore, respectfully prayed that this Hon'ble Commission may be pleased to :

- (a) *Initiate the proceedings for determination of the appropriate capital cost for the Solar Power Projects established by the Project Developers pursuant to the Order dated 29.1.2010 passed by the Hon'ble Commission and re-visit the capital cost approved at Rs 16.50 crores/MW based on the actual reasonable and prudent capital cost incurred by the Solar Power Developers;*
- (b) *Take into consideration the actual equity capital deployed for servicing at the rate of 14% post-tax instead of allowing Return on Equity on the normative at 30% of the project cost, wherever the actual equity deployed is less than 30% of the project cost;*
- (c) *Re-determine the front-loading of tariff in the first twelve (12) years based on the actual cash flow required by the Project Developers to service the debt and equity;*
- (d) *Re-visit the other norms and parameters laid down in the Order dated 29.1.2010 to determine whether the actual*

achievement of the norms is better than those laid down in the Order dated 29.1.2010; and

- (e) *Pass any such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

53. The specific case of the Appellant is that there is a significant reduction in the capital cost which has been on account of the Notifications issued by the Central Government exempting the excise and custom duty on the equipment of Solar Power Projects. These Notifications were subsequent to the tariff determination process in the Order dated 29.1.2010 and when there are materials available on record to show that the Capital cost assumed by the State Commission of Rs.16.50 Crores in the tariff order has been considerably reduced subsequent to the Tariff Order, the State Commission has got regulatory powers to revise the tariff decided by the State Commission in the earlier order dated 29.1.2010 in the light of the subsequent developments.

54. The nature of reliefs sought for by the Appellant before the State Commission in the Petition are as under:

- (a) The Appellant is seeking for the initiation of the proceedings as there was a cause of action for initiation of such proceedings to decide appropriate capital cost to be allowed to

the project developers based on the actual capital cost incurred by the project developers.

- (b) The tariff should be re-determined after taking into consideration the actual equity capital deployed in the various projects instead of normative 30% and allow Return on Equity on the actual capital employed wherever the actual capital deployed is less than 30% of the project cost. Accordingly, servicing of equity is to be considered project specific for project where the equity deployed is less than 30% of the Project Cost.
- (c) Re-determine the front loading of tariff for first 12 years as front loading of tariff as decided earlier by the State Commission is unnecessary.
- (d) Revisit other norms and para-meters laid down in Order dated 29.1.2010 to find whether the actual achievement of norms is better.

55. The whole reading of the Petition as well as the prayer would indicate that the Appellant has prayed for revising the tariff in public interest in exercise of the regulatory powers in view of the subsequent developments. Therefore, it may not be correct on the part of the State Commission to observe that the Petition filed by the Appellant before the State Commission should be construed to be a Review Petition especially the averments

contained in the Petition would not show that the Appellant has challenged the Tariff in the Original Tariff Order.

56. The question whether the State Commission has the power to revise the tariff by exercising the regulatory powers or the powers to re-open the power purchase agreement due to subsequent developments in the present case, is entirely different from the question as to whether the Petition filed before the State Commission would amount to Review for revisiting or re-determination of the tariff earlier determined in the Original Tariff Order.
57. In this context, it would be worthwhile to refer to some of the decisions rendered by this Tribunal as well as Hon'ble Supreme Court distinguishing the prayer for Review from prayer for revision of tariff:

(a) **Junagadh Power Projects Private Limited Vs GUVNL & Ors (Full Bench Judgment dated 2.12.2013 in Appeals 132 and 133 of 2012)**

"29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. The State Commission has the duty to incentivise the generation of electricity from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel

than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company. In fact the State Commission has itself in the case of Abellon Clean Energy by order dated 7.2.2011 modified the tariff determined earlier in the generic tariff order dated 17.5.2010. In the order dated 17.5.2010, there was no separate tariff for biomass projects with air cooled condensers and a common tariff was decided irrespective of the type of cooling used. However, the State Commission re-determined the tariff decided in order dated 17.5.2010 and allowed increase in tariff for biomass plants with air cooled condenser.

.....

31. Considering all the above factors, we feel that this is an appropriate case where the State Commission should examine and consider to re-determine the biomass fuel price. It should not be considered as a review of its earlier order dated 17.5.2010. In fact this should be considered as re-determination of tariff invoking the powers of the State Commission under the Electricity Act, 2003 to review the tariff in the circumstances of the case to avert closure of the biomass fuel based projects in the State.”

(b) Uttar Pradesh Power Corporation Limited V National Thermal Power Corporation Limited and Ors (2009) 6 SCC 235

35. Revision of a tariff must be distinguished from a review of a tariff order. Whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive

power to be exercised by the Central Commission in regard to the proceedings before it.

38. The Central Commission, as indicated hereinbefore, has a plenary power. Its inherent jurisdiction is saved. Having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited. The provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction. It is empowered to lay down its own procedure.

40. Regulations 92 and 94, in our opinion, do not restrict the power of the Central Commission to **make additions or alterations in the tariff. Making of a tariff is a continuous process. It can be amended or altered by the Central Commission, if any occasion arises therefor. The said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion.**

46. The concept of regulatory jurisdiction provides for revisit of the tariff. It is now a well-settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such.”

(c) **V S Rice and Oil Mills Vs State of AP (1964) 7 SCR 456**

“20. The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the

essential articles in question and to arrange for its equitable distribution and its availability at fair prices.

(d) **Uttar Haryana Bijli Vitran Nigam Ltd Vs Haryana Electricity Regulatory Commission & Ors**
2012 ELR (APTEL) 1085

“14. From the above, it is clear that there is a specific finding that the tariff fixed by the State Commission at the time of approval of the PPA was subject to the review and the Regulations framed by the State Commission have an overriding effect over the existing contracts over the PPA. Therefore, even when the PPA did not provide for a specific clause for revision of the project cost, the State Commission under the Regulations was empowered to re-determine the tariff fixed by it under section 62 of the Act.”

- 58.** The above, decisions would make it evident that in exercise of the regulatory powers the appropriate Commission can revisit the tariff and re-open Power Purchase Agreements especially where public interest is involved and the interest of consumers so requires.
- 59.** In view of the clear statement made by the Appellant that they have not challenged the Order dated 29.1.2010 and their prayer is for re-determination of tariff under the exercise of the regulatory powers in the light of the fact that the actual capital expenditure shows considerable reduction subsequent to the tariff order dated 29.1.2010 and in the light of the stand taken by the Appellant that it has produced evidence before the State Commission to

show that the project developers have incurred capital cost only in the region of 11 Crores to 13 Crores per MW instead of Rs.16.50 Crores as fixed in the Tariff Order and also produced the evidence to indicate that there were Notifications exempting the Excise Duty and Custom Duty which reduces the project cost and on that basis, the Appellant has prayed for re-determination, it cannot be held that the Petition filed by the Appellant before the State Commission would amount to Review of the earlier Tariff Order dated 29.1.2010.

