

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**APPEAL NO 158 OF 2015**

**Dated: 14<sup>th</sup> May, 2018**

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF:**

Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhawan,  
Race Course, Vadodara

**....Appellant**

**Versus**

1. Gujarat Electricity Regulatory Commission,  
6th Floor, GIFT ONE,  
Road 5C, Zone 5, GIFT City,  
Gandhinagar - 382355, Gujarat
2. Madhya Gujarat Vij Company Limited  
Sardar Patel Vidyut Bhavan,  
Race Course Circle, Vadodara- 390 007 (Gujarat)
3. Uttar Gujarat Vij Company Limited  
Registered Office: Visnagar Road,  
Mehsana- 384 001 (Gujarat)
4. Dakshin Gujarat Vij Company Limited.  
Nana Varachha Road,  
Kapodara, Surat- 395 006 (Gujarat)
5. Paschim Gujarat Vij Company Limited.  
Off. Nana Mava Main Road,  
Near Bhaktinagar Railway Station,  
Laxminagar, Rajkot- 360 004 (Gujarat)
6. Madhav Solar (Vadodara Rooftop) Pvt. Ltd  
Through Director  
Madhav House, Plot No.4  
Nr. Panchratna Building, Subhanpura  
Vadodara – 390023 (Gujarat)

**...Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Parichita Chowdhury  
Mr. Shubham Arya  
Ms. Poorva Saigal  
Ms. Anushree Bardhan  
Mr. Sandeep Rajpurohit  
Mr. Pulkit Agarwal  
Ms. Neha Garg

Counsel for the Respondent(s) : Ms. Suparna Srivastava  
Ms. Sanjna Dua  
Ms. Anushka Arora for R-1  
Mr. S.R. Pandey, Legal Advisor  
  
Mr. Sakya Singha Chaudhuri  
Mr. Avijeet Lala  
Ms. Astha Sharma  
Mr. Tushar Srivastava  
Mr. Mavleen M. for R-6

## **J U D G M E N T**

### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The present appeal has been filed by Gujarat Urja Vikas Nigam Ltd. ("**GUVNL**") under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 18.5.2015 passed in *Suo Moto* proceedings No. 2 of 2015 by the Gujarat Electricity Regulatory Commission (hereinafter referred to as "**the State Commission**") whereby the State Commission has proceeded to extend the control period specified in the Order No. 1 of 2012 dated 27.1.2012 from 31.3.2015 to 30.6.2015. By the Order No. 1 of 2012 dated 27.1.2012, the State Commission had determined the tariff for procurement of electricity by the distribution licensees and others

in the State of Gujarat from the Solar Energy Projects to be set up during the control period from 29.1.2012 to 31.3.2015.

2. The Order dated 18.5.2015 was not officially communicated to the Appellant. However the Appellant came to know of the Order from the website of the State Commission.

Aggrieved by the Order dated 18.05.2015, the Appellant has filed the present appeal before this Appellate Tribunal. The facts of the case and questions of law are given below:

### 3. **FACTS OF THE CASE**

- 3.1 The Appellant, Gujarat Urja Vikas Nigam Limited is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Race Court, Vadodara. The Appellant is an unbundled entity of the erstwhile Gujarat Electricity Board. The Appellant procures electricity on behalf of the four distribution licensees in the State of Gujarat and accordingly enters into the Power Purchase Agreement (“**PPA**”) with the generating companies.
- 3.2 The Respondent No. 1 is the State Commission of Gujarat constituted under the Electricity Act, 2003 for performing various regulatory functions under the Act. The four distribution companies in the State are Respondents No. 2 to 5 herein.
- 3.3 The Respondent No. 6 is a private limited company engaged in solar power generation in the State of Gujarat and is main answering respondent.
- 3.4 By Order dated 29.1.2010, the State Commission decided on the promotional tariff for solar power projects that may be established in the State of Gujarat during the control period of 2 years from the date of the order (i.e. till 28.1.2012) and for procurement of

electricity by or on behalf of the distribution licensees in the State for fulfilment of the Renewable Purchase Obligation (**RPO**) specified under Section 86(1)(e) of the Electricity Act, 2003.

- 3.5 Thereafter, by order dated 27.1.2012 passed in Order No. 1 of 2012, the State Commission determined the tariff applicable for the subsequent control period namely applicable for the projects commissioned on or after 29.1.2012. In the Order dated 27.1.2012 the State commission, inter alia, decided as under:

*The Commission approves the tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects for the Control Period from 29 January, 2012 to 31 March, 2015 as outlined in the table below:*

Period →	29 Jan. '12 to 31 Mar. '13	1 Apr. '13 to 31 Mar. '14	1 Apr. '14 to 31 Mar. '15
<i>For megawatt-scale photovoltaic projects availing accelerated depreciation</i>			
Levelized Tariff for 25 years	₹ 9.28 per kWh	₹ 8.63 per kWh	₹ 8.03 per kWh
For first 12 years	₹ 9.98 per kWh	₹ 9.13 per kWh	₹ 8.35 per kWh
For subsequent 13 years	₹ 7.00 per kWh	₹ 7.00 per kWh	₹ 7.00 per kWh
<i>For kilowatt-scale photovoltaic projects availing accelerated depreciation</i>			
Levelized Tariff for 25 years	₹ 11.14 per kWh	₹ 10.36 per kWh	₹ 9.63 per kWh

<i>Levelized Tariff for Solar Thermal Projects</i>	
With accelerated depreciation benefit:	₹ 11.55 per kWh for 25 years

The above order along with tariff table was amended vide corrigendum dated 11.07.2014.

