
Appellate Tribunal for Electricity
(Appellate Jurisdiction)

IA NO.172 of 2014 in Appeal No.91 of 2014
IA No.189 of 2014 in Appeal No.97 of 2014
IA No.190 of 2014 in Appeal No.98 of 2014
IA NO.192 of 2014 in Appeal No.100 of 2014
IA No.207 of 2014 in Appeal No.115 of 2014
IA No.208 of 2014 in Appeal No.116 of 2014
AND
IA No.235 of 2014 in Appeal No.134 of 2014

Dated:21st July, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

IA NO.172 of 2014 in Appeal No.91 of 2014

1. **Ajmer Vidyut Vitaran Nigam Ltd**
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001

2. **Jaipur Vidyut Vitaran Nigam Ltd**
Vidyut Bhawan, Janpath
Jaipur-302 005

3. **Jodhpur Vidyut Vitaran Nigam Ltd**
New Power House, Industrial Area,
Jodhpur-342 003

.....Applicant(s)/Appellant(s)

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Coastal Gujarat Power Limited
C/O The Tata Power Company Limited,
4, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021**
- 3. Gujarat Urja Vikas Nigam Limited Vadodara
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007
Gujarat**
- 4. Maharastra State Electricity Distribution Company
Limited
'Prakashgad', Bandra (East),
Mumbai-400 051**
- 5. Uttar Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan,
Plot No.C-16, Sector-6,
Panchkula, Haryana-134 112**
- 6. Dakshin Haryana Bijli Vitran Nigam Ltd.,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-f5 005**
- 7. Punjab State Power Corporation Ltd,
The Mall, Patiala-147 001**
- 8. Union of India through Secretary,
Ministry of Power,
Shram Shakti Bhawan,
New Delhi-110 001**

.....Respondent(s)

Counsel for the Appellant(s): Mr. M G Ramachandran,
Mr. Anand K Ganesan
Ms. Anushree Bardhan
Ms. Poorva Sehegal

Counsel for the Respondent(s) Mr. Nikhil Nayyar
Mr. Dhananjay Baijal for R-1
Mr. Amit Kapur
Mr. Apporva Misra
Mr. Abhishek Munot
Mr. Kunal Kaul for R-2

IA NO.189 of 2014 in Appeal No.97 of 2014

- 1. Uttar Haryana Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan Plot No.C-16, Sector-6,
Panchkula, Haryana-134 112**
- 2. Dakshin Haryana Bijli Vitran Nigam Ltd
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125 005**

.....Applicant(s)/Appellant(s)

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Coastal Gujarat Power Limited
C/O The Tata Power Company Limited,
4, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021**

3. **Gujarat Urja Vikas Nigam Limited Vadodara
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007
Gujarat**
4. **Maharashtra State Electricity Distribution Company
Limited
'Prakashgad', Bandra (East),
Mumbai-400 051**
5. **Ajmer Vidyut Vitaran Nigam Ltd
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001**
6. **Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Janpath,
Jaipur-302 005**
7. **Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur-342 003**
8. **Punjab State Power Corporation Ltd,
The Mall, Patiala-147 001**
9. **Union of India through Secretary,
Ministry of Power,
Shram Shakti Bhawan,
New Delhi-110 001**

.....Respondent(s)

**Counsel for the Appellant(s): Mr. M G Ramachandran,
Ms. Poorva Saigal
Ms. Anushree Bardhan
Ms. Swagatika Sahoo**

**Counsel for the Respondent(s) : Mr. Dhananjay Baijal
Mr. Nikhil Baijal for R-1
Mr. Amit Kapur,
Mr. Gaurav Duedja
Mr. Akshat Jain
Ms. Poonam Verma
Mr. Apporva Misra
Mr. Abhishek Munot R-2**

IA NO.190 of 2014 in Appeal No.98 of 2014

- 1. Uttar Haryana Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan Plot No.C-16, Sector-6,
Panchkula, Haryana-134 112**
- 2. Dakshin Haryana Bijli Vitran Nigam Ltd
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125 005**