- 60.** In view of the above factual situation of the case, we hold that the Petition filed by the Appellant before the State Commission in the present case, is not for Review but only praying for re-determination of tariff on the basis of the subsequent developments which took place after the Tariff Order. Whether a case has been made out for re-determination by exercising the Regulatory powers on the basis of the subsequent developments that took place in the present case, is a different question which we shall consider later.
- 61.** Accordingly, we answer the 2nd question in favour of the Appellant as we are of the view that the Petition filed by the Appellant before the State Commission was not a Review Petition and therefore, question of Limitation does not arise.
- 62.** Let us now come to the 3rd **Question** whether the other grounds mentioned in the Impugned Order, such as lack of

Regulatory powers to revise the Tariff, principles of Res-judicata, Promissory Estoppels and Legitimate Expectations etc., for rejecting the Petition as not maintainable are justified or not.

- 63.** Even though we hold that the Petition filed before the State Commission is maintainable as it is not a Review Petition, we are now called upon to decide about the validity of the other grounds on the basis of which the Petition was dismissed by the State Commission as not maintainable.
- 64.** Merely because we have held that the Petition filed before the State Commission was maintainable, as it was not a Review Petition, it does not mean that the Petition was maintainable in respect of other grounds also. Therefore, we have to consider that other grounds, referred to in the Impugned Order by the State Commission to hold that the Petition was not maintainable, are valid or not.
- 65.** Let us now refer to various other grounds referred to by the State Commission in the Impugned Order for rejecting the Petition as not maintainable. These grounds are given as below:

(a) Re-determination of tariff and re-opening of PPAs under Regulatory power sought by GUVNL is neither valid nor warranted especially since the Tariff Order, 2010 has been issued under Section 86 (1) (a) of the Electricity Act, 2003.

(b) Once capital cost and Debt Equity Ratio are decided by the Commission on normative basis and the tariff

decided by the Commission on these norms has been accepted and acted upon by GUVNL, GUVNL cannot subsequently raise a dispute with respect to such tariff.

(c) When a Court has decided an issue one way or the other at an earlier stage and such decision has attained finality, the parties will not be allowed to re-agitate the matter at a subsequent stage. The principle of Res Judicata applies.

(d) PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentive.

(e) The Government of Gujarat through its Solar Power Policy, 2009 (amended in 2010) promised to pay the tariff determined by GERC vide Tariff Order, 2010 in furtherance of which the developers entered into PPAs with GUVNL. As such, GUVNL is estopped from seeking re-determination at a subsequent stage on the ground of public interest or the tariff not being beneficial to it.

(f) This Tribunal in Appeal No.75 of 2012 has held that project wise tariff determination will not be permitted for Solar developers developing the projects pursuant to original tariff order.

(g) GUVNL, State Govt and the State Commission are the State within the meaning of Article 12 of the Constitution of India. The developers entered into PPAs with on the basis of the Tariff Order, 2010 and the Solar Power Policy. Therefore, computation of tariff has been represented by the State and as such, the Developers have the right to seek enforcement of the said representation based on the Doctrine of Legitimate Expectation.

(h) Every project involves a bundle of risks and where an investor assumes such bundle of risks, he is entitled to whatever returns that he is able to make including benefits of efficiencies that he may be able to generate. It is not permissible for the GUVNL to selectively evaluate

and examine capital cost in isolation while ignoring all other elements and risk involved in the development of the Project like variation in Foreign Exchange Rate, variation in interest on loan, possibility of achieving lower CUF etc.

(i) There was representation from GUVNL to the Project Developers that he agreed to pay the tariff decided by the State Commission in its order based on which the PPA was signed and the project developers set up the plants by putting faith in GUVNL. Now GUVNL has acted against it which is detrimental to the Project Developers. Therefore, it is a fit case where Doctrine of Promissory Estoppels is applicable.

(j) GJUVNL has accepted the normative para-meters based tariff. In generic tariff determined by the Commission as promotional measure, it is not permissible to true-up based on the actual para-meters. The plea of GUVNL for re-determination of tariff which is in the form of true-up is not permissible.

(k) There is no additional burden, over and above the burden anticipated at the time of signing of the PPAs and as such, the plea of GUVNL to re-open and re-determined the tariff to protect the consumer's interest is not valid.

(e) Absence of specific cause of action as well as any evidence to substantiate the claim of GUVNL.

66. According to the Appellant, the Petition cannot be dismissed even at the admission stage on the grounds mentioned above without further enquiry after admission as these aspects would involve mixed questions of law and facts.

67. It is a settled position of law that the State Commission is well within its rights to reject the Petition seeking for Re-determination or Revision of the Original Tariff if there is no cause of action or no legal right to seek for the said re-determination.

- 68.** In other words, the existence of a cause of action showing infraction of a legal right is essential for the maintainability of the Petition in a Court of law. Such a right can only arise from a contract, statute or operation of law.
- 69.** According to the Respondents, the Appellant in the present case, has failed to show any provision under the contract i.e. PPA, statute i.e. Gujarat Commission's Regulations, Electricity Act, 2003 or under the Tariff Order which provides it a basis to claim a legal right to seek reduction in the normative tariff decided under the tariff order.
- 70.** In short, the case of the Respondents is that even assuming that the State Commission is empowered to re-open the PPA and to re-visit the tariff under the PPA, no right or cause of action has been disclosed by the Appellant in the present case to obtain such a relief of reduced Tariff. Therefore, the question arises is as to whether the State Commission has the powers to re-determine the normative tariff at a later stage on actual and whether the Appellant has a right to claim such a re-determination in the present facts and circumstances of the case.
- 71.** It is not disputed regarding the legal position that the State Commission has the obligation in terms of the Act, 2003, National Electricity Policy, National Tariff Policy to promote generation from renewable sources by way of incentivising

it. Section 86 (1) (e) of the Electricity Act, 2003 sets out promotion of generation of electricity from renewable source of energy as one of the ongoing functions of the State Commission. National Electricity Policy provides that adequate promotional measures will have to be taken for development of technologies and sustained growth of resources.

- 72.** It further states that efforts must be made to encourage private sector participation in producing energy from non-conventional energy sources. The National Tariff Policy stipulates procurement of energy from non Conventional Energy Source at preferential tariff determined by the Sate Commission in order to enable the non-conventional energy to compete with the conventional energy source.
- 73.** In view of the above, Appropriate Commission has the duty and obligation to ensure that the project developers intending to install power projects through renewable source of energy are encouraged.
- 74.** In the light of the above legal position, it has to be seen where there is any legal right available to the Appellant arose out of cause of action to seek reduction of normative tariff and consequently agitate for re-opening the PPA to reduce the tariff to disincentivise the renewable energy developers which would discourage future investments in the Sector. As indicated above, the Petition in the absence of a

foundation of a legal right, cannot be maintained in a court of law as the establishment of a legal right is pre-requisite for a legal authority to exercise its adjudicatory jurisdiction.

75. Keeping this in view, it has to be seen whether the Appellant in the present case has established its legal right or cause of action to seek re-determination of normative tariff decided under the tariff order in the light of the subsequent events.

76. The Appellant has relied upon the following subsequent events:

(a) Issuance of Custom Notification dated 27.2.2010 and Excise Notification dated 27.2.2010 after issuance of the tariff order dated 2.9.2010, reducing custom duty and excise duty on Solar Power Equipments;

(b) After issuance of the tariff order there is a reduction of capital cost and therefore, the normative capital cost bench mark considered under the Original tariff order should be revisited.

77. The Appellant have relied upon these events which took place within a month after the issuance of tariff order. In this context, it has to be noticed that the Appellant had not chosen to approach the State Commission for Revision or Review on the basis of these events immediately after the issuance of the above notifications.