- 3.6 The control period specified in the Order No. 1 of 2012 dated 27.1.2012 for the Project Developers to establish the Solar Power Projects and to get the tariff specified in the said Order dated 27.1.2012 duly expired on 31.3.2015. Accordingly, the Solar Power Project Developers who have established the Solar Power Project

on or before 31.3.2015 can claim the said tariff specified in the Order dated 27.1.2012.

3.7 The State Commission has issued the impugned Order dated 18.5.2015 in *suo moto* proceedings inter alia, providing as under:

“1. *The Commission has issued its Order No. 1 of 2012 dated 27.1.2012 in the matter of ‘Determination of tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects’.*

2. *In Para 4.12 of the said Order No. 1 of 2012, it is provided that:*

*4.12 Control Period*

*The control period proposed for the Commission’s Discussion Paper is from 29 January, 2012 to 31 March 2015.*

**Suggestions from Objectors:**

*One of the Developers suggested that the control period should be up to 31 March 2016. Another Developer suggested the Commission to consider delayed projects for the same tariff till commissioning is achieved with 12 months of new control period commencement date.*

**Commission’s Ruling:**

*The control period for this Tariff Order shall be from 29 January 2012 to 31 March 2015.*

*Moreover, under the Commission’s Order, it is stated that ‘the Commission approves the tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects for the Control Period from 29 January 2012 to 31 march 2015.....*

3. *The Commission has already initiated the process of determination of tariff for the procurement of power by distribution licensees and others from solar energy projects for the State of Gujarat for the next control period, which may take some time and hence, as an*

*interim arrangement, the Commission has decided to extend the control period of the Order No. 1 of 2012 dated 27.1.2012 up to 30.6.2015.*

4. *In view of the above, the Commission decides that the control period of the Order No. 1 of 2012 dated 27.1.2012 shall be extended beyond 31.3.2015 up to 30.6.2015. Tariff for the period from 1.4.2015 to 30.6.2015 shall be as determined for the last year of the previous control period i.e. for the year 2014-15.”*

3.8 Aggrieved by the above Order dated 18.5.2015 extending the period of tariff determined under the Order dated 27.1.2012 passed by the State Commission, the Appellant is filing the present appeal.

#### 4. **Questions of Law**

The present appeal raises the following important questions of law for adjudication by this Hon'ble Tribunal:

Whether in the facts and circumstances of the case, the State Commission is right in extending the control period up to 30.6.2015 –

- (a) Without notice and without public hearing and hearing the interested parties including and in particular the Appellant and the Distribution Licensees who are required to purchase electricity from the Solar Power Projects?
- (b) Without holding a proceeding with opportunity to all concerned including the public to file their respective objections/suggestions?
- (c) Without giving effect to substantial reduction in the cost of establishing the Solar Power Projects during the FY 2015-16 as evident from the Order passed by the Central Commission;
- (d) In a *suo moto* proceeding merely extending, without proper reasoning, instead of determining the tariff in a

proper proceedings and giving effect to the same retrospectively with effect from 1.4.2015.

**5. Relief Sought**

In view of the facts and circumstances mentioned above it is most respectfully prayed that this Hon'ble Tribunal may be pleased to:

- a) Allow the appeal and set aside the order dated 18.05.2015 passed by the State Commission to the extent challenged in the present appeal.
- b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

**6. The following are the gist of written submissions made by Mr. M.G. Ramachandran/Ms. Ranjitha Ramachandran, the learned counsel for the Appellant (Gujarat Urja Vikas Nigam Limited):**

- 6.1 The Appellant states that the tariff for the Solar Power Projects were being determined by the State Commission for procurement by the distribution licensees and others for a definitive control period, and not in an open ended manner, in the first instance by order dated 29.1.2010 for a period of 2 years till 28.1.2012 and thereafter by order dated 27.1.2012 for a specified period till 31.3.2015. The above was done in the context of the substantial reduction in the cost of establishing Solar Energy Projects progressively from the year 2010. The levelized tariff in the first control period for the Solar PV Projects, was fixed at Rs 12.54 per Kwh. In the Order dated 27.01.2012 relating to the next control period from 28.11.2012 to 31.3.2015, the levelised tariff for the Solar PV Projects were fixed at Rs 9.28 per Kwh for projects commissioned during the period 28.1.2012 to 31.3.2013, Rs 8.63 per Kwh for the projects commissioned during 1.4.2013 to



31.3.2014 and Rs 8.03 per Kwh for the projects commissioned during 1.4.2014 to 31.3.2015.

- 6.2 The State Commission has acted in violation of the principles of natural justice in passing the Order dated 18.5.2015 without hearing the interested parties and without any notice or an opportunity to the Appellant and the Distribution Licensees to represent their views. The State Commission is a statutory body with adjudicatory and regulatory powers, including powers to determine the tariff as applicable for power projects. Section 95 of the Electricity Act, 2003 states that the proceedings before the Appropriate Commission shall be deemed to be judicial proceedings and the Appropriate Commission shall be deemed to be a civil court:

*“95. Proceedings before Commission.- All proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860) and Appropriate Commission shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).”*

- 6.3 Any order by the State Commission can be passed only after issuing notice to all affected parties and in case of tariff orders, after issuance of public notice to represent views of the Stakeholders. The State Commission cannot be permitted to pass an order without notice and without granting an opportunity of hearing to the affected parties. It is undisputed that as the procurer of solar power, the Appellant is an affected person and therefore the State Commission was required to issue notice to the Appellant.