.....Applicant(s)/Appellant(s)

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Adanai Power Limited
9th Floor, Shikhar, Mithakali Six Roads,
Navrangpura, Ahmedabad-380 009**
- 3. Gujarat Urja Vikas Nigam Limited Vadodara
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007
Gujarat**

.....Respondent(s)

**Counsel for the Appellant(s) : Mr. M G Ramachandran,
Ms. Poorva Saigal
Ms. Anushree Bardhan
Ms. Swagatika Sahoo**

**Counsel for the Respondent(s) : Mr. Dhananjay Baijal
Mr. Nikhil Baijal for R-1
Mr. Amit Kapur,
Mr. Gaurav Duedja
Mr. Akshat Jain
Ms. Poonam Verma
Mr. Apporva Misra
Mr. Abhishek Munot R-2**

IA NO.192 of 2014 in Appeal No.100 of 2014

**Punjab State Power Corporation Ltd.
The Mall,
Patiala-147 001**

.....Applicant/Appellant

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Coastal Gujarat Power Limited
C/O The Tata Power Company Limited,
4, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021**
- 3. Uttar Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan,**

**Plot No.C-16, Sector-6,
Panchkula, Haryana-134 112**

- 4. Dakshin Haryana Bijli Vitran Nigam Ltd.,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125 005**
- 5. Gujarat Urja Vikas Nigam Limited Vadodara
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007
Gujarat**
- 6. Maharashtra State Electricity Distribution Company
Limited
'Prakashgad', Bandra (East),
Mumbai-400 051**
- 7. Ajmer Vidyut Vitran Nigam Ltd.,
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001**
- 8. Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Janpath,
Jaipur-302 005**
- 9. Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur-342 003**
- 10. Union of India through Secretary,
Ministry of Power,
Shram Shakti Bhawan,
New Delhi-110 001**

.....Respondent(s)

Counsel for the Appellant(s): Mr. Anand K Ganesan
Ms. Anushree Bardhan
Ms. Poorva Sehegal

Counsel for the Respondent(s): Mr. Amit Kapur,
Mr. Approva Mishra
Mr. Kunal Kaul
Mr. Abhishek Manot

IA NO.207 of 2014 in Appeal No.115 of 2014

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

.....Applicant/Appellant

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Coastal Gujarat Power Limited
C/O The Tata Power Company Limited,
4, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021**
- 3. Maharastra State Electricity Distribution Company
Limited
'Prakashgad', Bandra (East),
Mumbai-400 051**
- 4. Ajmer Vidyut Vitaran Nigam Ltd
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001**

5. **Jaipur Vidyut Vitaran Nigam Ltd
Vidyut Bhawan, Janpath
Jaipur-302 005**
6. **Jodhpur Vidyut Vitaran Nigam Ltd
New Power House, Industrial Area,
Jodhpur-342 003**
7. **Punjab State Power Corporation Ltd,
The Mall, Patiala-147 001**
8. **Haryana Power Generation Corporation Limited
Room No.329, Sector-6,
Panchkula-134 109, Haryana**
9. **Union of India through Secretary,
Ministry of Power,
Shram Shakti Bhawan,
New Delhi-110 001**

.....Respondent(s)

**Counsel for the Appellant(s): Mr. Anand K Ganesan
Ms. Swapna Seshadri**

**Counsel for the Respondent(s): Mr. Amit Kapur, Caveatur
Mr. Apoorva Misra
Mr. Abhishek Munot
Mr. Kunal Kaul for R-2**

IA NO.208 of 2014 in Appeal No.116 of 2014

**Gujarat Urja Vikas Nigam Limited,
Sardar Patel Bhawan,
Race Course Circle,**

Vadodara-390 007

Gujarat

.....Applicant/Appellant

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Adani Power Limited,
9th Floor, Shikhar, Mithakali Six Roads,
Navrangpura,
Ahmedabad-380 009**
- 3. Uttar Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan,
Plot No.C-16, Sector-6,
Panchkula, Haryana-134 112**
- 4. Dakshin Haryana Bijli Vitran Nigam Ltd.,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125 005**