- 78.** In other words, if the Appellant believed that such Notifications resulted in benefits accruing that would effectively decrease the Solar project cost, the Appellant should have brought the issue to the notice of the State Commission in and around February, 2010 itself and there is no reason for the Appellant to have waited till 2013 to agitate such an issue.
- 79.** It was open for the Appellant to approach the State Commission on the basis of the changed circumstances at that stage itself. On the other hand, in the present case, the Appellant allowed the developers to act on the basis of the tariff order.
- 80.** At a belated stage, the Appellant has approached the Commission i.e. after three years seeking for the revision on the ground of subsequent events when the developers have already commissioned the Solar Projects.
- 81.** As pointed out by the Respondents, the PPAs usually have a 'Change in Law' clause to provide relief to the parties under the PPA by mitigating the effect of change in law. But, in the present case, admittedly, there is no 'Change in Law' clause and therefore, the parties to the concluded PPAs would merely agree for fixed tariff despite change in the applicable law that would take place in future.
- 82.** When the Appellant has not been directly allowed to make claim based on "Change in Law" on account of issuance of

Custom and Excise Notifications, it should not be allowed indirectly to make such a claim for re-determination against the project developers as the said right is not available to the Appellant that too at the belated stage.

83. The Respondents have pointed out the following reasons to show that the grounds relating to the subsequent development based on the Excise and Custom Notifications are entirely bereft of merit:

(a) The proximity of the dates of the exemption Notification i.e. 27.2.2010 to the date of the Tariff Order dated 29.01.2010 reflects that intention of the Government which was keen on introducing as many incentives it could apart from the attractive tariff, to woo Solar Developers into the State of Gujarat.

(b) An “attractive” promotional tariff was declared on 29.01.2010.

(c) The State Commission did not reserve unto itself the power to review the tariff on the introduction of tax exemptions;

(d) The Appellant entered into PPAs with the Respondents after the said exemptions were introduced, being fully aware of the said exemptions and the likelihood of the said exemptions affecting the actual cost of the generators;

(e) Being aware of such tax exemptions in the February of 2010 itself, neither did the Appellant approach the Commission at that point in time, i.e. prior to entering into PPAs with the Respondents herein for amendment of the Tariff Order nor did the Appellant seek to hedge such risk by providing for the same in the PPAs.

- 84.** The above reasonings, in our view are sound and proper. Admittedly, the prayers and relief sought for by the Appellant in the Petition would not relate to the re-opening of the PPAs.
- 85.** The State Commission while determining the solar tariff in the year 2010 was conscious of the fact that the area of Solar Energy was nascent in the year 2010 and that prices were likely to drop and consequently, the State Commission required the tariff to be re-visited after a shorter interval than provided in the MYT norms.
- 86.** The State Commission had accordingly revisited the tariff at the end of the first control period i.e. after two years. Therefore, the prayers sought for by the Appellant, if allowed, would require the State Commission to issue a fresh tariff order amending or revoking the tariff order 2010 after the expiry of control period of two years from the date

of the tariff order. This is not permissible under the scheme of the Electricity Act, 2003.

- 87.** That apart, the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting up the Project. Tariff order, 2010 did not reserve the power to review or re-visit if the actual parameters applied by the generators vary with the normative para-meters.
- 88.** The Tariff determined by the State Commission was a promotional tariff. The said tariff announced by the State Commission in the year 2010 was the incentive offered to the generators who invested during the first control period to be entitled to such an attractive promotional tariff.
- 89.** In fact, the said tariff was accepted by all parties and acted upon. The PPAs entered into by the parties were confirmed by the State Commission. The said Tariff was also adopted by the Gujarat Government and notified. The attractive tariff itself was the incentive. This cannot be sought to be taken away long after the generators have acted upon the same.
- 90.** As mentioned earlier, the Tariff Order dated 29.1.2010 was fully accepted by the parties without any reservations. Neither the Solar tariff order nor the PPA have any revision clause empowering the State Commission to revise the

tariff except for the lone exception with regard to accelerated depreciation that too at the behest of solar developers who had not availed such a benefit under the income tax act.

- 91.** Besides that, the Circulars issued by the State of Gujarat and adoption of tariff by the State Commission and the State Policy would show that promise of the State Government to the private parties and the generators which led to the execution of the PPA between the parties.
- 92.** In other words, the PPA executed by the parties and the conduct of the parties acting upon such Agreements over a long period bind them to the rights and obligation stated in the Agreements.
- 93.** Admittedly, the generic tariff was already determined by the State Commission through the tariff order on the basis of the normative principles. Now by moving fresh petition before the State Commission, the Appellant wanted for re-determination of the tariff on the basis of the cost of the project and actual amount spent by the developers i.e. project wise tariff on cost plus principle based on actual cost/expenditure incurred.
- 94.** In this context, it would be relevant to point out that already an Appeal has been filed in Appeal No.75 of 2012 as against the Order of the State Commission before this Tribunal. The said

Appeal was dismissed by this Tribunal by the judgment dated 17.4.2012 holding that it is not permissible to fix the project specific tariff when already generic tariff has been determined.

- 95.** In this judgment in Appeal No.75 of 2012, this Tribunal has categorically held that the normative tariff determined by the State Commission in its Original Tariff Order will be binding on all Solar Power Developers and they cannot seek project-wise tariff determination.
- 96.** The relevant observations of this Tribunal in the Judgment is as follows:

“17.4 We are in agreement with the submissions made by the learned counsel for the State Commission. There is absolutely no case for the State Commission to determine the project wise tariff afresh for the projects which signed Power Purchase Agreement based on the first tariff order and failed to commission their projects during the control period. The findings of the Tribunal in Appeal nos. 50 & 65 of 2008 in respect of Hydro Projects will not be applicable in this case. In case of Hydro Projects the capital cost could vary depending on the geological conditions and inflows of water with respect to the

norms assumed in the generic tariff. Such variables are not relevant in case of Solar PV projects. Thus, findings of the Tribunal in Techman case will not be applicable to the present case.

17.5 Therefore, we find no force in the contention of the Appellant regarding determination of project specific tariff. Accordingly, this issue is decided against the Appellant.

- 97.** These findings of this Tribunal in the above Appeal, relied upon by the State Commission would make it clear that the Appellant cannot seek re-opening of the PPAs of the Generators who commissioned their project subsequent to the control period specified in the Original Tariff Order. This prayer made by the Appellant is virtually against the earlier explicit stand taken by the Appellant before the State Commission as well as before this Tribunal opposing project wise determination of tariff on cost plus principles.
- 98.** It is to be pointed out that the Appellant who is a state instrumentality was the contesting Respondent in Appeal No.75 of 2012. The Appellant in reply filed in the above Appeal before this Tribunal specifically stated that the projects which have not been commissioned during the first control period are not entitled to project specific tariff. It is strange to notice that in the present case, the Appellant acting in complete contrary to the earlier stand, has altered its previous position and is now seeking a project specific tariff for all the projects commissioned during the first control period.
- 99.** The Appellant being a Government entity had agreed to tariff determination through normative principles in accordance with the Original Tariff Order. The Appellant accordingly signed the PPA dated 26.3.2010 and agreed to

pay the tariff determined on normative basis to the Solar Developers.