6.4 The order passed by the State Commission without hearing is contrary to Section 86{3} which mandates transparency to be maintained. The said provision reads as under:

***“86. Functions of State Commission***

*....*

*(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions”*

6.5 The Conduct of Business Regulations, 2004 framed by the State Commission provide as under:

***“Initiation of Proceedings***

***23. The Commission may initiate any proceedings suo moto or on a Petition filed by any affected person.***

***24. The notice of the initiation of the proceedings may be issued by the Commission, and the Commission may give such orders and directions as may be deemed necessary, for service of notices to the affected parties, the filing of Reply in opposition or in support of the Petition in such form as it may direct.***

*The Commission may, if it considers appropriate, issue orders for publication of the Petition and/Reply inviting comments on the issues involved in the proceedings in such form as the Commission may direct.”*

6.6 The contention of the State Commission that the provision for issuance of notice is discretionary and not mandatory is misconceived. Every Order passed by the State Commission has an impact on certain parties, in this case, the Appellant, distribution licensees and ultimately consumers in the State. It is not open to the State Commission to claim that it can pass orders without issuing notice and without giving an opportunity of hearing to affected parties.

6.7 Further the said provision is equally applicable to Petitions filed by a party against another party. If the contention of the State

Commission is accepted, then conceivably, the State Commission may decide such a Petition without issuing notice to the other affected party. This is completely unacceptable.

- 6.8 The above Conduct of Business Regulations also distinguishes between the discretionary and mandatory by the use of the phrase “*The Commission may, if it considers appropriate, issue orders for publication of the Petition*”. This is in contrast to the use of the word “*may be issued*”.

In this regard, it is well settled principle that the use of the word “may” does not by itself mean that the provision is discretionary. It could be construed as “shall” or “must”. In this regard, reliance is placed on the judgment of the **Hon’ble Supreme Court in Dilip K. Basu v. State of West Bengal and Ors. (2015) 8 SCC 744.**

- 6.9 The context in the present case read with principles of natural justice require that issuance of notice to the affected parties after initiation of proceedings, is mandatory and not discretionary. This Hon’ble Tribunal has already held that an order passed by the State Commission without notice and without affording reasonable opportunity of hearing is in violation of principles of natural justice and is liable to be set aside:

**M/s Hi-Tech Industries v. Himachal Pradesh Electricity Regulatory Commission and Another dated 18.12.2015 in Appeal No. 188 of 2014 and BATCH**

**ORDER**

*“All the instant Appeals, being Appeal Nos. 188 of 2014, 189 of 2014, 190 of 2014, 191 of 2014, 192 of 2014, 194 of 2014 and 195 of 2014 are hereby allowed and the impugned clarificatory order, dated 2.5.2011, along with findings recorded therein is hereby set-aside. All the consequential actions or the subsequent orders or the consequential demand notices or bills raised by the Respondent Board on the strength of the aforementioned*

*impugned clarificatory order, dated 2.5.2011, are also hereby quashed or set-aside. We hereby direct the State Commission to issue notices to the Appellants and other industrial consumers of the state of Himachal Pradesh and also issue public notice seeking their objections or comments and, thereafter, giving reasonable opportunity of hearing to such kind of consumers including the Appellants to pass the order afresh without being influenced in any way with the findings recorded in the impugned clarificatory order, dated 2.5.2011. We hope and trust that the learned State Commission shall abide by the principles of natural justice and then pass the order in a judicial and judicious way without being influenced by any of the findings recorded in the aforesaid impugned clarificatory order. In the facts and circumstances of the matter, we do not propose to impose any costs”.*

6.10 **M/s Jai Balaji Industries Limited vs. State of Chhattisgarh**  
dated 05.04.2018 in Appeal No. 96 of 2018.

**“13. The impugned Order has been passed by the second Respondent without affording the reasonable opportunity to the Appellant which is in gross violation of the principles of natural justice.** The second Respondent has committed error, in treating the application filed by the Appellant as review petition, and passed the order contrary to the prayer sought by the Appellant in their Application. The Appellant has not filed a review application. The Appellant has filed an application for setting aside the ex-parte Order dated 03.10.2016. The said application ought to have been entertained and passed an appropriate order after affording reasonable opportunity of hearing to the Appellant. Treating the application filed by the Appellant for setting aside the ex-parte order as review petition, is not sustainable and liable to be vitiated.”

6.11 It has not been disputed by the Respondent No. 6 that there is a violation of the principles of natural justice but the argument of the Respondent No. 6 is that no prejudice has been caused to the Appellant in view of the Impugned Order. At the outset, it is submitted that the contention of the Respondent No. 6 is contrary to its own admission that there is an impact of Rs. 18,27,540 per

year and applicable for 25 years (however the Appellant does not admit to the veracity of the calculations). Thus there is a prejudice caused to the Appellant in as much as the Appellant is required to pay a higher tariff to the Respondent No. 6 and this higher tariff is passed on to the consumers that too, without giving opportunity of being heard. The comparison of the impact to the annual revenue requirement of the distribution licensees is wrong and misconceived. The Respondent No. 6 cannot take refuge in the contention that the distribution licensees procure power from multiple sources and seek higher tariff on the basis that the quantum procured from Respondent No. 6 is small compared to entire procurement. If this contention is accepted, then every generator would be entitled to seek higher tariff on the basis that there is no appreciable impact on the total procurement. In any event, the issue has to be decided on principles and not on the basis of the impact in a particular case.

- 6.12 The Respondent No. 6 has relied on the judgment of the **Hon'ble Supreme Court in Canara Bank and Others v. Debasis Das and Others (2003) 4 SCC 557** to contend the 'useless formality theory' or that without substantial prejudice, the violation of principles of natural justice have no consequence. At the outset, it is submitted that the judgment cited by the Respondent No. 6 is related to service matter and not to a judicial authority. The 'useless formality theory' cannot apply to the requirement of issuance of notice by a judicial or quasi judicial body after initiation of proceedings to the affected persons. The judgment itself recognizes that the adherence to principles of natural justice is of supreme importance when a quasi judicial body embarks on determining the dispute between the parties (Para 15). In

particular, in a case of determination of applicability of tariff, there cannot be any argument that the issuance of notice is a useless formality.

