COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 42 OF 2018 & IA NO.214 of 2018
APPEAL NO. 242 OF 2018 & IA NO.1032 OF 2018
APPEAL NO. 243 OF 2018 & IA NO.1036 OF 2018
APPEAL NO. 244 OF 2018 & IA NO.1028 OF 2018
APPEAL NO. 280 OF 2018 & IA NO.1182 OF 2018
APPEAL NO. 282 OF 2018 & IA NO.1186 OF 2018
APPEAL NO. 357 OF 2018 & IA NO. 1381 OF 2018
APPEAL No. 78 OF 2018 & IA NO.358 OF 2018
APPEAL NO. 117 OF 2018 & IA NO.510 OF 2018
APPEAL NO. 118 OF 2018 & IA NO.475 OF 2018
APPEAL NO. 206 OF 2018 & IA NO.780 OF 2018
APPEAL NO. 227 OF 2018 & IA NO. 910 OF 2018
APPEAL NO. 268 OF 2018 & IA NO.1178 OF 2018
APPEAL NO. 196 OF 2018 & IA NO.515 OF 2018
APPEAL NO. 271 OF 2018 & IA NO.1065 OF 2018
APPEAL NO. 287 OF 2018 & IA NO.973 OF 2018
APPEAL NO. 288 OF 2018 & IA NO.1070 OF 2018
APPEAL NO. 254 OF 2018 & IA NO. 1060 OF 2018
APPEAL NO. 207 OF 2018 & IA NO.775 OF 2018

Dated: 29th March, 2019

Present: Hon'ble Mr. Justice N. K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Technical Member

APPEAL NO. 42 OF 2018 & IA NO. 214 of 2018

In the matter of:

M/s. Fortune Five Hydel Projects Pvt. Ltd
701-702, Prestige Meridian – II, No: 30,
MG Road, Bangalore – 560 001 …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
Through its Secretary
912, 6&7th Floor, Mahalakshmi Chambers,
Mahatma Gandhi Road,
Bengaluru, Karnataka – 560001

2. **Bangalore Electricity Supply Company Limited**,
Through its Managing Director,
K.R. Circle, Bangalore – 560001

3. **Hubli Electricity Supply Company Limited,**
Through its Managing Director,
P.B. Road, Navanagar,
Hubli – 580025

4. **Mangalore Electricity Supply Company Limited,**
Through its Managing Director
MESCOM Bhavana,
Kavoor Cross Road, Bejai,
Mangaluru – 575 004.

5. **Gulbarga Electricity Supply Company Limited**
Through its Managing Director,
Station Road,
Kalaburagi – 585 101

6. **Chamundershwari Electricity Supply Corporation Limited,**
Through its Managing Director,
No.29, Kaveri Grameena Bank Road,
Hinkal, Vijayanagar, 2nd Stage,
Mysuru – 570 019.

7. **Karnataka Power Transmission Corporation Limited,**
Through its Managing Director
28, Race Course Road,
Bangalore – 560009 ……Respondents

APPEAL NO. 242 OF 2018 & IA NO.1032 OF 2018

IN THE MATTER OF:

M/s Mangalore Energies Pvt Ltd.
173, 11th Cross, 3rd Main, 11th Cross,
Dollars Colony, RMV 2nd Stage,
Bengaluru – 560 094 …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
   Through its Secretary
   912, 6&7th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001.

2. **Bangalore Electricity Supply Company Limited,**
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. **Hubli Electricity Supply Company Limited,**
   Through its Managing Director,
   P.B. Road, Navanagar,
   Hubli – 580025

4. **Mangalore Electricity Supply Company Limited**,
   Through its Managing Director
   MESCOM Bhavana,
   Kavoor Cross Road, Bejai,
   Mangaluru – 575 004.

5. **Gulbarga Electricity Supply Company Limited**
   Through its Managing Director**,**
   Station Road,
   Kalaburagi – 585 101

6. **Chamundershwari Electricity Supply Corporation Limited,**
   Through its Managing Director,
   No.29, KaveriGrameena Bank Road,
   Hinkal, Vijayanagar, 2nd Stage,
   Mysuru – 570 019.

7. **Karnataka Power Transmission Corporation Limited**,
   Through its Managing Director
   28, Race Course Road,
   Bangalore – 560009 ……Respondents

APPEAL NO. 243 OF 2018 & IA NO.1036 OF 2018

IN THE MATTER OF:

M/s Vyshali Energy Pvt. Ltd.
701, Prestige Meridian –II No:30,
MG Road, Bengaluru – 560 001 …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
   Through its Secretary
   912, 6&7 Th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001

2. **Bangalore Electricity Supply Company Limited,**
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. **Hubli Electricity Supply Company Limited,**
   Through its Managing Director,
   P.B. Road, Navanagar,
   Hubli – 580025

4. **Mangalore Electricity Supply Company Limited**,
   Through its Managing Director
   MESCOM Bhavana,
   Kavoor Cross Road, Bejai,
   Mangaluru – 575 004.

5. **Gulbarga Electricity Supply Company Limited**
   Through its Managing Director**,**
   Station Road,
   Kalaburagi – 585 101

6. **Chamundershwari Electricity Supply Corporation Limited,**
   Through its Managing Director,
   No.29, KaveriGrameena Bank Road,
   Hinkal, Vijayanagar, 2nd Stage,
   Mysuru – 570 019.

7. **Karnataka Power Transmission Corporation Limited**,
   Through its Managing Director

28, Race Course Road,
Bangalore – 560009 ……Respondents

APPEAL NO. 244 OF 2018 & IA NO.1028 OF 2018

IN THE MATTER OF:

M/s Greenko Bagewadi Wind Energies Pvt. Ltd.
173, 11th Cross, 3rd Main, Dollars Colony,
RMV 2nd Stage, Bengaluru – 560 094 …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
   Through its Secretary
   912, 6&7 Th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001

2. **Bangalore Electricity Supply Company Limited,**
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. **Hubli Electricity Supply Company Limited,**
   Through its Managing Director,
   P.B. Road, Navanagar,
   Hubli – 580025

4. **Mangalore Electricity Supply Company Limited**,
   Through its Managing Director
   MESCOM Bhavana,
   Kavoor Cross Road, Bejai,
   Mangaluru – 575 004.

5. **Gulbarga Electricity Supply Company Limited**
   Through its Managing Director**,**
   Station Road,
   Kalaburagi – 585 101

6. **Chamundershwari Electricity Supply Corporation Limited,**
   Through its Managing Director,
   No.29, KaveriGrameena Bank Road,
   Hinkal, Vijayanagar, 2nd Stage,
   Mysuru – 570 019.

7. **Karnataka Power Transmission Corporation Limited**,
   Through its Managing Director
   28, Race Course Road,
   Bangalore – 560009 ……Respondents

APPEAL NO. 280 OF 2018 & IA NO.1182 OF 2018

IN THE MATTER OF:

M/s Matrix Wind Energy Pvt. Ltd
8-2-277/12, No. 296, Road No.3,
UBI Colony, Banjara Hills
Hyderabad – 500 034 …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
   Through its Secretary
   912, 6&7 Th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001

2. **Bangalore Electricity Supply Company Limited,**
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. **Hubli Electricity Supply Company Limited,**
   Through its Managing Director,
   P.B. Road, Navanagar,
   Hubli – 580025

4. **Karnataka Power Transmission Corporation Limited**,
   Through its Managing Director
   Kaveri Bhavan, K.G.Road,
   Bengaluru-560 009 ……Respondents

APPEAL NO. 282 OF 2018 & IA NO.1186 OF 2018

IN THE MATTER OF:

M/s Matrix Power (Wind) Pvt. Ltd.
702, Prestige Meridian –II No: 30,
MG Road, Bengaluru – 560 001 …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
   Through its Secretary
   912, 6&7 th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001

2. **Bangalore Electricity Supply Company Limited,**
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. **Hubli Electricity Supply Company Limited,**
   Through its Managing Director,
   P.B. Road, Navanagar,
   Hubli – 580025

4. **Karnataka Power Transmission Corporation Limited**,
   Through its Managing Director
   Kaveri Bhavan, K.G.Road,
   Bengaluru-560 009 ……Respondents

APPEAL NO. 357 OF 2018 & IA NO. 1381 OF 2018

IN THE MATTER OF:

M/s Matrix Green Energy Pvt. Ltd.
B-2-277/12, No.296, Road No.3, UBI Colony,
Banjara Hills, Hyderabad – 500 034. …Appellant

- Versus –

1. **Karnataka Electricity Regulatory Commission**
   Through its Secretary
   912, 6&7 th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001

2. **Bangalore Electricity Supply Company Limited,**
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. **Gulbarga Electricity Supply Company Ltd**,
   Through its Managing Director
   Station Road, Kalaburagi – 585102 Karnataka,

4. **Karnataka Power Transmission Corporation Limited**,
Through its Managing Director
Kaveri Bhavan, K.G.Road,
Bengaluru-560 009 ……Respondents

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Gopal Chowdhury
Mr. S. Venkatesh
Mr. Sandeep Rajpurohit
Mr. Samarth Kashyap

Counsel for the Respondent (s) : Mr. Anand K.Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan for R-1

Mr. S.S. Naganand, Sr. Adv.
Mr. Balaji Srinivasan
Ms. Pallavi Sengupta for R-2 & 4-7

APPEAL No. 78 OF 2018 & IA NO. 358 OF 2018

In the matter of:

M/s Green Infra Wind Power Generation Ltd.
Through its authorized Secretary
Door No.515 & 514, Tolstoy House,
Tolstoy Marg,
New Delhi- 110 001, India **…Appellant**

- Versus –

1. **Karnataka Electricity Regulatory Commission**
Through its Chairman
No. 9/2 6th & 7th Floor,
Mahalakshmi Chambers, M G Road,
Bengaluru, Karnataka, India 560 001.

2. **Bangalore Electricity Supply Company Limited**
Through its Managing Director
K R Circle,
Bengaluru – 560 001

3. Hubli Electricity Supply Company Limited,
Through its Managing Director
P.B. Road, Navanagar,
Hubballi – 580 025

4. Mangalore Electricity Supply Company Limited,
Through its Chairman
MESCOM Bhavana,
Kavoor Cross Road,
Bejai, Mangaluru – 575 004

5. Gulbarga Electricity Supply Company Limited,
Through its Chairman
Station Road,
Kalaburagi – 585 101

6. Chamundershwari Electricity Supply Corporation Limited,
Through its Managing Director
No.29, KaveriGrameena Bank Road,
Hinkal, Vijayanagar, 2nd Stage,
Mysuru – 570 019 **… Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Catherine Ayallore

Counsel for the Respondent (s) : Mr. Anand K.Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan for R-1

Mr. S.S. Naganand, Sr. Adv.
Mr. Balaji Srinivasan
Ms. Pallavi Sengupta for R-2- 4 & 6

Mr. Shahbaz Hussain
Mr. Fahad Khan for R-5

APPEAL NO. 117 OF 2018 & IA NO. 510 OF 2018

In the matter of:

Lalpur Wind Energy Private Limited
The IL&FS Financial Centre,
1st Floor, C-22, G - Block,
BandraKurla Complex,
Mumbai - 400051 **…Appellant**

Versus

1. **Karnataka Electricity Regulatory Commission**
   No. 16, C-1, Millers Bed Area,
   Vasanth Nagar, Bengaluru- 560052

2. **Bangalore Electricity Supply Company Limited**
   K.R. Circle, Bengaluru- 560 001

3. **Hubli Electricity Supply Company Limited**
   P.B. Road, Navanagar
   Hubballi- 580 025

4. **Mangalore Electricity Supply Company Limited**
   MESCOM Bhavana
   Kavoor Cross Road, Bejai
   Mangaluru- 575 004

5. **Gulbarga Electricity Supply Company Limited**
   Station Road, Kalaburagi- 585001

6. **Chamnudershwari Electricity Supply Corporation Limited**
   No. 29, KaveriGrameena Bank Road, Hinkal
   Vijayanagar, 2nd Stage,
   Mysuru- 570 019

…Respondents

APPEAL NO. 118 OF 2018 & IA NO. 475 OF 2018

In the matter of:

Renew Power Ventures Private Limited
10th Floor, Square, M-Block,
Jacaranda Marg,
DLF Phase 2, Sector 25,
Gurugram, Haryana 122022 **…Appellant**

Versus

1.Karnataka Electricity Regulatory Commission
No. 16, C-1, Millers Bed Area,
Vasanth Nagar, Bengaluru- 560052

2.Bangalore Electricity Supply Company Limited
K.R. Circle, Bengaluru- 560 001

3.Hubli Electricity Supply Company Limited
P.B. Road, Navanagar
Hubballi- 580 025

4. Mangalore Electricity Supply Company Limited
MESCOM Bhavana
Kavoor Cross Road, Bejai
Mangaluru- 575 004

5. Gulbarga Electricity Supply Company Limited
Station Road, Kalaburagi- 585001

6.Chamnudershwari Electricity Supply Corporation Limited
No. 29, KaveriGrameena Bank Road, Hinkal
Vijayanagar, 2nd Stage,
Mysuru- 570 019.

…Respondents

APPEAL NO. 206 OF 2018 & IA NO. 780 OF 2018

In the matter of:

01. M/s Golden Hatcheries
No. 3, Queens Road Cross,
Near Congress Committee Office,
Bangalore- 560052, Karnataka

02. M/s Greenergy Wind Corporation Pvt. Ltd.
No. 3, Queens Road Cross,
Near Congress Committee Office,
Bangalore- 560052, Karnataka

03. M/s SugnaneshwaraHydel Power Pvt. Ltd.
Aurormira House, Old #11, New #29,
Shafee Mohammed Road, Thousand Lights,
Chennai- 600 006, Tamil Nadu

04. M/s Green Energy Solar Enterprise Pvt. Ltd.
No. 3, Queens Road Cross,
Near Congress Committee Office,
Bangalore- 560052, Karnataka **... Appellant(s)**

Versus

01. Karnataka Electricity Regulatory Commission
No. 16, C-1, Millers Bed Area,
Vasanth Nagar, Bengaluru- 560052

02. Bangalore Electricity Supply Company Limited
K.R. Circle, Bengaluru- 560 001

...Respondents

APPEAL NO. 227 OF 2018 & IA NO. 910 OF 2018

In the matter of:

01 M/s Bhuruka Gases Limited
Plot – 5A & 6, Doddanakundi Industrial Area
Whitfield, Mahadevapura Post,
Bengaluru- 560 048, Karnataka

02 M/s Bhoruka Park Pvt. Ltd.
#48 Lavella Road,
Bengaluru- 560001, Karnataka

…Appellant(s)

Versus

01. Karnataka Electricity Regulatory Commission
No. 16, C-1, Millers Bed Area,
Vasanth Nagar, Bengaluru- 560052

02. Bangalore Electricity Supply Company Limited
K.R. Circle, Bengaluru- 560 001

03. Hubli Electricity Supply Company Limited
Navanagar, PB Road,
Hubbali- 580025, Karnataka

04. Chamundershwari Electricity Supply Corporation Limited
No. 29, KaveriGrameena Bank Road, Hinkal
Vijayanagar, 2nd Stage, Mysuru- 570 019

…Respondents

APPEAL NO. 268 OF 2018 & IA NO. 1178 OF 2018

In the matter of:

Jindal Aluminium Limited
Jindal Nagar, Tumkur Road,
Bangalore- 560073, Karnataka

…APPELLANT

Versus

01. Karnataka Electricity Regulatory Commission
No. 16, C-1, Millers Bed Area,
Vasanth Nagar, Bengaluru- 560052

02. Gulbarga Electricity Supply Company Limited Station Road,
Kalaburagi- 585001

…Respondents

APPEAL NO. 196 OF 2018 & IA NO. 515 OF 2018

In the matter of:

Clean Wind Power (Manvi) Private Limited
202, Third Floor, Okhla Industrial
Estate Phase-III,
New Delhi -110020 India **…Appellant**

Versus

1.Karnataka Electricity Regulatory Commission
No. 16, C-1, Millers Bed Area,
Vasanth Nagar, Bengaluru- 560052

2. Bangalore Electricity Supply Company Limited
K.R. Circle, Bengaluru- 560 001

3.Hubli Electricity Supply Company Limited
P.B. Road, Navanagar
Hubballi- 580 025

4.Mangalore Electricity Supply Company Limited
MESCOM Bhavana
Kavoor Cross Road, Bejai
Mangaluru- 575 004

5.Gulbarga Electricity Supply Company Limited
Station Road, Kalaburagi- 585001

6.Chamnudershwari Electricity Supply Corporation Limited
No. 29, KaveriGrameena Bank Road, Hinkal
Vijayanagar, 2nd Stage,
Mysuru- 570 019

…Respondents

Counsel for the Appellant (s) : Mr. Parinay Deep Shah
Ms. Ritika Singhal
Ms. Surabhi Pandey

Counsel for the Respondent (s) : Mr. Anand K.Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan for R-1

Mr. S.S. Naganand, Sr. Adv.
Mr. Balaji Srinivasan
Ms. Pallavi Sengupta for R-2,4,5 & 6

APPEAL NO. 271 OF 2018 & IA NO. 1065 OF 2018

In the matter of:

CENTRAL ARECANUT AND
COCOA MARKETING &PROCESSING CO-OPERATIVE LIMITED
Varanashi Towers, Mission Street,
MANGALURU - 575 001
(Represented by its Authorized Signatory) …APPELLANT

AND

1. **KARNATAKA ELECTRICITY REGULATORY COMMISSION,**
No. 16, C-1, Millers Bed Area,
Vasanth Nagar,
BENGALURU - 560 052
(Represented by its Chairperson)

2. **HUBLI ELECTRICITY SUPPLY CORPORATION LIMITED**

A Company registered under the
Provisions of Companies Act, 1956
Registered Office at Navanagar, P B Road,
HUBBALI – 580025
(Represented by its Managing Director)

3. **KARNATAKA POWER TRANSMISSION CORPORATION LIMITED**
Kaveri Bhavan, K. G. Road,
BENGALURU – 560 009
(Represented by its Managing Director)

4. **MANGALORE ELECTRICITY SUPPLY COMPANY LIMITED**
MESCOM Bhavan, 4th Floor, BejaiKavoor Cross Road,
Mangaluru – 575 004.

(Represented by its Managing Director)…. **RESPONDENTS**

APPEAL NO. 287 OF 2018 & IA NO. 973 OF 2018

In the matter of:

GRAPHITE INDIA LIMITED,
A company registered
under the provisions of the Companies
Act, 1956, having its
Registered Office at 31, Chowringhee Road,
KOLKATA- 700 016
(Represented by its Vice President-Works) …**APPELLANT**

AND

1. **KARNATAKA ELECTRICITY REGULATORY COMMISSION,**
No. 16, C-1, Millers Bed Area,
Vasanth Nagar,
BENGALURU - 560 052
(Represented by its Chairperson**)**

2. **BANGLORE ELECTRICITY SUPPLY COMPANY LIMITED**
A Company Registered under the
Provisions of Companies Act, 1956
having its Registered Office at

K.R. Road,
BENGALURU 560 001
(Represented by its Managing Director)

3. **CHAMUNDESHWARI ELECTRICITY SUPPLY CORPORATION LIMITED**
A Company registered under the
Provisions of Companies Act, 1956
having its Registered Office at
No.29 Vijayanagara II Stage, Hinkal,
Mysuru – 570017
(Represented by its Managing Director)

4. **KARNATAKA POWER TRANSMISSION CORPORATION LIMITED**
Kaveri Bhavan, K. G. Road,
BENGALURU – 560 009
(Represented by its Managing Director)

5. **STATE OF KARNATAKA**
Department of Energy
VikasaSoudha
Dr. Ambedkar Veedhi,
BENGALURU –560 001
(Represented by its
Additional Chief Secretary)**…. RESPONDENTS**

APPEAL NO. 288 OF 2018 & IA NO. 1070 OF 2018

In the matter of:

BRINDAVAN HYDROPOWER PRIVATE LIMITED,
having its Registered Office at No. 103,
Eden Park, NO.20 VittalMallya Road,
BENGALURU 560001 (Represented by its Managing Director)
…APPELLANT

Versus

1. **KARNATAKA ELECTRICITY REGULATORY COMMISSION,**
No. 16, C-1, Millers Bed Area, Vasanth Nagar,
BENGALURU - 560 052
(Represented by its Chairperson)

2. **BANGLORE ELECTRICITY SUPPLY COMPANY LIMITED**
   A Company Registered under the
   Provisions of Companies Act, 1956
   having its Registered Office at
   K.R. Road,
   BENGALURU 560 001
   (Represented by its Managing Director)

3. **MANGALORE ELECTRICITY SUPPLY COMPANY LIMITED**,
   A Company Registered under the Provisions of Companies Act, 1956, having its Registered Office at
   MESCOM Bhavana, Kavoor Cross Road, Bejai,
   Mangaluru – 575 004.

4. **KARNATAKA POWER TRANSMISSION CORPORATION LIMITED**
   Kaveri Bhavan, K. G. Road,
   BENGALURU – 560 009
   (Represented by its Managing Director)

5. **STATE OF KARNATAKA**
   Department of Energy , VikasaSoudha
   Dr. Ambedkar Veedhi,
   BENGALURU –560 001
   (Represented by its Additional Chief Secretary)…. RESPONDENTS

APPEAL NO. 254 OF 2018 & IA NO. 1060 OF 2018

In the matter of:

PRAGATHI GROUP
A partnership firm constituted
and governed by the provisions of the
Partnership Act, 1932, having its principal place
of business at No.28/2, 2nd Floor,
Cunningham Road,
Bengaluru - 560 052
Represented by its Managing Partner
Mr. Y.A. Harikishore **... Appellant**

AND

1. KARNATAKA ELECTRICITY REGULATORY COMMISSION
Having its Office at No. 16, C-1,
Millers Bed Area, Vasant Nagar,
BENGALURU – 560 052
(Represented by its Chairperson)

2. STATE OF KARNATAKA
Department of Energy
Vikas Soudha,
BENGALURU – 560 001
(Represented by its Additional Chief Secretary)

3. KARNATAKA POWER TRANSMISSION CORPORATION LIMITED
A Company Registered under the Provisions of
Companies Act, 1956 having its Registered
Kaveri Bhavan, K.G.Road,
BENGALURU 560 009
(Represented by its Managing Director)

4. BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED
A Company Registered under the Provisions of
Companies Act, 1956 having its Registered
Office at K.R. Circle,
BENGALURU - 560 001
(Represented by its Managing Director)

…Respondents

Counsel for the Appellant (s) : Mr. Anantha Narayana M.G.

Counsel for the Respondent (s) : Mr. Sumana Naganand
Ms. Pallavi Sengupta
Mr. Balaji Srinivasan
Ms. Pallavi Sengupta for R-3 & 4

APPEAL NO. 207 OF 2018 & IA NO. 775 OF 2018

In the matter of:

Rai Bahadur Seth Shreeram Narasingdas Pvt. Ltd.
(Previously constituted as M/s R.B. Seth ShreeramNarsingdas)
Having its registered office at:
D No. 1499/1, PO Box No. 38,
Kariganur Post, Hospet – 583 201,
Represented by its authorized signatory
Represented by its authorised representative Ms. Amrita Sanghi **…Appellant**

Versus

1. **Karnataka Electricity Regulatory Commission,**
   Having its office at:
   No. 16, C-1, Millers Bed Area,
   Vasanth Nagar,
   Bengaluru – 560052
   (Represented by its Chairperson)

2. **Hubli Electricity Supply Company,**
   A company registered under the provisions of the Companies Act, 1956,
   Having its registered office at:
   P.B. Road, Navanagar,
   Huballi – 580 025
   (Represented by its Managing Director)

3. **Gulbarga Electricity Supply Company,**
   A company registered under the

provisions of the Companies Act, 1956,
Having its registered office at:
Station Road,
Kalaburagi – 585 101
(Represented by its Managing Director)

4. **Karnataka Power Transmission Corporation Limited,**
A company registered under the provisions of the Companies Act, 1956,
Having its registered office at:
Kaveri Bhavan, KG Road, Bengaluru – 560009
(Represented by its Managing Director)

5. **Bangalore Electricity Supply Company,**
A company registered under the provisions of the Companies Act, 1956,
Having its registered office at:
K.R. Circle, Bengaluru – 560 001
(Represented by its Managing Director)

…Respondent(s)

Counsel for the Appellant (s) : Ms. Arunima Kedia

Counsel for the Respondent (s) : Mr. Anand K.Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
for R-1

Mr.S.S. Naganand, Sr. Adv.
Ms. Pallavi Sengupta
Mr. Balaji Srinivasan for
R-2,4 & 5

Mr. G.S. Kannur, Sr.Adv.
Mr. Nithin Saravanan
Ms .Aruna Singh for R-3

J U D G M E N T

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

1. These Appellants herein questioning the legality, validity and propriety of the impugned order dated 09.01.2018 passed in Petition Nos. 90/2016, 100/2016 104/2016, 47/2017 and 130/2017 respectively on the file of the Karnataka Electricity Regulatory Commission filed these instant appeals under Section 111 of the Electricity Act, 2003. The Respondent Commission in the Impugned Order adjudicated upon multiple Petitions filed by various Distribution Licensees within the State of Karnataka, wherein ESCOMs inter alia sought reduction in the banking period from one (1) year to three (3) months and determination and levy of additional surcharge on open access customers. The Respondent Commission reduced the banking period for the Non-REC route based RE Projects, opting for wheeling from the existing one year to six month. The Appellants have challenged that the Impugned Order is liable to be set aside for following reasons: -

(a) The State Commission while passing the Impugned Order has rendered a specific finding that *'The continuance of the promotional tariffs and other concessions, which are finally passed on to the consumers, is no longer justified'*. The said finding violates the very object for which the Act (especially Section 86 (1) (e)) was notified. State Commission being a Statutory Body is only empowered to act within the framework of the statute and cannot in any manner circumvent or negate the mandate of the Statute.