- 100.** That apart, the Appellant did not at any stage either prior to PPA or after signing the PPA or before the Respondents commenced the development of the plant ever represented to the Respondents that it would seek to have a project specific tariff determined as opposed to the generic tariff determined under the Original Tariff Order on normative parameters. Once the Appellant executes the PPA it did not have the power or authority to alter any terms of the PPA except through mutual consent of both the parties.
- 101.** As mentioned earlier, from the perusal of the provisions of the Act, 2003, which have been invoked by the State Commission in passing the Original Tariff Order, it is evident that the entire focus of the said proceedings was to promote Solar Energy by providing the developers with the preferential tariff.
- 102.** According to the Respondents, if the relief sought for by the Appellant is granted, then the same would be counter productive to the mandate of the provisions of the Act, 2003.
- 103.** As a matter of fact, it has been categorically held in the Original Tariff Order dated 29.1.2010 that the choice of technology solely vested with the Solar Developers. The

only requirement from the developers was to ensure that a new solar PV Plant is developed within the control period and the same would entitle the developer the Tariff determined by the State Commission. The only requirement of the developer to be entitled to the tariff under the Original Tariff Order was that it should commission a brand new project within the stipulated control period provided by the State Commission.

104. The learned Counsel for the Appellant submitted that the Regulator has wide powers and the word “regulate” encompasses the powers with regard to all incidental and supplementary matters including the powers to re-visit the tariff. In support of its submissions, the Appellant has cited the following authorities:

- (a) UPPCL Vs NTPC Ltd and Others (2009) 6 SCC 235;
- (b) Cellular Operators Association of India Vs Union of India (2003) 3 SCC 186;
- (c) V S Rice and Oil Mills Vs State of AP (1964) 7 SCR 456;
- (d) State of UP Vs Maharaja Dharamander Prasad Singh (1989) 2 SCC 505;

- (e) Hotel & Restaurant Association Vs Star India (P) Ltd (2006) 13 SCC 753;
- (f) K Ramanathan Vs State of Tamil Nadu (1985) 2 SCC 116;

105. In these decisions the word “regulate” and regulatory powers of the Regulator have been interpreted. The Hon’ble Supreme Court in this decision has interpreted the above term while dealing with the functions of the Central Commission. The functions of the Central Commission under Section 79 (1) (a) (b) of the Act is to regulate the tariff of the generating companies but the State Commission u/s 86 (1) (a) is to determine the tariff for supply by the Generating Companies to the Distribution Licensees.

106. The Hon’ble Supreme Court in these judgments held that while exercising regulatory powers the Regulator has wide powers regarding incidental and supplementary powers.

107. In the present case the Appellant has filed the Petition u/s 86(1)(a) read with Section 62 of the Act. Both these Sections empower the State Commission to determine the tariff and not to regulate the tariff for generating Companies since the generation is totally de-licensed under the Act. However, the State Commission u/s 86(1) (b) can regulate electricity purchase and procurement process of distribution

license including the price at which electricity shall be procured from the Generating Companies and other sources.

108. The Appellant merely contended that the Tariff order dated 29.1.2010 had been passed on certain basis namely capital cost for the Solar Projects and debt equity ratio for such projects etc., and therefore, this Tribunal should take into account the subsequent developments that took place.

109. According to the Appellant, the subsequent development is that purportedly, the capital cost being actually incurred by 10 projectors was only in the region of Rs.11-13 Crores per MW as against Rs.16.50 Crores per MW as fixed in the original tariff order and therefore, it warrants a revision. Further, in some projects the equity was less than the normative equity of 30%.

110. According to the Respondents, a generic tariff order on normative parameters is not permissible to be altered or revisited on the basis of the actual cost after the expiry of the control period. After the expiry of the first control period, tariff has been re-determined for the next control period by the State Commission and the new tariff for the second control period is less than the tariff determined for the first control period by the Order dated 29.1.2010. However, the said tariff for the second control period would

not apply to the projects commissioned during the first control period. Similarly, MYT Regulations of 2011 also do not apply to the Respondents. Therefore, the generic tariff order on normative parameters is not permissible to be altered on the basis of the actual cost incurred since the Tariff Order, 2010 did not reserve in the said order, the power to revisit if the actual parameters applied by the generators vary with the normative parameters. Neither the Power Purchase agreement nor the Tariff Order permits such a Revision.

111. We find force in these submissions made by the Respondents.

112. The Appellant has relied upon the Junagadh Power Projects Private Limited Vs GUVNL & Ors (Full Bench Judgment dated 2.12.2013 in Appeals 132 and 133 of 2012) rendered by this Tribunal. The Appellant has pointed out the relevant extract from the Junagadh judgment which is as follows:

*29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. **The State Commission has the duty to incentivise the generation of electricity***

from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company.

30.....

C) It has also been reported that the biomass projects in the State are partially closed down and operating at an extremely Low Plant factor due to high price of biomass fuel which has affected their commercial viability.

.....

(E) It is not a case where the Appellants are requesting for revision in return on equity, capital cost of project, operation & maintenance cost, depreciation or any other controllable parameter which has affected the expected return on capital to the project developers.

.....

31. Considering all the above factors, we feel that this is an appropriate case where the State Commission should examine and consider to re-determine the biomass fuel price. It should not be considered as a review of its earlier order dated 17.5.2010. In fact this should be considered as re-determination of tariff invoking the powers of the State Commission under the Electricity Act, 2003 to review the tariff

in the circumstances of the case to avert closure of the biomass fuel based projects in the State.

113. The perusal of the Junagadh judgment would indicate that this Tribunal took cognizance of the subsequent fact such as closure and operation on an extremely low plant factor of biomass based projects due to high price of biomass fuel. In that case, the State Commission had determined the promotional generic tariff of biomass projects with some estimation of biomass fuel price for base year with an escalation factor for the biomass fuel price for the subsequent years for a period of 20 years even though it was specifically noted by the State Commission that no reliable data for biomass fuel prices was available with the Commission. However, the price of biomass fuel in the market reportedly increased substantially resulting in closure of biomass projects or operation at very low plant load factor. The price of biomass fuel was beyond the control of the project developers. Thus, the promotional tariff determined by the State Commission was not serving the desired purpose. The State Commission has been given the mandate under the Electricity Act to promote the renewable sources of energy and if such sources are facing threat of being closed down due to external and uncontrollable factor, then the State Commission has to exercise its regulatory powers. Therefore, it was necessary for the State Commission to take practical decisions which would

help in ensuring existence of these renewable sources of energy rather than their extinguishment as alleged. Accordingly, the State Commission was directed to intervene and re-determine the biomass fuel price prospectively. It has been specifically held in the said judgment that the Appellant in that case were not requesting for revision in Return on Equity and Capital Cost of the project. In the present case, the Appellant is seeking for revision of capital cost etc after considering the actual capital cost and debt equity deployed for each project. Therefore, Junagarh case will be of no use to the Appellant.

114. One of the subsequent developments cited by the Appellant is of a decrease in custom duty for seeking an unilateral reduction in tariff. On this aspect, the Respondent has pointed out the following:

- (a) The reduction in Custom Duty is a measure adopted by the Central Government. It is in lien with the larger policy to in-centivise Solar Power Generation.
- (b) The said reduction is an added incentive given to the Solar Power Producers. Therefore, to seek reduction in tariff for every incentive granted would negate the benefit of incentives thereby neutralising the effect and rendering the incentives meaningless.