.....Respondent(s)

**Counsel for the Appellant(s):Mr. Anand K Ganesan
Ms. Swapna Seshadri**

**Counsel for the Respondent(s):Mr. Amit Kapur,
Mr. Gaurav Dudeja
Mr. Akshaj Jain
Ms. Poonam Verma for R-2**

IA NO.235 of 2014 in Appeal No134 of 2014

**PRAYAS (ENERGY GROUP)
Athawale Corner, Karve Road,
Deccan Gymkhana, Pune-411 004
Maharashtra, India**

.....Applicant/Appellant

Versus

- 1. Central Electricity Regualtory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Adani Power Limited
9th Floor, Shikhar, ZMithakali six Road,
Navarangpura, Ahmedabad**
- 3. Uttar Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan,
Plot No.C-16, Sector-6,
Panchkula, Haryana-134 112**
- 4. Dakshin Haryana Bijli Vitran Nigam Ltd.,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125 005**
- 5. Gujarat Urja Vikas Nigam Limited Vadodara
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007
Gujarat**

.....Respondent(s)

**Counsel for the Appellant(s):Mr. Kumar Mihir
Mr. Avinash Menon**

**Counsel for the Respondent(s):Mr. Buddy A Ranganadhan
Mr. Pranav Yyas
Mr. Somnath Shukla for R-2**

/O R D E R/

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

1. These Interim Applications seeking for the stay of the Impugned Orders have been filed by the Applicants in this Batch of Appeals challenging the two orders dated 21.2.2014 passed by Central Electricity Regulatory Commission ("Central Commission") granting compensatory tariff to power plants of Coastal Gujarat Power Ltd. and Adani Power Ltd. as a consequence of a Regulation by Government of Indonesia impacting price of imported coal from Indonesia used at these power plants.
2. Both Coastal Gujarat Power Limited and Adani Power Ltd, the Generating Companies had entered into Power Purchase Agreements in the year 2007/2008 following tariff based competitive bidding u/s 63 of the Electricity Act, 2003 for supply of power on long term basis i.e. 25 years. The generating companies entered into fuel supply agreements

for imported coal from Indonesia. On 23.9.2010, Government of Indonesia promulgated a Regulation effective from September, 2011 which required the sale price of coal even under the existing agreement in Indonesia to be aligned with International benchmark price which altered the premise on which the energy charges were quoted by the Respondent generating companies in their bids. Thereafter, the Respondent generating companies approached the Central Commission for suitable revision of tariff on the main ground that the operation of the power plants had become commercially unviable.

3. The Central Commission by orders dated 2.4.2013 in case of Adani Power and dated 15.4.2013 in case of Coastal Gujarat Company decided holding that even though no case was made out under Force Majeure and Change in Law under the PPA, there was a need to allow compensatory tariff in the circumstances of the case and accordingly ordered by virtue of the powers to regulate the tariff of these power plants under Section 79 (1)(b) of the Electricity Act, 2003. The Central Commission after passing these Orders dated 2.4.2013 and 15.4.2013, constituted two Committees comprising the beneficiary utilities which are Appellants herein, the Respondent generating companies and independent experts to be nominated on mutual consent of the parties with a view to find out a solution. The Central Commission directed the Committees to

send the report to them for passing further orders. Shri Deepak Parekh, Chairman, HDFC, as an independent expert, headed the Committees.