6.13 In any case, it is submitted that the contention of the Respondent No. 6 cannot be accepted as the settled position of law is that no prejudice being caused cannot be a ground for violation of the principles of natural justice as held in subsequent decisions of the Hon'ble Supreme Court and as held by this Hon'ble Tribunal:

a) DharamapalSatyapal Ltd v. Deputy Commissioner of Central Excise Gauhati & Ors(2015) 8 SCC 519

b) DNH Power Distribution Corporation Limited v. NTPC SAIL Power Company Limited by the Hon'ble Tribunal dated 04.01.2018 in Appeal No. 92 of 2014

c) DANS Energy Pvt Ltd v. Uttarakhand Electricity Regulatory Commission and Another by the Hon'ble Tribunal dated 14.11.2017 in Appeal No. 285 of 2016:

6.14 The State Commission ought to have proceeded to determine the generic tariff applicable for the Solar PV Projects after hearing all the interested parties and after considering all the relevant material and thereafter apply the said tariff for all the projects established on or after 01.4.2015. In the present case, had the State Commission issued notice, the Appellant could have pointed out the fact of falling prices of solar projects to the State Commission as well as the determination by the Central Commission of a lower tariff. It is not open to the Respondent No. 6 to claim despite above, there was no prejudice caused.

6.15 The only reason given in the Impugned Order is that the State Commission had already initiated the process of determination of tariff for procurement of power by distribution licensees and others from solar energy projects for the State, which may take some

time. It is submitted that the earlier control period had expired on 31.03.2015. It was up to the State Commission to undertake the tariff determination process within time to ensure that the tariff order is passed prior to 31.03.2015. This was not done. It is submitted that the Regulatory Commissions, including the Gujarat Commission, for various reasons, are at times unable to determine the tariff within time. However this does not mean that the earlier tariff order be extended. The pendency of the tariff proceedings is not a reason to extend the earlier tariff. In such cases, the Commissions provide for application of the tariff finally determined from a retrospective date:

- a) Order dated 30.01.2010 passed in Petition No 1 of 2010 determining the tariff for wind power projects provided for a control period from 11.08.2009 i.e. applicable retrospectively.
- b) Order dated 08.08.2013 passed in Petition No. 4 of 2013 determining the tariff for biomass based power projects from 01.08.2013;
- c) Order dated 31.05.2017 passed by the Central Commission in Petition No. 05/SM/2017 determining levelised generic tariff for various renewable energy generating stations for FY 2017-18 i.e. from 01.04.2017.
- d) Order dated 28.11.2017 passed *Suo Moto* by Rajasthan Commission determining the generic tariff for biomass, biogas and biomass gasifier based power plants with effect from 01.04.2017.

6.16 In fact even in the present case of Solar power projects, the Order dated 17.08.2015 retrospectively decided the tariff for projects commissioned from 01.07.2015. Therefore it is not that the tariff determined subsequently cannot be applied from an earlier date.

6.17 Thus, there was no reason or justification as to why the Impugned Order dated 18.05.2015 was required to be passed extending

earlier tariff order for solar power projects. This is particularly when the State Commission was aware that the cost of solar power projects are declining and therefore the tariff likely to be determined would be lower than the previous tariff determined under Order dated 27.01.2012.

**6.18 The Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited v/s Solar Semiconductor Power Company Private Ltd 2017(12) SCALE 781 has held that there can be no extension of control period by the State Commission in a discretionary manner.**

6.19 The contention of the Respondent No. 6 that the above judgment is only in context of extension of time under a single PPA is misconceived. The Respondent No. 6 has relied on Para 36 of the judgment reproduced below:

*“36. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations – (i) for extension of time prescribed by the Regulations and (ii) extension of time prescribed by the Commission in its order for doing any act. The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent no.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission.”*

6.20 The said Para refers to the control period in context of tariff order and commissioning in context of the PPA. The applicability of tariff in the PPA in the above case as well as EMCO case were similar



to the PPA in the present case of Respondent No. 6, namely lower of the PPA mentioned tariff or the tariff as determined by the State Commission for solar projects effective on the date of commissioning of solar power project, whichever is lower, is applicable.

6.21 The Regulation 85 of Conduct of Business Regulations, 2004 provides for extension of time prescribed by the Regulations or by order of the Commission for doing any act for sufficient reason. It is submitted that the said Regulation refers to extension of time granted by Orders for procedural aspects such as filing of Replies, Petitions, Review Petitions, submission of costs etc. The 'order of the Commission' refers to the Orders made under the Conduct of Business Regulations and not Orders relating to substantive rights. This Regulation cannot be used to affect the substantive right of the parties. It is well settled principle that the inherent power of the Courts cannot affect the substantive rights of the litigants (Para 55(16) of the Solar Semiconductor Case).

6.22 Even assuming but not admitting that the State Commission has the power to extend the control period, such an extension cannot be granted without following due process. Such extension of control period has an impact on the tariff applicable to power projects and the procurement price for the distribution licensees.

6.23 The Hon'ble Supreme Court in the Solar Semiconductor Case (Supra) has held that any amendment to a Tariff Order is required to follow the procedure under Section 64 of the Electricity Act, 2003.

6.24 Section 64 of the Electricity Act, 2003 reads as under:

**“64. Procedure for tariff order.—(1) An application for determination of tariff under section 62 shall be made by a**

*generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

*(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.*

*(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering public-*

*(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;*

*(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made there under or the provisions of any other law for the time being in force:*

*Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.*

*.....”*

6.25 In the present case, the Tariff Order dated 27.01.2012 specified the control period until 31.03.2015. The tariff order would have continued only until such period unless amended. The Impugned Order has amended the said the control period until 30.06.2015. Therefore the Impugned Order is an amendment to the tariff order dated 27.01.2012 and therefore is required to follow the same procedure under Section 62 and 64.