- 115.** This reply by the Respondent merits consideration.
- 116.** In regard to the re-opening of the Power Purchase Agreement, the learned Counsel for the Appellant submitted that the State Commission has the powers to re-open the PPA.
- 117.** In the light of the objectives of the Act, it should be pointed out that the Power Purchase Agreements can be re-opened only for the purpose of giving a thrust to the renewable energy projects and not for curtailing the incentives. In support of this aspect, the learned Counsel for the Respondent has cited the judgment in Ritwik Energy System Vs Transmission Corporation of Andhra Pradesh in Appeal No.90 etc. Batch of 2006.
- 118.** According to the Appellant, the State Commission has wide regulatory powers to revise the tariff in public interest. According to the Respondent, the State Commission do not have the powers to regulate the tariffs of the Generating Companies. Section 86 (1)(a) confers the powers to the State Commission only to determine the tariff and not to regulate the tariff of Generating Companies. The powers conferred to the Central Commission u/s 79(1)(a) and (b) to regulate the tariffs of the Generating Companies is not available to the State Commission u/s 86 (1)(a). The various decisions cited by the Appellant with regard to the

Regulations, have no application to the present case. The State Commission have the powers to regulate the power purchase by the Distribution Companies under Section 86 (1) (b). In other words, this does not confer the powers on the State Commissions to indirectly regulate the Generating Companies.

119. It cannot be disputed that the generic Tariff Order dated 29.1.2010 had been issued in the present case u/s 61(h) Section 86(1)(a) and 86(1)(e). As such, the said order had been issued by the State Commission in exercise of its power to determine the tariff of the Generating Companies and to promote renewable energy projects. It is not desirable to re-open the PPA based on the promotional tariff determined by the State Commission to reduce the incentive to renewable energy Generators.

120. One more important aspect to be noticed at this juncture is this. As a matter of fact, even when the generic tariff order had been passed, the only objection taken by the Appellant was that the capital cost should be determined as per the prevalent market rate. Said objection was considered by the State Commission and on the basis of the same, the allowable capital cost was determined. Therefore, it is not permissible for the Appellant now to go behind the said objection raised by it before the State Commission.

- 121.** It is submitted by the Appellant that the State Commission has got the powers to re-open the PPAs to safeguard the interests of the consumers.
- 122.** According to the Respondents, the PPA cannot be re-opened by the Commission except in exceptional circumstances and none of such exceptional circumstances exists in the instant case and nor they have been alleged in the Petition.
- 123.** The rights and liabilities arising from a binding contract cannot be escaped on the basis of some presumption in relation to same facts leading to the execution of the Agreement between the parties.
- 124.** Furthermore, as pointed out by the Respondents, the PPAs do not contain any provisions empowering the State Commission to undertake re-visiting or re-determination of the tariff.
- 125.** The State Commission in view of the fact that there was a possibility of considerable reduction in capital cost in future, prescribed the control period of only two years. There is no provision for revision of the tariff prior to two years in the event of deviation in the normative parameters.
- 126.** This Tribunal as quoted above, has already held that the Power Purchase Agreement can be re-opened only for the purpose of giving thrust to the non conventional energy

projects and not for curtailing the incentives. The above ratio has been decided in the decision in Ritwik Energy Systems Vs Transmission Corporation of Andhra Pradesh Case in Appeal No.90 and 91 batch of 2006. The relevant portion of the observations is as follows:

“Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives.

127. The Only exception given in the tariff order dated 29.1.2010 which permits re-opening of the PPA for re-determination of tariff is given as follows:

“Tariff for PV and Solar Thermal Power Projects

*The above tariffs take into account the benefit of **accelerated depreciation** under the Income Tax Act and Rules. For a project that does not get such benefit, the Commission would, on a Petition in that respect, determine a separate tariff taking into account all the relevant facts.”*

128. So in view of the above, it is clear that the State Commission has envisaged only one situation wherein only project developers can approach the State Commission for specific tariff determined for that project only when such developer has not availed accelerated depreciation. For every other developer, the State Commission has already determined the tariff through the generic tariff order dated

29.1.2010. This prayer has also been upheld in Appeal No.111 of 2010 dated 30.4.2013. The relevant observation is as follows:

“15. In view of the above, it would be worthwhile to refer to the observation made by the State Commission earlier giving the liberty in the order No.2 of 2010 passed on 29.1.2010. The said observation is as follows:-

“The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and the Rules. For a project, that does not get such benefit, the Commission, would on a petition in that respect, determine a separate tariff taking into account all the relevant facts”

16. The above observation would reveal that such a liberty was given to the project developers if they do not get the benefit of accelerated depreciation. According to the State Commission, in view of the liberty given in the order No.2 of 2010 dated 29.01.2010 to the effect that the project developer who did not get the benefit of accelerated depreciation, it could file a petition for fixing specific tariff and in that event, the State Commission would consider and decide the same after taking into account all aspects and therefore, the Petition was maintainable. While giving such a finding while admitting the petition, the State Commission has taken into account the background of the case also”.

129. It has been pointed out by the Respondents that the relief sought for by the Appellant in the Petition filed before the State Commission in the year 2013 only after the operation of the first control period of two years from 29.1.2010 has

come to an end. Therefore, these reliefs cannot be granted since the Order which was sought to be re-visited was no longer in operation by virtue of Section 64 (6) of the Electricity Act, 2003. Section 64(6) of the Electricity Act permits amendment or alteration to the tariff order only during the time of its operation. Such tariff order having lived its life and having been replaced by a fresh tariff order passed in the year 2012 is incapable of revision and revisit in 2013 i.e. after two years is over. This argument of the Respondent, in our view also deserves consideration.

130. The Appellant submitted that the Tariff Order dated 29.1.2010 had been passed on certain basis namely capital cost for the Solar Project, debt equity ratio for such a project etc and this Tribunal in Junagarh case held that subsequent development that took place have to be taken into action for revisiting the tariff. The subsequent development according to the Appellant is that the capital cost actually incurred by the project developers was between Rs.11 and 13 Crores per MW as against Rs.16.50 Crores per MW assumed in the tariff order and therefore, the said tariff order warrants a revision as such, the said order was adverse to the interests of the public.

131. We are not able to accept this argument. A generic tariff order on normative parameters on assumption is not permissible to be re-visited on the basis of the actual cost

that too after the expiry of the operation of the two year's control period. After the expiry of first control period, the specific provision has been done for re-determination of tariff on year to year basis under both the Central Commission's Regulations and the State Commission's Regulations. However, these Regulations would not apply to the projects commissioned during the first control period. Therefore, the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred especially when the Tariff Order, 2010 did not reserve with itself the power to re-visit if the actual parameters applied by the Generators vary with the normative parameters. As mentioned above, the facts in Junagarh judgment would reveal that it was not a case where the Appellants were requesting for revision in return on equity, capital cost of projects, operation and maintenance cost, depreciation or any other controllable parameters which affected the expected returns on capital to the project developers. That is not the case here. In the present case, the Appellants asked for revision on the capital cost of the project return on equity etc.,

132. In Junagarh judgment, this Tribunal taking cognizance of the subsequent development such as closure/ operation of biomass projects on extremely low plant factor due to high prices of biomass fuel in the market which is an

external and uncontrollable factor directed the State Commission to re-determine the biomass fuel price prospectively to prevent closure of the renewable energy projects. In that case, the State Commission had determined the tariff with estimated escalation of biomass fuel but actually the bio mass fuel cost increased substantially resulting in closure/operation of the Power Plants at extremely low Plant Load factors.