4. The beneficiaries and representatives of State Government participated in the meetings of the Committee and gave their suggestions without prejudice to their right to Appeal. The two Committees formed for Gujarat Coastal and Adani Power under the signatures of the Chairman and another independent expert nominated by the parties submitted the Reports recommending compensatory tariff and its formulation before the Central Commission. All the Appellant beneficiaries except Punjab Utility filed affidavits before the Central Commission giving in principle consent to the Committee Report subject to certain conditions.
5. After considering the recommendations given in the Committee Report and submission made by the parties, the Central Commission passed the two impugned orders dated 21.2.2014 deciding a compensatory tariff to be paid by the Appellants to the Respondent Generating Companies over and above the tariff agreed to in the PPAs, w.e.f. from COD of the units exercising its Regulatory powers u/s 79 (1)(b) of the Electricity Act, 2003. The Central Commission has also given direction in regard to sharing of actual profit from coal mining operation in Indonesia and also ordered some

reduction in return on equity for the Respondent generating companies.

6. Aggrieved by this impugned orders dated 21.02.2014 passed by the Central Commission, the Appellants have filed these Appeals seeking for the quashing of the impugned orders dated 21.02.2014 imposing compensatory tariff on the main ground that the said orders have been passed without jurisdiction and without following the mandatory provisions of the Act, and the principles laid down by this Tribunal as well as by the Hon'ble Supreme Court of India.
7. During the pendency of these Appeals, the Applicants/Appellants have filed these interim applications seeking for the stay of the operation of the impugned orders dated 21.02.2014 on the ground that there is a prima-facie case to grant stay of operation of the impugned order particularly when the balance of convenience lies in favour of the Applicants.
8. These Applications are vehemently opposed by the learned Counsel for the Respondents generating Companies on the ground that no *prima facie* case is made out for grant of stay and that the balance of convenience lies in favour of the generating companies and no irreparable loss or injury

would be caused to the Applicants if the impugned orders were implemented pending disposal of these Appeals.

9. The learned Counsel for the Applicants have made the following submissions in order to show that there is a *prima facie* case for grant of the interim stay:-

(a) Central Commission cannot exercise its Regulatory powers u/s 79 (1) (b) of the Electricity Act to vary the tariff adopted u/s 63 of the Electricity Act, 2003.

(b) The sanctity of the bidding process has been vitiated by providing a higher tariff to the Generating Companies contrary to the terms and conditions of the bidding process adopted u/s 63 of the Electricity Act.

(c) In case of Adani Power Ltd., the Central Commission has no jurisdiction to deal with the Petition filed by the Generating Companies u/s 79 (1) (b) of the Electricity Act, as there existed no composite scheme for generation of sale of electricity in two states namely (i) Haryana, (ii) Gujarat. Mere sale of electricity to two or

more States cannot constitute such a composite scheme.

(d) Merely because, the performance of a contract results in losses or become onerous, it cannot be the ground to ignore the contractual obligations. The financial difficulties or contract become onerous is no ground to avoid the performance of the contract.

(e) When “Force Majeure” and “Change in law” is not applicable, as held by the Central Commission, there is no scope for the Central Commission for exercising the existing regulatory powers to control over the Tariff adopted u/s 63 of the Act.

(f) This Tribunal in various judgments has already held that the Regulatory power cannot be exercised to alter the tariff adopted u/s 63 of the Electricity Act, 2003. As such, impugned orders have been passed in violation of the dictum laid down by this Tribunal and the Hon’ble Supreme Court.

(g) The Central Commission in order to find out some amicable and acceptable solution for this dispute directed for the constitution of the committee through the earlier order. Accordingly, the Applicants had bona fide participated in the said Committee proceedings so that amicable solution could be arrived at by the Committee. But, the Committee sent the Report after enquiry, signed by only two members without any amicable solution agreed to by the parties. Strangely, the Central Commission acting upon the said report, passed the impugned order directing the Applicants to pay the compensatory tariff to the Generating Companies, thereby vitiating the tariff discovered under competitive bidding process u/s 63 of the Act, 2003 that too, with retrospective effect.

10. On these seven grounds, number of lawyers appearing for the Applicants in different Appeals, have prayed for the grant of interim stay of the impugned order.