6.26 Another way of looking at the Impugned Order is that it is determination of tariff for the period from 01.04.2015 to 30.06.2015. The Tariff Order is an order by which the Commission provides the tariff applicable for a single project or all projects. The tariff can be determined by way of cost plus determination,

adoption of a competitive bid tariff or negotiated tariff or by way of reference to any other order. The State Commission in passing the Impugned Order has provided for the tariff as applicable for the projects commissioned between 01.04.2015 to 30.06.2015. Therefore the said Order is a Tariff Order determining the tariff for such projects. Such Tariff Orders can only be passed after following the procedure under Section 64 of the Electricity Act, 2003.

6.27 In principle, if the Commissions are permitted to extend control periods of tariff orders without following the requirements of Section 62 and 64, it lays down a dangerous precedent whereby the Commissions may eschew their statutory duty to determine tariff and merely extend the control period of the earlier tariff orders. This cannot be the intention of the Electricity Act, 2003.

6.28 The Electricity Act, 2003 recognizes the need to protect consumers' interest:

*“61. Tariff regulations.—The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing*

*.....*

*(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;”*

6.29 It is settled law that the regulatory functions and inherent powers of the State Commission have to be exercised in larger interest of consumers. The Hon'ble Supreme Court after considering the provisions of the Electricity Act, 2003 in Solar Semiconductor Case (Supra) observed on similar lines.

6.30 The above decision has been relied on by the Hon'ble Tribunal in context of regulatory functions in DANS Energy Pvt. Ltd v.

Uttarakhand Electricity Regulatory Commission and Another dated 14.11.2017 in Appeal No. 285 of 2016.

- 6.31 In the said decision, the Hon'ble Tribunal has also emphasised the function of the State Commission to ensure procurement of power at economical rate so that no undue extra burden is placed on the consumers. The Hon'ble Tribunal has also relied on an earlier decision of the Hon'ble Tribunal in of Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) Vs. M/s. Century Flour Mills Ltd and Anr.
- 6.32 By extension of the control period, the State Commission has determined a tariff for the projects commissioned during 01.04.2015 to 30.06.2015 at a higher tariff. In this regard, comparison can be drawn between the tariff as per the Impugned Order, the tariff as determined by the Central Commission for the applicable year 2015-16 and the tariff determined by the State Commission on 17.08.2015. In the Order dated 31.3.2015, the Central Commission has determined the generic levelised tariff for the financial year 2015-16 for Non-Conventional/Renewable Projects including Solar PV Projects. The generic tariff for the Solar PV Projects determined by the Central Commission is Rs 6.35 per Kwh (levelised for the period of 25 years).
- 6.33 The burden of such higher tariff has to be borne by the consumers in the State of Gujarat only for the reason that there was a delay by the State Commission in determining the tariff for solar power projects and for unknown reasons, the State Commission has decided not to determine the tariff for such period.
- 6.34 There has been a significant progressive reduction in the cost of the Solar Energy Projects not only with reference to the projects

set up in Gujarat but on all India basis. This was also noted by the State Commission in the Order dated 27.01.2012. The Solar PV Projects which would be established during the FY 2015-16 (i.e. 1.4.2015 onwards) would involve a capital expenditure of much lesser amount as compared with the levelised tariff of Rs 8.03 per kWh determined for 2014-15 by the State Commission in view of the declining trend in the cost of Solar Energy Projects equipment including and in particular the Solar Panels and Modules.

6.35 In this regard, specifically for Respondent No. 6, the tariff currently enjoyed by the Respondent No. 6 is Rs. 10.76 per kWh as opposed to Rs. 8.42 per kWh in Tariff Order dated 17.08.2015 (Kilowatt scale Solar PV project not availing accelerated depreciation). If the State Commission had determined the tariff based on capital cost applicable for the period of 01.04.2015 to 30.06.2015, the applicable tariff would have been Rs. 8.42 per kWh.

6.36 The State Commission during the arguments has sought to raise contradictory contentions on the one hand, the State Commission submits that the Impugned Order dated 18.05.2015 is a final order and clearly provides for extension of control period of the Order dated 27.01.2012 until 30.06.2015. On the other hand, the State Commission seeks to argue that the Appellant ought to have represented in the subsequent tariff proceedings which resulted in tariff order dated 17.08.2015, for a control period from 01.04.2015 instead of 01.07.2015. Once the Impugned Order is a final order, the State Commission would not and could not entertain a representation in the subsequent proceedings contrary to such order. The Appellant cannot be expected to forego its right to appeal against the Impugned Order, in the hope that the State

Commission may overlook and override its own Orders in subsequent proceedings. The Impugned Order passed by the State Commission has to be decided on its own merits and cannot be affected by subsequent proceedings. The contention of the Respondents is facetious.

6.37 The Appellant is not seeking retrospective operation of Order dated 17.08.2015. In fact the Appeal had been filed prior to the Order dated 17.08.2015. The issue is only whether the Impugned Order dated 18.05.2015 is legally sustainable. It is the Appellant's case that the State Commission has to determine the tariff after hearing affected parties and cannot merely extend/amend the earlier tariff order.

7. **The following are the gist of submissions made by Mr. Sakya Singha Chaudhuri, Ld. Counsel for the Respondent No. 6, (Madhav Solar (Vadodara Rooftop) Pvt. Ltd.):**

7.1 It is alleged by the Appellant that the Hon'ble Commission did not follow the principles of natural justice while passing order dated 18.05.2015 in *suo moto* petition being no. 2 of 2015 whereby the Hon'ble Commission extended the control period of Order no. 1 of 2012 dated 27.01.2012 from 31.03.2015 to 30.06.2015, as an interim arrangement till the time the tariff is not determined for the next control period.