133. The following relevant extracts from the Junagarh judgment would clarify the context and the reasoning which weighed with this Tribunal while rendering the said judgment. The same is as follows:

*“29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. **The State Commission has the duty to incentivise the generation of electricity from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the***

interest of the consumers as well as the generating company.

30.....

(C) It has also been reported that the biomass projects in the State are partially closed down and operating at an extremely Low Plant factor due to high price of biomass fuel which has affected their commercial viability.

(E) It is not a case where the Appellants are requesting for revision in return on equity, capital cost of project, operation & maintenance cost, depreciation or any other controllable parameter which has affected the expected return on capital to the project developers.”

134. In the light of the above observations, it is to be reiterated that the Junagarh judgment in which the Appellants, being the project developers requested the revision only on the subsequent facts such as closure and operation of power plants on extremely low plant factor due to high prices of bio-mass fuel would not apply to the present case since this is a case where the Appellant Distribution Licensees are requesting for revision in return on equity, capital cost of the project etc.,

135. In the present case, the refusal of the State Commission to exercise its regulatory powers neither deals with the adjudication of any right nor adds any new right or destroys a right for the Appellant which existed before the issuance

of the Impugned Order passed by the State Commission on 8.8.2013.

136. The Appellant, as indicated above, relied upon the subsequent events namely issuance of the Customs Notification and Excise Notifications dated 27.2.2010.

137. According to the Appellant, these Notifications issued after the issuance of the generic tariff Order has resulted in reduction of the Capital Cost and therefore, the normative Capital Cost considered under the generic tariff order should be revisited. The subsequent changes however took place within a month after the issuance of generic tariff order. As mentioned earlier, if the Appellants believe that such Notifications resulted in the benefits accruing to the project developers, which would factually decrease the project cost, the Appellant should have brought the issue to the notice of the State Commission in and around February, 2010 and not waited till 2013 to agitate the issue, after the Solar Projects have been commissioned by the project developers and supply of Solar Energy has commenced.

138. In other words, the Appellant allowed the Developers to act on the basis of the generic tariff order all along. The Appellant has not also given any reasons as to why the Appellants have slumbered on their so called rights for

such a long time. Therefore, the approach of the Appellant before the State Commission for relief at a belated stage cannot be entertained.

139. As mentioned above, the 'Change in Law' Clause to provide relief to the parties under the PPA is not available in the present case. Since the Appellant is not directly allowed to make claim based on the change in law at a later stage on account of issuance of Notifications under the PPA, the Appellant should not be indirectly allowed to make such a claim for reduction of normative tariff fixed under the generic tariff order.

140. According to the Respondents, if the normative parameters are revisited at this stage, the entire objective of seeking generic tariff on normative parameters will be vitiated. This aspect also merits consideration. When it was not established by the Appellant that there is a legal right available to the Appellant to seek for re-determination by re-opening the PPA, the State Commission would not be expected to revisit the generic tariff thereby to disincentivise the project developers and consequently discourage future investments in the Sector.

141. Therefore, the prayer for re-determination of generic tariff on the basis of the subsequent development namely issuance of Customs and Excise Notifications does not

merit consideration especially when the prayer for re-determination mainly on the basis of actual expenses towards capital cost, debt equity ratio etc.,

142. According to the Appellant, the issue such as Res-judicata, Promissory Estoppel and Legitimate Expectations cannot be the grounds for rejecting the Petition as not maintainable on a preliminary basis.

143. The learned Counsel for the Appellant has cited the following decisions on the said proposition:

- (a) Major S S Khanna v Brig F J Dillon (1964) 4 SCR 409
- (b) Madhukar D Shende v Tarabai Aba Shedage (2002) 2 SCC 85;
- (c) Larsen & Toubro Ltd v Union of India (2005) 3 SCC 654;
- (d) S B International Ltd v Assistant Director General of Foreign Trade (1996) 2 SCC 439;
- (e) Ram Pravesh Singh v State of Bihar (2006) 8 SCC 381
- (f) Ramesh B Desai v Bipin Vadilal Mehta

144. The learned Counsel for the Appellant points out that in these decisions it is held that the jurisdiction to try issue of

law apart from the facts may be exercised only where in the opinion of the Court, the whole suit may be disposed of on the issue of the law alone but the Code of Civil Procedure does not confer the jurisdiction upon the Court to try a suit on mixed issue of law and facts as a preliminary issue. When that is the ratio decided by the Hon'ble Supreme Court, the State Commission ought not to have decided the issue such as Res-judicata, promissory estoppels and legitimate expectations which relates to the facts as a preliminary basis.

- 145.** On the other hand, the learned Counsel for the Respondents submit that that the Gujarat Solar Policy, 2009 issued by the State Government specifically provided the orders of the State Commission shall supersede the provisions of the policy and subsequent to the issuance of the tariff order dated 29.1.2010, the Government of Gujarat duly adopted the provisions of the Order and issued notice and therefore, the PPAs were executed by both the Appellant and Solar Power Developer, the developers have got legitimate right to seek enforcement of the said representation on the basis of the Doctrine of Legitimate Expectation and the fact that the tariff order passed on 29.1.2010 on the basis of which Gujarat Solar Policy Notification was issued on 22.6.2010 and subsequently, the PPAs were signed by the parties are not disputed by the

Appellant, the State Commission is well within its rights to give a finding on the doctrine of legitimate expectations even at the initial stage.

146. Let us now discuss the issue.

147. As correctly pointed out by the Respondents subsequent to the issuance of the tariff order dated 29.1.2010, with regard to the Solar Power Developers, the Government of Gujarat adopted the provisions of this Order and issued an amendment to the Gujarat Solar Policy through its Notification dated 22.6.2010. Only on the basis of the developments, the PPAs were signed by the Appellant that of Solar Power Developers. Thus, it is clear that all the Developers entered into PPAs with the Appellant based on the policy issued by the Government of Gujarat based on the tariff order and also on the basis of the PPAs. The question whether the parties having agreed upon to the terms and conditions and having acted upon the same, could go back violating the legitimate expectations of the developers to have the legitimate right to seek enforcement of the said representation of the PPAs.

148. The learned Counsel for the Respondents cited the following authorities:

- (a) UP AWAS Evam Vikas Parishad Vs Gyan Devi & Ors (1995) 2 SCC 326;

(b) Delhi Cloth & General Mills Ltd Vs Union of India
(1988) 1 SCC 86;

(c) Punjab Communications Ltd Vs Union of India
(1999) 3 SCC 499;

149. In these decisions it has been held that the private parties dealing with Government have legitimate expectations before dealing with regularity predictability and certainty.

150. From these decisions it is evident that a right has been enjoyed by the private parties previously when the parties have a legitimate expectation to enjoy the same since the right has been withdrawn with a rationale behind it.

151. In the light of the above ratio, we have to analyse the issue.

152. In the present case, the Appellant and the State Commission are considered to be the State within the meaning of Article 12 of the Constitution of India. Based on the tariff order dated 29.1.2010 and based on the PPA entered into between the parties, the Respondents have developed the project. Once a tariff and process of computation has been represented by the State, then based on the Doctrine of the Legitimate Representations, the Respondents have got the right to seek enforcement of the said representation.