11. In reply to the above grounds urged by the Applicants/Appellants, the learned Counsel for the Respondents opposing the grant of stay have made the following submissions:-

(a) The Orders dated 2.4.2013 and 15.4.2013 are the controlling orders for compensatory tariff which have not been challenged by the Applicants other than Haryana Utilities. Haryana Utilities have filed Appeal no. 100 of 2013 to challenge the 2.4.2013 order but have not sought stay but have sought liberty to participate in the proceedings for compensatory tariff in the IA filed before the Tribunal without prejudice to their rights. The Applicants participated actively in the proceedings before the Committee and the Central Commission and gave their suggestions regarding determination of compensatory tariff on account of Indonesian Regulation. Therefore, the Applicants cannot raise the issue of jurisdiction in the present Appeals as against the impugned orders dated 21.2.2014.

(b) The Applicants have failed to establish the case for the grant of interim stay of the operation of the impugned orders. The Central Commission in terms of the section 79 (1) (b) & (f), 61 and 175 of the Electricity Act, 2003 read with paragraphs 4.7 and 5.17 of the Competitive Bidding Guidelines and Articles 12, 13 and 17 of the Power Purchase Agreements (PPA) as also under Section 56 of the Indian Contract Act, 1872 has got the power and jurisdiction to pass these impugned orders. Hence, the submissions of the Applicants that there is no jurisdiction, is totally misconceived.

(c) The Tariff determination by the Regulatory Commissions either under Section 62 or under competitive bidding route u/s 63, must be based upon the guiding principles stipulated under Section 61 striking an effective balance between affordability and viability. The governing framework explicitly contemplate an ongoing Role of the Appropriate Commission in deciding various claims/disputes on the following aspects:-

- (i) Impact of “Change In Law”
- (ii) Force Majeure
- (iii) Determination of Tariff
- (iv) Change in Tariff

(d) In view of the stated objectives of the statute, the Central Commission came to a well-reasoned conclusion on the basis of materials available on record after detailed deliberation and consideration of all the submissions made by the parties.

(e) It is settled position of law that injunctions are not granted where the possible loss can be quantified and compensated without any irreparable harm or injury.

(f) In the present case, if the impugned order is allowed to be implemented, the financial burden which the Procurers will incur, can be effectively recovered with interest in terms of the PPA from the Generating Companies in case the Applicants/Appellants finally succeed in the present Appeals.

(g) On the other hand, if the impugned orders are stayed and subsequently the Appeals are decided in favour of the Respondents, then the consumers of the Applicants would be burdened with significant interest caused in addition to the principal amount. Therefore, granting stay of impugned order will only add to further woes and losses being suffered by Applicants.

(h) If the impugned order is implemented at the earliest, it will compensate the Respondents for the loss incurred by it on account of promulgation of the Indonesia regulation. On the other hand, if it is not implemented at the earliest, it would become impossible for the Respondents to perform obligation under the PPA. Ultimately, the Respondents would be forced to shut down its power plant.

(i) It is settled position of law that unless the three following ingredients for grant of stay are established

by the Applicants i.e. (a) Prima-facie case, (b) Irreparable loss (c) Balance of convenience, the Applicants would not be entitled for stay of the operations of the impugned order. In this case, these ingredients have not been established. Further, the remedy of restitution is always available to the Applicants, if the Appeals are decided in their favour.

12. On these grounds the learned Counsel for the Respondents made their submissions objecting to the grant of stay vehemently.
13. In the light of the contentions of the rival parties, we have to deal with regard to the grant of interim stay, pending disposal of these Appeals.
14. Both the parties cited a cart load of authorities rendered by this Tribunal as well as the Hon'ble Supreme Court laying down the guidelines for deciding the question as to whether the stay of the Interim Order has to be granted or not in a particular case, pending Appeals in the Appellate Forum.

We feel that we need not quote all these judgments cited by both in this Order as it will cover number of pages and the law laid down in these judgments is not disputed.