(b) The Impugned Order has been passed in exercise of the Inherent Powers of the Respondent Commission which is in teeth of the Hon'ble Supreme Court's Judgment in GUVNL vs. GERC Civil Appeal No. 6399 of 2016 dated 25.10.2017 wherein the Hon'ble Supreme Court has categorically held that Inherent Powers are procedural in nature and cannot be exercised to alter substantive right of the parties.

(c) Respondent Commission through an Order is seeking to interfere in an already executed WBA by the Appellants. The Constitutional bench of the Hon'ble Supreme Court in the case of PTC India Ltd. Vs. CERC (2010) 4 SCC 603 has categorically held that a Commission can only interfere into an existing agreement by specifying Regulations. However, in this case the Respondent Commission though an Modification Order in exercise of its Inherent Power is seeking to interfere/ alter an already executed WBA signed by the Appellant and ESCOMs.

2. Brief Facts of the case(s):

The brief facts of the case(s) are as follows:-

2.1 Appeal No.42 of 2018 has been filed by the Appellant, M/s Fortune Five Hydel Projects Pvt. Ltd. (FFHPL) is a wind power developer situated in Bagewadi cluster in Bijapur District having 101.2 MW wind power generating capacity in the state and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.2 Appeal No.242 of 2018 has been filed by the Appellant M/s Mangalore Energies Pvt. Ltd is a 15 MW wind power developer situated State of Karnataka wind power generating capacity in the state and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.3 Appeal No. 243 of 2018 has been filed by the Appellant, M/s. Vyshali Energies Pvt. Ltd is a 100 MW wind power developer situated State of Karnataka wind power generating capacity in the state and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.4 Appeal No.244 of 2018 has been filed by the Appellant, M/s Greenko Bagewadi Wind Energies Pvt Ltd is a 34 wind power developer situated State of Karnataka wind power generating capacity in the state and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.5 Appeal No.280 of 2018 has been filed by the Appellant, M/s Matrix Wind Energy Pvt. Ltd. is a 50 MW wind power developer in the State of Karnataka and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.6 Appeal No.282 of 2018 has been filed by the Appellant, M/s Matrix Power (Wind) Pvt. Ltd. is a 15 MW wind power developer in the State of Karnataka and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.7 Appeal No.357 of 2018 has been filed by the Appellant, M/s Matrix Power (Wind) Pvt. Ltd. is a 15 MW wind power developer in the State of Karnataka and has been generating power and supplying to third parties in accordance with the provisions of the Electricity Act.

2.8 Appeal No.78 of 2018 has been filed by the Appellant, M/s Green Infra Wind Power Generation Ltd., a renewable energy generating company.

2.9 Appeal No. 117 of 2018 has been filed by the Appellant, M/s. Lalpur Wind Energy Pvt. Ltd . The Appellant has commissioned wind power

projects aggregating to 184.8 MWs all over India including a 44 MW wind power project at Haveri and Dharwad Districts of Karnataka. The Appellant, through these plants, is supplying power to third party open access consumers.

2.10 Appeal No. 118 of 2018 has been filed by the Appellant, M/s. Renew Power Ventures Pvt. Ltd. The Appellant is a renewable energy company having an installed capacity of more than 1000MW across India. The Appellant has an installed capacity of over 320 MW in the State of Karnataka. Currently, the Appellant has four projects i.e. Renew Wind Energy (Karnataka) Pvt. Ltd., Renew Wind Energy (AP) Pvt. Ltd., Renew Saur Urja Pvt. Ltd. and Renew Wind Energy (Budh 3) Pvt. Ltd., generating renewable power in Karnataka.

2.11 Appeal No. 206 of 2018 has been filed by the Appellant, M/s. Golden Hatcheries & Ors. Appellant No. 1 is a Proprietorship Company having an installed capacity of 5.1 MW in wind and 30 MW in solar. The Appellant through its wind and solar power projects is supplying power to various third party consumers. Appellant No. 2 is a Company incorporated under the provisions of the Companies Act, 1956. It is a Wind Energy Generator having an installed capacity of 25.85in the State of Karnataka. Appellant No. 2, through its wind generating power plants, is supplying power to various third party consumers. Appellant No. 3 is a Company incorporated under the provisions of the Companies Act, 1956. It has installed a 13.5 MW Mini Hydel Project across river Bhima in ShahpurTaluk of Yadgir District of Karnataka. The Appellant is selling the energy generated from its plant to third part consumers. Appellant No. 4 a Company incorporated under the provisions of the Companies Act, 1956. It has installed a Solar Power

Project of 30 MW in the State of Karnataka. The Appellant is supplying the energy generated from its solar power plants to third party consumers.

2.12 Appeal No. 227 of 2018 has been filed by the Appellant, M/s. Bhuruka Gases Limited & Ors. Appellant No. 1 is a Company having an installed capacity of 13.8 MW wind energy power station located in Masbinal Village of Vijayapura District in Karnataka. The Appellant is using the energy generated from this wind power project for its captive use. Appellant No. 2 is a Wind Energy Generator having an installed capacity of 4.6 MW in the State of Karnataka and is supplying power to various third party consumers.

2.13 Appeal No. 268 of 2018 has been filed by the Appellant, M/s Jindal Aluminium Limited. Appellant has a 13.6 MW wind power project situated in Bellary District of Karnataka. The Appellant is using the power generated from this plant for captive consumption.

2.14 Appeal No. 196 of 2018 has been filed by the Appellant, M/s Clean Wind Power (Manvi) Private Limited. The Appellant is non-REC group captive power plant. The plant has a capacity of 50 MW and has been in operation since 28.03.2015.

2.15 Appeal No. 271 of 2018 has been filed by the Appellant M/s Central Arecanut and Cocoa Marketing & Processing Co-op Limited. However, the Appellant is impugning only OP No.100/2016 & 104/2016 in this appeal.

2.16 Appeal No. 287 of 2018 has been filed by the Appellant, M/s Graphite India Limited. However, the Appellant herein is impugning only the orders passed in OP No.90/2016 and O.P. No.130/2017.

2.17 Appeal No. 288 of 2018 has been filed by the Appellant, M/s Brindavan Hydropower Private Limited. However, the Appellant is challenging the Impugned Order in so far as it relates to OP No.90 of 2016 filed by Respondent BESCOM and OP No.104 of 2016 filed by MESCOM.

2.18 Appeal No. 254 of 2018 has been filed by the Appellant, M/s Pragathi Group. However, the Appellant herein is impugning only the orders passed in OP No.90/2016 and O.P. No.130/2017. Appeal No.207 of 2018 has been filed by the Appellant, M/s R.B. Seth Shreeram Narsingdas. The Appellant company have been involved primarily in the business of iron ore mining since 1951, in the beneficiation of iron ore and generation of renewable energy.

2.8 Karnataka Electricity Regulatory Commission (Respondent Commission/ State Commission) is the is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

2.9 Other Respondents are the distribution licensees and transmission companies operating in the State of Karnataka and are Government of Karnataka undertakings (ESCOMs).

3. QUESTIONS OF LAW

The Appellants have raised following questions of law for our consideration:-

I. Whether the Impugned Order is in teeth of the express mandate of Article 51A (g) of the Constitution and Section 86 (1) (e) of the Act?

II. Whether the Respondent Commission a statutory body can read down the specific mandate of the Act under which it has been created?

III. Whether the Respondent Commission by restricting the banking facility to a meagre of six months has in effect defeated the purpose and the concept of banking?

IV. Whether in terms of the scheme of the Act can the Respondent Commission through an Order meddle with an existing Agreement to frustrate renewable generation?

V. Whether the Respondent Commission while passing the Impugned Order has failed to appreciate that the ESCOMS were estopped by the Doctrine of Promissory Estoppel to seek modification in the express terms agreed under the WBAs?

VI. Whether the Respondent Commission while passing the Impugned Order has failed to appreciate that ESCOMs have not provided any data to substantiate its claim that there is monetary impact on the ESCOMs due to annual banking facility?

VII. Whether the Respondent Commission has passed the Impugned Order in the absence of any substantial evidence?

VIII. Whether the Respondent Commission while passing the Impugned Order has exceeded the limit of its jurisdiction?

IX. Whether the Respondent Commission while passing the Impugned Order has failed to appreciate that the ESCOMS have failed to provide any new development, which was not present earlier, which had now warranted the curtailment of banking period?

X. Whether the Appellants areprotected by the doctrine of Legitimate Expectation?

XI. Whether Impugned Order can have retrospective effect?

4. All the above Appeals arise from the Common Order dated 09.01.2018 (Impugned Order) passed by the Karnataka Electricity Regulatory Commission in Petition Nos. 90/2016, 100/2016 104/2016, 47/2017 and 130/2017 and the issues involved in all these appeals are common in nature, therefore, we decide to adjudicate the batch of appeals by a common judgment.

5. Learned counsel, Mr. Gopal Chaudhary and Mr. S.Venkatesh, appearing for the seven (7) Appellants have filed consolidated written submissions as under:-

5.1 The Written Submissions are filed on behalf of the Appellants in the following Appeals:-

(a) M/s Fortune Five Hydel Projects Private Limited ("**FFHPPL**") i.e. the Appellant in Appeal No. 42 of 2018;

(b) M/s Mangalore Energies Pvt. Ltd. ("**MEPL**") i.e. the Appellant in Appeal No. 242 of 2018;

(c) M/s Vyshali Energy Pvt. Ltd. ("**VEPL**") i.e. Appellant in Appeal No. 243 of 2018;

(d) M/s Greenko Bagewadi Wind Energies Pvt. Ltd ("**GBWEPL**") i.e. Appellant in Appeal No. 244 of 2018;

(e) M/s Matrix Wind Energy Pvt. Ltd. ("**MWEPL**") i.e. Appellant in Appeal No. 280 of 2018;

(f) M/s Matrix Power (Wind) Energy Pvt. Ltd. ("**MPWEPL**") i.e. Appellant in Appeal No. 282 of 2018;

(h) M/s Matrix Green Energy Pvt. Ltd. ("**MGEPL**") i.e. Appellant in Appeal No. 357 of 2018;

5.2 The Appellants as described in above(a to f) Para are all wind based RE Generators. However, Appellant as described in Para (h) above i.e. MGEPL is a Solar based RE Generator. Therefore, in so far as case of MGEPL is concerned the Impugned Order in fact violates the principles

of Natural Justice, as the Respondent Commission before passing the Impugned Order did not accord any opportunity to the solar developers such a MGEPL to place submissions on reduction of Banking facility. The specific submissions qua MGEPL (i.e. Solar Generators) are detailed separately in the present Written Submissions.

II. *KEY ISSUES FOR CONSIDERATION OF THE HON'BLE TRIBUNAL*

A. The Impugned Order is without any basis/ does not deal with the contention raised by ESCOMs in the Petition but capriciously grants the relief sought

5.3 The ESCOMs have filed the Petitions primarily on the Ground that the Annual Banking Facility causes tremendous financial hardship on the ESCOMs as in peak demand months the ESCOMs and the Appellants and their consumers draw power from the grid. The said contention is raised by ESCOMs in their Petition at: -

(a) Petition No. 90 of 2016 filed by BESCOM

(b) Petition No. 104 of 2016 filed by MESCOM

(c) Petition No. 104 of 2016 filed by HESCOM

(d) Petition No. 47 of 2017 filed by GESCOM

5.4 The Respondent Commission in terms of the submissions made by ESCOMs then frames the issues for consideration at Para 13 of the Impugned Order and the issues are reproduced as follows:-

"Issue No. (1): Whether the Petitioners have made out a case for modification of the current banking facility extended to the RE Generator?

Issue No. (2): Whether any modification of the current banking facility can be made applicable to the existing RE Generators?

Issue No. (3): Whether the modification of the current banking facility, as prayed by the Petitioners, should be limited only to captive wind generators?"

5.5 The Respondent Commission then proceeded to adjudicate upon all three issues framed above after finding the same to be intertwined. However, the conclusion arrived at by the Respondent Commission was not based upon the facts pleaded by the ESCOMs and the Appellant Objectors and the same is evident from the following: -

(a) The Respondent Commission at Para 13(a) holds that "Admittedly", during peak months the purchase price of power is generally high and such price during the peak-time of the day would be even higher. The said finding of the Respondent Commission is patently incorrect as the Appellants had specifically disputed the assertion made by the ESCOMs on the financial injury. Therefore, the finding of the Respondent Commission that it was an admitted fact that the Annual Banking Facility impacted the ESCOMs financially was patently incorrect and therefore, the Impugned Order and its basis is liable to be set aside.

(b) The Appellants had categorically averred that the contention of ESCOMs is unsubstantiated and that no data to prove the same has been provided. However, the Respondent Commission in a capricious manner proceeded to hold that financial difficulty as urged by ESCOMs was an "admitted fact". The Hon'ble Supreme Court in Maharashtra State Board of Secondary and Higher Secondary Education vs. KS Gandhi (1991) 2 SCC 716 has categorically held that:-

" If the facts are disputed, necessarily the authority or the Enquiry Officer, on consideration of the material on record, should record reasons in support of the conclusion reached".

(c) Therefore, clearly the Respondent Commission has gravely erred by arriving at a finding that it was 'admitted' that ESCOMs had to purchase expensive power to offset the impact of annual banking facility and therefore, the Impugned Order is liable to be set aside.

(d) The Respondent Commission at Para 13 (d) of the Impugned Order has held that "admittedly" the Commission has the powers to amend the existing banking facility for valid reasons. The said finding is also erroneous for detailed reasons mentioned above. The Appellants in fact had also disputed that the Commission cannot amend the existing banking facility. Moreover, the Objection filed by FFHPPL had also objection to the Commission's ability to modify existing WBAs signed between parties. Therefore, the said finding of the Respondent Commission that admittedly, the Commission has the power to amend existing WBA is completely fallacious and is liable to be rejected. In fact, the Respondent Commission has failed to address the issue of jurisdiction, to be able to modify the executed contract in a proceeding under Section 86 1(b) of the EA, 2003 read with Regulation 11 of the KERC (General and Conduct of Proceedings) Regulations, 2000.

(e) Further, the Respondent Commission from Para 13(c) to Para 13(g) has held that promotional measures given to Renewable Energy were no longer justified. The merits of the said finding are assailed in the subsequent paragraphs. However, from the perusal of the entire operative Order it is seen that the Respondent Commission while seeking to justify its actions on the reduction of banking facility

has not returned any finding on the alleged financial difficulty faced by ESCOMs by analysis of data or by giving any reason. **There is no discussion whatsoever on the source of power to amend existing WBA, need for altering WBA, and rights of Appellants**. Therefore, the Impugned Order in fact is a non-speaking Order as it does not disclose its mind or give reasons for its conclusion to reduce annual banking facility. In fact the Respondent Commission while passing the Impugned Order also does not deal with the principal contention of ESCOMs by returning any reasoning/ finding on the contentions raised. Hence, the Impugned Order is based on conjectures and surmises and is liable to be set aside. The Appellants crave liberty of the Tribunal to rely upon the Judgment of the Hon'ble Supreme Court in Kranti Associates Pvt. Ltd. Vs. Massod Ahmad Khan (2010) 9 SCC 497 at Para 12 to Para 47 to aver that the Impugned Order is devoid of any reasoning and is liable to be set aside.

B. The Impugned Order passed by the Respondent Commission has read down the specific mandate of the Act under which it has been created

5.6 Respondent Commission while passing the Impugned Order has returned a specific finding that '***The continuance of the promotional tariffs and other concessions, which are finally passed on to the consumers, is no longer justified***'.

5.7 The said finding mutilates and violates the very object for which the Act [especially Preamble which provides for promotion of efficient and environmentally benign policies read with Section 61 (h) and Section 86 (1) (e)] was notified. State Commission being a Statutory Body is only empowered to act within the framework of the statute and cannot in any manner circumvent, re-write or negate the mandate of the Statute. The

alleged reduction of tariff does not in any manner means that promotion for renewable energy are to be reduced or withdrawn.

5.8 Impugned Order of the Respondent Commission is contrary to the express mandate of the Section 61 (h) and 86 (1) (e) of EA, 2003 which provides that a State Commission must promote co-generation and generation of electricity from **renewable sources of energy** by providing suitable measures for connectivity to the grid and sale of electricity to any person and specify for purchase of electricity for such sources, a percentage of total consumption of electricity in the area of Distribution Licensee.

5.9 The quasi-judicial body like the State Commission, in present case, which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act and the Commission can only necessarily act within the parameters prescribed by the Act creating it and the confines of jurisdiction vested in it by the Act. The Appellant craves liberty to rely upon the Judgment of the Hon'ble Supreme Court in N.C. Dhoundial v. UOI & Ors. (2004)2 SCC 579 and the relevant extracts are reproduced as follows:-

> *"**4.** We cannot endorse the view of the Commission. **The Commission which is a unique expert body is, no doubt, entrusted with a very important function of protecting human rights, but, it is needless to point out that the Commission has no unlimited jurisdiction nor does it exercise plenary powers in derogation of the statutory limitations. The Commission, which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act. Of course, as any other statutory functionary, it undoubtedly has incidental or ancillary powers to effectively exercise its***

jurisdiction in respect of the powers confided to it but the Commission should necessarily act within the parameters prescribed by the Act creating it and the confines of jurisdiction vested in it by the Act".

5.10 Therefore, the finding of the Respondent Commission (who is a creature of a statute) that promotional measures for Renewable energy are no longer required grossly violates the Statue i.e. Section 61 (h) and 86(1)(e) of EA, 2003 and hence liable to be set aside.

C. *Respondent Commission vide the Impugned Order has defeated the purpose and the concept of banking*

5.11 Respondent Commission by restricting the banking facility to a meager of six months i.e., from January to June and July to December has in effect defeated the purpose and the concept of banking. The finding of the Respondent Commission is erroneous due to following reasons: -

(a) 70% of Wind generation is during the month of May to September of a year;

(b) Therefore, the proposed banking of six months would be for namesake as, in none of the cases (two six-month slots in a year), the wind generated in peak period (May to September) can be utilized in such banking period.

(c) During the peak period the wind generators are power sufficient and does not require any power from the grid. Therefore, excess power is banked with the licensee so that the same can be consumed at a later stage.

5.12 The Wind Energy Generators solely depends upon availability of wind at a particular velocity. In other words, it is periodical in nature. Its generation is not constant even during a period of 24 hours of a day.

Since, wind generation is periodical in nature, at times the energy generated is not required and hence the same is banked with the distribution licensee who supplies this energy to its consumers at applicable tariff. Further, for returning the banked energy, Licensee may have to procure additional electricity from other sources. However, the licensee, which is the banker of electrical energy, earns interest on this banked energy. Therefore, admittedly banking is in fact beneficial for the Licensee.

5.13 Wind generation cannot be backed down or shut down when there is demand deficit and therefore surplus energy generated is banked. The banking of power is not a commercial benefit but an essential support for infirm power generating to the RE based generators.

5.14 Further, banking facility is essential for the wind generators as held by this Tribunal in its Judgment dated 18.03.2011 in Appeal No. 98 of 2010 titled as TNEB vs. TNERC & Ors. wherein the Tribunal held as below: -

> *"18. Before getting into the merits of Appellant Board's arguments, on this issue let us understand the very concept of Banking of Electrical Energy.* ***Banking of energy is analogous to small saving bank account in a financial bank. A person deposits his surplus amount in a saving bank account. He can withdraw his money from bank any time according to his requirement. For this deposited money, he earns some interest. The bank in turn gives loan to some other needy customer at a higher rate of interest. In this process, saving account holder as well as bank are benefited. Now come to electricity banking. Electricity is a commodity, which cannot be stored. It is to be consumed at the very***

instant it is produced. Generation by Wind Energy Generators solely depends upon availability of wind at a particular velocity. In other words it is periodical in nature. Its generation is not constant even during a period of 24 hours of a day. It could be possible that it generates electricity when captive user does not require it. In such a case energy generator banks it with distribution licensee who supplies this energy to its consumers at applicable tariff*. However, for returning the banked energy, Licensee may have to procure additional electricity from other sources. Unlike the Banks which pay interest to saving account holder, here the licensee, banker of electrical energy, earns interest on this banked energy. Thus banking rate electrical energy should be nominal. In the light of above fact situation, we would now examine the merits of Appellant Board's contentions vis-a-vis findings of State Commission on this issue."*

5.15 Further, the Tribunal in its Judgment dated 21.09.2011 in Appeal No. 53, 94 & 95 of 2010 titled as TNEB vs. TNERC has held as follows:-

"27 (d) The concept of "banking" was evolved by the State Commission which is in line with the provisions of the Act, 2003, National Electricity Policy and the National Tariff Policy. Therefore, the impugned order promotes the object of the Act/Rules and the purpose it serves. It would be impossible to set-up the Wind Energy Units without the banking facilities due to the very characteristics of wind power generation. It was only because of the promises made by the Government and the Appellant in respect of Wind Power Generation which included the concept of banking, the wind generators set-up their

facilities by incurring heavy expenditure. Therefore, the Appellant is estopped from making claims contrary thereto."

5.16 Therefore, the potential of wind energy being seasonal in nature, can be harnessed only through the provision of the annual banking facility, despite the timing difference between supply and demand. Therefore, if banking is restricted to six-month period and the energy banked has to be utilized during the following month itself, then there would be virtually no banking. The Tribunal in past vide its Judgment in Appeal No.98 of 2010 (Supra) and Appeal No.53 of 2010 (Supra) has taken a similar view holding that any curtailment in banking facility would render the banking mechanism as meaningless.

5.17 In addition to the above, it is stated, that most of the RE projects utilizing the Banking Facility are operating the project for Captive Use. The Impugned Order has created an anomaly because as per Rule 3 (1)(a)(ii) of the Electricity Rules, 2005 the captive status is to be determined on an 'Annual Basis', whereas, banking of power as per the Impugned Order will only be permitted on 6 months basis, thereby causing the Generating Unit to lose its Captive Status. In addition to Section 86(1) (e) it is also mandated under the Act to promote Captive Generation. Therefore, the Impugned Order violates the purpose of Renewable Generation as well as Captive generation which is not permissible as per the Act.

D. The Impugned Order cannot modify existing contracts i.e. made applicable to existing projects - Re: Contracts across the board can only be amended through regulations

5.18 Any significant change in the regulatory framework affecting the already installed projects, including but not limited to a direction to curtail the banking period to six months from the date of generation,

can only be enforced by way of an amendment to the extant KERC Regulations/Order and such amendment has to be prospective in nature. Therefore, the application of the Impugned Order can only be made for projects where WBAs are being entered into, post the Impugned Order. In the executed WBAs, Banking Facility has been introduced by the Hon'ble Commission through its various Orders. However, the said facility has now culminated into a contract between the Appellant and ESCOMs i.e. various WBAs signed between parties.

5.19 Respondent Commission through an Order is seeking to interfere in an already executed Wheeling and Banking Agreement (WBA) by the Appellant which is impermissible in law. The Hon'ble Supreme Court in PTC India Ltd. Vs. CERC, (2010) 4 SCC 603 (Paras 58, 60 and 66) has held as follows:-

> *"**58.** One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act.* ***Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j)."***

5.20 Therefore, the Respondent Commission by the Impugned Order in terms of the Judgment of the Hon'ble Supreme Court cannot interfere with existing contract as has sought to be done. The said contract across the board can only be interfered with by framing of Regulations which also ought to be prospective in nature.

Re: Respondent Commission does not enjoy any regulatory/ statutory control over existing WBAs

5.21 The WBAs which have been entered in accordance to earlier Orders are concluded contracts and the reduced period of WBAs would mutilate the purpose and import of such concluded contracts. It is settled principle of law that once a Contract is signed, the parties to the Agreement are bound by its terms and conditions. Moreover, in so far as the Appellant is concerned, the Regulatory Commission does not enjoy any Regulatory Control over the WBA signed between the Appellant and ESCOMs.. Therefore, the terms of the WBA are beyond the regulatory control of the Respondent Commission and cannot be amended during the currency of the Agreement.

The Hon'ble Supreme Court in the case of India Thermal Power Limited vs. State of MP (2000) 3 SCC 379 has held ***that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are***

statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties.

5.22 Therefore, clearly only the terms and conditions of the WBA over which the Respondent Commission exercises Statutory/ Regulatory Control can be amended/ altered by the said Respondent Commission. In this case as stated above, the Regulatory Commission's powers are confined to determination of tariff of purchase of power by ESCOMs and not beyond that. Therefore, the Respondent Commission, therefore, cannot amend/ alter existing contracts which have now attained finality.