- 153.** Even though, the Doctrine of Legitimate Expectations involves some facts, it becomes the issue of law since the factual position giving right to the issue of law in the present case, is not disputed. Therefore, there is nothing wrong for the State Commission to decide this issue even at the preliminary stage on the basis of the undisputed facts and records.
- 154.** Similar arguments were advanced by the Appellant with regard to the violation of the Promissory Estoppel.
- 155.** According to the Appellant, the Promissory Estoppel is a fact to be decided only during the final disposal on merit and not on preliminary stage. Admittedly, the Appellant signed the PPAs with Respondent and agreed to pay tariff determination on normative basis to the Respondent. The Appellant did not at any stage, i.e. either prior to the PPA or after signing of the PPA or before the Respondent commenced the development of the plant ever represented to the Appellant that it will seek to have the project specific tariff determined as opposed to the tariff determined under the Original generic Tariff Order. Once the Appellant executed the PPA, the Appellant cannot have the power or authority to alter any terms of the PPA except through the mutual consent of the Developer who is a party to the PPA.

156. In this context, it would be worthwhile to refer to the judgment reported in the case of Union of India v Wing Commander R R Hingorani (1987) 1 SCC 551. In this decision the Hon'ble Supreme Court has held as follows:

“8.....Before an estoppels can arise, there must be first a representation of an existing fact distinct from a mere promise made by one party to the other; secondly that the other party believing it must have been induced to act on the faith of it; and thirdly, that he must have so acted to his detriment.”

157. So, as per this decision, the ingredients for satisfying the estoppels would be

- (a) a representation of an existing fact distinct from a mere promise made by one party to the other;
- (b) the other party believing it must have been induced to act on the faith of it;
- (c) The other party must have so acted to his detriment;

158. Admittedly, in the present case, the Respondent have altered its position to develop the project on the basis of the PPAs signed with the Appellants. Further, the said PPAs provided a generic tariff determined as per the tariff order on normative principles.

159. In the above circumstances the present prayer of the Appellant seeking for the redetermination of the tariff based

on the cost plus basis is in violation of the Doctrine of Promissory Estoppel.

160. As explained above, these are all the undisputed facts which would go to show that all the three ingredients have been satisfied to raise the principles of Promissory Estoppel.

161. For the principles of Estoppels to be attracted, there has to be a definite and unambiguous representation to a party which should act thereupon and then alone the consequences in law can follow.

162. In the present case, the policy guidelines issued by the Central Government were the proposals sent to the State Government. Thereupon, the State Government accepted to consider amending or altering as per the needs and conditions and then they made efforts to achieve the objects of encouraging non-conventional energy generators and purchasers to enter into this field.

163. The PPA executed by these parties and their conduct of acting upon such agreements over a longer period would bind them to the rights and obligations stated in the agreements. The parties cannot deny the facts as they existed at the relevant time. The parties would have to abide by the existing facts, the correctness of which they cannot deny.

164. In respect of the issue of Promissory Estoppel the Honble Supreme court has decided the ratio in the case of Southern Petrochemical Industries Co Ltd Vs Electricity Inspector and ETIO and Ors, AIR 2007, SC 1984 and also in the case of Kusumam Hotels (P) Ltd V Kerala Seb 2008 (13) SCC 213.

165. The Doctrine of Promissory Estoppel and Legitimate Expectations are applicable in the present case since it is settled position of law that the doctrine of Promissory Estoppel and Legitimate Expectations are applicable when:

- (a) A party makes an unequivocal promise or representation to the other party, which in effect create legal relations or affect the legal relationship to arise in the future.
- (b) The other party believing it is induced to act on the faith of it to act to its detriment/to invest. In other words, the party invoking the doctrine has altered its position relying on the promise.
- (c) Private parties in dealing with the Government have legitimate expectation to be dealt with regularity, predictability and certainty.
- (d) Legitimate Expectation is capable of including expectations which go beyond enforceable legal

rights, provided they have some reasonable basis.

(e) Denial of legitimate expectation amounts to denial of rights guaranteed to a party by the Government. In this regard, the following judgments are noteworthy:

- (i) Delhi Cloth and General Mills Ltd Vs Union of India (1988) 1 SCC 86;
- (ii) Monnet Ispat and Energy Ltd vs Union of India (2012) 11 SCC;
- (iii) Gujarat State Financial Corporation vs M/s. Lotus Hotel Private Ltd (1983) 3 SCC 379;

166. Admittedly, the present case is based on the Gujarat Solar Policy, 2009, 2010 Order, Amended Solar Policy, 2010 and PPA signed with Gujarat Urja. The said PPA provided a generic tariff determined on normative principles. Therefore, the present action of Gujarat Urja seeking re-determination of Tariff based on cost plus basis amounts to acting in violation of the Doctrine of Promissory Estoppel and is liable to be rejected.

167. It is settled position of law that vested right cannot be taken away except by operation of law. The position has been reaffirmed by-

- (a) The Hon'ble Supreme Court recently in J S Yadav Vs State of UP reported as (2011) 6 SCC 570;
- (b) This Tribunal judgment dated 26.2.2014 in Appeal No.73 of 2013 titled "Assam Power Distribution Company Ltd Vs CERC;
- (c) This Tribunal judgment dated 10.4.2012 in Appeal No.165 of 2011 in the case of UHBVNL vs HERC & Ors held that:
 - (i) Power developers have made huge investments in establishing power plants pursuant to the Tariff Order of the State Commission (HERC).
 - (ii) The said investment was on the basis of tariff determined by the State Commission and a PPA was executed incorporating the Order of the State Commission for sale of Solar Power.

(iii) Therefore, tariff being too high cannot be a ground of challenging the Order of the State Commission determining the tariff of Solar Power plants.

168. In view of the above, there is nothing wrong on the part of the State Commission to reject the complaint on the ground of violation of 'Promissory Estoppels'.

169. Now we shall come to the next aspect relating to the proceedings barred by Res-judicata.

170. Let us see the relevant findings rendered by the State Commission on the issue of Res-judicata which is as under;

“6.9 The Commission had passed the Order No.2 of 2010 dated 29.1.2010 and the Petitioner accepted the Tariff decided by the Commission in the said order. Based on the said tariff order the petitioner had signed the Power Purchase Agreements with the Project Developers and agreed to pay the tariff decided by the Commission as stated in Article 5.2 of the PPA. Many of the Solar Power Project Developers have set up Power Projects, and have started to supply the electricity to the Petitioner and raised bills as agreed in the PPA. The Petitioner has also paid the bills against the invoices issued by the Respondents for supply of the electricity and the same is still continuing. Thus, the Petitioner has acted upon the decision of the Commission in Order No. 2 of 2010 dated 29.1.2010 and subsequent order No. 1 of 2012 dated 27.1.2012. Once the Petitioner has acted upon the order of the Commission, he

is not permitted to raise the dispute on the same ground which was decided through earlier order by the Commission. In the present case, the Petitioner seeks re-determination of Tariff due to variance in capital cost and equity and other parameters of the tariff decided in earlier order No.2 of 2010 by the Commission. Once, the capital cost and Debt Equity Ratio are decided by the Commission on a normative basis and the tariff decided by the Commission on these norms is accepted by the Petitioner, who also signed the PPAs with the Respondents, it is not relied for the Petitioner to dispute the same can be.