15. We shall now, straightway deal with the issue raised in the Interim Applications.

16. Out of the seven issues, we feel that it would be appropriate to confine ourselves only with two issues which are more important to decide about the prima facie case for granting interim relief, as the other issues are such that they could be decided at the time of final disposal of these Appeals, as they require thorough probe in the light of the detailed facts of this case.

17. Hence, let us now consider these two issues. These two issues are these:-

(a) The **first issue**: The Central Commission cannot alter the Tariff adopted u/s 63 of the Electricity Act,

which would tantamount to vitiating the bidding process thereby affecting other bidders prejudicially.

(b) The **second issue**: Having held that “Force Majeure” and “Change in Law” would not be applicable to the present case, the Central Commission could not exercise Regulatory jurisdiction to the increase of tariff discovered in the competitive bidding process, in the name of compensatory tariff.

18. Since these issues are interconnected, we shall deal with them together.

19. At the outset, it shall be stated that we are not able to accept the contention of the Applicants that the Citation quoted by the Applicants in Essar Power Ltd. case, India Bulls case and JSW case, etc. would directly apply to the present case for considering the interim relief as the circumstances in those referred cases were different. Those cases related to limited role of the Appropriate Commission at the time of adoption of

tariff following the procedure of competitive bidding u/s 63 of the Electricity Act to give direction for reviewing the terms and conditions of PPA and for re-negotiation when the Project could not be taken up due to non-approval of environmental clearance for coal mine and parties had taken steps for termination of PPA or where the eventuality under change in law position was known to the bidder and contemplated at the time of submitting the bid.

20. The present cases relate to the regulatory role of the Central Commission during the operation stage of the projects in the circumstances when an unforeseen event which could not be contemplated by the parties had occurred which has affected the commercial sustainability of the Projects.

21. The PPAs in the present case are for 25 years duration. The tariff also would not remain constant for the entire tenure of the PPA. There are provisions built into the bidding documents and PPA where the role of the Regulatory Commission is defined during the tenure of the

PPA in the matters of tariff. The Central Commission has to notify escalation rates for fuel and fuel transportation rates and inflation rate to be applied to capacity charge. These escalation rates are to be used for altering the tariff during the tenure of PPA. The Appropriate Commission also has an adjudicatory role where any dispute arises claiming any change in or regarding determination of tariff or any tariff related matter which wholly or partly results in change in tariff. There are provisions regarding 'Change in Law' and 'Force Majeure' in Standard Bidding Documents in which compensation or additional tariff has to be allowed.

22. Accordingly, the PPA entered into between the parties in the present cases also defines the regulatory role of the Appropriate Commission in the tariff matters for the defined events, where the Appropriate Commission has to determine/adjudicate upon matters relating to change in tariff.

23. Such power to a Regulatory authority cannot be entrusted by orders, notifications or PPA but has to be found in the Statute. In the present case, the power of the Central Commission to determine the factors to alter the tariff or to determine the components of tariff under certain circumstances or adjudicate upon in the tariff related matter as defined in the bidding documents and PPA can perhaps only be derived u/s 79(1)(b) & (f) of the Electricity Act, 2003.

24. The main question to be considered is whether the Central Commission has a Regulatory role in tariff matters during the tenure of the PPA in operation stage even as per PPAs which have been entered into following tariff based competitive bidding u/s 63. In the same way, the incidental question to be decided in these Appeals is whether the Central Commission was correct in exercising its regulatory role in allowing compensatory tariff due to the impact of Indonesian Regulation which adversely affected the price of

imported coal used at the power plants of the Respondent Generating Companies to make their operation commercially unviable, in the interest of sustainable operation of the Project and meeting the objects of the Electricity Act, 2003, even though it is not covered under 'Force Majeure' and 'Change in Law' defined in the PPA. These are the major issues which are to be considered by this Tribunal for the first time and the same requires detailed deliberations.

25. It is true that change in law in the PPA only includes the change in Indian Law which results in change in any cost or revenue. However, in these cases compensatory tariff has been allowed over and above the tariff agreed in the PPA by the Central Commission exercising its powers u/s 79 (1)(b) under a situation caused due promulgation of Indonesian Regulation which according to the Central Commission was extraordinary and uncontrollable situation which was beyond the contemplation of the parties and compensatory tariff was

required to be allowed in the interest of sustainable operation of the power plants.