5.23 The Appellant is Generating Company and by virtue Statement of Objects and Reasons Clause 4 (i) which provides that *Generation is being delicensed and captive generation is being freely permitted* read with Section 7 of the Electricity Act, 2003 is free from any form of licensing. Further, the State Commission only exercises Regulatory Control in determining Tariff of power purchase by a Distribution Licensee under Section 86 (1)(b) read with Section 62 of the Act. Apart from the aforesaid, the Respondent Commission cannot modify the executed contracts with the Distribution Licensees, based on which generating companies have invested in setting up of generating station. The object and purpose of Statute to de-license generation in order to solicit private investment will stand defeated, if Respondent Commission exercise regulatory control that vitally affects the interest of the Generating Company/Developer. In this regard reference to be made to the Hon'ble Supreme Court

Judgement in case of Tata Power Company Limited vs. Reliance Energy Limited (2009) 16 SCC 659, Paras 5, 11 and 120.

E. Respondent Commission by reviewing its earlier Order dated 04.07.2014 has exceeded the limit of its jurisdiction

5.24 The Respondent Commission had previously already decided the identical issue raised by ESCOMs vide Order dated 09.10.2013 and 04.07.2014 and the following is relevant:-

(a) ESCOMs had raised the identical plea of financial prejudice during the proceedings before the Respondent Commission in 2013. The same was rejected by the Respondent Commission in its Order dated 09.10.2013

(b) Further, again in 2014 the ESCOMs raised the same plea of Financial Prejudice and the said plea was rejected for the second time by the Respondent Commission in its Order dated 04.07.2014.

5.25 Therefore, after passing the WBA Order dated 04.07.2014 the said Respondent Commission had become *functus officio* and could not have reviewed the terms of its earlier Order. Based on WBA Order dated 04.07.2014, the Distribution Licensees made representations to the Generating Companies and have executed fixed term contracts for ten (10) years. The said WBA Order has infact been worked out and implemented by execution of the binding contract. Therefore, the Respondent Commission is barred by the principles of res judicata or otherwise and it was legally not permissible for the Respondent Commission to adjudicate upon the Petition filed by the ESCOMs since it sought to raise an issue, which had conclusively been decided earlier and implemented. In this regard the Appellant craves liberty of this Tribunal to rely upon the Judgment of the Hon'ble Supreme Court in

Dwarka Das vs. State of MP (1999) 3 SCC 500 wherein the Hon'ble Supreme Court has held as follows: -

> ***"The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order".***

5.26 Therefore, once the WBA Order dated 04.07.2014 was passed the Respondent Commission had become *functus officio* and could not modify its previous Order. Further, ESCOMs had not placed on record any new material warranting reduction in tenure of the Banking Facility. Hence, ESCOMs in the garb of a modification petition cannot seek to review the decision of the Respondent Commission passed over 3 years ago based on which the Appellant and other RE Generators have entered into a Wheeling and Banking Agreements. In addition to the above, it is stated that the ESCOMs had filed the Petition under Regulation 11 of the KERC (General and Conduct of Proceedings) Regulations, 2000.

5.27 The Hon'ble Supreme Court in GUVNL Vs. Solar Semiconductor Power Company (India) Pvt. Ltd. and Ors (2017) 166 SCC 498 has categorically held that the State Commission cannot exercise its Inherent Power to amend/ alter terms and conditions of an agreement duly signed between parties.

F. Impugned Order also made applicable to Solar Projects in violation of Section 86(3) of the Electricity Act 2003 – Applicable to MGEPL

5.28 The ESCOMs had filed their respective Petitions in relation to the WBA facility given to wind generators. The Respondent Commission while

issuing the Public Notice dated 13.05.2017 had also referred to the Petitions filed by ESCOMs to be in relation to Wind generators. The Respondent Commission while giving its reasoning for modification had also referred to Wind Generation in Para 13 of the Impugned Order. However, while passing the operative part of the Impugned Order the Respondent Commission has included Solar Projects and also reduced its annual banking facility. The said direction of the Respondent Commission mutilates Section 86 (3) of the Act as no notice was given to MGEPL who is solar RE Generator before the Impugned Order was passed. Also it is curious to see that even ESCOMs had not pleaded reduction of Solar Banking period, therefore, clearly the impugned Order is not sustainable in so far as Solar Generators are concerned.

5.29 Therefore, the Impugned Order in fact violates the principles of Natural Justice and ought to be set aside. In the present case, the Solar Generator/Developer has an executed contract with defined WBA and same is in nature of contractual/civil right cannot be defeated in any circumstances, more so behind the back of Developers, who was not given a notice of the said proceedings.

5.30 In addition to the above, it is trite law that when a quasi- judicial body seeks to affect adversely rights of parties then it is incumbent duty to give notice as well as hearing to such affected party. The aforesaid principle of law has been upheld by Hon'ble Supreme Court & this Tribunal is following cases:-

(a) Manohar v. State of Maharashtra, (2012) 13 SCC 14.

(b) 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.

"11. Such kind of approach by any State Regulatory Commission cannot be allowed to be continued in future because it gives a wrong signal to the consumer at large. ***What we expect from the State Commission is that the State Commission should candidly and honestly observe the principles of natural justice and if the provisions of law require the issuance of notice, such notice should be issued to the persons who are likely to be affected and the affected persons*** *or the public at large or the consumers of the State, like industrial consumers in the present Appeals, should be afforded reasonable opportunity of hearing and only, thereafter, judicial order/ quasi-judicial order should be passed and not otherwise."*

II. RESPONSE TO CONTENTIONS OF ESCOMS

A. ESCOMs had approached the State Commission with a request to reduce banking period and the said request was made in light of genuine practical difficulties faced by ESCOMs in allowing annual banking.

5.31 The above contention of ESCOMS is wholly without merit as:-

(a) The ESCOMs previously during the proceedings of the Tariff Order dated 09.10.2013 and Order dated 04.07.2014 had raised the identical plea as was raised in the present case.

(b) The said contention of ESCOMs was categorically rejected by the State Commission while passing the Order dated 09.10.2013 and Order dated 04.07.2014 **.** Therefore, in so far as the issue of alleged financial loss to ESCOM is concerned the State Commission had become Functus Officio.

(c) Curiously, the ESCOMs again raised the very same issue again in OP No. 90 of 2016 without providing any additional material or any documentary evidence in support of its contention.

(d) The said issue was re-agitated in the garb of an Original Petition though it was in the nature of a Review Petition. The State Commission curiously made a volte farce from its original Orders and proceeded to grant relief to ESCOMs without assigning any cogent reasoning. Therefore, the Impugned Order is seeking indirectly review the Order dated 04.07.2014 which is impermissible in law and is liable to be set aside.

(e) Therefore, it is completely fallacious for ESCOMs to state that since it was facing financial difficulty it approached the State Commission. In fact, the issue had already been considered and was decided against ESCOMs.

(f) In fact, a perusal of the Impugned Order would show that the Respondent Commission has rejected the contentions of the ESCOMs in relation to the alleged increase in the cost of providing annual banking. Moreover, there is no discussion in the Impugned Order relating to the submissions that is made by the ESCOMs on the alleged financial loss in the Impugned Order. The Impugned Order proceeds on a completely different footing which was not the case of the ESCOMs that is the reduction of tariff of renewable energy generation.

5.32 Further, ESCOMs in their Statement of Objection dated 05.07.2018 have provided data for 2017-18 to support their claim of financial loss in permitting annual banking facility. In this regard the following is submitted:-

(a) Firstly, the Impugned Order was passed on 09.01.2018. Therefore, the data now placed by the ESCOMs was not within the subject matter of the proceedings before the Respondent Commission.

(b) Secondly, the Appellant in Appeal No. 280 of 2018 has filed Written Submission dated 17.01.2019 controverting the data and its consequent implication and the same is not being repeated herein for the sake of brevity.

B. WBA has clearly stipulated that the same can be amended by the Respondent Commission

5.33 The above contention of ESCOMs is wholly without merit for the following reasons: -

(a) At the outset it is stated that when the ESCOMs had filed the Petitions they had not invoked the amendment provision of the WBA. Moreover, the Respondent Commission has also not relied upon the said Article 13.6 to support its contention. Therefore, the said contention cannot be raised at this stage.

(b) Further, the Hon'ble Supreme Court in PTC Vs. CERC (Supra) has categorically held that an Appropriate Commission can only interfere with an Existing Agreement across the board by means of Regulations which is in the nature of Subordinate Legislation and not through an Oder.

(c) Therefore, the said finding of the Hon'ble Supreme Court is law in accordance with Article 141 of the Constitution of India. In so far as reference to the Amendment Clause of the WBA is concerned the same may be exercisable in case to case basis only in relation to Tariff as the same falls within the regulatory jurisdiction of the State Commission. But not across the board through an Order.

(d) Moreover, such a condition imposed in the WBA is in fact void in terms of Section 23 of the Indian Contract Act, 1872 and ought to be read down in the facts of the present case.

(e) In so far as the contention of the ESCOMs is concerned that the Commission has issued various Clarificatory Orders and the benefit

thereof has been passed on to Renewable Generators. Therefore, Impugned Order cannot be questioned is also untenable as this Hon'ble Tribunal after interpreting Section 86(1)(e) of the Act in its Judgment in Rithwik Energy vs. Transmission Corporation of Andhra Pradesh 2008 has categorically held that a Renewable Agreement can only be reopened to give thrust to renewable energy and not otherwise. The said Judgment of this Tribunal was followed in Tarini Infrastructure Ltd. Vs. Gujarat Urja Vikas Nigam Ltd. and others, Appeal No. 29 of 2011 which has been affirmed by the Hon'ble Supreme Court in (2016) 8 SCC 743. Therefore, the contention of the ESCOMs is liable to be rejected.

(f) Therefore, the reliance placed on Article 13.6 is misplaced and the Impugned Order is liable to be set aside.

5.34 Therefore, in view of the submissions made above, the present Appeals are deserving and ought to be allowed and the Impugned Order ought to be set aside.

6. Learned counsel, Mr. Amit Kapur, appearing for the Appellant (GIWPL) In Appeal No. 78 of 2018 has filed his written submissions as under:-

6.1 The Projects are structured on group captive basis. Power is consumed by various captive consumers. GIWPL has entered into the following wheeling and banking agreements for wheeling of power by the group captive consumers with the distribution companies operating in the State of Karnataka (collectively referred to as "**WBAs**"):-

(a) WBA dated 17.03.2014 (amended on 13.06.2014) with Karnataka Power Transmission Corporation Ltd. ("**KPTCL**"), HESCOM, BESCOM and CESU for 20MW for a period of ten (10) years from the date of execution, expiring on 17.03.2024.

(b) WBA dated 29.01.2015 with KPTCL, HESCOM and BESCOM for 3.2MW for a period of ten (10) years from the date of execution, expiring on 29.01.2025.

(c) WBA dated 29.01.2015 with KPTCL, HESCOM and BESCOM for 0.8MW for a period of ten (10) years from the date of execution, expiring on 29.01.2025.

(d) WBA dated 01.08.2016 (amended on 03.02.2017) with KPTCL, BESCOM, GESCOM and CESC for 36MW for a period of ten (10) years from the date of execution, expiring on 01.08.2026.

6.2 The standard agreement was approved by Ld. Karnataka Electricity Regulatory Commission ("**KERC**"). At the time of execution of these WBAs, annual banking facility was as reflected in Orders dated 11.07.2008 such that:-

(a) Article 1 defines 'Banking' as residual electrical energy which will be utilized at a later date/month, and as per the terms of the WBAs.

(b) Article 6.2 permits GIWPL to bank energy generated in the plant for its own use at a later time on a water/wind year basis. The net banked energy is carried forward from month to month within the same water/wind year but beyond the year.

(c) Article 11 provides that the annual banking facility was to operate for the 10 year term of each WBA, i.e., till 17.03.2024, 29.01.2025, 01.08.2026.

6.3 The Impugned Order has in effect rewritten existing WBAs entered into by GIWPL, curtailing the incentives provided to the existing RE generators. Ld. KERC by way of the common Order dated 09.01.2018 altered the concluded WBAs with effect from 01.07.2018, to:-

(a) Reduce the banking period ***from the existing period of one year*** (April to March) to two blocks of ***six months, i.e., January to June and July to December***.

(b) Limit the drawal of energy from the grid during ***peak Time of Day ("ToD") hours*** to energy ***banked during the peak ToD*** hours.

6.4 Without any reasoning or viable analysis, the Impugned Order alters the banking framework in force since 2008 to cause an irreparable harm and loss to GIWPL since:-

(a) Banking has been limited based on ToD slots and period of banking has been reduced to 6 months.

(b) GIWPL/its captive consumers may have to arrange power from alternate sources if banked energy is not available.

6.5 These changes will have an adverse financial impact on GIWPL's Projects and viability of the investment. It would lead to a 6% to 10% of annual generation reduction in the net banked energy (called unsettled energy) and substantial losses. It is noteworthy that the maximum generation of wind energy occurs in Karnataka during the months of May to September, while the peak demand season is January to March. Due to the aforesaid changes, the excess energy created in the July to December block will be discounted to 85% of the generic wind tariff at the end of December instead of being available for draw during in the peak demand season of January to March.

6.6 Impugned Order is being assailed on the following grounds:-

(a) Ld. KERC had approved the applicable banking arrangements and the model banking and wheeling agreements by its orders dated 11.07.2008 and 04.07.2014 for 10 year period. As such, Ld. KERC was *functus officio* insofar as the WBAs entered into pursuant to the same

are concerned during that 10 year PPA term. Changes to banking and wheeling agreements by way of an order can apply to future investments but not interfere with or amend the existing agreements, as held by the Hon'ble Supreme Court of India in *PTC India vs CERC & Ors* 2010 4 SCC 603 ("**PTC Judgment**").

(b) Ld. KERC is not empowered to issue orders to modify terms of executed contracts in terms of the Electricity Act, 2003 since rights that have vested cannot be taken away.

(c) The Impugned Order violates the Doctrine of Legitimate Expectation. GIWPL has made substantial investments and entered into commercial arrangements based on the assurance that the terms of banking arrangements are frozen for a term of 10 years which is being disrupted.

(d) The Impugned Order is arbitrary, irrational and contrary to law, since:

(i) Ld. KERC wrongly relied on banking facility provisions prevailing in the states of Maharashtra, Gujarat, Andhra Pradesh and Telangana since the same have not been made applicable retrospectively.

(ii) There is no factual or legal basis for reducing the banking period.

(iii) Ld. KERC erred to rely on the findings in *Gokak Power and Energy Ltd vs KERC & Ors* ("**Gokak judgement**") since the facts are completely different.

(e) Colorable exercise of power by Ld. KERC as evidenced by the retrospective application of the directions in the Impugned Order:

(i) Modification of annual banking arrangement is contrary to Regulation 8 of the KERC Conduct of Proceedings Regulations and barred by res-judicata.

(ii) Ld. KERC's directions are contrary to the principles enshrined in Section 61 and Section 86(1)(e) of the Electricity Act, Revised Tariff Policy, and National Electricity Policy, 2005 relating to promotion of Renewable Energy.

(iii) Ld. KERC has failed to balance public and private interest.

II. SUBMISSIONS

IIA. Ld. KERC erred to revise wheeling and banking agreements *post facto.*

6.7 Ld. KERC by way of the Impugned Order has amended the WBAs executed by GIWPL *ex post facto* by changing the banking period from one year to 6 months and by limiting the drawal of banked power based on time of day. Clauses 6.2.1 to 6.2.3 and 11.1 of the WBAs executed by GIWPL provide details for annual banking period. Clause 11.1 of the wheeling and banking agreements provides that the term of the Agreement shall be for a period of 10 years.

6.8 GIWPL invested and developed projects in terms of orders dated 11.07.2008, 24.04.2014, 04.07.2014 and executed the WBAs in terms of the Standard Wheeling and Banking Agreement approved by Ld. KERC vide orders dated 11.07.2008, 08.07.2014 and 12.09.2014.

6.9 Ld. KERC extended the validity of the order dated 11.07.2008 till 30.06.2014, by order dated 24.04.2014

6.10 By Order dated 04.07.2014 Ld. KERC continued the annual banking facility for non REC projects.

6.11 In terms of the said Orders dated 11.07.2008, 04.07.2014 and 12.09.2014, changes to the banking and wheeling agreements were made applicable to only new agreements. Existing agreements were left undisturbed.

6.12 Hence, the tariff regime for non REC projects has been continued by Ld. KERC for 9 years until the passing of the Impugned Order. After the issuance of the Impugned Order, the standard format for wheeling and banking agreement for Non- REC Projects was revised again on 27.03.2018 in terms of the changes to the banking facility. It is submitted that this revised format is applicable to all fresh agreements that are going to be entered into. Such revision in format ought not to be used to override existing contracts since once Ld. KERC decided the applicable banking arrangements, it became *functus officio* insofar as the said terms and agreements were concerned. Ld. KERC has exercised its power in 2014 and determined a framework. Having decided the issue, Ld. KERC could not have reopened the issue to amend the terms of the banking arrangements already approved.

613 Ld. KERC does not have the power to give retrospective effect to or to amend contracts and statutory arrangements *post facto* by way of orders. Further, substantive amendments must be applied prospectively unless the statutory authority has the right to make it applicable retrospectively. In the present case, neither the Electricity Act nor the Regulations of the State Commission permit retrospective amendment of substantive rights.

6.14 The existing contracts can only be modified by a regulation to that effect, and not by mere order of the state commission. In Hon'ble Supreme Court of India's decision in PTC Judgment, where Central Electricity Regulatory Commission ("**CERC**") had issued regulations affixing trading margins, the Hon'ble Supreme Court of India held that CERC could override existing PPAs only by issuing regulations under Section 178 of the Act, as under:

"A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j)."

Accordingly, by drawing a parallel analogy, KERC cannot override existing contracts by an order passed under Section 86.

6.15 The Impugned Order is contrary to judgment of this Tribunal in the case of *Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission*, 2014 SCC OnLine APTEL 168 ("**GUVNL Judgment**"), wherein it was held that a PPA cannot be re-opened to for the purpose of curtailing incentives given to RE generators, as under:

"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.***

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 v. 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 reopened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives."***

IIB. The Impugned Order is arbitrary, irrational and contrary to law

(i) *Ld. KERC has wrongly relied on the banking facility provisions prevailing in the states of Maharashtra, Gujarat, Andhra Pradesh and Telangana*

6.16 The KERC has wrongly relied on the banking arrangements prevailing in the states of Maharashtra, Gujarat, Andhra Pradesh and Telangana to apply the same to wind projects in Karnataka. The terms of banking facility in these states were quite distinct.

Evidently, vested rights of parties with respect to banking arrangements have remained unchanged and undisturbed since the introduction of banking arrangements in the said states.

(ii) *There is no factual or legal basis for reducing the banking period*

6.17 he Petitioners in OP No. 90/2016, OP No.100/2016, OP No. 104/2016, OP No. 47/2017 and OP No. 130/2017 (Respondent DISCOMS & Ors.) made vague references to high power procurement cost in fourth quarter of the financial year on account of the annual banking period. The Impugned Order did not consider any data to establish the adverse financial impact of annualized banking period. As such, amending the banking arrangements in the absence of evidence to justify such change is unreasonable and legally unsustainable.

618 The Respondents had raised this very issue which was rejected by a Speaking Order dated 04.07.2014. Based on the order dated 04.07.2014, GIWPL entered into WBAs. Since then, there has been no change in circumstances which necessitated a re-look at the issue so decided. The Impugned Order does not disclose any reason for this reversal.

6.19 Further, this Hon'ble Tribunal in its judgment dated 18.03.2011 in Appeal No. 98 of 2010 titled ***TNEB vs TNERC*** (Para 20,23) on the issue of whether banking period should be reduced to one month from one year period held that the Ld. State Commission was right in refusing to permit the change since no new development had taken place warranting such change.

(iii) The findings in Gokak Judgment are not applicable in the present case

6.20 KERC has wrongly relied on the findings of this Hon'ble Tribunal in the Gokak Judgment (Para 17) to hold that the RE generators including GIWPL do not have any vested right for annual banking period since:-

(a) Gokak Judgment relates to reduction in banking period to one-month for RE generators availing the benefit of REC, i.e., doctrine of election.

(b) Hon'ble Tribunal held that banking facility was a promotional measure for RE generators. Once an RE generator voluntarily choose to obtain the benefits of the REC Regulations, 2010, that generator was to be treated at par with a conventional generator and was not entitled to the annual banking facility.

(c) Gokak Judgment does not go into the issue of retrospectively changing banking period allowed to RE generators not availing benefits of REC.

In contradistinction, GIWPL is a RE generator who is not availing REC benefits and cannot be treated at par with RE generators availing the benefit of REC. As such, the vested rights of GIWPL by way of the various WBAs executed by it are being affected retrospectively, which is beyond the scope of the Gokak Judgment.

IIC. Modification of annual banking arrangement is contrary to Regulation 8 of the KERC Conduct of Proceedings Regulations and the issue is barred by res judicata.

6.21 As stated above, at the time of execution of the WBAs, annual banking facility was enshrined in Orders dated 11.07.2008 and 04.07.2014 which attained finality. In terms of Regulations 8 of the KERC Conduct of Proceedings Regulations, Ld. KERC can exercise its power of review within a period of 90 days only, as under:

"8. Powers of Review, Revision etc. (1) The Commission may, either on its own motion or on an application made by any interested or affected party, within 90 days of the making or issuing of any decision, direction, order, notice or other document or the taking of any action in pursuance of these Regulations, review, revoke, revise, modify, amend, alter or otherwise change such decision, direction, order, notice or other document issued or action taken by the Commission or any of its Officers.

(2) An application under sub-regulation (1) shall be filed in the same manner as a Petition under Chapter-II of these Regulations"

6.22 The Impugned Order tantamounts to review/modification of the Order dated 04.07.2014, as stated categorically in the Impugned Order:-

" (1) ***In partial modification of the Commission's Order dated 4th July, 2014****, the banking period for the Non-REC route based RE Projects, opting for wheeling, is reduced from the existing one year to six months."*

6.23 Such modification beyond the limitation period of 90 days is impermissible in law:-

(a) Since Ld. KERC has partially modified its earlier orders dated 04.07.2014 by way of the Impugned Order by modifying the terms of the banking facility that was available on an annual basis earlier.

(b) The modifications are barred by limitation since it has been more than 3 years since Ld. KERC issued order dated 04.07.2014.

(c) Ld. KERC has not passed any order for extension of limitation.

(d) The Impugned Order does not record the reasons for reviewing / modifying the Order dated 04.07.2008 after 90 days had lapsed.

6.24 The Respondents have contended that Ld. KERC has power to review its orders in terms of Section 94 of the Act. It is submitted that once the State Commission has framed Regulations, it can exercise powers only in accordance with such regulations. Ld. KERC is obligated to exercise its powers within the parameters of KERC (General and Conduct of Proceedings) Regulations 2000. In the PTC Judgment, it has been held that while exercising its powers under Section 79(1), Ld. CERC is obligated to exercise them in terms of the regulations formulated under Section 178.

Therefore, Ld. KERC cannot exercise its powers in violation of express provisions.

6.25 In terms of the order dated 11.07.2008, the extant banking arrangement have been made effective for a period of 10 years. It is clearly evident that after Ld. KERC rejected the proposal for changes in the banking arrangement in its Order dated 04.07.2014, reopening the issue is barred by the principle of res-judicata. In doing so, Ld. KERC has expressly rejected the proposal for reducing the banking period.

IID. Ld. KERC has disturbed vested rights of GIWPL

6.26 In the present case, Ld. KERC has disturbed vested rights contrary to law by way of the Impugned Order dated 09.01.2018. The right to avail of annual banking facility is a vested right in favor of GIWPL as provided for in the WBAs which are valid for a period of 10 years and

had been approved by Ld. KERC. It is settled law that vested rights cannot be taken away except by operation of law. The position has been reaffirmed by –

(a) Hon'ble Supreme Court of India in *J.S. Yadav Vs. State of U.P.* reported as (2011) 6SCC 570 (Para 22-23).

(b) This Tribunal's Judgment dated 26.02.2014 in Appeal No. 73 of 2013 titled *Assam Power Distribution Company Ltd. Vs. CERC* (Para 18).

IIE. Ld. KERC has violated the doctrine of legitimate expectation

6.27 The change in the banking and wheeling arrangement directed by Ld. KERC violates the Doctrine of Legitimate Expectation. GIWPL has made substantial investments and entered into commercial arrangements based on the assurance that the terms of banking arrangements are frozen for a term of 10 years. Hon'ble Supreme Court in a catena of Judgments has held that if based on a Government Representation a party alters its position then the said party has the legitimate right to seek enforcement of the said representation, as under:

(a) *Delhi Cloth and General Mills Limited v. Union of India* reported as (1988) 1 SCC 86 (Para 18, 24)

(b) *Monnet Ispat and Energy Limited v. Union of India* reported as (2012) 11 SCC 1 (Para 188.1 – 188.5)

(c) *Punjab Communications Limited v. Union of India* reported as (1999) 4 SCC 727 (Para 37, 38, 40, 42)

(d) *Union of India v. Hindustan Development Corporation and Others* reported as (1993) 3CCC 499 (Para 33-35)

(e) *Ashoka Smokeless Coal India (P) Limited v. Union of India* reported as (2007) 2 SCC 640

Ld. KERC is estopped from amending/changing these arrangements to the detriment of GIWPL.