In response, it is submitted that at the time when the impugned order dated 18.05.2015 was passed, the process for determination of tariff for procurement of power by distribution licensee and others from solar energy projects for the State of Gujarat for the Control Period commencing from 01.04.2015 had already begun and was under process. But since determination of new tariff order would have taken some time, the Hon'ble Commission "as an

*interim arrangement*” passed the order dated 18.05.2015 so that there is no Regulatory uncertainty during the intervening period. As a safeguard and to ensure that there is no ambiguity, the Hon’ble Commission simply extended the Control Period from 31.03.2015 till 30.06.2015. Since, the Hon’ble Commission was only extending the Control Period for 3 months based on the Tariff Determination for the Control Period ending on 31.03.2015, as an interim arrangement, the same required no fresh hearing and no fresh consideration in the matter.

7.2 It is a settled law that mere violation of the principles of natural justice would not result in setting aside of an order unless some substantial prejudice has been caused. The same is illustrated in the following judgments passed by the Hon’ble Supreme Court of India:

- ***Canara Bank v. V.K. Awasthy (2005) 6 SCC 321***
- ***Punjab National Bank and Ors. v. Manjeet Singh and Anr. (2006) 8 SCC 647***
- ***Burdwan Central Coop. Bank Ltd. v. Asim Chatterjee (2012) 2 SCC 641:***
- ***Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise and Ors. (2015) 8 SCC 519***

7.3 This Hon’ble Tribunal has also recognised the *Useless Formality Principle* in the following matters:

- i. ***2015 SCC Online APTEL 95 – Hooghly Chamber of Commerce & Industry v. West Bengal Electricity Regulatory Commission and Ors.***
- ii. ***2015 SCC Online APTEL 135 – Financial Technologies Ltd. v. CERC and Anr.***



**iii. 2017 SCC Online APTEL 56 – Western Electricity Supply Co. of Odisha Ltd. &Ors. v. Odisha Electricity Regulatory Commission and Ors.**

- 7.4 In line of the above-mentioned judgments, no real prejudice has been caused to the Appellant on account of the impugned order. It is submitted that the impact on MGVL/ Respondent no. 2 due to impugned order is a mere Re. 0.00016per unit, i.e., 0.0035% of the total power purchase cost.
- 7.5 Looking at the impact on MGVL/ Respondent no. 2, conducting of a Public Hearing would only have been a mere ‘useless formality’ as per the judgments quoted above. This is more so when a public consultation process for new tariff order was already underway. It may be noted that above impact is computed only on the energy requirement of MGVL. When done on GUVNL, the impact would still be reduced to around one fourth of the above value.
- 7.6 Without prejudice to the above, it is also relevant to refer point no. 8 to Clause 1.3.1 of the RFP document which provides the following:

*“Rooftop Solar Incentive  
In the event the Quoted Tariff is higher than the GERC Tariff, then the difference between the Quoted Tariff and the GERC Tariff shall be the RSI. The GoG will reimburse the RSI to the Solar Company in accordance with the terms and conditions of the Project Implementation Agreement for each kWh of Electricity delivered at the Interconnection Point.”*

Further, the said clause also finds mention in the Tariff Adoption Order of Hon’ble GERC, viz:

*“4.2 He further submitted that the tariff quoted and discovered under the competitive bidding process is less than the tariff determined by the Commission in its order in*

*Suo Moto Petition No. 1 of 2012 dated 11.07.2014. Therefore, the nodal agency, i.e. GPCL is not required to pay any amount to the project developer....”*

7.7 Further, it is, in fact, the Respondent no. 6 who would actually be prejudiced if the Tariff of the impugned order dated 18.05.2015 is withdrawn at this stage. It is submitted that in the PPA dated 17.06.2014 entered into between the Respondent no. 6 and Respondent no. 2, the Scheduled COD or ‘Scheduled Commercial Operation Date’ is defined as ‘the date falling on the last day of the expiry of 12 (twelve) months from the Effective Date, as extended or preponed in accordance with the provisions of this Agreement and in respect of Unit(s), the date falling on the last day of the expiry of 3(three) or 9(nine) or 12(twelve) months, as the case may be, from the Effective Date, as extended or preponed in accordance with the provisions of this Agreement’. Further, Article 5 of the PPA dated 17.06.2014, provides that ‘The Solar Company shall be entitled to receive a Tariff for the Delivered Energy, from the First Commissioning Date at the rate of Rs. 10.76 (Rupees ten and seventy six paise) per kWh for all Unit(s) Commissioned on or before 31 March 2015. ...’.

Thereafter, the Order for ‘adoption of tariff by the Commission as per the competitive bidding process carried out by the petitioner and adoption of tariff payable by the Madhya Gujarat Vij Company Ltd. to Respondent no. 6 determined through competitive bidding undertaken by Madhya Gujarat Vij Company Ltd. for development and operation of roof-top Solar Power Project in Vadodara, Gujarat’ was passed on 26.11.2014, i.e, 5 months after the signing of the PPA dated 17.06.2014. Hence, it is clear that the Respondent no. 6 only got time till 31.03.2015, i.e. only 4 months

to complete the commissioning of the Project, which also included the job of identifying rooftops for installation of complete 4 MW. It is further submitted that even at the time of signing of the PPA the Respondent no. 6 only had 9 months to complete the project, which was further reduced to 4 months as the Order adopting the Tariff was passed belatedly by the Hon'ble Commission.