26. These cases are first of its kind involving two large projects of over 4000 MW capacity. The impact of Indonesian Regulation is large as indicated by the Central Commission as the fuel cost is a major component of the total tariff. The issues raised in those Appeals are being considered by this Tribunal for the first time and have far reaching consequences. Whether the Central Commission has got a jurisdiction or whether it was correct in allowing the compensatory tariff exercising its Regulatory power in the circumstances of the case will have to be examined by us in the main Appeal.

27. Admittedly, after the orders of the Central Commission dated 2.4.2013 and 15.4.2013 regarding exercise of its regulatory powers and formation of an Expert Committee, the Applicant beneficiaries have actively participated in the meetings and given their suggestions regarding

determination of compensatory tariff without prejudice to their right of Appeal. Some beneficiaries also gave their in principle consent to the Committee Report subject to certain conditions. In the proceedings which culminated in the impugned orders, the Applicants participated actively and gave their suggestions on the issue of compensatory tariff without raising the issue of regulatory jurisdiction of the Central Commission. The Central Commission has issued very detailed orders after about two years of deliberations.

28. As pointed out by the learned counsel for the Respondents none of the beneficiary utilities have challenged the orders of the Central Commission dated 2.4.2013 and 15.4.2013 except Haryana which has challenged the order dated 2.4.2013 in Appeal No. 100 of 2013 but after filing the Appeal also actively participated in the Committee Meetings and gave in principle consent to the Report of the Committee. Appeal No. 100/2013 filed by Haryana Utilities is pending and no stay has been sought by Haryana Utilities

in that Appeal and permission was sought to participate in the meeting without prejudice to their right.

29. The Central Commission has quantified the losses suffered by the Appellants as a consequence of the promulgation of Indonesian Regulation during the operation of the Projects. It is contended that if due to financial constraints, the generation at these Projects is affected during the pendency of the Appeals, it would cause an adverse effect on the power supply to the consumers during the ensuing summer months.
30. In view of the above, we do not think that a *prima facie* case has been made out for our intervention at the interim stage for granting the stay of the Order in entirety as we have to decide the important issues raised in these Appeals only after final hearing in main Appeals. During the pendency of these Appeals, we have to ensure that the generation at these large power plants are not affected due to financial constraints.

31. However, keeping in view the contention of the Applicants with vehemence regarding burden that they have to bear on account of payment of arrears for the period 1.4.2012 to 28.2.2014 ordered by the Central Commission, we would like to grant partial stay.

32. Accordingly, we pass the following Interim Order which in our view would balance the interest of both the parties:

(i) We direct the beneficiary Applicants to make current payment as per the impugned order of the Central Commission i.e. from March 2014 onwards.

(ii) The bills raised in July 2014 for the energy supplied during June 2014 shall be made in full as per the impugned orders of the Central Commission. The arrears from March 2014 to May 2014 shall be paid in six equal instalments from end of July 2014 onwards.

(iii) The Respondent Generating Companies will keep an account of the amount received by them from the beneficiary Applicants as compensatory tariff. In case, the Appeals are allowed, the amount so received

shall have to be refunded to the beneficiary Applicants/Appellants with interest.

(iv) The retrospective direction regarding payment of arrears from 1.4.2012 to 28.2.2014 by the beneficiary Applicants need not be complied with pending disposal of the Appeal since the same would be subject to the outcome of these Appeals after the final disposal.

33. With these directions, these Applications are allowed in part.

It is made clear that our observation in this Order is not our final opinion on these issues. Both the parties are at liberty to argue the Appeals on all the issues raised in these Appeal at the time of final hearing.

34. Post the main Appeals **for hearing on 19.8.2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:21st July, 2014

~~√REPORTABLE/NON REPORTABLE~~