6.28 The Hon'ble Supreme Court in *Delhi Electricity Regulatory Commission v. BSES Yamuna Power Ltd.,* (2007) 3 SCC 33 has held that a change in the rate of depreciation from an assured rate of 6.69% to 3.75% infringes the doctrine of legitimate expectation since policy directives issued by the Government of Delhi inviting bids from the private sector were based on certain assurances which had been altered.

6.29 Further, the Hon'ble Supreme Court has in the case of ***State of West Bengal & Ors. v Niranjan Singha***, reported as (2001)2 SCC 326, held that the doctrine of legitimate expectation is an aspect of Article 14 and would be relevant when determining if an action by a statutory authority was arbitrary. In the present case, Ld. KERC has evidently acted in an arbitrary manner.

IIF. Ld. KERC's directions are contrary to the principles enshrined in Section 61 and Section 86(1)(e) of the Electricity Act, Revised Tariff Policy, and National Electricity Policy relating to promotion of Renewable Energy.

6.30 KERC's directions in Order dated 09.01.2018 are contrary to the following, in so far as it is contrary to objective of promotion of electricity generated from renewable sources:

(a) Principles enshrined in Section 61(b), (c) and (h) of the Act.

(b) Section 86(1)(e) of the Act which requires Ld. KERC to promote, *inter-alia,* generation of electricity from renewable sources, as recognized in the following decisions:-

(i) Hindustan Zinc Ltd. v. Rajasthan ERC (2015) 12 SCC 611 (Paras 16-18, 29, 30, 33, 35)

(ii) Bangalore Electricity Supply Co. Ltd. v. Konark Power Projects Ltd., (2016) 13 SCC 515 (Paras 11-13)

(iii) *Century Rayon vs MERC & Ors*. in Appeal No. 57 of 2009 dated 26.04.2010 [2010] APTEL 37

(iv) *M.P. Biomass Energy Developers Association v. MERC and Anr*, 2017 ELR (APTEL) 0377

(v) *Green Energy Association vs. Madhya Pradesh Electricity Regulatory Commission and Ors*. in Appeal No. 16 of 2015 dated 28.04.2016

(c) The Tariff Policy and the National Electricity Policy lay emphasis on promotion of renewable energy. The Tariff Policy has statutory force as noted by the Hon'ble Supreme Court in Energy Watch Dog v CERC reported as (2017) 14 SCC 80.

IIG. *Ld. KERC's directions in Order dated 09.01.2018 are violative of the principle of regulatory certainty.*

6.31 KERC has violated the principle of regulatory certainty, as enshrined in the Revised Tariff Policy as under:

(a) ***"4.0 OBJECTIVES OF THE POLICY***

…

(b) Ensure financial viability of the sector and attract investments;

(c) ***Promote transparency, consistency and predictability in regulatory approaches*** *across jurisdictions and minimise perceptions of regulatory risks;"*

[emphasis supplied]

(b) Further, Paragraph 5.8.8 of the National Electricity Policy provides as under:

5.8.8 of National Electricity Policy:

"*5.8.8 Steps would also be taken to address the* ***need for regulatory certainty*** *based on independence of the regulatory commissions and transparency in their functioning to generate investor's confidence*."

[emphasis supplied]

It is evident from the forgoing that the principle of regulatory certainty is a statutorily recognized concept and the Ld. KERC is bound by it.

6.32 The Projects of GIWPL were conceptualized and planned on the basis

of certain basic assumptions including the facility to bank power on an annual basis and no restrictions being in place for when such banked power can be withdrawn by the generators. The directions of Ld. KERC in the Impugned Order reversing or doing away with established principles i.e. concept of banking of power on annual basis with no restrictions on drawal of banked energy as provided for in Order dated 04.07.2014 undermines the principle of regulatory certainty and adversely impacts the economic viability of the Projects.

IIH. Ld. KERC has failed to balance public and private interest

6.33 KERC has failed to strike a balance between public and private interest by changing the annual banking period to a 6 month period. It is submitted that only the interests of the Respondents is being safeguarded at cost of the RE generators. In fact, the interest of the consumers is as equally important as that of the generating companies. In support reliance is placed on:-

(a) Hon'ble Supreme Court of India's Judgment in ***A.P. Electricity Regulatory Commission v. R.V.K. Energy (P) Ltd.,*** (2008) 17 SCC 769, as under:

"90. Commercial relationship between a generating company and the consumer has all along been accepted. Public interest would not mean the interest of A.P. Transco alone. Equity in favour of one of the generating companies could not have been the sole ground for coming out with such a policy decision and that too while considering the application for grant of exemption from the purview of the licensing provision."

(b) This Tribunal's judgment dated 23.09.2016 in Appeal No. 53 of 2016 titled ***TNGDCL vs Century Flour Mills,*** to hold:

"11

(e)….

i. The State Commissions have the responsibility of providing measures to promote Renewable Sources of Energy under Section 61(h) and 86(1) (e) of the Electricity Act, 2003.

ii. The guiding factors for determination of tariff for Appropriate Commission under Section 61 (c) of the Electricity, 2003 Act are the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; while factors under Section 61 (d) of the Electricity Act, 2003 are safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

iii. Provisions of the Act do not discriminate between the Public and the Private interest."

III. RESPONSE TO CONTENTIONS OF THE RESPONDENTS

IIIA. Ld. KERC had no power to modify concluded banking arrangements.

6.34 The Respondents have relied upon the Order dated 08.07.2014 which approved the standard Wheeling and Banking agreement to contend that Ld. KERC has the power to modify or amend any of clause or clauses of the standard agreement, viz. -

"*The Commission may from time to time add, vary, alter, modify or amend any of clause or clauses of the standard WBA or the entire agreement, either suomotu or on an application by any of the Stakeholders*."

6.35 This contention is erroneous for the following reasons:-

(a) Order dated 08.07.2014 was only a supplementary Order which was passed in light of the Order dated 04.07.2014 which put in place the banking arrangement, and which was subsequently modified by the Impugned Order. As such, the right to annual banking of power was introduced by way of the Order dated 04.07.2014 and not the Order dated 08.07.2014.

(b) The Order dated 04.07.2014 does not have any provision for modification or amendment (either *suo motu* or on an application by either party).

(c) The order dated 08.07.2014 was issued to reflect the changes to the wheeling and banking provisions vide order dated 04.07.2014 and provide a standard WBA format for all future agreements. In fact, in terms of order dated 12.09.2014, KERC clarified that the standard WBAs from order dated 08.07.2014 are applicable only to those agreements that have been executed after 08.07.2014 and not to those that have been executed prior.

(d) While the Order dated 08.07.2014 allows for amendment / modification of the standard Wheeling and Banking Agreements, such amendment or modification has to be in consonance with the principal order dated 04.07.2014. An ancillary order which only approves a standard form of contract cannot be relied upon to re-write a substantive order retrospectively.

(e) The Order dated 08.07.2014 refers to amendments to the standard Agreement. Neither the Order nor the Regulations of Ld. KERC allow for amendment of already concluded contracts.

(f) The Impugned Order has neither been passed with reference to nor in terms of the Order dated 08.07.2014. It is settled law that once an order has been passed, it can be defended on grounds / reasons mentioned in the Order alone and no additional grounds can be supplemented, as held in the case of *Mohinder Singh Gill v. Chief Election Commr.,* (1978) 1 SCC 405.

6.36 The Respondents have also contended that GIWPL has accepted certain modifications pertaining to wheeling and banking applicable to both

existing as well as future projects issued by Ld. KERC vide orders dated 12.09.2014, 21.11.2014 and 26.02.2015 and the said changes were incorporated in supplementary agreements to the WBAs. In this regard, it is submitted that:

(a) The aforesaid Orders do not substantially rewrite or retrospectively modify an existing arrangement. Order dated 12.09.2014 clarified that residual energy at the end of the year will be deemed to have been purchased by relevant DISCOMS at 85% of generic tariff that has been determined by Ld. KERC. GIWPL does not challenge the powers of the Ld. KERC to determine tariff and accordingly did not challenge the modification;

(b) Order dated 21.11.2014 modified definition of 'injection point' and terms for recovery from exclusive customers. However, the supplementary WBAs entered into by GIWPL were not to incorporate these changes, rather GIWPL amended provisions for metering and drawal points.

6.37 Respondents have contended that the revised standard WBA format provided in order dated 08.07.2014 itself stipulates that Ld. KERC can modify the terms of the contract by relying on Articles 1.1, 5 and 6 therein. However, the clauses referred to by the Respondents relate to tariff. Tariff determination is a periodic process and there are specific regulations which allow Ld. KERC to determine tariff from time to time. This is different from wheeling and banking arrangements/agreements which are prescribed as a commercial arrangement between the distribution licencees and the generating companies / consumers.

6.38 Though, the WBAs contain provisions which state that Ld. KERC has the power to alter the terms of the WBA, suo motu or upon application by either party:-

(a) The Impugned Order has not been passed in exercise of the Article 13.6 / 12.6 of the WBAs. The said Articles pertain to party-specific amendments which may be required.

(b) By way of the Impugned Order, Ld. KERC has issued a generic sweeping order which impacts all WBAs. The Article 13.6 / 12.6 does not cover such generic revisions in the banking arrangement.

(c) In a similar matter in the case of Gujarat, GUVNL's prayer to reopen all solar PPAs executed was rejected by Ld. GERC vide Order dated 08.08.2013 in Petition No. 1320 of 2013. The GERC Order was upheld by this Tribunal in GUVNL Judgment, referred to above.

IIIB. Ld. KERC is precluded from modifying terms of executed contracts by exercising its inherent powers under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations 2000

6.39 Respondent No. 5 has submitted that the petitions filed by the Discoms have been filed under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations 2000, and that the same overrides Regulation 8 which prohibits the review of any order after the expiry of 90 days. It is submitted that the said contention is wrong in context of the inherent powers of the Ld. KERC in terms of Regulation 11.

6.40 Respondents contention is incorrect since inherent powers cannot be exercised where substantive provisions exist. The inherent powers are exercised only in cases where the situation is not otherwise covered by any regulation or statute. In light of an express provision of review, inherent power could not have been exercised. In the case of *Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited and Ors.* (2017) 16 SCC 498, the Hon'ble Supreme Court has observed as under:

"32. ***But the specified inherent powers are not as pervasive a power as available to a court Under Section 151 of the Code of Civil Procedure, 1908****:…*

..

34…. ***In other words there cannot be any exercise of inherent power by the Commission on an issue which is otherwise dealt with or provided for in the Act or Rules.***

37. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.

…

55. The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of process of the Court. …

..

*60. ….****As rightly contended by the learned Senior Counsel for the Appellant, the State Commission in exercise of its power Under Section 62 of the Act, may conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.***

Accordingly, the KERC could not have exercised its inherent powers to modify the terms of the contract since they are substantive rights. Further, Ld. KERC is precluded from exercising its inherent powers on an issue for which procedure has been specifically provided. In the present case, Ld. KERC has reviewed order dated 04.07.2014 beyond the 90 days prescribed therein and accordingly, such an order has to be set aside. Thus, Respondent's contention that the power to review is subject to the inherent powers of the commission is denied.

IIIC. There is no factual basis for the need for change in the banking facility

6.41 The Respondents have contended that as a result of the increase in number of renewable energy generators, the losses caused to DISCOMS due to providing annual banking facility, is on account of the following:

(a) Procurement of power from Energy Exchange or through short term/ bilateral contracts or through UI, at higher rates;

(b) Load shedding;

(c) Fixed charges payable to conventional energy sources who have to be given backing down instructions during Monsoon.

6.42 Respondents have contended that the Impugned Order has been issued as a result of well-founded analysis of data since the data pertaining to the state DISCOMS is available to Ld. KERC on an everyday basis. However, no evidence has been recorded in the Impugned Order towards the same. The Impugned Order has been passed on the basis of bald averments made by the Discoms. Respondents' contention is denied on account of the following:

(a) information in the Reply filed by the Respondents was not before Ld. KERC. Therefore, reliance on such information is of no consequence;

(b) the data included in the Reply is not backed by any records, and a submission that the same is available publicly is not sufficient;

(c) neither the Impugned Order nor the Respondents in their respective petitions have relied on the said data and accordingly, it does not reflect that Ld. KERC has reviewed this alleged data or that the amendments to the banking arrangements are premised thereon.

IIID. Ld. KERC has failed in its obligation to promote generation of renewable energy as mandated in Section 61 of the Electricity Act, 2003

6.43 In terms of the Ld. KERC's order dated 04.07.2014 the banking facility for non-REC wind projects is extended and implemented on an annual basis. The excess energy that has not been drawn at the end of March in a particular financial year would be deemed to have been purchased at 85% of the generic tariff rate. As a result of the aforesaid changes introduced vide the Impugned Order, the excessive energy created in the revised banking period of June-December would be deemed to have been purchased at 85% of the applicable tariff at the end of December. As a consequence, this power would not be available during January-March, which is the peak demand season.

6.44 Respondents have contended that the Discoms are being forced to use the said energy for their own customers during the months of wind generation when otherwise the demand is low and pay capacity charges for issuing backing down instructions. Further, that as a result of withdrawal by wind generators during the peak season, the functioning of Discoms is hindered since they have to purchase additional energy to supply to their consumers.

6.45 In terms of Section 42 of the Electricity Act, 2003, a distribution licensee is obligated to develop and maintain an efficient coordinated and economical distribution system and to supply electricity in accordance with the provisions contained in the Electricity Act, 2003. Therefore, the obligation for maintaining an efficient and coordinated system for distribution is on the Discoms. The Discoms also have to ensure compliance with the provisions of Electricity Act, 2003 including Section 61, which mandates the promotion of generation from renewable sources.

6.46 The contention that wind generators are being allowed to function in the manner described above and that the same is causing hardship to Discoms is a mischaracterization of the issue at hand. The wind generators have no other option but to opt for banking facility owing to the seasonal nature of the generation patterns, which is beyond the control of the wind generator. Hence, by modifying the banking facility in favour of the Discoms, Ld. KERC has failed to promote the generation of renewable sources.

6.47 Further, for availing the benefit of banking, the wind generators are obligated to pay banking charges as specified by Ld. KERC. In the present case, the wind generators have been paying banking charges. Therefore, the Discoms are being compensated for use of the banking facility. Hence, it is incorrect to base the Impugned Order on alleged financial impact on Discoms.

6.48 On the other hand, the Ld. KERC has failed to analyze the burden on the wind generators, as the energy generated during peak wind season has to be sold at a lower rate (85% of generic tariff) and will have to be bought back from the grid at a higher rate during the low wind season, as opposed to being allowed to withdraw the energy it has banked. While the DISCOMS allege that the increase in the RE generators capacity has increased their costs, it is submitted that the implication on the generators at an individual level is beyond the alleged injury caused to the DISCOMS. Further, GIWPL ought to be protected because it has executed WBAs which crystallize its rights to avail the banking facility, whereas the DISCOMS concerns have been entertained without any basis.

7. Learned counsel, Mr. Parinay Deep Shah, appearing for the Appellants in Appeal Nos.117 of 2018, 118 of 2018, 206 of 2018,

227 of 2018, 268 of 2018, & 196 of 2018 has filed consolidated written submissions as under :-

7.1 The State Commission, by the Impugned Order, has amended existing WB Agreements, executed between the Appellants and the ESCOMs. It is the contention of the State Commission and the Respondent ESCOMs that the State Commission had the power to do this under the provisions of the WB Agreement. The Appellant submits as under:-

A. <u>State Commission does not have the jurisdiction to modify existing WB Agreements</u>

7.2 The State Commission does not have jurisdiction to modify WB Agreement relating to banking across the board through a judicial order. This violates the principles settled by the Constitutional Bench of the Hon'ble Supreme Court in *PTC India Limited v. Central Electricity Regulatory Commission* (2010) 4 SCC 603.

7.3 Further, the WB Agreements executed by the Appellants with the relevant ESCOMs specifically provide that the same shall be in force for a period of 10 years. Also, in Article 6.2.2. it is provided that the energy generated at the plant shall be banked on water/wind year basis and will be permitted to be carried forward from month to month within the same water/wind year. It is further provided that no carry forward of banked energy is permitted from water/wind year to the next water/wind year. Additionally, the WB Agreement defines wind year to mean as "*commencing from April to March of next year*."

7.4 The question that now arises is, whether the State Commission could exercise jurisdiction to modify all such WB Agreements across the board by reducing the existing banking period from 1 year to 6 months and thereafter, to hold that 6 months shall be reckoned from January to

June and July to December in respect of wind power projects. The aforesaid decision of the State Commission is without jurisdiction for the reason that the State Commission does not have the power to modify executed fixed term contracts.

7.5 The Respondent ESCOMs and the State Commission have asserted that the WB Agreements, signed by the Appellants, itself contains provisions for modification of contract and refers Article 13.6, 1 and 5 of the WB Agreements. The said assertion is untenable and a clear after-thought because, firstly, neither the petitions filed by the ESCOMs and the Public Notices issued pursuant thereto invoked the said provisions of the WB Agreement, nor has the State Commission, in the Impugned Order, invoked or relied upon the said provisions of the WB Agreement while amending or modifying the WB Agreements between the parties. Secondly, Article 13.6 of the WB Agreement is contrary to the settled principle of law that parties cannot confer jurisdiction where none exists. The same has also been specifically recognized by this Tribunal in Appeal No. 07 of 2009. The Act does not empower the State Commission to modify the terms of Banking as incorporated in executed contracts Thus, the parties cannot confer jurisdiction on the State Commission which it does not enjoy under the parent statute. Thirdly, Article 13.6 is also bad in law as it does not need consent of the parties to modify the contract/agreement between them. Lastly, even if it was assumed to be valid in law, the State Commission will have to make the amendment agreement specific and not by a generic order as the Impugned Order is. Further Articles 1 and 5 have no relevance in the present matter as is evident from the text of the said provisions.

7.6 The State Commission has nowhere in the Impugned Order mentioned under what provision of the law it has passed the said Order. Even in

the public notices dated 13.05.2017 and 28.06.2017 issued by the State Commission, no reference was made to Article 13.6 of the WB Agreements. Further, each WB Agreement, signed by the RE Generator, is project specific and cannot be amended without considering the unique features of the said project. The State Commission is now, before this Tribunal, belatedly trying to cover-up the aforementioned jurisdictional lacunae, which is otherwise fatal to the Impugned Order, by mentioning all possible provisions of law and/or agreement to defend the Impugned Order. The Respondents' contention that the Impugned Order has been passed under Article 13.6 of WB Agreements, has no merit and thus, should be dismissed.

7.7 Further, while the Impugned Order is liable to be set aside on the ground that it is without jurisdiction or in exercise of excess jurisdiction (i.e. ultra-vires the jurisdiction conferred upon it under the Act), it is also necessary to highlight the fact that the present Appellants cannot be put to any prejudice during the term of the WB Agreement. Once the WB Agreement has been executed between the parties, the State Commission cannot retake power to modify the terms of a contract unless the State Commission can establish that such power is explicitly vested in it under a statute/ regulation. The State Commission's power to regulate a generating company, which is delicensed, is extremely limited. Therefore, while interpreting the provisions of the Act, the contracts entered into by a generating company have to be allowed to be worked out. The State Commission's ability/ jurisdiction is limited to fixing of any tariff/ charges in exercise of powers under the statute in terms provided under Sections 62, 64 and 86(1)(a) and (b) of the Act. This power of the State Commission does not confer upon it jurisdiction

to modify other essential terms of the contract over which it does not have any regulatory/ statutory jurisdiction.

7.8 For the above argument, reference may be made to *India Thermal Power Ltd. v. State of MP and Ors.,* (2000) 3 SCC 379, wherein the Hon'ble Supreme Court, in para 11, held that merely because a contract has been entered into in exercise of an enacting power conferred by a statute by itself will not make the contract a 'statutory contract.' If entering into a contract is necessary in terms of the statute, only then the contract becomes a 'statutory contract.' The Hon'ble Supreme Court further noted that a contract may contain certain terms which are not statutory and have been incorporated by mutual agreement of the parties. Thus, it was noted that the contracts can be regarded as statutory only to the extent that they contain provisions regarding tariff and other statutory requirements.

7.9 The Banking is not a statutory right and the same has also been admitted to by the Respondents. The parent statute i.e. Electricity Act, 2003 does not provide for Banking. It has been provided by the State Commission to the Appellants and other RE Generators by way of orders that have since been enforced/ implemented by way of the WB Agreements, executed between RE Generators and ESCOMs. Thus, since Banking is not a statutory right, the State Commission cannot exercise jurisdiction under Article 13.6 of the WB Agreements for modification of Banking terms of WB Agreements.

B. <u>Non-Application of mind by the State Commission</u>

7.10 The Respondents assert that sufficient data was placed before the State Commission for it to pass the Impugned Order. However, the Respondents have failed to show *any* data submitted before the State

Commission showing adverse impact of Banking on the Respondent ESCOMs, let alone adverse impact significant enough to warrant any intervention by the State Commission in terms of the Impugned Order. Besides simply stating that sufficient data was placed on record before the State Commission, the Respondent ESCOMs do not make any reference to any data or analysis of losses that were being caused to them on basis of which the Impugned Order was passed reducing the annual banking period to 6 months.

7.11 The Respondents further contend that the Hon'ble Tribunal can consider the data placed before this Tribunal even if it was not placed before the Commission. In this context the Respondent places reliance on Supreme Court Judgment in *Rachakonda Narayana v. Ponthala Parvathamma* (2001) 8 SCC 173. The said judgment is not applicable in the present context, and is distinguishable on facts inasmuch as the said judgment states that appeal is continuation of the suit and that the Appellate Court can go into any question relating to rights of the parties. However, the said judgment did not deal with any fresh documentation being placed by the parties before the Appellate Court. In the present case, the Impugned Order is based on facts which were not supported by any analysis or information provided by the ESCOMs.

7.12 Further, despite no data/information being submitted by the ESCOMs supporting modification of Banking vide the Impugned Order, the State Commission deviated from its' previous orders dated 11.07.2008, 22.03.2013, 09.10.2013,04.07.2014 wherein it rejected the ESCOMs' request for modification of banking for want of information. However, it appears that the Commission was persuaded by extraneous considerations, which is recorded in pages 27 and 28 of the Impugned Order.

7.13 The price/tariff discovered through bids, which the State Commission is currently relying upon in the Impugned Order, relate to later projects, i.e. those which have been commissioned after the execution of the contracts providing banking facilities and as such, there are various other parameters which have resulted in lower tariffs for projects commissioned subsequently. While the State Commission could have considered modifying the banking facilities for such future projects, the State Commission could not have modified executed contracts on the basis of the aforesaid justification. The factors relied upon by the State Commission, being a future occurrence, have no nexus to the projects already commissioned and for which WB Agreements have been executed. This is fortified by the fact that these Agreements clearly provide that they shall remain valid for a period of 10 years from the date of their execution.

7.14 It is pertinent to note that since 2005, when banking was first introduced in the State of Karnataka for wind and mini-hydel projects, the State Commission has passed several orders rejecting the request of ESCOMs to modify the banking period on account of want of adequate data. In this context, reference may be made to the following orders passed by the State Commission- 11.07.2008 , 22.03.2013, 09.10.2013, 04.07.2014.

7.15 Further, the State Commission, while passing the Impugned Order, ignored the Respondent ESCOMs Reply, dated 11.08.2017, filed to the objections raised by the stakeholders during the public hearing dated 12.07.2017. In this Reply, the ESCOMs submitted that they had already filed Interlocutory Application before the State Commission seeking amendments to the main petition and limiting its prayer to *modification of banking period to three months for captive generators*. Thus, it is evident that the State Commission had a pre-conceived bias and was

determined to pass the Impugned Order beyond the relief being sought by ESCOMs.

C. Impact of Banking on the ESCOMs

7.16 The analysis brought out during proceedings, proves that the claims of ESCOMs of suffering financial losses due to Banking are unsubstantiated and incorrect. The Windy (High Wind) season is from May to September when maximum banking of electricity takes place. ESCOMS have claimed that they are incurring financial loss due to backing down of state thermal and central generating plants during high wind season spanning from May to September.

7.17 ESCOMs have also claimed that in order to supply to consumers the banked power in the months of January to March, they are purchasing expensive power in short term market at high rate and therefore incurring high financial cost. However, it is pertinent to mention that the variable energy tariff of backed down thermal power plants namely RTPS, BTPS and UTPS are highest in merit order, as can be seen from the BESCOM Tariff Order for FY 2017-18. **Hence, backing down of thermal plants during wind season of May to September is solely on account of commercial reasons and not attributable to excessive wind power getting banked,** as claimed by the ESCOMs. Thus, the ESCOMs have not been able to submit any data/information establishing any significant adverse impact of Banking facilities/arrangement as it stood prior to the Impugned Order.

D. Non-applicability of judgments cited by the Respondents

Apart from the aforesaid broad submissions, it is necessary to also distinguish a few of the judgments cited by the Respondents.

a. Gokak Power and Energy Ltd. v. KERC and Others; Appeal No. 29 of 2014

7.18 The Respondents have placed erroneous reliance on this judgment as it is not applicable for the projects of the Appellants. The said judgment Gokak Power deals with REC based projects which projects were to be treated as the conventional energy projects and as such were not entitled to the promotional measures such as the banking of energy, which are to be given to the renewable energy projects.; this fact has been duly noticed by the Tribunal.