6.10 It is a settled Law that the Principle of Res Judicata applies when a judicial decision attains finality on any issue between two parties in earlier proceedings and then both the parties would not be allowed to canvass the issue again in future proceedings between the same parties. In other words, the Court having decided the issue in one way or other at the earlier stage will not allow the parties to reagitate the matter at a subsequent stage of the same proceedings.

6.11 The Hon'ble Supreme Court of India in the case of Satyadhan Ghosal V. Smt. Deorajin Debi (1960) 3 SCR 590 held as under:

“7. The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the

appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?

6.12 Therefore, the instant Petition of the Petitioner is barred by Res Judicata in as much as the orders No.2 of 2010 dated 29.1.2010 have attained finality. Hence the Petitioner seeking the redetermination of tariff which has already been determined by the Commission is not permissible. On this ground also, the present petition is not maintainable”.

171. The crux of the findings is as follows:

- (a) The State Commission had passed the tariff order on 29.1.2010.
- (b) The Gujarat Urja accepted the Tariff order passed by the State Commission. Based on the Tariff Order, the Gujarat Urja signed PPAs with the Project developers agreeing to pay the tariff decided by the State Commission. This is clear from the Article 5.2 of the PPA.
- (c) The Solar Power Developers have set-up power projects on the basis of this PPA. They have also decided to supply electricity to the Appellant and raise the bills which have been duly paid by the Gujarat urja. Thus, the Gujarat Urja acted upon the tariff order dated 29.1.2010 and also subsequent order dated 20.1.2010.
- (d) Once, the Gujarat Urja acted upon the order of the State Commission, it cannot be permitted to raise the dispute over their tariff and seek for redetermination of tariff.
- (e) Once a capital cost and debt equity ratio have been decided by the State Commission on normative basis and the same is accepted by the Gujarat Urja who signed the PPA, it is not open to the Gujarat Urja to dispute the same.

- (f) The judicial decision taken by the State Commission attains finality which have been acted upon, both the parties would not be allowed to canvass the issue again in future proceedings with the same parties.
- (g) Hon'ble Supreme Court in the Satyadhan Ghosal V Smt Deorajin Debi (1960) 3 SCR 590, case has subsequently held that the principle of Res-judicata is embodied in relation to suits in Section 11 of the CPC applies when the judicial decision taken by the quasi judicial authority which have been acted upon by the parties. In the present case, the Gujarat Urja is barred by Res-judicata in view of the Judicial order dated 29.1.2010 which has attained finality.

172. The learned Counsel for the Respondent on the strength of these findings would contend that in the present case, the issue relating to the tariff has already been decided with the parties in earlier proceedings and decision have become final as the decision was not appealed before the Appellate Forum. The parties cannot be allowed to canvass the issue again in the future proceedings between the same parties.

173. As mentioned above, the determination of tariff has already attained finality in the judicial decision taken by the Order

dated 29.1.2010. This decision has become final as no Appeal has been preferred by any of the parties before the Appellate Forum.

174. It is settled law as held by the Hon'ble Supreme Court that a judicial authority having decided the issue in one way or other at an earlier stage will not allow the parties to re-agitate again on the subsequent stage of the same proceedings.

175. In the instant proceedings, the Appellant is seeking for re-determination of tariff which has already been determined between the said parties. This cannot be disputed. Therefore, the principles of Res-judicata would squarely apply to the present case also as decided by the State Commission as a preliminary issue on the basis of the admitted facts.

176. As such, there is no infirmity in the findings rendered by the State Commission in the Impugned Order with reference to Legitimate Expectations issue, Estoppel and Res-judicata as the preliminary issue.

177. Summary of our Findings

(1) The State Commission is well within its rights to decide about the maintainability of the Petition not only on considering the contents of the Petition but also the contents of the objections

raised by the other side through their reply and to reject the Petition at the admission stage itself.

(2) The Petition filed by the Appellant before the State Commission in the present case is not for Review of the State Commission's generic tariff order dated 29.1.2010 but only for re-determination of tariff on the basis of the subsequent developments which took place after the issuance of the Tariff Order. However, whether a case has been made out for re-determination by exercising the regulatory powers on the basis of subsequent developments that took place in the present case is a different question which we have considered.

(3) The State Commission has correctly rejected the Petition of the Appellant for re-determination of tariff as not maintainable due to following:

(a) The Appellant relied upon Custom Notification and Excise Notification dated 27.2.2010 reducing custom and excise duty on Solar Power equipments. It was open to the Appellant to approach the State Commission in and around February, 2010 itself on the basis of the changed

circumstances. There was no reason for the Appellant to have waited till 2013 to agitate the issue after the control period was over and after the Solar Project were commissioned. On the other hand, the Appellant allowed the Project Developers to act on the basis of the tariff order.

(b) There is no “Change in Law” clause in the PPA or the tariff order to provide relief to the parties by mitigating the effect of ‘Change in Law’. When the Appellant has not been directly allowed to make claim based on ‘Change in Law’ on account of Custom and Excise Notifications, it should not be allowed indirectly to make such a claim for re-determination against the Project Developers.

(c) The State Commission while determining the Solar Tariff Order in the year 2010 was conscious of the fact that the Solar Energy Development was at nascent stage and the cost of Solar Plants is likely to drop and consequently the State Commission decided the tariff for only Control Period of 2 years with a view to determine the tariff after the end of the first control period for the next

control period. Therefore, if the prayer of the Appellant is allowed, it will require the State Commission to issue a fresh tariff order amending or revoking the tariff order of 2010 after the expiry of the first control period.

(d) Generic Tariff Order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting-up the Project and actual equity deployed.

(e) The tariff determined by the State Commission by the 2010 order was a promotional tariff and an incentive offered to the renewable energy Generators who invested during the first control period. The parties acted upon the tariff order. The said tariff order was also accepted by the State Government and notified. The tariff itself was a promotional measure to incentivise the Solar Project Developers. This cannot be sought to be taken away long after the renewable energy Generators have acted upon the same.

(f) The Appellant effectively want project wise determination of tariff. In Appeal No.75 of 2012 this Tribunal held that it is not

permissible to fix project specific tariff when already generic tariff has been determined and the normative tariff determined by the State Commission in the 2010 order will be bind on all Solar Power Developers.

(g) PPA can be re-opened only for the purchase of giving thrust to the renewable energy projects and not for curtailing the incentives.

(h) When it was not established by the Appellant that there is a legal right available to the Appellant to seek re-determination of tariff by re-opening the PPA, the State Commission would not be expected to revisit the generic tariff thereby to discentivise the project developers and consequently discourage future investment in the Sector.

(i) The State Commission has correctly held that Doctrine of Legitimate Expectations, Principles of Promissory Estoppel and Res-Judicata will be attracted in this present case to reject the prayer of the Appellant.

178. Thus, we are of the opinion that the Appeal is liable to be dismissed though we hold that the Petition filed before the State Commission cannot be construed to be Review

Petition and accordingly, the same is dismissed as devoid of merits.

179. However, there is no order as to cost.

180. Pronounced in the Open Court on this 22nd day of Aug, 2014.h

(Rakesh Nath)

Technical Member

Dated:22nd Aug, 2014

REPORTABLE/~~NON-REPORTABLE~~

(Justice M. Karpaga Vinayagam)

Chairperson