- 7.8 The Impugned Order has been passed in exercise of the Commission's inherent powers. In this regard, reliance has been placed on the Judgment **Gujarat Urja Vikas Nigam Ltd. vs. Solar Semiconductor Power Company (India) Private Ltd. and Ors. 2017 SCC Online SC 1248**. The State Commission has thus inherent powers to extend the control period of its Tariff Order dated 29.01.2010 beyond the control period in respect of one PPA.
- 7.9 The Hon'ble Court has clearly distinguished between Control Period prescribed under the order and that prescribed under the PPA. The impugned order in the present case has recorded sufficient reasons for extending the period of order from 31.03.2015 to 30.06.2015, which in fact was necessary to avoid a gap between two control periods.
- 7.10 The Appellant herein has not challenged the Tariff Order dated 17.08.2015 which has now attained finality and is in operation since 01.07.2015. There is no regulation which states that the Tariff compulsorily has to be applicable for the entire financial year. As a matter of fact the earlier Tariff Order also did not apply from the beginning of a financial year. It is submitted that since the Appellant has not challenged the Tariff order dated 17.08.2015, challenging the order dated 18.05.2015 is an empty formality.
8. We have heard at length the learned counsels for the both parties and considered carefully their written submissions, arguments put

forth during the hearings, etc. The following only one issue arises in the present appeal for our consideration:

**Whether in the facts and circumstances of the case, the State Commission is right in extending the control period up to 30.06.2015 in a *suo moto* without holding a proceeding with opportunity to all concerned including the public?**

9. **Our Findings and Analysis on the above issue**

9.1 The Appellant has submitted that tariff for the Solar Power Projects were being determined by the State Commission for procurement by the distribution licensees and others for a definitive control period, and not in an open ended manner. By passing the impugned order dated 18.05.2015 without hearing interested parties and without any notice or an opportunity to the Appellant to represent their views. The State Commission has thus acted in violation of the principles of natural justice. It is undisputed that as the procurer of solar power, the Appellant is an affected party and, therefore, the State Commission was required to issue notice to the Appellant. Such an action on the part of the State Commission is contrary to Section 86(3) of the Act and also, against the Conduct of Business Regulations, 2004 framed by the State Commission.

9.2 The Appellant has further submitted that the contention of the State Commission that the provision for issuance of notice is discretionary and not mandatory, is misconceived. Every order passed by the State Commission has bearing on certain parties as the Appellant in this case. It is not open to the State Commission to claim that it can pass orders without issuing notice and without giving an opportunity of hearing to affected parties. To support its contention, the Appellant has cited the judgment of **Hon'ble**

**Supreme Court in Dilip K. Basu vs. State of West Bengal and Ors. (2015) 8 SCC 744. and also Hon'ble Tribunal's Judgment in M/s Hi-Tech Industries vs. Himachal Pradesh Electricity Regulatory Commission ad Another dated 18.12.2015 in Appeal No. 188 of 2014 and Batch.**

- 9.3 The Appellant has further brought out that the Respondent No. 6 has relied on the **judgment of the Hon'ble Supreme Court in Canara Bank and Others v. Debasis Das and Others (2003) 4 SCC 557 to contend the 'useless formality theory' or that without substantial prejudice, the violation of principles of natural justice have no consequence.** The Appellant has contested that the findings in such judgments can not apply to the requirement of issuance of notice by a judicial or quasi judicial body after initiation of proceedings to the affected parties. Further, the contention of the Respondent cannot be accepted as the settled position of law is that no prejudice being caused, cannot be a ground for violation of the principles of natural justice as held in several judgments of the Hon'ble Supreme Court and this Hon'ble Tribunal. The Appellant has also relied on the various other judgments in this regard.
- 9.4 The Appellant has also contended that there was no reason or justification as to why the Impugned Order dated 18.05.2015 was required to be passed extending period of earlier tariff order for solar power projects. The Appellant has cited the findings in the judgment of Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company Private Ltd. 2017(12) SCALE 781** which has held that there can be no extension of control period by the State Commission in a discretionary manner. The Appellant has stated that even

assuming that the State Commission has the power to extend the control period, such an extension cannot be granted without following due process stipulated under Section 64 of the Electricity Act, 2003.

- 9.5 In the instant case, the Impugned Order has amended the said control period up to 30.06.2015 and is tantamount to an amendment to the tariff order dated 27.01.2012 and therefore, is required to follow the same procedure under Section 62 and 64. The Appellant has further alleged that if the Commissions are permitted to extend the control periods of tariff orders without following the requisite procedures, it will lay down a dangerous precedent whereby the Commission may not determine tariff for subsequent control period and merely extend the control period of the earlier tariff order. As per the Electricity Act, Section 61(d), the Appropriate Commission is required to protect consumers' interest and it is a settled law that the regulatory functions under inherent powers of the State Commission have to exercise in larger interest of the consumers. In this regard, the Appellant has cited judgments of Hon'ble Supreme Court as well as Hon'ble Tribunal which clearly held that the State Commission has to ensure procurement of power at economical rate so that no undue extra burden is placed on the consumers.
- 9.6 The Appellant has further highlighted that there has been a significant progressive reduction in the cost of the solar power projects not only in Gujarat but on all India basis and allowing higher tariff of the previous control period is nothing but extra burden on the consumers.
- 9.7 **Per Contra**, The Respondent No. 6 has submitted that at the time when the Impugned Order dated 18.05.2015 was passed, the

process of determination of tariff for procurement of power by distribution licensees and others from solar energy projects had already begun for the control period commencing from 01.04.2015. But since determination of new tariff order would have taken considerable time, the State Commission as an interim arrangement passed the Impugned Order keeping in view that there is no regulatory uncertainty during the intervening period. As a safeguard and to ensure that there is no ambiguity, the Hon'ble State Commission simply extended the control period from 31.03.2015 to 30.06.2015. As the Hon'ble Commission was only extending the control period for three months based on the tariff already determined for the control period ending on 31.03.2015, as an interim arrangement, the same required no fresh hearing.