7.19 The APTEL has specifically observed, at paras 17(b) and (c) of aforementioned judgment in the case of Gokak Power, that the renewable energy generators have the option of registering under the REC mechanism and once they have registered under the mechanism, they cannot expect the same benefit as those being offered other renewable generators. It is necessary to clarify that REC based projects are not entitled to any concessional benefits, such as concessional transmission charges, conditional banking, etc. In this context, reference may be made to the CERC (Terms and Conditions for recognition and issuance ofRenewable Energy Certificate for Renewable Energy Generation) Regulations, 2010. The reason for the aforesaid is that since REC projects work on a principle where the brown component of power was akin to conventional energy, while the green component was sold separately through the exchange. Hence, the said judgment is materially different from the presentfacts and as such, has no application.

b. Shree Sidhabali Steel v. State of Uttar Pradesh, reported in (2011) 3 SCC 193

7.20 The aforesaid judgment of the Hon'ble Supreme Court relates to exercise of power conferred under Electricity Supply Act, 1948. Section

49 of the said 1948 Act empowered the State Electricity Board to issue notification for granting rebate. However, subsequently, by exercising power under section 24 of the UP Electricity Reforms Act, 1999, the said notification granting rebate was withdrawn. The exercise of powers to grant rebate and withdraw the same are legislative in nature. The Hon'ble Supreme Court, in paragraphs 36, 37 and 38 of the judgment, held that the power to issue a notification would also include the power to add, amend, vary or rescind the notification. The Hon'ble Supreme Court in this context relied upon section 21 of the General Clauses Act.

7.21 In the present case, admittedly there has been no exercise of any legislative powers. The Commission has passed a 'judicial order' under Section 86(1)(b) of EA 2003, which is now under challenge in appellate proceedings. Therefore, the principle settled by the Hon'ble Supreme Court in Shree Sidhabali Steel has no application to the present facts. More so, when PTC India Ltd. case holds the field. In the PTC judgment, the Constitutional Bench of the Hon'ble Supreme Court has unequivocally held that the Commission does not have the power to modify contracts "*across the boa*rd" by way of a judicial order. The impugned judgment order foul of the said principle of the Constitutional Bench.

7.22 Further, while the Sidhabali judgment holds that once a rebate is granted it can be withdrawn and need not continue in perpetuity, the rebate given therein was not made a part of an executed contract/agreement between the parties. In the present matter, the WB Agreements between the Respondents and the Appellants contain a specific provision being Article 11.1 which guarantees that the agreement will continue for a period of 10 years.

7.23 Finally, the Appellants and other Renewable Energy Generators invested in the State of Karnataka on account of the Orders (representation) of the State Commission and the terms agreed to by the relevant ESCOMs. The Appellants and other RE Generators have also entered into long term Power Sale Agreements, on the basis of WB Agreements signed with the ESCOMs, with open access consumers at negotiated tariff derived on the basis of capital investment made in the project in terms of WB Agreement. Therefore, it is humbly submitted that if the Impugned Order is not set aside by the Tribunal it would result in grave loss to the Appellants.

8. Learned counsel, Mr. Shridhar Prabhu, appearing for the Appellants In Appeal Nos. 271 of 2018, 287 of 2018, 288 of 2018, & 254 of 2018, 2018 has filed consolidated written submissions as under:-

8.1 The following grounds raised by Appellants have not been tenably countered by the Respondents:

Re: **Hostile Discrimination**

8.2 Because Section 86 of the Act provides for a promotion of renewable sources of energy by providing suitable measures for connecting with the Grid. The impugned order, as well as earlier orders, including the 2014 order, was passed by the 1st Respondent Commission deriving powers under the said Section 86 (1) (e) of the Electricity Act, 2003, which generally speaks about the promotion to renewables.

8.3 When the Act speaks of the generic promotion of all forms of renewable sources including co-generation a sub categorization from among the renewable cannot be permitted. The Appellants in this regard begs to place reliance on the judgment delivered by the Constitution Bench of the Hon'ble Supreme Court of India in the case of **E.V.Chinnaiah Vs.**

State of Andhra Pradesh and others (AIR 2005 SCC 162), wherein, the Hon'ble Supreme Court has held that a homogeneous Group cannot be sub classified by any executive action or legislative enactment by interfering, disturbing, re-arranging, re-grouping or re-classification.

8.4 All renewable energy sources form a homogeneous group that cannot be sub-classified for the purpose of providing open access/wheeling and banking. Based on either the sources, the date of commissioning location and the date of execution of wheeling and banking, all such distinctions are violative and *ultra vires* of Section 86 (1) (e) of the Act.

8.5 Because the KERC's public hearing notice in O.P. Nos. 90, 100, 104/2016 and 47/2017 specifically stated that they are in respect of seeking modifications in the Banking facility to Wind Energy Power Projects. Even the original petition filed by BESCOM was in respect of Wind Energy Projects only, as evident from Ground No.13, 14, 15, 16 and 17 in the Original Petition that formed the purported basis for the Impugned Order. There was no occasion for the Appellant even remotely suspect that public hearing notice dated 28th July, 2017 will have any bearing on the Appellant's project with regard to the Banking facility or charges.

8.6 Because as per clause 12.6 of the Wheeling and Banking Agreement any modifications or alterations to the Wheeling and Banking Agreement can be done only by giving an opportunity of hearing to all the parties. In the present case, since the public hearing notice itself was in relation to Wind Power Projects and the petitions filed also were specifically with regard to the Wind Power Projects, it cannot be said that the Appellants got the opportunity of hearing. Thus, on this ground alone the impugned order is liable to be set aside.

8.7 Because the 9th January, 2018 impugned order, at best or at worse, is applicable to the wind power projects and not to the Appellants. In fact, after the impugned order was passed by KERC a discussion paper was issued by KERC titled "***Wheeling and Banking charges for Renewable Power Projects"***. In this discussion paper, there was a clear mention that this discussion paper is in respect of Wheeling and Banking facility for all Renewable Power Projects, as against the public hearing notice dated 28th June, 2017 which was in relation to only Wind Power Projects.

8.8 Because when the public hearing notice dated 28th June, 2017 was issued, the petitions filed by the DISCOMs were already on record. In fact, these petitions were filed in 2016. This means that all data that forms the basis for filing of these petitions is that of FY-16. In fact, the petitions filed by BESCOM very clearly states this fact in para 3 of the petition. The KERC has already passed tariff order 2017 which relates to the revenue of annual performance for FY-16. Once this tariff order is passed, the Commission is estopped from altering the same in January 2018 impugned order. Therefore, the whole exercise is marred and vitiated.

Re: **Ambiguity on the Petition – Entire Proceedings vitiated**

8.9 Because the petitions displayed by the Commission contained a lot of track changes. Hence, there was lot of confusion on whether the said petitions were the final petition or not. In any case, the Commission could not have expected any solar sector stake-holders to reply to the petitions pertaining to Wind Power Projects.

8.10 Because BESCOM in OP No.90/2016 is said to have filed a memo requesting for permission to make certain amendments to the petition. However, these are not published by KERC either in the website or elsewhere.

8.11 Because OP No.130/2017 was filed much later than other petitions, in which, public consultations had commenced. However, it was not felt necessary to have a separate public consultation in respect of such petition.

Re: Individual Notices not issued – Violation of KERC (General and Conduct of Proceedings) Regulations, 2000.

8.12 In case of issuance of a *quasi-judicial* order, the compliance with the procedural provisions on the part of the Respondent KERC of issuing only a Public Notice and inviting Objections and exercise meant to be undertaken only for the usual Tariff determination was not a sufficient compliance with the principles of natural justice in the present case. The KERC (Tariff) Regulations, 2000 provide for this procedure of Public Notice etc. is not in conflict with the KERC (General and Conduct of Proceedings) Regulations, 2000. The definition of 'proceedings' under these General and Conduct of Proceedings Regulations, 2000 given in Regulation 2(1)(h) of the said Regulation clearly stipulates that 'proceedings' shall include proceedings of all nature that the Commission may hold in the discharge of its functions under the Act and Regulation 24 of these Regulations provides for 'Service of notices and processes issued by the Commission' by any of the modes including "by hand delivery/courier/Certificate of Posting/Registered Post Acknowledgement due/Facsimile transmission/e-mail and or by a publication in Newspapers. The object of providing for these Regulations is clear, namely, to comply with the principles of natural

justice and give an opportunity of hearing to the affected parties. Therefore, in the present case, the Respondent KERC erred in not giving notice and opportunity of hearing to all the individually affected parties viz. power generating companies, like the present petitioner.

Re: KPTCL, Nodal Agency and Key signatory to WBA and collector of all charges, not involved

8.13 Because KPTCL Limited, Nodal Agency for the facilitation of Wheeling and Banking facility as per KERC's Open Access Regulations, is alone the competent authority to make any changes or alterations with regard to the Wheeling and Banking. However, at no stage of the proceedings of KERC, nodal agency was involved. In fact, KPTCL is a party to all the Wheeling and Banking Agreements. The charges collected under the Wheeling and Banking Agreements are deposited to the account of KPTCL. If at all someone has to raise an issue as to financial loss or inconvenience, it is KPTCL and NOT the Distribution Companies.

Re: Violation of section 62 Electricity Act, 2003 – Expenses covered in ARR / Retail Supply Tariff Order

8.14 Because as per Section 62 (4) of the Act, no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year except in respect of any charges expressly permitted under the terms of any fuel surcharge formula, as may be specified. In the present case, on 14th April, 2017 the retail supply tariff order was passed by the Commission determining all applicable Open access charges. In fact, in the tariff petition Respondent – BESCOM has mentioned all the Annual Revenue Requirements and Expected Revenue on Charges (ARR & ERC) which is passed on to the consumers/Open Access Customers by way of retail supply tariff order. The tariff petitions are

filed normally in November, 2017. Therefore, the latest ARR & ERC is reflected in these petitions. Therefore, the petitions filed in 2016 and 2017 – all prior to the tariff petitions filed in November, 2017- have no validity in the eyes of law.

8.15 Because in the petitions filed by the Respondent – DISCOMs before KERC contained no data or documentation. Even if the Appellants were to suspect that these petitions related to the Solar Projects, there was no occasion for the Appellants to counter any of the petition averments because the petition contained no data at all.

Re: Karnataka Electricity Reforms Act, 1999 violated

8.16 Because as per Section 27 (9) the Karnataka Electricity Reform Act, 1999, each supply licensee shall publish in a daily newspaper having circulation in the area of supply and make available to the public on request, the tariff for supply of electricity within the area of supply and such tariff shall take effect only after seven days from the date of such publication. The present change in the Banking Period and TOD being applicable has not been notified by the licensees.

Re: **No inherent powers**

8.17 Because whenever changes are to be made to Wheeling and Banking Agreements it has to commence with a Petition and culminate with an order in that Petition as in the case of order dated 01st July, 2010. Unlike this, and in violation of its own regulations, the 1st Respondent / KERC has passed an *ex parte* order and violated principles of natural justice.

8.18 The 1st Respondent has no inherent powers to effect the mid-course revision to its orders as held by the Hon'ble Supreme Court of India from time to time, including in the case of of **GUVNL vs Solar Semi-**

Conductors Power Company Pvt Ltd reported in (2017) 16 SCC 498.

Re: Concluded Contract and the orders

8.19 Because the Wheeling and Banking Agreement signed between the Appellant and the utilities is approved by the 1st Respondent. It is also in the format approved by the 1st Respondent. It is clearly mentioned in the Agreement that any amendment to this Agreement have to be with mutual consent of the parties. Further, it is mentioned in the Agreement that the 1st Respondent shall be entitled to modify, alter the conditions of the Agreement at the instance of the parties after giving an opportunity of hearing to the parties.

Re: Promissory Estoppel - Legitimate Expectations

8.20 Because the Appellant's Mini Hydel Project was designed by Appellant to cater power requirements at manufacturing units throughout the year. All the energy generated at the project is utilized for the consumers for their use on the basis of "*water year*". Hence six-monthly banking will deficit the basic purpose of design of this project. Further, if the balance energy banked at December end is made ZERO, then, the Auxiliary consumption at the generating plant, during January to June, shall be charged at 1.5 times the Normal Tariff (Rs. 6.95/kwh). All this could have been represented to the 1st Respondent. However, the Appellant was denied of the opportunity of hearing and natural justice is violated.

Re: **APTEL Orders violated**

8.21 Because the Appellant would have espoused its cause in defending the need for a benign Wheeling and Banking facility which is to be held public at the very heart of the renewable energy sources such as wind,

as held by the Appellate Tribunal for Electricity (APTEL) order dated 21st September, 2011 in Appeal Nos. 53, 94 and 95/2010, the Banking facility is essential for the wind generators. Therefore, the annual banking facility should be continued. As per the definition of banking, the energy banked is the residual energy remaining at the end of wind year and not the gross energy generated. The residual energy is purchased by the ESCOMs at 85% of the Generic Tariff.

8.22 Because KERC itself notes that Banking facility is not a commercial benefit but an essential support for renewable energy generators as held by the Appellate Tribunal for Electricity in its Order dated 21st September, 2011 in Appeal Nos. 53, 94 and 95/2010. However, the impugned order does not assign any reason for deferring with the APTEL decision which is binding on KERC

Re: Violation of Supreme Court Orders – Rehearing Warranted

8.23 Because even according to the 1st Respondent the public hearing in the matter was conducted sometimes on 12th July, 2017. However, the Order is passed on 09th January, 2018, after a lapse of nearly five months.

Re: **Rights under the Agreement cannot be altered by Regulator**

8.24 The rights of the Appellants accrue from the terms of the Wheeling and Banking Agreement. The Wheeling charges and the Banking charges along with the period of Banking facility is all pre-agreed under the terms of the Wheeling and Banking Agreement. Further, as per the terms of the Wheeling and Banking Agreement no amendment can be made to the terms of the Agreement except by a written instrument duly executed by both the parties. However, KERC shall be entitled to modify/alter the conditions of the Agreement at the instance of either of the parties (in *suo moto*), after giving an opportunity of hearing to both

the parties. However, in the present case the terms of the Wheeling and Banking Agreement and the charges contained therein have been altered and amended *suo moto.*

Re: No cause / public interest shown for change

8.25 Because the rights agreed by way of agreement cannot be snatched away by a *suo moto* quasi-judicial order. The commercial loss if any for regulated entities such as the Respondent Companies can always be rendered by the regulated entity such as the Respondent is subject to pass-through. In other words, all charges borne by the Distribution Licensee/Transmission Licensee will be borne by its consumers. In fact, there is no iota of evidence produced by the Respondent Companies to show that there is any loss due to provision of Wheeling and Banking facility.

8.26 Because Wheeling and Banking facility has been extended in Karnataka ever since 1990 - ever since the first renewable energy project was established. When the charges were firmed up for five years vide 2014 Order, all issues, including the public interest, financial conditions of Respondents were considered. The Respondents have not shown how the so called "overwhelming public interest" which was absent in 2014 suddenly surfaced in 2018.

Re: How Respondents Arguments are flawed – Rejoinder Arguments on behalf of the Appellant

A. *Shree Sidhbali Steels Limited Vs. State of Uttar Pradesh* distinguished.

8.27 It is trite law that section 21 of the General Clauses Act has no application to quasi-judicial orders. This aspect has been amply clarified by the Apex Court in one of the recent rulings: ***Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd. vs. Commissioner of Income Tax, Gwalior*** (**AIR 2018 SC 3560**:**(2018) 4**

SCC 494]. The Apex Court in *SIdbhali* case was dealing with the situation where the tariff determined under the Electricity (Supply) Act, 1948 was changed under the provisions of UP Electricity Reforms Act, 1999. Under Section 49 (3) of the 1948 Act a clear provision was made for area-wise differential tariff with a view to ensure co-ordinated development of backward areas. However, under the 1999 Act there was no such provisions.The present case deals with situation where the Wheeling and Banking charges were fixed for 5 years under the 2003 Act but were changed before the expiry of the Control Period without assigning any reason, purportedly under the same Act. Therefore, there is no similarity or binding ratio flowing from the case relied upon by the Respondents.

B. Gujarat Urja Vikas Nigam Limited vs. Tarini Infrastructure Ltd. and Ors. (*2016) 8 SCC 743- *in perspective:

The Respondents' reliance on the aforesaid case is completely misplaced in view of the fact that Karnataka Commission is governed by its own regulations as is evident from the relevant paragraph (Para-18) contained in the very same judgement.

C. Transmission Corporation of Andhra Pradesh Ltd. and Ors. vs. Sai Renewable Power Pvt. Ltd. and Ors– In perspective

The aforesaid case relied upon by the Respondents supports the case of the Appellant, in view of the paragraph Nos. 49 & 50 of the judgement.

D. Financial Data supplied by the Respondents is misleading - <u>Techno-economic Viability</u>

a. The impugned order does not offer any justification for curtailing the banking period from one year to 6 months. A plain perusal of

the data on the energy wheeled by BESCOM for the month of November, 2018 as against the total consumption from all these sources will go to show that it is virtually impossible for any consumer to consume the energy before the expiry of wind/water year. About 80% to 90% of the total generation from wind projects happens during 4 to 5 months during the year and therefore it is virtually impossible for any consumer to exhaust the consumption in six (6) months' period. It is precisely, therefore, from the very inception, the Banking facility was extended to the Appellants and all other projects, on annual basis. Government of Karnataka in its Government Order mentions the Banking facility to be on annual basis with this in intent.

b. The Respondent ESCOMs had not submitted any data much less any prudent data to substantiate their contentions. It is for the first time, that too, by way of a written statement, that, the Respondent Distribution Companies are providing some data before this Tribunal. This data too is also selective for a few projects of a few Appellants herein. All these cannot be looked into in appeal. The task of an appellate Court is only to examine the legal veracity of the impugned order and not to re-hear the entire matter on factual issues, as if it were the Court of the original instance.

c. The Respondent Companies are not authors of the impugned order and they cannot supply logic to the impugned order by supplying some new and subjective data on select projects to justify the Impugned Order on newfound grounds.

d. In sum, all techno commercial data are to be filed along with the petition before the KERC and not before this Tribunal in the present proceedings.

9. Learned counsel Ms. Pritha Srikumar Iyer, appearing for the Appellant in Appeal No.207 of 2018 has filed the written submissions as follows:-

9.1 The Appellant fully adopts the submissions made on behalf of the Appellants in the other matters in the present batch of matters. The further submissions on behalf of the Appellant herein is set out below.

9.2 At the time of execution of these WBAs, annual banking facility was provided as reflected in Orders of the KERC dated 11.07.2008 and 04.07.2014. Each of these WBAs provides for banking of energy on a Wind Year to Wind Year basis without restriction on the time of drawal of banked energy. All WBAs stipulate that they may be amended by the KERC only after giving an opportunity of hearing to both parties (Clause 13.6/12.6).

9.3 Modification of the scheme of wheeling and banking cannot be undertaken by the KERC in exercise of its adjudicatory powers, as was done in this case. [*PTC India Ltd.* v. *CERC,* (2010) 4 SCC 603 (Para 58, 66)]. The Impugned Order is not an exercise of regulatory powers – there has been no compliance with Sections 181(3) and 182 of the Electricity Act, 2003 read with the Electricity (Procedure for Previous Publication) Rules, 2005. The WBAs with the Appellant could not be modified without following procedure prescribed thereunder [*Vemagiri Power Generation Limited vs. Transmission Corporation of A.P. Ltd.,*2007 ELR (APTEL) 1580 (Paras 14, 17, 18, 22, 23)].

9.4 The public notice is not valid notice as:

a. The Appellant ought to have been made a party to the proceedings and issued notice to file reply;

b. Under the KERC (General & Conduct of Proceedings) Regulations, 2000, service of notice by publication in newspaper is contemplated only when it is not reasonably practicable to serve a person personally by hand delivery, facsimile, registered post etc.;

c. In terms of Regulation 26(1) of the KERC Conduct of Proceedings Regulations, a public notice inviting objections is to be issued in addition to the specific notices calling for replies. The participation of such members of the public seeking to file objections in the proceedings is up to the discretion of the Ld. KERC. This is evident from the text of Regulation 26 of the KERC Conduct of Proceedings Regulations:

9.5 Violation of promissory estoppel and the doctrine of legitimate expectation

a. Small Hydro Power Developers' Association vs. Transmission Corporation of A.P. Ltd., (2008) APTEL 58 (Para 34, 41, 42, 46, 48 – 56, 64 – 69, 71 – 82);
b. TNEB vs. TNERC, Judgment of Hon'ble APTEL dt. 21.09.2011 in Appeal No.53 of 2010 (Para 27(d), p.31);
*c. GUVNL vs. GERC***,**Judgment of Hon'ble APTEL dt. 22.08.2014 in Appeal No. 279 of 2013 (Paras 71 – 74, 88 – 92, 99, 100, 117 – 119, 123 – 126, 154 – 168);
d. *Mahabir Vegetable Oils Pvt. Ltd. vs. State of Haryana,* (2006) 3 SCC 620 (Para 25 – 38);
e. *Gujarat State Financial Corporation vs. Lotus Hotels Pvt. Ltd.*, (1983) 3 SCC 379 (Paras 9 – 13);
f. *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh*, AIR 1979 SC 621 (Para 24);
g. *Commissioner of Income Tax, UP vs. M/s Shah Sadiq*,1987 3 SCC 516 (Paras 13 – 15).

9.5 Violation of the Electricity Act, 2003 and the National Electricity Policy, 2005

a. *RVK Energy Pvt. Ltd.* v. *Central Power Distribution Company of Andhra Pradesh,* 2007 ELR (APTEL) 1222 (Para 27, 28, 33);
b. *Energy Watchdog* v. *CERC,* (2017) 14 SCC 80 (Para 20).

9.6 The Impugned Order suffers from non-application of mind.

9.7 The Impugned Order is not a reasoned order

a. *Mekaster Trading Corporation vs. UoI,* 2003 (71) DRJ 376 (Page 389 – 393);
b. *Kranti Associated Pvt. Ltd. vs. Masood Ahmed Khan*, (2010) 9 SCC 496 (Para 47).

9.8 The Impugned Order is non-reasoned/non-speaking

10. The learned counsel, Mr. Anand K. Ganesan, appearing for the Respondent No.1/ State Commission has filed the common written submissions in Appeal Nos. 42 of 2018 & batch as follows:-

10.1 The primary issues raised by the Appellants in the present appeal are as under:

(a) The State Commission has no power to reopen concluded contracts, which provides for banking period of one year. Vested rights have been affected by the State Commission which is beyond its jurisdiction.

(b) The State Commission has reviewed its previous orders, which cannot be done. Review can only be done in case of error apparent on the face of the record.

(c) Res-judicata is applicable in the present case and the State Commission could not have revised the banking period.

(d) The principle of promissory estoppel is applicable in the present case and the State Commission could not have revised the banking period.

(e) The State Commission has retrospectively amended the banking period, which is impermissible.

(f) The proceeding before the State Commission was only in relation to wind generators, and the State Commission has proceeded to revise the banking period for solar developers also.

(g) There was not sufficient data available before the State Commission warranting the revision in the banking period.

10.2 The banking facility is the facility available to the renewable energy generators as a promotional measure under Section 86(1)(e) of the Electricity Act. The banking facility enables the renewable generators to generate and inject electricity into the grid during a particular period of time and consume it at a different point of time. Since electricity cannot be stored, the electricity when generated by the renewable generators is absorbed by the distribution licensees and when the electricity is required to be consumed, the same is supplied by the distribution licensees. The above facility is not available to conventional energy sources, but is only a promotional measure granted to renewable energy generators.

10.3 The banking facility is primarily based on the requirement to promote renewable energy generators. The banking charges and other terms and conditions are not determined as a compensatory charge to the expenses incurred by the distribution licensees in providing banking charges, but considering the need to promote renewable energy generators the State.

10.4 The State Commission had previously permitted the banking facility on a yearly basis. By the impugned order, the banking facility has been

reduced from yearly banking facility to 6 months of banking facility. The State Commission has applied the above decision to all renewable energy generators, vide the impugned order.

10.5 Since the proceedings on the issue being considered by the State Commission would affect all the renewable energy generators in the state, the State Commission issued public notice in accordance with its Conduct of Proceedings Regulations. Considerable representations were received from various stakeholders. The State Commission also held public hearings in the matter and thereafter passed the impugned order. It is incorrect to contend that there was either no notice or insufficient notice and the impugned order is vitiated for violation of the principles of natural justice.

10.6 Though not specifically raised as a ground of appeal, it is submitted that the Conduct of Proceedings Regulations, 2000, of the State Commission provides for service by means of publication. In this regard, Regulation 23 and 24 of the Conduct of Business Regulations, inter-alia, provides as under:

> ***"23. Presentation and Admission of Petitions***
> *….*
> *(5) If the Commission admits the Petition, it may give such orders and directions as may be deemed necessary, for service of notices to the respondent and other affected or interested parties in the Petition for the filing of replies and rejoinders in opposition or in support of the Petition in such form and manner as the Commission may prescribe.*
>
> ***24. Services of notices and processes issued by the Commission***

(1) *Any notice or process issued by the Commission may be any one or more of the following modes as may be directed by the Commission":*

a) by hand delivery/courier;

b) under a certificate of posting;

c)by registered post acknowledgment due;

d)by facsimile transmission or electronic mail (e-mail)

e) by publication in newspaper in cases where the Commission is satisfied that it is not reasonably practicable to serve the notices, processes, etc. on any person in the manner mentioned above;

f) in any other manner as may be considered appropriate by the Commission. The Commission shall be entitled to decide in each case the person (s) who shall bear the cost of such service and publications.

….

(5) Where any Petition is required to be advertised it shall be advertised within such time as the Commission may direct and, unless otherwise directed by the Commission, in one issue each of a daily newspaper in English language and two daily newspapers in Kannada language having circulation in the area specified by the Commission*."*

10.7 The State Commission has conducted a detailed hearing of the matter, heard and considered the submissions of all the parties, which has also been recorded by the State Commission in the Impugned Order. It is only then that the State Commission has proceeded to decide upon the present issue of reduction of banking period.

10.8 In matters such as these where there are large number of renewable energy developers, the issues raised also affect the consumers of

renewable energy projects taking supply on open access, the order may affect future or prospective consumers or developers, the only appropriate matter of service is by means of publication, wherein representations and suggestions are invited from the public at large and any stake-holder is entitled to file its submissions and argue the matter before the State Commission.

10.9 In the above circumstances, it is submitted that adequate notice was given and the matter was duly heard by the State Commission before the impugned order was passed. In the above background, the submissions on behalf of the State Commission on the specific issues raised by the Appellants are as under:

A. The state commission has no power to reopen concluded contracts, which provides for banking period of one year. vested rights have been affected by the state commission which is beyond its jurisdiction

10.10 The contention of the Appellants on the power of the State Commission to reopen contracts between the parties is both incorrect in law and also in the facts and circumstances of the present case. The agreement executed by the parties itself provides for variation on the terms and conditions of the agreement by the State Commission. In this regard article 13.6 of the agreement, inter-Alia, reads as under:

> *"13.6* ***Amendments:*** *This Agreement shall not be amended, changed, altered, or modified except by a written instrument duly executed by an authorized representative of both Parties.* ***However, KERC shall be entitled to modify/alter the conditions of this contract at the instance of either of the parties after giving an opportunity of hearing to both the parties.****"*

10.11 Apart from the above, the wheeling and banking agreements between the parties do not decide on the period of wheeling and other terms and conditions relating to banking period in tariff thereof, but only incorporate the terms of the orders passed by the State Commission. Therefore, when the agreement only incorporates what has been decided by the State Commission, it is always open to the State Commission to revise the terms and conditions of banking, which would automatically get incorporated in the agreement between the parties.

10.12 This issue has been settled by the Hon'ble Supreme Court in the case of Gujarat UrjaVikas Nigam limited v. Tarini Infrastructure Limited, (2016) 8 SCC 743 wherein it has been held, inter alia, as under:

> *"**12.** While Section 61 of the Act lays down the principles for determination of tariff, Section 62 of the Act deals with different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paras 36 and 64 of A.P. Transco v. Sai Renewable Power (P) Ltd. [A.P. Transco v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34] This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open bidding (Section 63).* ***In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff***

> ***agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.***
>
> *…*
>
> ***16. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 year) as has been envisaged by Clause 4.6 of PPA in the case of Junagadh.*** *That apart, modification of the tariff on account of air-cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory.*
>
> *…*
>
> *[Emphasis Supplied]*

10.13 The above decision applies on all fours to the present case. When the original banking terms and conditions were determined by the State Commission and were incorporated in the agreement between the parties, it is always open to the State Commission to determine from time to time the banking terms and conditions which would automatically get incorporated in the agreement between the parties, without the requirement of a specific clause in the agreement for such incorporation.

10.14 The only condition for the exercise of power by the State Commission in terms of the above clause is that an opportunity of hearing to be provided to both the parties. This has been done and it is not even the case of the Appellants that they were not heard by the State Commission. Further the petition of the distribution licensees was for amendment of the banking period and therefore all the renewable

energy generators were duly put to notice on the precise issue which was being considered by the State Commission.

10.15 The contention of the Appellants that the State Commission has no power to amend the banking period as it would amount to reopening the agreements entered into between the parties is misconceived. The only issue is whether the power has been correctly exercised by the State Commission or not. The issue is not of whether the State Commission has the power.

10.16 Further, the contention of the Appellants that the State Commission cannot derive powers under the provisions of the agreement is also not correct. The agreement is subject to approval by the State Commission. In fact, the terms and conditions of the agreement have been notified by the State Commission, with the specific condition that the said terms and conditions can be amended by the state Commission.

10.17 The Hon'ble Supreme Court in the case of **A.P Transco v Sai Renewable Power (P) Ltd. (2011) 11 SCC 34**, considering the case where the agreement itself provides for revision of tariff from time to time, has specifically upheld the powers of the State Commission for such revision not only under the provisions of the statutory enactment, but also under the provisions of the agreement entered into between the parties.

10.18 In the circumstances mentioned above, the contentions of the Appellants on the powers of the State Commission to revise the banking period, which would have the effect of revising the terms as incorporated in the agreement between the parties is erroneous and is liable to be rejected.

B. The State Commission has reviewed its previous orders, which cannot be done. review can only be done in case of error apparent on the face of the record.

C. Res-judicata is applicable in the present case and the state commission could not have revised the banking period.

D. The principle of promissory estoppel is applicable in the present case and the state commission could not have revised the banking period.

10.19 The above propositions put forth by the Appellants are erroneous and have no application in the present case. The State Commission by the impugned order has not reviewed and set aside its previous orders wherein the banking terms and conditions are determined, but has only revise the banking terms and conditions for the future.

10.20 Review of an order would amount to finding an error in a particular order, setting it aside and passing a fresh order which would then relate back to the date of the original order. In such cases, the jurisdiction is circumscribed by the provisions of Order 47 Rule 1 of the Civil Procedure Code.

10.21 The State Commission as a regulatory authority is always entitled to revise the tariff and other terms and conditions from time to time, considering the future developments in the matter. Revision of tariff is not the same as the review of tariff order. The principles of res judicata etc. also have no application in such cases.

10.22 This principle has been settled by the Hon'ble Supreme Court in the case of **UP Power Corporation Limitedv NTPC & Ors. (2009) 6 SCC 235,** wherein it has been held as under:

"34. While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission strictosensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof. Its jurisdiction, in that sense, as submitted by Mr. Gupta, for the aforementioned purposes would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto.

35.Revision of a tariff must be distinguished from review of a tariff order. Whereas Regulation 92 of the 1999 Regulations provides for a 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.

36. Having regard to the nature of jurisdiction of the Central Commission in a case of this nature, we are of the opinion that even principles of res judicata will have no application.

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.

[Emphasis Supplied]

10.23 In the circumstances, the contentions of the Appellants on the issue of review petition being maintainable, res-judicata being applicable etc. are incorrect. The petition was not a review petition, nor was it considered as a review petition. The Petition was only for revising the terms and conditions of banking, which the State Commission is entitled to do.

10.24 The further contention of the Appellants on the principle of applicability of promissory estoppel has no application. Firstly, there is no prohibition for the State Commission to revise the terms and conditions in relation

to banking of electricity. The State Commission, which has prescribed the terms and conditions for banking, it is always within the powers of the State Commission to revise the terms and conditions for banking from time to time. This has also been upheld by the Hon'ble Supreme Court in the case of ***Tarini Infrastructure***.

10.25 Further, as mentioned above, the PPA itself provides for the right of the State Commission to revise the terms from time to time. Therefore, there was no question of any promise that the terms of remained the same for estoppel to apply. The contract itself provides for the revision, the question of estoppel does not apply. In this regard, the decision of the Hon'ble Supreme Court in the case of **A.P Transco v Sai Renewable Power (P) Ltd. (2011) 11 SCC 34**,para 88 is relevant.

10.26 In the circumstances mentioned above, the contentions of the Appellant on the issue of review of the tariff order, estoppel, res judicata etc. are misconceived and are liable to be rejected.

E. The state commission has retrospectively amended the banking period, which is impermissible.

10.27 It is the case of the Appellants that the State Commission by way of the Impugned Order has sought to change the WBA and apply the changes retrospectively. This contention is incorrect. The impugned order has been applied by the State Commission from the date of the order and not for the period prior to the impugned order. This has been specifically held by the State Commission as under:

> *"(4) The revision of banking period and restriction on drawl of the banked energy, as indicated above,* ***shall be applicable to all RE projects under Non-REC route wheeling energy under an existing Wheeling and Banking Agreement, from the date of the new norms of the banking facility coming into forc****e;*
> *and*

(5) The existing Wheeling and Banking Agreement format shall be amended accordingly."

[Emphasis Supplied]

10.28 The contentions of the Appellants appear to be that since the Agreements were entered into prior to the date of the order: the said agreement being affected, the impugned order would have retrospective effect and therefore is bad in law. This contention is also misconceived. Merely because the Impugned Order affects contracts already in place, the same would not result in the impugned order having retrospective applicability. The applicability of the impugned order is only for the period after the passing of the impugned order and not for the period prior thereto.

10.29 It is a settled principle of law that the when a particular provision operates in future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. In this regard, the following decisions of the Hon'ble Supreme Court are relevant:

A. <u>TrimbakDamodharRaipurkar v AssaramHiramanPatil, (1962) Supp (1) SCR 700</u>

"*9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included.*

B. <u>N.K. Bajpai v Union of India, (2012) 4 SCC 653</u>

60.One must clearly understand a distinction between a law being enforced retrospectively and a law that operates retroactively. The restriction in the present case is a clear example where the right to practise before a limited forum is being taken away in praesenti while leaving all other forums open for practise by the Appellants. Though such a restriction may have the effect of relating back to a date prior to the praesenti. In that sense, the law strictosensu is not

retrospective, but would be retroactive. It is not for the Court to interfere with the implementation of a restriction, which is otherwise valid in law, only on the ground that it has the effect of restricting the rights of the people who attain that status prior to the introduction of the restriction. It is certainly not a case of settled or vested rights, which are incapable of being interfered with. It is a settled canon of law that the rights are subject to restrictions and the restrictions, if reasonable, are subject to judicial review of a very limited scope.

61. We do not find any reason to accept the submission that enforcement of the restriction retroactively would be impermissible, particularly in the facts and circumstances of the present case.

[Emphasis Supplied]

10.30 In view of the above, there is no merit in the contentions of the Appellants that impugned order has retrospective application and therefore ought to be set aside.

F. The proceedings before the State Commission was only in relation to wind generators, and the state commission has proceeded to revise the banking period for solar developers also.

10.31 The submissions of the Appellants that the proceedings before the State Commission was only in relation to wind energy generators and not with solar generators is misconceived. The petition was filed by the distribution licensees seeking revision in the terms and conditions in relation to banking of power. The prayer made by the distribution licensees before the State Commission did not restrict to only wind generators.

10.32 Therefore it is not correct on the part of the Appellants to contend that other renewable generators apart from wind should not be covered by the impugned order.

G. There was insufficient data before the state commission for revision of banking period.

10.33 The contention on behalf of the Appellants is that the distribution licensees did not establish the per unit impact on the power purchase cost and the total effect on the revenue requirements for revision of the terms and conditions of banking. The impugned order of the State Commission does not determine the tariff for the distribution licensees or otherwise the tariff applicable to the renewable energy generators. The State Commission has only revised the banking terms and conditions, which has been provided as a promotional measure to the renewable energy generators.

10.34 If not for the promotional measure under Section 86(1)(e) of the Electricity Act, 2003, the renewable generators would not be entitled to the banking facility. No such banking facilities are given to conventional energy generators. The State Commission in the impugned order has gone into this issue of the promotional measure, the historical reasons for the renewable energy generators being given the banking facility for one year considering the high cost of generation and a substantial change that has occurred by way of reduced procurement cost from renewable energy generators. In this regard the State Commission has noted the following :

(a) The annual banking facility was continued previously including the order dated 04/07/2014 as a promotional measure. One of the main reasons was, the high cost of generation of renewable energy compared to conventional plants which discouraged the distribution licensee to purchase renewable power.

(b) The renewable energy sector has undergone a substantial change since 2014. Technology has advanced, there have been rapid capacity additions, competition has increased, financing costs have become low, capital cost is reduced etc. which has resulted in substantial fall of renewable energy tariff.

(c) The prices discovered through bids from wind and solar projects in the country is now below Rs. 3 per unit, which is considerably lower than the cost of generation from new conventional power plants as of today.

(d) The wind and solar plants are now in a position to compete with conventional power plants in terms of tariff.

(e) The new National Tariff Policy, 2016 also provides for future procurement of renewable energy by means of a competitive bidding rather than promotional tariff.

(f) The wheeling charges of 5% and banking charges of 2% which were earlier given as promotional measures do not even compensate the current technical losses in the system which is of about 13%.

(g) In the above circumstances and considering the developments till date, it would not be in public interest to continue the same facility of annual banking, concessional wheeling and banking charges.

10.35 The above developments as referred by the State Commission cannot be disputed. The State Commission has also held that banking facility is not a vested right, but only a promotional measure and it is not open to the generators to claim that the present banking facility should be continued without any modification. It is always open to the State

Commission to impose reasonable restrictions, as is being done in other renewable energy rich states.

10.36 The State Commission has also taken into account the banking facilities provided in other states, which were much stricter than what was prevalent in the state of Karnataka. In fact, the State of Gujarat which has substantial renewable energy capacity, banking facilities are provided only a monthly basis and that too divided between peak and normal hours.

10.37 In the States of Maharashtra, Andhra Pradesh, and Telangana, banking is available on a peak to peak basis which means that the consumption of power has to be at the time of peak generation. The State Commission has looked into these aspects, duly considered the circumstances in the State of Karnataka and then decided to reduce the banking period from 1 year to 6 months.

10.38 The State Commission was having a look at the banking facilities to be granted as a promotional measure to renewable energy sources considering the developments in the sector and the practice followed another states.

10.39 With regard to the difficulties in the operation of banking facility, the same is evident from the following submissions of the objectors themselves before the State Commission:

(a) 70% of the wind generation is during the period from May to September.

(b) The maximum demand for electricity is during the period from January to March of every year. Even as per the objectors, about

60% of the total energy banked is utilised during the months from January to March of every year.

(c) The changes in the banking system will financially burden the wind generators as the sale during the peak wind season would be at a low rate while the purchase of electricity from the grid during low wind season and peak demand season would be at a higher rate.

(d) The Appellants have advanced elaborate arguments with regard to the data furnished by the Respondents herein, in the Statement of Objections filed in support of the contention that the consumers of the State are being burdened by the annual banking scheme. Although an attempt was made to state that the introduction of 6-month banking will adversely affect the generators as they will, in reality, be forced to surrender a larger quantum of energy to the State, the said arguments are based wholly on projections and assumptions and are opposed to reality. In order to demonstrate the same, it would be necessary to peruse the actual generation data pertaining to the Appellants in the present Appeal for the years FY 2014-15 to FY 17-18. The actual generation data clearly demonstrates the fact that during the high wind/monsoon season, the generator has pumped in substantial quantum of energy, without wheeling the same to the OA consumers, which results in large quantum of energy having been banked with the ESCOM. During this season, the market rate of energy is normally very low due to lower demand and higher availability, especially from the RE sources. From the data it can be seen that the same banked energy has been utilised during Non-wind lean season i.e. during

summer season, resulting in drawal of high cost energy at the cost of ESCOMs/other paying consumers.

(e) In every single year, the Appellants herein have drawn the entire quantum of banked energy that it has accumulated over the year. Further, such drawal of energy has been mainly during the summer months. Therefore, the contention that the unutilized energy being surrendered is significant and as the same is being purchased at 85% of the generic tariff, it is more economical to the Respondents to purchase the said power at Rs 3.09/- per unit instead of purchasing power in the short term market at Rs 4.08 is untenable. This is the trend that is currently being followed by all renewable energy generators who are utilizing the facility of wheeling and banking.

(f) It would also be of relevance to note that the State of Karnataka requires Round the Clock power on a regular basis. The utilities cannot rely on unutilized banked energy alone to meet its power requirements. Such banked energy is also infirm power. Although at times, unutilized banked energy is available, at times, the same is not. Therefore, the contention that the State is purchasing short term power at higher cost to the detriment of its consumers, when lower costing power is being made available to it by the wheeling and banking customers is wholly untenable.

10.40 The State Commission has also noted the inherent contradiction in the case of the objectors that the reduction of banking period would result in losses as they would be required to procure power at higher cost during peak period, while at the same time, the contention was that the cost of purchase for the distribution licensee during the peak demand period would not be high.

10.41 The contention on the decision of the Hon'ble Tribunal in the case of ***Gokak Power***, Appeal No. 33 of 2012 dated 30/05/2014 being for REC generators not applicable on the Appellant is also not correct. The only reliance placed by the State Commission was on the recognition by the Tribunal that there are no Regulations providing for banking for a particular period. This is true for both REC and non-REC renewable generators.

10.42 The State Commission has discussed in detail the circumstances and developments since the last order in 2014, which warranted a reduction in the banking period. The situation in the other states have also been examined and the State Commission has decided to reduce the banking period from 1 year to 6 months. In the circumstances, the contentions of the Appellants are not correct.

11. The learned senior counsel, Mr. S.Naganand, appearing for the Respondent Nos. 2 to 6 has filed the common written submissions in Appeal Nos. 42 of 2018 & batch as follows:-

11.1 By way of the present Appeal, the Appellants herein are assailing the Order dated 09.01.2018 in O.P.No.90/2016 and connected matters by which the State Commission has modified its earlier Order dated 04.07.2014 in the matter of banking of energy for non-REC route renewable energy projects and has reduced the period within which to avail banked energy from one year to six months, by introducing Time of Day banking for the purpose of drawing energy and making the same effective with immediate effect. The Order impugned has been assailed by wind, solar and mini hydel generators primarily on the same grounds.

11.2 The Respondents herein have filed a detailed statement of objections in response to the contentions in the Appeals which may

be read as a part of these submissions. Some of the Appellants before this Tribunal have filed Written Submissions as well. A summary of arguments of the Respondents to the contentions urged by all the Appellants before this Tribunal in the present batch of cases, is as under:

A. State Commission has defeated the purpose of banking and ignored the mandate of Section 86(1)(e) which requires promotion of renewable energy sources:

11.3 The State Commission is a statutory body established under the provisions of the Electricity Act, 2003. The power of the State Commission flows from Section 86 of the Act. One of the primary functions of the State Commission is to regulate the Electricity Sector in the State. In order to do so, the State Commission is empowered to form regulations on all issues which are enumerated in Section 181 of the Act, in addition to being vested with the power to regulate/facilitate intra-state transmission and wheeling of energy and also determine tariff with regard to the said activities. In furtherance to the said statutory power vested in the State Commission by the Act and the KERC (Terms and Conditions for Open Access)Regulations 2004, it has passed the Order dated 11.7.2014 in the matter of wheeling and banking of energy in the State and subsequent orders pertaining to very same issue.

11.4 The situation that prevailed at the time when the Act came into effect and the present scenario is vastly different. Over the past 15 years the renewable energy sector has grown by leaps and bounds. In the year 2003, the total quantum of renewable energy being generated in Karnataka was 1034.10 Million Units constituting 3.31 % of the entire power generated in the State of Karnataka. However, at present the

total quantum of renewable energy generation in the State of Karnataka is 8670 MU amounting to 13.37 % of the entire power generation in the State of Karnataka. This trend will continue and a significant quantum of renewable energy will be added to the system in the coming two years. 1200 MW of solar energy from solar parks at Pavagada are being added to system between March-2019 and November -2019. In addition to this, an additional capacity is expected to be added by the 1 to 3 MW Farmer scheme, VGF scheme, talukwise scheme for Solar rooftop and also by wind mill Generation. The ESCOMs are expected to purchase 17000 MU of energy from Renewable energy sources for the year 2019-20 amounting to 24% of the total purchases. Therefore, the kind of promotion and encouragement that was required 15 years ago and now are vastly different. Due to the development of the renewable energy sector and technological advancements and the fact that renewable energy developers are now on par with mainstream power generators, the need for such promotion is reduced. Further, the fact that there has been such a vast increase in renewable energy generation in the State itself indicates that the State Commission has implemented sufficient initiatives to promote and encourage renewable energy development, which are no longer required.

11.5 The State Commission is also required by law to balance out the interests of the consumers of the State. Therefore, having regard to the same, the State Commission thought it appropriate to limit the period of banking and introduce TOD metering in the State. The impugned order as such, is in keeping with the mandate of law and therefore does not warrant interference.

11.6 It would also be of relevance to note that neither the Act nor the Regulations framed under it in the State of Karnataka provide for

banking of energy as a matter of right. In this regard reliance is placed on the decision of this Tribunal in the matter of *Gokak Power & Energy Limited vs KERC & Ors in Appeal No 29/2014* dated 30.05.2014**.**The said concept was introduced to facilitate growth of the industry etc. At present, the regulator has, after due consideration of all factors and after taking into consideration the views of all the stakeholders, deemed it appropriate to curtail the period of banking. The same is in keeping with the changed scenario in the State.

11.7 The issue with regard to whether a concession that has been granted once ought to be continued in perpetuity has been examined by the Hon'ble Apex court in the matter of *Shree Sidhabali Steel vs State of Uttar Pradesh reported in (2011) 3 SCC 193 (Para 53-55).* The Hon'ble Supreme Court has been pleased to hold that a concession granted can be withdrawn as well. Therefore, the contention that the Appellants are entitled to the concessions etc. in perpetuity, is untenable and opposed to law.

B. Power of the State Commission to alter the terms of a concluded contract:

11.8 The question pertaining to whether the State Commission is empowered to alter the terms of a concluded contract has been examined in several cases and it is settled law that the State Commission is empowered to alter the terms of a concluded contract. In the present case, it ought to be noted that the terms of the contract between the parties i.e. the wheeling and banking agreement itself contains provisions which permit alteration/ modification of the terms of the contract. Article 13.6 of the wheeling and banking agreement specifically permits modification of the terms of the contract. In addition, Article 1, 5 clearly state that the terms of the contract are

subject to changed orders of the Commission which will be passed from time to time. These provisions have been approved by the State Commission in the Standard format of the wheeling and banking agreement and have been accepted by the signatories to the agreements, which is the Appellants.

11.9 It is settled law that the plain meaning of terms found in the contract ought to be given effect to. In the present case, when the contract clearly provides for modification/alteration of the same in more than one clause, it has to be noted that the Appellants were aware of the same and had expressly agreed to it. Therefore, it is not open to the Appellants to now question the power of the State Commission to modify the terms of the contract. In this regard reliance is placed on the decision of the Supreme Court of India in the matters of *Transmission Corporation of Andhra Pradesh Ltd vs GMR Vemagiri Power Generation Limited & Anr reported in (2018) 3 SCC 716 (Para 20).*

11.10 The State Commission by order dated 8.7.2014 has approved the revised standard Wheeling and Banking agreement format for RE projects under non REC route and for RE captive power plants under REC route wherein it has held that "the Commission may from time to time add, vary, alter, modify or amend any clause or clauses of the standard WBA or the entire agreement, either suo motu or on an application by any of the Stakeholders." This was never questioned by any of the Appellants nor any other stakeholder. Although it has been contended on behalf of some of the Appellants that this order is in the nature of a clarification of the order dated 4.7.2014 and as the order dated 4.7.2014 makes no reference to any modification/alteration, no reliance can be placed on the order dated 8.7.2014. However, the settled position of law is that a clarificatory order in furtherance to the

main order is to be construed as a part of the main order itself. In this regard reliance is placed on the decision *in S.S. Grewal vs State of Punjab &Ors reported in (1993) Suppl 3 SCC 234 (Para 9).*

11.11 The Appellants herein are therefore bound by the order dated 8.7.2014 which specifically provides for modification of the terms of the wheeling and banking agreement. At any rate, the Hon'ble Supreme Court of India, while considering the power of the State Commission to modify the tariff in existing PPA's has laid down authoritatively that even though the PPA is executed for a specific term/period, the tariff can be altered by the State Commission by exercising power under the provisions of the Act. The same would also apply to the present situation and the mere fact that the agreements between the ESCOM's and the generating companies are for a specific period in respect of wheeling and banking would in no manner curtail the power of the State Commission to stipulate conditions. In this regard reliance is placed on the decisions in the matters of:

i. GESCOM vs KERC & Ors in Appeal No 87/2015. (Para 20)

ii. Gujarat Urja Vikas Nigam Limited vs Tarini Infrastructure Limited & Ors reported in (2016) 8 SCC 743. (Para 18)

11.12 The Appellants have sought to place reliance on the decision in the matter of GUVNL vs Solar Semi-Conductors Power Company Pvt Ltd reported in (2017) 16 SCC 498 to contend that the State Commission cannot alter the control period of a tariff order. The said decision arose in the context of exercise of inherent power by the Gujarat State Electricity Commission. It is submitted that the impugned order has not been issued in exercise of the inherent power of the State Commission, but has been issued in exercise of the power available under Section 60 to 63 and 86 of the Act read with the provisions of the wheeling and

banking agreements executed by the Appellants and Respondents and the earlier orders of the State Commission. Kind reference is made to the Constitution bench decision of the Hon'ble Supreme Court in Padma Sundar Rao vs State of Tamil Nadu reported in (2002) 3 SCC 533 laying down that a precedent is binding only for the point in issue and the same cannot be extended to other facts stated. Therefore, the judgment in GUVNL's case would not apply to the facts of these Appeals.