9.8 The Respondent has further contended that mere violation of the principles of natural justice would not result in setting aside of an order unless some substantial prejudice has been caused. The Respondent has relied on several judgments of the Hon'ble Supreme Court as well as this Hon'ble Tribunal which have recognized the "useless formality principle". The Respondent has further emphasized that in line of these judgments, no real prejudice has been caused to the Appellant on account of the Impugned Order and impact whatsoever may occur would be of meagre magnitude for the concerned distribution company or almost negligible to the Appellant.

9.9 The Respondent has further contended that the Impugned Order has been passed by the State Commission in exercise of its inherent powers. In this regard, reliance has been placed on the Judgment **Gujarat Urja Vikas Nigam Ltd. vs. Solar Semiconductor Power Company (India) Pvt. Ltd. and Ors.**



**2017 SCC Online SC 1248.** The Hon'ble Court has distinguished between the Control Period prescribed under an order and that prescribed under the PPA.

- 9.10 The Impugned Order in the present case has recorded sufficient reasons for extending the period of order from 31.03.2015 to 30.06.2015, which in fact was necessary to avoid a gap between the two control periods. The Respondent has further submitted that the Appellant herein has not challenged the tariff order dated 17.08.2015 which has now attained finality and is in force since 01.07.2015. As such challenging the order dated 18.05.2015 is an empty formality by the Appellant.
- 9.11 The Respondent has further contended that as per RFP document, it was duly entitled for Rooftop Solar Incentive (RSI) as well as commissioning period up to 12 months which was drastically reduced due to various formalities like signing of PPA, adoption of tariff, etc. It is relevant to note in this case that if a Tariff of Rs. 8.42/kWh is considered to be the approved tariff, the differential part of Tariff i.e., Rs. 2.34/kWh shall have to be eventually borne by GPCL, i.e., Government of Gujarat as per the above documents. Thereby the net impact on the Government's / Consumer's pocket is nil. Therefore, the argument that the consumers are prejudiced because of the impugned order is frivolous and ought to be rejected out rightly.

### **Our Findings**

- 9.12 We have carefully gone through the submissions of the learned counsel appearing for the Appellant and Respondent and also, the judgments of the Apex Court as well as this Tribunal as referred to by the counsel appearing for the parties. We find that the State

Commission has extended the control period of its Order dated 27.01.2012 from 31.03.2015 to 30.06.2015 mainly on two accounts. The first being, a fact that the process for tariff determination for the next control period had begun and likely to take considerable time to get finalized in view of the lengthy procedures and formalities. Secondly, as the tariff for the last year of the previous control period i.e. 2014-15 was in force and the same was finalized after requisite procedures and formalities as per the Act. In light of these facts, as an interim arrangement, it was legally feasible to extend the previous control period by just three months. The ruling of the State Commission in the impugned order is reproduced as under:

3. ***“The Commission has already initiated the process of determination of tariff for the procurement of power by distribution licensees and others from solar energy projects for the State of Gujarat for the next control period, which may take some time and hence, as an interim arrangement, the Commission has decided to extend the control period of the Order No. 1 of 2012 dated 27.1.2012 up to 30.6.2015.*”**
4. ***In view of the above, the Commission decides that the control period of the Order No. 1 of 2012 dated 27.1.2012 shall be extended beyond 31.3.2015 up to 30.6.2015. Tariff for the period from 1.4.2015 to 30.6.2015 shall be as determined for the last year of the previous control period i.e. for the year 2014-15.”***

9.13 While referring to the decisions of several judgments of Hon'ble Supreme Court and this Tribunal, we hold that there is a distinction between control period prescribed under an Order and that prescribed under a PPA. In the instant case, the State Commission has extended the control period prescribed under its Order dated

27.01.2012 by three months exercising its inherent regulatory powers and not of the control period prescribed under a PPA. The State Commission after thorough evaluation of the overall documentary evidence available on the file and after assigning valid and cogent reasons for extending the control period from 31.03.2015 to 30.06.2015 which admittedly was necessary to avoid a vacuum between two control periods during the reference three months.

9.14 Regarding the progressive reduction in the cost of solar power projects throughout the country as emphasized by the Appellant, it is significant to note that the State Commission has duly acknowledged this fact and in turn, reflected in its successive tariff orders of 2010, 2012 and 2015. As far as, the tariff determined by CERC vis-à-vis that tariff by GERC, it is relevant to consider that the tariff for larger/MW scale solar plants would always be less than the smaller/KW scale solar plants. Accordingly, we do not observe any flaw in the prudence of the State Commission to this account.

**We, therefore, do not find any legal infirmity nor material irregularities in the Impugned Order passed by the State Regulatory Commission.**

**10. Summary of Our Findings & Analysis:**

In view of our deliberations and findings in the issues at supra, we are of the considered view that while passing the impugned order, the State Commission has not committed any error of law and has rightly justified its decision by assigning valid and cogent reasons. The Impugned Order does not exhibit any infirmity or ambiguity and hence, does not attract any interference by us. Therefore, the Appeal filed by the Appellant is liable to be dismissed.

**ORDER**

We are of the considered opinion that issues raised in the present Appeal are devoid of merit and hence, the Appeal No. 158 of 2015 is dismissed. The Impugned Order dated 18.05.2015 passed by the Gujarat Electricity Regulatory Commission, is hereby upheld.

No order as to costs.

Pronounced in the open Court on this **day of 14<sup>th</sup> May, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**