C. Permissibility of Review/Revision of a tariff order dated 4.7.2014 before expiry of the control period mentioned therein:

11.13 The power of the State Commission to fix tariff is not disputed by the Appellants. The power of the State Commission in this regard flows from Section 61 to 63 and Section 86 of the Act. Section 62 specifically permits modification of tariff not more than once during the control period. The present order cannot be said to be issued in excess of the State Commission's jurisdiction.

11.14 Even otherwise, Section 21 of the General Clauses Act, 1897 provides that power to issue an order includes the power to alter, amend, vary or rescind the order. The order impugned as well as the order dated 4.7.2018 have also been issued in furtherance to the exercise of such power. It is settled law that when an authority is vested with statutory power to do a particular act, it is also vested with power to alter/ amend/undo such act. In this regard reliance is placed on the decision in the matter of reported *in Shree Sidhabali Steel vs State of Uttar Pradesh reported in (2011) 3 SCC 193 (Para 38).* Therefore, the contentions of the Appellants that the State Commission had no power to modify its order dated 4.7.2014 is untenable.

11.15 The impugned order is not an order reviewing the order dated 4.7.2014, but is a modification of the same. Therefore, the contentions raised with regard to Section 94, delay in reviewing the order, lack of parameters of review etc. are untenable.

D. Applicability of the principles of res judicata in so far as the power of the State Commission to review its order dated 11.7.2014 is concerned:

11.16 The principle of res judicata would not apply to the present case at all. It is settled law on the applicability of the principle of res judicata and Section 11 of the Code of Civil Procedure 1908, that the said principle would only apply when the issue in a subsequent lis arises from the same cause of action. In the present case, this principle is wholly inapplicable. Moreover, the Appellant's contention is opposed to the mandate of the statute which specifically provides for revision of tariff. Therefore, the contentions in this regard are untenable.

E. Applicability of the doctrine of promissory estoppel and legitimate expectation:

11.17 In the present case, a contract has been executed by the Appellants and the Respondents. It is in the standard format which has been approved by the State Commission. The agreement has never been challenged/ questioned by the Appellants. The Appellants have executed the contract without demur. Having done so and knowing fully well that it is within the purview of the power of the State Commission to modify the terms of the contract between the parties hereto (which is expressly stated therein), the contention of the Appellants that the Doctrine of Legitimate Expectation would apply to the present case is wholly untenable. Similarly, the Doctrine of Promissory Estoppel is also inapplicable. Further, it is settled law that both these doctrines would not apply in cases where there is a contract. The principle of

promissory estoppel and legitimate expectation cannot be invoked contrary to the statutory provisions. There can be no estoppel against law. In this regard reliance is placed on the following decisions;

i. *Transmission Corporation of Andhra Pradesh Ltd &Anr vs Sai Renewable Power Pvt .Ltd (2011) 11 SCC 34 (Para 83, 86,88).*
ii. *Kothari Industrial Corporation Limited vs TNEB &Anr(2016) 4 SCC 134 (Para 10 to 14)*
iii. *Motilal Padampat Sugar Mills vs State of Uttar Pradesh & Ors (1979) 2 SCC 409 (Para 24 to 27)*
iv. *Assistant Excise Commissioner & Ors vs Isaac Peter & Ors (1994) 4 SCC 104 (Para 25)*

F. Non-issuance of individual notices vitiating the entire proceedings:

11.18 The State Commission is bound by the Act and the Regulations framed thereunder. The KERC (General and Conduct of Proceedings) Regulations, 2000 deals with the procedure to be followed by the State Commission. Regulation 24 of the said Regulations deals with Service of notices and processes issued by the commission. In the present case, the procedure set out in the Regulations has been followed. The State Commission has followed the requisite procedure. The said Regulations do not provide for individual notices to be issued to each party when the State Commission is exercising its regulatory power of tariff fixation in regard to tariff, terms and conditions for wheeling and banking which are to be uniformly applicable to all participants.

11.19 Furthermore, Regulation 5 of the KERC Tariff Regulations 2000 specifically provides for issuance of a paper publication and not individual notices. The Regulations of the State Commission do not require individual notices to be issued as now contended. The State Commission has issued public notice and held a public hearing after calling for comments from all stakeholders. On 12.06.2017, public

hearing was held in which the Appellants herein participated. In addition, submissions of solar and mini hydel generators were also considered. Thereafter on consideration of all the material placed on record by the Appellants, Respondents and other stakeholders, the order impugned was passed reducing the banking period to six months and imposing certain conditions on renewable energy generators. As such, there is no infirmity in the procedure followed by the State Commission.

G. Passing of the order in the absence of any material being placed before the State Commission:

11.20 In the original petition filed by the ESCOM's, the Respondents clearly set out the changed scenario which has necessitated the change in the banking period. Perusal of the petitions would indicate that the Respondents have clearly stated that they are facing a financial burden on account of the prevalent scenario wherein they are forced to purchase high cost power only to facilitate annual banking by renewable energy generators who are availing wheeling and banking facility from the Respondents. The loss incurred due to annual banking of power by generators during monsoon period and drawl at summer period is causing loss to distribution companies. The same is passed on to the consumer in the form of increased tariff. In order to meet the requirement of the banking, the Respondents have been forced to procure power from the Energy Exchange, or UI or to procure power under short term basis. The Respondent has placed material before the State Commission to justify the modification along with the Memo dated 2.2.2017 and a written response to comments of the public which was filed on 31.7.2017. Therefore, the contention of the Appellants that

the State Commission has revised the earlier order in the absence of any data is untenable.

11.21 The State Commission being an expert Regulatory body which is seized of all regulatory powers has taken note of the harmful and onerous effect of annual banking facility and has passed the impugned order. It is submitted that an appeal is a continuation of the original proceedings. Therefore, material that has now been placed before this Tribunal can also be considered to decide the appeal.Material which is germane to decide the dispute on hand cannot be ignored and ought to be considered. In this regard, reliance in placed on the decision in the matter of *Rachakonda Narayana vs Pontala Parvathama reported in (2001) 8 SCC 173 (Para 9 & 10).*

H. Invalidity of the impugned order which is effective retrospectively:

11.22 With regard to these averments it is submitted that the impugned order has not been made effective retrospectively. The order has been given effect to from the date of its pronouncement, i.e. 9.1.2018. The impugned order puts into effect certain modifications that are required to be followed uniformly by all wind, solar and hydel plants in the State. These modifications that have been directed to be made are as contemplated in the earlier orders of the State Commission as well as in the standard format of the Wheeling and banking agreement that have been executed as well. Therefore, the contention that the impugned order is invalid because it modifies a contract that was executed prior to the order is untenable.

I. The financial data furnished by the Respondent being misleading:

11.23 On behalf of the Appellants in Appeal No.280/2018 elaborate arguments have been addressed based on some computation sheets filed in the course of the arguments. It is submitted that without any pleadings or grounds raised in their appeal memorandum and the primary documents not being placed on record by the said Appellant, the computation sheets ought not to be considered.

11.24 Without prejudice to the above, it is submitted that although an attempt is being made to state that the introduction of 6 month banking will adversely affect the generators as they will in reality be forced to surrender a larger quantum of energy to the State. The said arguments are based wholly on projections and assumptions and are opposed to reality. In order to demonstrate the same, it would be necessary to peruse the actual generation data pertaining to the Appellants in the present Appeal for the years FY 2014-15 to FY 17-18 which makes the situation clear.

11.25 From the generation, consumption and banking data in respect of Fortune Five, it is clear that the argument advanced by the Appellants is untenable on facts. In every single year, the Appellant has drawn the entire quantum of banked energy that it has accumulated over the year. Further, such drawal of energy has been mainly during the summer months. Therefore, the contention that the unutilized energy being surrendered is significant and as the same is being purchased at 85% of the generic tariff and that it is more economical to the Respondents to purchase the said power at Rs 3.09/- per unit instead of purchasing power in the short-term market at Rs 4.08, is untenable. This is the trend that is currently being followed by all renewable energy

generators who are utilizing the facility of wheeling and banking. This has been possible due to annual banking as per agreements prior to the impugned order. By the modified semiannual banking, the Appellants have to utilize the banked energy in the same half hear which will prevent utilities from having to incur huge extra cost to purchase power during peak periods.

11.26 It would also be of relevance to note that the State of Karnataka requires Round the Clock power on a regular basis. The utilities cannot rely on unutilized banked energy alone to meet its power requirements. Such banked energy is also infirm power. Therefore, the contention that the State is purchasing short term power at higher cost to the detriment of its consumers, when lower cost power is being made available to it by the wheeling and banking customers is wholly untenable. The statement produced by the Appellant in Appeal 280/2018 on 11.1.2019 is inaccurate and misleading and therefore deserves to be ignored.

J. Clause in WBA permitting amendment of the contract is void on account of Section 23 of the Contract Act:

11.27 The Section 23 of the Indian Contract Act 1872 provides that a consideration or object of an agreement is unlawful if it is forbidden by law, or defeats the provision of law, or would involve injury to the person or property of another, or the court considers it immoral or opposed to public policy. In the case on hand, the clause in question does not fall under any of the said heads. In fact, the power to modify the terms of the contract flows from the statute and regulations itself. Therefore, these contentions are untenable. The Hon'ble Supreme Court has examined the scope and ambit of Section 23 in the matter of *GherulalParakh v MahadeodasMaiya, AIR 1959 SC 781.*The present

scenario would undoubtedly not fall within the purview of the said provision. Therefore, these averments do not merit consideration.

K. Non-issuance of public notice to Solar and Mini Hydel generators vitiates the entire process:

11.28 The prayers in the original petitions filed by the Respondents herein would clearly indicate that the exercise in question was not restricted to one category of generators but to all renewable energy generators. The said petitions were published on the website of the Respondents as well as the State Commission and was available in public domain to all stakeholders. Perusal of the list of participants would clearly show that generators other than wind generators also participated in the process. This finds a reference in internal page no 13 of the impugned order at paragraph 6(m) and page no 16 at paragraph 7(e) also. Therefore, it was for all generators to be vigilant and participate in the process of public hearing and many have availed the opportunity and made their submissions which has received careful attention at the hands of the State Commission.

L. Impugned order being opposed to the Tariff Policy and National Electricity Policy:

11.29 The National Electricity Policy and the Tariff Policy formulated by Government of India are guidelines issued for development of the power sector in the country. The same is advisory in nature and has no binding force of law. This has been laid down by this Tribunal in the matter *of Maruti Suzuki India Ltd vs HERC & Ors in Appeal 103/2012 dated 24.3.2015 (Para 61).* In the present case, the State Commission has acted in terms of the Regulations and Act. Therefore, the contentions to the contrary do not merit consideration.

M. Engrafting of law into a contract:

11.30 It is settled law that law can be read into a contract. In this regard reliance is placed by the Respondents on the decision in the matter *of Indiramani vs W.R Nature reported in AIR 1963 SC 274.*

N. Acquiesce and waiver:

11.31 The Appellants herein have by their conduct accepted the terms of the contract and have waived their right to question the same. This is in keeping with the settled legal principle pertaining to acquiesce and waiver. In this regard reliance in placed on the decision in the matter of *Babulal Badriprasad Varma vs Surat Municipal Corporation and Ors reported in 2008 12 SCC 401 – 43 (Para 44).*

11.32 The State Commission has done the delicate balancing exercise and has regulated the wheeling and banking agreement to make it more equitable and the same does not warrant interference in these Appeals by this Tribunal.

12. <u>Additional submissions filed by Respondents No. 2 to 6</u>

a) The impugned order is without any basis/does not deal with the contention raised by ESCOMs in the petition but capriciously grants the relief sought.

12.1 In the proceedings before the State Commission, the Respondents had placed material before the State Commission to justify the modification of banking facility along with the Memo dated 02.02.2017 and a written response to comments of the public which was filed on 31.07.2017 and same is noted in para 4(b),(c), 8(d), 8(e),13(e) of the impugned Order. The State Commission, being an expert Regulatory body, is seized of all regulatory powers and has taken note of the harmful and onerous effect of annual banking facility and has passed the impugned Order. After considering the material on records, the State Commission

has come to the conclusion that ESCOMS had to purchase expensive power to offset the impact of annual banking facility and the same is detrimental to the financial health of the ESCOMS. It is submitted that the contention of the Appellant that the State Commission has passed the impugned Order without considering any material record and reasoning is wholly untenable.

b) Impugned order is a non speaking order as there is no discussion on the source of power to amend existing WBA and rights of appellant:

12.2 The Electricity Act and Wheeling and Banking Agreement empowers the State Commission to amend the existing wheeling and banking agreement. It is submitted that the Appellants herein cannot dispute the power of the State Commission to amend the wheeling and banking agreement as they themselves have got the benefit of the amendment to the existing wheeling and banking agreement by the State Commission. It is pertinent to note that the State Commission vide Order dated 04.07.2014 has introduced payment to unused banked energy at the end of the banking period and same was incorporated into the exiting wheeling and banking agreements and these amendments have not been questioned by any generator. The Appellants cannot claim banking facility as a matter of right. The State Commission, in order to balance the interest of all the stakeholders, has reduced the period of banking from one year to 6 months.

c) Respondent commission does not enjoy any regulatory/statutory control over the existing WBAs

12.3 The Appellants herein have placed reliance on the judgment of the Hon'ble Supreme Court in the matter of *Indian Thermal Power Ltd v. State of MP and others,* (2000) 3 SCC 379, to contend that the State

Commission can amend the WBA to matters over which it has statutory/ regulatory control i.e. tariff fixation.The Appellants have placed reliance on the judgment of the Hon'ble Supreme Court in the matter of *Tata Power Company Ltd v. Reliance Energy Ltd.,*(2009) 16 SCC 659, to contend that the object of the de-licensing generating companies will be lost, if the State Commission is allowed to exercise its regulatory power to vitiate the interests of the Generators. Therefore, it is the contention of the Appellants that the State Commission does not have power to amend the existing wheeling and banking agreements. The contention of the Appellant that the State Commission does not have statutory or regulatory power over the facility of banking is wholly untenable. It is pertinent to note that as per KERC (Terms and Conditions for Open Access) Regulation, 2004, it is mandatory for the Appellant to execute Wheeling and Banking Agreement in a format as approved by the State Commission. It is submitted that no reliance can be placed on the above judgments as in the present case, wheeling and banking agreement empowers the State Commission to amend the agreement.

d) impugned order is made applicable to solar generator in violation of Section 86(3) of Electricity act, 2003

12.4 The contention of the Appellants that the impugned Order was passed in violation of principles of natural justice as solar generators were not given an opportunity of hearing is untenable and denied. It is submitted that on perusal of petitions filed by the Respondents before the State Commission, it is evident that the Respondents had prayed for modifications of banking facility with respect to all Renewable Energy Generators. In the public hearing conducted by the State Commission, many stakeholders have made submissions with regard to modification of banking facility extended to solar generators also. Therefore, the

averment that the solar generators did not get an opportunity of hearing prior to amendment of the terms of banking for solar generators is untenable and denied.

e)Section 86(1)(b) has been wrongly invoked by the respondents

12.5 It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction. In the present case, State Commission is empowered under the Electricity Act, 2003 and Wheeling And Banking Agreement to pass the impugned order.

f) Larger public interest lies in promotion of renewable energy generators as mandated under section 86(1)(e)

12.6 It was found that by providing annual banking, the State was suffering huge financial loss on account of high cost of energy at the time when the energy was requested to be wheeled. In turn, this additional cost was being passed on to the consumers of the State, who were forced to bear the additional burden in order to facilitate annual banking for one category of generators who opted for wheeling and banking facilities. In order to balance the interest all the stakeholders in the field, the State Commission has rightly curtailed the banking period to 6 months. It is pertinent to note that by way of the impugned order facility of banking is not taken away in toto and there is no violation of Section 86(1)(e) as contended by the Appellant. It is submitted by way of the impugned order State Commission has only balanced the interest of the ESCOM'S, Generators and Consumers of the State.

13. After marathon hearing of the learned counsel appearing for the Appellants and learned senior counsel appearing for Respondents and carefully gone through their written submissions and after careful perusal of the common impugned

order passed by the first respondent/KERC, the main issues which arise in the batch of Appeals are as follows :-

Issue No.1:- Whether the impugned order passed by Karnataka Electricity Regulatory Commission modifying the terms & conditions of banking arrangements and concluded contracts, retrospectively, is sustainable in law?

Issue No.2:- Whether the impugned order has been passed in violation of principle of natural justice, doctrine of Primissory estoppels, legitimate expectation, etc..?

Issue No.3:- Whether the impugned order has been passed without substantial data /analysis /evidence and is a non-reasoned / non-speaking order?

Our findings and analysis :-

14. Issue No.1:-

Learned counsel for the Appellants vehemently submitted that the finding of the Respondent Commission at Para 13 (d) of the impugned order that it has the powers to amend the existing banking facility for valid reasons is erroneous and fallacious. In fact, the Respondent Commission has failed to address the issue of jurisdiction, to be able to modify the executed contract in a proceeding under Section 86 1(b) of the Act read with Regulation 11 of the KERC (General and Conduct of Proceedings) Regulations, 2000. Learned counsel further contended that the logic given by the Commission in the impugned order that promotional measures being given to Renewable Energy were no longer justified is without any rationale and analysis of the facts as well as alleged financial difficulties faced by ESCOMS. Besides, there is no

discussion whatsoever on the source of power to the Commission to amend existing Wheeling & Banking Agreement (WBA), rights of Appellants etc. which in turn indicate that the Impugned order is a non-speaking Order and has been passed without adequate consideration and analysis. To strengthen their contentions, learned counsel relied on the judgment of the Hon'ble Supreme Court in Kranti Associates Pvt. Ltd. Vs. Massod Ahmad Khan (2010) 9 SCC 497 which clearly held that any order devoid of reasoning and analysis is liable to be set aside.

14.1 Learned counsel further submitted that the Respondent Commission while passing the impugned order and recording a specific finding that the continuance of the promotional facilities for RE generators is no longer justified and violated the very object of the Act and various Govt. policies, guidelines etc. which categorically stipulate that the State Commission must promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures. They quick to point out that the State Commission, being a quazi-judicial body which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act and the Commission can only necessarily act within the parameters prescribed by the Act and to substantiate their submissions, learned counsel placed reliance on the judgment of the apex court in N.C. Dhoundial v. UOI & Ors.: (2004)2 SCC 579 of which and the relevant extracts are reproduced as follows:-

> *"**4.** We cannot endorse the view of the Commission. **The Commission which is a unique expert body is, no doubt, entrusted with a very important function of protecting human rights, but, it is needless to point out that the Commission has no unlimited jurisdiction nor does it exercise plenary powers in derogation of the statutory limitations. The Commission, which is the creature of***

statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act. Of course, as any other statutory functionary, it undoubtedly has incidental or ancillary powers to effectively exercise its jurisdiction in respect of the powers confided to it but the Commission should necessarily act within the parameters prescribed by the Act creating it and the confines of jurisdiction vested in it by the Act".

Learned counsel contended that by restricting the banking facility to a meager of six months i.e., from January to June and July to December would ultimately defeat the very purpose and the concept of banking for which the same has been devised by the Commission to promote generation from renewable sources. Learned counsel emphasized that RE generation is periodical in nature and generation is not even constant in a day and hence its banking with the distribution licensee is essential failing which the surplus energy which is generated during less demand period will be lost forever. He pointed out that the generation from RE sources cannot be backed down or shut down when there is demand deficit and therefore surplus energy generated is banked and the licensee utilizes such banked energy to their consumers and may have to procure additional electricity from other sources during the lean period when generation from RE sources is low or minimum. As such, banking of energy is not a commercial benefit but an essential support for infirm power generation from the RE generators. This aspect has been duly acknowledged as an essential support facility by this Tribunal and its Judgment dated 18.03.2011 in Appeal No. 98 of 2010 in the case TNEB vs. TNERC & Ors. has held that the banking of energy is essential support for RE based generators due to the fact that their generation is intermittent, infirm and non-constant. This Tribunal in host of judgments including the above has taken a consistent view that any curtailment in banking facilities would

render the banking mechanism as meaningless. In fact, the Regulatory Commission's powers are confined to determination of tariff for purchase of power by ESCOMs and not beyond that as exercised in the present case. Learned counsel quick to point out that the ESCOMs had raised the identical plea of financial prejudice before the Respondent Commission in 2013 & 2014 which was rejected by the Respondent Commission in its Order dated 09.10.2013 and 04.07.2014. Moreover, after passing the WBA order dated 04.07.2014, the Respondent Commission had become *functus officio* and could not have reviewed the terms of its earlier Order. Based on WBA Order dated 04.07.2014, the Distribution Licensees made representations to the Generating Companies and have executed fixed term contracts for ten (10) years and, therefore, the Respondent Commission is barred by the principles of res judicata.

14.2 To substantiate their contentions, learned counsel placed the reliance of the judgment of the apex court in Dwarka Das vs. State of MP (1999) 3 SCC 500 wherein the Hon'ble Supreme Court has held as follows: -

> ***"The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order".***

Further, Hon'ble Supreme Court in GUVNL Vs. Solar Semiconductor Power Company (India) Pvt. Ltd. and Ors (2017) 166 SCC 498 categorically held that the State Commission cannot exercise its Inherent Power to amend/ alter terms and conditions of an agreement

duly signed between parties. Regarding the contentions of the ESCOMs that the Commission has issued various clarificatory orders and the benefit thereof has been passed onto RE generators and therefore the impugned order cannot be questioned by the Appellants. Learned counsel placed reliance on the judgment of this Tribunal interpreting Section 86(1) (e) of the Act in its judgment in Rhitwik Energy Vs. Transmission Corporation of Andhra Pradesh 2008 which has categorically held that a renewable agreement can only be re-opened to give thrust to renewable energy and not otherwise. The said judgment of this Tribunal was followed in Tarini case which has been affirmed by the Hon'ble Supreme Court in 2016 8 SCC 742. Summing up their submissions, learned counsel(s) for the Appellants emphasized that in a catena of judgments passed by the Hon'ble Supreme Court and this Tribunal, it has been categorically held that the PPA cannot be re-opened for the purpose of curtailing incentives given to RE generators. The specific findings of this Tribunal in GUVNL judgment is reproduced as under:-

"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.***

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 v. 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 reopened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives."***

14.3 Learned counsel for the Appellants further submitted that the reliance placed by KERC on Gokak judgment is entirely different due to the fact that this judgment relates to reduction in banking period to one month for RE generators availing the benefit of REC which is distinguishable from the facts of the instant case. It is further contended by the learned counsel that at the time of execution of WBA, annual banking facility was enshrined in orders dated 11.07.2008 and 04.07.2014 which has attained finality. In terms of Regulation 8 of KERC Conduct of Proceedings Regulations, it can exercise its power of review within a period of 90 days and not thereafter. Regarding the contentions of the Respondents that KERC has power to review its orders in terms of Section 94 of the Act, learned counsel for the Appellants vehemently submitted that once the State Commission has framed Regulations, it can exercise powers only in accordance with such regulations and not otherwise.

14.4 In terms of the order dated 11.07.2008, the extant banking arrangement have been made effective for a period of 10 years and, therefore, re-opening of the issue before expiry of 10 years is barred by the principle of res-judicata. Accordingly, the State Commission's directions in the order dated 09.01.2018 are contrary to the objective of promotion of electricity developed from RE sources, as stipulated in the Act, principles enshrined in Section 61(b), (c) and (h) and Section 86(1) (e) of the Act. The impugned order is also in utter contravention of the National Electricity Policy and Tariff Policy of Govt. of India which have statutory force as held by the apex court in the case of Energy Watch Dog v CERC reported as (2017) 14 SCC 80.

14.5 Learned counsel for the Appellants reiterated that the impugned order has not been passed in exercise of the Articles 13.6/12.6 of the WBA which is a party- specific amendment. Besides the Commission has issued a generic sweeping order which impacts all WBAs irrespective of their dates of commencement and dates of expiry. Learned counsel in support of their contentions placed reliance on the GERC Order dated 08.08.2013 in Petition No. 1320 of 2013 which was upheld by this Tribunal rejecting the prayer of GUVNL to reopen all solar PPAs executed. Learned counsel quick to point out that inherent powers cannot be exercised by the Respondent Commission in a case where substantive provisions exist. Contrary to the contentions of the Respondents and the Respondent Commission, learned counsel for the Appellants pointed out that neither the petitions filed by ESCOMs nor the public notices issued pursuant thereof invoked any provisions of the WBA regarding powers for modification of contract and the State Commission has also not invoked or relied upon any such provisions of WBA particularly Article 13.6. Admittedly, Article 13.6 of WBA is contrary to the settled principles of law that parties cannot confer jurisdiction where none exists and the same has been specifically recognised by this Tribunal in Appeal No.7 of 2009. Besides, the Act also does not empower the State Commission to modify the terms of banking incorporated in executed contracts.

14.6 Regarding the findings of the State Commission in the impugned order that the price/tariff from RE generation discovered through bids, learned counsel pointed out that the same relates to the latest projects and there are various other parameters which have resulted in lower tariff. Accordingly, the State Commission ought not to have considered modifying the banking facilities for the old projects based on the

aforesaid justification. Learned counsel for the Appellants further contended that the instant case involved a large number of RE generators and the issues raised would also affect the consumers of RE projects taking supply on open access and hence the impugned order will affect prospective consumers or developers. Having manifold restrictions on the RE generators as well as open access consumers consuming renewable energy, the order has been passed by the State Commission in an unjust way without recording valid grounds and cogent reasoning. Hence, the order is arbitrary and suffers from infirmity and perversity.

14.7 ***Per contra*****,** learned counsel for the Respondent Commission submitted that adequate notice was given and matter was duly heard by the State Commission before passing the impugned order. He further submitted that the contentions of the Appellants questioning the powers of the State Commission to re-open executed contracts between the parties is incorrect in law as the agreements itself provide for variation on the terms and conditions by the State Commission under Para 13.6 of WBA which reads as under:-

> *"13.6* ***Amendments:*** *This Agreement shall not be amended, changed, altered, or modified except by a written instrument duly executed by an authorized representative of both Parties.* ***However, KERC shall be entitled to modify/alter the conditions of this contract at the instance of either of the parties after giving an opportunity of hearing to both the parties.****"*

Learned counsel contended that when the agreement only incorporates what has been decided by the State Commission, it is always open to the State Commission to revise the terms and conditions of banking, which would automatically get incorporated in the agreement between

the parties. To substantiate his contentions, learned counsel relied on the judgment of the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam limited v. Tarini Infrastructure Limited*, *(2016) 8 SCC 743* which has rendered ruling on the above lines.

14.8 Learned counsel further submitted that the State Commission has also noted the inherent contradiction in the contentions of the objectors that the reduction of banking period would result in losses as they would be required to procure power at higher cost during peak period, while at the same time, they contend that the cost of purchase for the distribution licensee during the peak demand period would not be high. The reliance of the Commission on the decision of this Tribunal in the case of ***Gokak Power***, Appeal No. 33 of 2012 dated 30/05/2014 is not applicable on the Appellant is also not correct as the reliance placed by the Commission was on the recognition by the Tribunal that there are no Regulations providing for banking for a particular period for both REC and non-REC renewable generators.

14.9 Learned senior counsel, Mr. S. Naganand, appearing for Respondent Nos. 2 to 6 submitted that the situation what prevailed at the time when Electricity Act came into effect and the present scenario regarding RE generation is entirely and vastly different. Over the past 15 years , the quantum of renewable energy generation has jumped from 3% to above 13% now of the entire power generated in the State of Karnataka. He vehemently submitted that with the present pace of RE development in the state of Karnataka, the percentage of RE generation to that of total would increase manifold and for the year 2019-20, it is expected to be about 24% of the total purchases. Citing these factual figures, learned counsel emphasized that the RE sector does not need larger promotional facilities now as the sector has grown

to maturity by now. He quick to point out that the State Commission is required by law to balance out the interests of the consumers of the State vis .a vis. those of the generators. Having regard to the same, the State Commission considered it appropriate to limit the period of banking and introduce TOD metering in the State and accordingly passed the balance order which otherwise does not warrant any interference. Learned counsel further submitted that neither the Act nor Regulations framed under it by KERC provide for banking of energy as a matter of right and cited the reference of this Tribunal's judgment in the matter of *Gokak Power & Energy Limited vs KERC & Ors.* Learned counsel for the Respondents further contended that the contentions of the Appellants that once a concession granted and ought to be continued in perpetuity are without rationale. To fortify his arguments, he placed reliance on the decision of the Apex court in the matter of *Shree Sidhabali Steel vs State of Uttar Pradesh reported in (2011) 3 SCC 193 (Para 53-55)* wherein it has been held that a concession granted can be withdrawn as well.

14.10 Further, regarding the question pertaining to whether the State Commission is empowered to alter the terms of a concluded contract has been examined in several cases and it is settled law that the State Commission is empowered to alter the terms of a concluded contract. Additionally, in the present case, even WBA itself contains provisions which permit alteration/ modification of the terms of the contract (WBA Article 13.6). Learned counsel also invited reference to Article 1, 5 which clearly relate to orders of the Commission which will be passed from time to time. He quick to point out that the Appellants were fully aware of above stipulations and had expressly agreed to it and, therefore, it is not open to the Appellants to now question the powers of

the State Commission to modify the terms of the contract. In this regard, learned counsel placed reliance on the judgements of the Hon'ble Supreme Court in the matter of *Transmission Corporation of Andhra Pradesh Ltd vs GMR Vemagiri Power Generation Limited & Anr reported in (2018) 3 SCC 716 (Para 20).* He further submitted that State Commission by its order dated 8.7.2014 has approved the revised standard Wheeling and Banking agreement format for RE projects under non REC route and for RE captive power plants under REC route wherein it has held that "the Commission may from time to time add, vary, alter, modify or amend any clause or clauses of the standard WBA or the entire agreement, either suo motu or on an application by any of the Stakeholders."

14.11 Learned counsel reiterated that the Appellants herein are, therefore, bound by the order dated 8.7.2014 which specifically provides for modification of the terms of the WBA. Learned counsel also placed reliance on other two judgments in this regard i.e.

iii. GESCOM vs KERC & Ors in Appeal No 87/2015. (Para 20)
iv. Gujarat Urja Vikas Nigam Limited vs Tarini Infrastructure Limited & Ors reported in (2016) 8 SCC 743. (Para 18)

Learned counsel vehemently submitted that even otherwise Section 21 of the General Clauses Act, 1897 provides that power to issue an order includes the power to alter, amend, vary or rescind the order. Learned counsel for the Respondents refuted the averments made by the Appellants that the impugned order has been made effective retrospectively whereas the order has been given effect to from the date of its pronouncement i.e. 09.01.2018. The impugned order puts into effect with certain modifications that are required to be followed uniformity by of all wind, solar and small hydro projects in the State.

Therefore, the contention that the impugned order is invalid because it modifies a contract that was executed prior to the order is untenable.

14.12 Learned counsel further contended that the National Electricity Policy and the Tariff Policy formulated by Government of India are guidelines issued for development of the power sector in the country and are advisory in nature having no binding force of law. This has been laid down by this Tribunal in the matter *of Maruti Suzuki India Ltd vs HERC & Ors in Appeal 103/2012 dated 24.3.2015 (Para 61).* Learned counsel further submitted that Act and the WBA empower State Commission to amend the existing agreement which the Appellants cannot dispute now as they themselves have got the benefit of the amendment to the existing wheeling and banking agreement by the State Commission. It is pertinent to note that the State Commission vide Order dated 04.07.2014 brought amendment relating to payment for unused banked energy at the end of the banking period. Admittedly, this amendment was incorporated into the exiting wheeling and banking agreements and the same has not been questioned by any generator / appellants. Through his rejoinder submissions, learned counsel contended that the reliance placed by the Appellants on the judgment of the Hon'ble Supreme Court in the matter of *Indian Thermal Power Ltd v. State of MP and others,* (2000) 3 SCC 379, to contend that the State Commission can amend the WBA to matters over which it has statutory/ regulatory control i.e. tariff fixation is entirely misplaced. Further, the contention of the Appellants that if the State Commission is allowed to exercise its regulatory power to vitiate the interests of the Generators, the object of the Act to de-license generation / generating companies will be lost is without any substance. Summing up his contentions, learned counsel for the Respondents reiterated that the

State Commission by way of the impugned order has only balanced the interests of all the stakeholders and any interference from this Tribunal does not call for.

Our Findings:-

14.13 We have carefully considered the submissions of the learned counsel for the Appellants and learned counsel for the Respondents and also took note of the findings of various judgments of this Tribunal as well as the apex court on the issue. It is not it dispute that RE generators based upon the representations of the State ESCOMs have come forward for development of RE resources for power generation namely wind, solar and small hydro and in the process also executed wheeling and banking agreements for a period of 10 years from the date of execution which were duly approved by the State Commission. As per the said WBA, RE generators were permitted to bank their surplus energy with the State ESCOMs and draw the same during lean season when RE generation is at low or minimum. Till the date of impugned order, RE generators were allowed to bank the surplus energy generated from their generating plants on an annual basis which is now proposed to be curtailed to a period of six months with additional restrictions of banking/consumptions on TOD basis. The Respondent Commission while passing the impugned order and directing the above amendments / modifications, has mainly based its decision on the premise that promotional measures given to RE generators were no longer justified in view of the matured market of the RE generation as well as huge financial loss being incurred by various ESCOMs on account of the annual banking. The Appellants contend that the State Commission has not given any valid reasoning on the source of power to it to amend existing WBA, need for altering WBA, rights of Appellants

and analysis on the financial loss to ESCOMs as alleged by them in the petitions. The Appellant's counsel go further to contend that the impugned order in fact is a non speaking order as it does not disclose its mind or render reasons for its conclusion to reduce the annual banking facilities and hence the order is purely based on conjectures and surmises.

14.14 Further, the findings of the Respondent Commission that the continuance of the promotional facilities and other concessions which are finally passed on to the consumers is no longer justified, mutilate and violate the very object of the Electricity Act which provides for promotion of efficient and environmentally benign sources of power, various provisions read with Section 61(h) and Section 86(1(e) of the Act, National Electricity Policy, Tariff Policy etc.. The State Commission , a statutory body is only empowered to act within the framework of the Statute and cannot in any manner circumvent, re-write or negate the mandate of the statute under which the State Commission has been constituted. The decision of the Hon'ble Supreme Court in N.C. Dhoundial v. UOI & Ors. case is quite relevant in this regard , as relied upon by the Appellants. In view of the fact that 70% of the wind generation happens only in 4-5 months of a year and the proposed banking of six months would, therefore, be for a name sake only as the banked energy cannot be fully utilized in the peak season of its generation. In a host of judgments, this Tribunal has held that the banking facilities for RE generation is an essential support as the generation from RE sources are periodical in nature and their generation is not constant even during a period of 24 hours of a day. In this regard, the Tribunal's judgment dated 18.03.2011 in Appeal No.98 of 2010 in INEB Vs. TNERC & Ors is quiet significant. The other

contention of the Appellants is that the Respondent Commission does not enjoy any regulatory / statutory control over the existing WBAs' and hence the executed contract across the board can only be interfered with by framing of regulations which are also prospective in nature. It is a settled principle of law that once a contract is signed, the parties to it are bound by its terms and conditions and, therefore, the terms of WBA are beyond the regulatory control of the Respondent Commission and cannot be amended during the currency of the agreement. In this context , it is pertinent to note the judgement of the Hon'ble Supreme Court in the case of India Thermal Power Ltd. Vs. State of M.P.(2000) 3 SCC 379. From the records placed before us, we notice that during past, the ESCOMs had also raised identical plea of financial prejudice during the proceedings before the State Commission in 2013 & 2014 which were rejected by the State Commission vide its order dated 9.10.2013 & 4.7.2014. It is the settled principle of law that after passing the WBA order dated 4.7.2014, the Respondent Commission had become *functus officio* and could not have viewed the terms of its earlier order and, therefore, the Commission is barred by the principle of res judicata or otherwise, it was legally not permissible for the Commission to adjudicate upon the petitions filed by the ESCOMs since it sought to raise an issue which had conclusively been decided earlier and implemented. Appellants' counsel have relied upon the judgment of Hon'ble Supreme Court in Dwarkadas Vs. State of M.P. (1999) 3 SCC 500, in this regard.

14.15 In addition to that, the Respondent ESCOMs have not placed on record any new material before the Commission warranting reduction in tenure of baking facilities. Any modification as now proposed by the order of the Commission tantamounts to seeking review of the earlier

decision of the Commission. Another contention of the Appellants is that in the petition filed by the ESCOMs, they had not invoked the amendment provision of the WBA namely Article 13.6 and, therefore, the Respondent Commission has also not relied upon the said article and accordingly it cannot be raised by the Respondents at this stage. The Respondent Commission has wrongly relied on the findings of this Tribunal in The Gokak judgment to hold that the RE generators do not have any vested right for annual banking period. It is relevant to note that the modification as being directed in the impugned order for reduction in banking period is contrary to the Regulation 8 of the KERC Conduct of Proceedings Regulations as the same tantamounts to review / modification of the order dated 04.07.2014. The relevant finding in the impugned order is as under:-

" (1) ***In partial modification of the Commission's Order dated 4th July, 2014, the banking period for the Non-REC route based RE Projects, opting for wheeling, is reduced from the existing one year to six months."***

(Emphasis supplied)

Such modification beyond the limitation period of 90 days is impermissible in law and also not in the spirit of Section 94 of the Act, as claimed by the Respondents. We do not find force in the Respondents' contentions that the Commission can exercise its inherent power to modify the terms of the agreement. Moreover, it is crystal clear from the judgment of Hon'ble Supreme Court in GUVNL Vs. Solar semi-Conductor India Pvt. Ltd. & Ors. that inherent powers cannot be exercised when substantial provisions exist.

14.16 Having regard to the submission made by the learned counsel for the Appellants as well as learned counsel for the Respondents and various judgements of the Hon'ble Supreme Court and this Tribunal, we opine

that the finding of the State Commission that promotional measures for enhancing RE generation is no longer required, based on the present day landed cost of RE generation and technological development, is not supported by the adequate analysis and also not justified in the eyes of law. Besides, amendment in the terms and conditions of the executed WBAs during the currency of its validity is considered beyond the regulatory ambit of the State Commission. Once the RE generators have come forward to invest in the sector and given certain representations such as flexibility in banking and consumption pattern, the same cannot be taken away by simply passing an order which is not permissible under the settled principles of law. It is not in dispute that over the period, there has been increase in RE generation in Karnataka but the banking of energy account for only a small percentage of total power purchase / supply of the State from all sources. The State Commission, being the sector regulator in the State has a mandate to strike judicious balance among all the stakeholders as required under various provisions of the Act. The small RE plants cannot be compared with major/mega RE plants which are generally supplying power to inter-state and are taken care of, for their balancing on the regional / all-India basis. The banking is not a sole commercial transaction but is a physical support to RE generation on account of their generation being infirm and periodical in nature. Moreover, any amendment has to take place for future projects and not for the already commissioned projects for which wheeling and banking agreements have been executed and valid for a period of 10 years from the date of execution.

14.17 In view of the aforesaid facts and circumstances, we are of the considered view that the impugned order passed by the State Commission reducing the banking period and imposing other

restrictions during currency of validity period of WBAs cannot be sustainable in law.

15. <u>Issue No.2</u>:-

Learned counsel for the Appellants submitted that the ESCOMs had filed their respective Petitions in relation to the WBA facility given to wind generators and the Respondent Commission while issuing the Public Notice dated 13.05.2017 had also referred to the Petitions filed by ESCOMs to be in relation to only Wind generators. While giving its reasoning for modification, the Respondent Commission had also referred to Wind Generation in Para 13 of the Impugned Order. However, while passing the operative part of the Impugned Order the Commission has included Solar Projects and also reduced its annual banking facilities. Learned counsel alleged that the said direction of the State Commission mutilates Section 86 (3) of the Act as no notice was given to the solar generators and it is also pertinent to note that even ESCOMs had not pleaded reduction in Solar Banking period. Learned counsel for the Appellants further submitted that it is trite law that when a quasi- judicial body seeks to affect adversely rights of parties then it is incumbent duty to give notice as well as hearing to such affected party. To substantiate their contentions, learned counsel relied upon the judgment of apex court and this Tribunal is following cases:-

(a) Manohar v. State of Maharashtra, (2012) 13 SCC 14.

(b) 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.

"11. Such kind of approach by any State Regulatory Commission cannot be allowed to be continued in future because it gives a wrong signal to the consumer at large. ***What we expect from the***

State Commission is that the State Commission should candidly and honestly observe the principles of natural justice and if the provisions of law require the issuance of notice, such notice should be issued to the persons who are likely to be affected and the affected persons *or the public at large or the consumers of the State, like industrial consumers in the present Appeals, should be afforded reasonable opportunity of hearing and only, thereafter, judicial order/ quasi-judicial order should be passed and not otherwise."*

15.1 Learned counsel for the Appellants vehemently submitted that in the present case, KERC has disturbed vested rights contrary to law by way of the impugned order by reducing annual banking facilities to meagre six months against the provision in executed WBA which are valid for 10 years and were duly approved by the State Commission. Learned counsel quick to point out that it is a well settled law that vested rights cannot be taken away except by operation of law which have been re-affirmed by various judgments of the Hon'ble Supreme Court and this Tribunal. Learned counsel for the Appellants pointed out that the impugned order changing the period of banking violates the Doctrine of Legitimate Expectation due to the fact that based on the representations of the State ESCOMs, substantial investments have been made by the Appellants and subsequently entered into commercial arrangements based on the assurance that the terms of banking arrangements are frozen for a period of 10 years from the date of execution of WBA. Learned counsel in support of their submissions cited cases wherein Hon'ble Supreme Court has categorically held that if based on a Govt. representation, a party alters its position, then the said party has legitimate right to seek enforcement of the said representation as under:-

(a) *Delhi Cloth and General Mills Limited v. Union of India* reported as (1988) 1 SCC 86 (Para 18, 24)

(b) *Monnet Ispat and Energy Limited v. Union of India* reported as (2012) 11 SCC 1 (Para 188.1 – 188.5)

(c) *Punjab Communications Limited v. Union of India* reported as (1999) 4 SCC 727 (Para 37, 38, 40, 42)

(d) *Union of India v. Hindustan Development Corporation and Others* reported as (1993) 3CCC 499 (Para 33-35)

(e) *Ashoka Smokeless Coal India (P) Limited v. Union of India* reported as (2007) 2 SCC 640

15.2 Advancing their arguments, learned counsel for the Appellants quick to submit that the directions of the Respondent Commission in the impugned Order reversing/doing away with established principles in relation to banking of power on annual basis with no restrictions on drawal of banked energy as provided for by the order dated 04.07.2014 undermines the principle of regulatory certainty and adversely impacts the economic viability of the Projects. Learned counsel emphasised that the role of the State Commission being regulator is to strike a balance between generators and distributors (ESCOMs). It is, however, evident from the non-reasoned order that it is only intending to safeguard the interest of ESCOMs at the cost of the RE generators. In support of their contentions, learned counsel relied upon various judgments as under:-

(a) Hon'ble Supreme Court of India's Judgment in ***A.P. Electricity Regulatory Commission v. R.V.K. Energy (P) Ltd.,*** (2008) 17 SCC 769, as under:

"90. Commercial relationship between a generating company and the consumer has all along been accepted. Public interest would not mean the interest of A.P. Transco alone. Equity in favour of one of the generating companies could not have been the sole ground for coming out with such a policy decision and that too while considering the application for grant of exemption from the purview of the licensing provision."

(b) This Tribunal's judgment dated 23.09.2016 in Appeal No. 53 of 2016 titled ***TNGDCL vs Century Flour Mills,*** to hold:

"11

(e)….

i. The State Commissions have the responsibility of providing measures to promote Renewable Sources of Energy under Section 61(h) and 86(1) (e) of the Electricity Act, 2003.

ii. The guiding factors for determination of tariff for Appropriate Commission under Section 61 (c) of the Electricity, 2003 Act are the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; while factors under Section 61 (d) of the Electricity Act, 2003 are safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

iii. Provisions of the Act do not discriminate between the Public and the Private interest."

15.3 Learned counsel further submitted that in case of issuance of a quasi-judicial order, the compliance with the procedural provisions on the part of the State Commission of issuing only a public notice and inviting Objections meant to be undertaken only for the usual Tariff determination, was not a sufficient compliance with the principles of natural justice in the present case. Learned counsel cited various provisions under the KERC (Tariff) Regulations, 2000 and emphasised that the object of providing these Regulations is crystal clear, namely, to comply with the principles of natural justice and give an opportunity of hearing to the affected parties which in fact has not been provided in the instant case.

15.4 Further, the Nodal Agency for the facilitation of Wheeling and Banking facilities i.e. KPTCL Limited, is alone the competent authority to make any changes or alterations with regard to the WBA. However, at no stage of the proceedings in KERC, KPTCL was involved. Learned counsel further submitted that the rights of Appellants accrue from the terms of the WBA in which all the aspects are pre-agreed. Further, as per the terms of the WBA, no adjudication can be made to the terms of the Agreement except by a written instrument duly executed by both the parties. However, in the present case, the terms of WBA are envisaged to be altered and amended *suo moto.* Learned counsel for the Appellants contended that the rights agreed by way of agreement cannot be snatched away by a *suo moto* quasi-judicial order. In fact, the commercial loss if any for regulated entities such as the Respondent ESCOMs can always be compensated by the regulated mechanism of pass-through whereas the RE generators have no other means to get remedy for their financial loss. Moreover, there is no iota of evidence produced by the ESCOMs to show that there is any loss due to provision of Wheeling and Banking facility. They quick to point out that by the impugned order, the State Commission has not only violated the principles of natural justice but also doctrine of promissory estoppels and the legitimate expectation.

15.5 ***Per contra,*** learned counsel for the Respondent Commission submitted that the impugned order has not set aside its previous orders wherein the banking terms and conditions are determined, but has only revised the banking terms and conditions for the future. He further submitted that the Commission, as a regulatory authority is always entitled to revise the tariff and other terms and conditions from time to time, considering the future developments in the matter and as such the

principles of res judicata etc. also have no application in such cases. To fortify his submissions, learned counsel relied upon the judgment of the apex court in the case of **UP Power Corporation Limited vs NTPC & Ors. (2009) 6 SCC 235.** Further, he pointed out that the contentions of the Appellants on the principle of applicability of promissory estoppel has no application as there is no prohibition for the State Commission to revise the terms and conditions in relation to banking of electricity which has also been upheld by the Hon'ble Supreme Court in the case of ***Tarini Infrastructure***. Moreover, the PPA itself provides for the right of the State Commission to revise the terms from time to time and, therefore, there was no question of any promise that attracts the terms of promissory estoppel to apply.

15.6 Learned counsel further submitted that the impugned order has been applied by the State Commission from the date of the order and not for the period prior to the order. Hence, the contentions of the Appellants that order has been applied retrospectively is not correct. It is a settled principle of law that when a particular provision operates in future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. To substantiate his submissions, learned counsel relied upon the judgment of the apex court in the following cases :-

A. TrimbakDamodharRaipurkar v AssaramHiramanPatil, (1962) Supp (1) SCR 700
B. N.K. Bajpai v Union of India, (2012) 4 SCC 653

15.7 Regarding another contention of the Appellants that proceedings before the State Commission was only in relation to wind energy generation and not for solar etc. is misconceived as the petitions filed by ESCOMs seeking revision in the terms and conditions in relation to

banking of power did not restrict to only wind generators. Learned counsel for the Respondent Commission emphasised that if not considered for the promotional measures under Section 86(1)(e) of the Electricity Act, 2003, the RE generators could not have been entitled to the banking facility due to the fact that such banking facility is not given to conventional energy generators. The State Commission in the impugned order has gone into this issue of the promotional measure, the historical reasons for banking for the renewable energy generators for one year considering the high cost of generation and a substantial change that has occurred by way of reduced generation cost from renewable energy generators etc.. These developments, as referred by the State Commission cannot be disputed and secondly the banking facility is not a vested right, but only a promotional measure. Therefore, it is not open to the RE generators to claim that the present banking facility should be continued without any modification. Moreover, it is always open to the State Commission to impose reasonable restrictions, as is being done in other renewable energy rich states where much stricter norms than what is prevalent in Karnataka are applicable. To cite an example, in the States of Maharashtra, Andhra Pradesh, and Telangana etc., banking is available on a peak to peak basis which means that the consumption of power has to be at the time of peak generation only.

15.8 Learned senior counsel for Respondent Nos.2 to 6 submitted that there is no applicability of the principle of res judicata in so far as the power of State Commission to review its order dated 11.07.2014 is concerned. He contended that it is settled law on the applicability of the principle of res judicata and Section 11 of the Code of Civil Procedure 1908, that the said principle would only apply when the issue in a subsequent lis arises from the same cause of action which is not

present in the instant case. Regarding the violation of the doctrine of promissory estoppel and legitimate expectation, learned counsel for the Respondent Nos.2 to 6 submitted that a contract has been executed by the Appellants and the ESCOMs in the standard format which has been approved by the State Commission. The agreement has never been challenged/ questioned by the Appellants and having done so and knowing full well that it is within the purview of the power of the State Commission to modify the terms of the contract between the parties hereto (which is expressly stated therein), the contention of the Appellants that the Doctrine of Legitimate Expectation would apply to the present case is wholly untenable. To strengthen his submissions, learned counsel relied on various judgements of the apex court as under:-

i. *Transmission Corporation of Andhra Pradesh Ltd &Anr vs Sai Renewable Power Pvt Ltd (2011) 11 SCC 34 (Para 83, 86,88).*
ii. *Kothari Industrial Corporation Limited vs TNEB &Anr(2016) 4 SCC 134 (Para 10 to 14)*
iii. *Motilal Padampat Sugar Mills vs State of Uttar Pradesh & Ors (1979) 2 SCC 409 (Para 24 to 27)*
iv. *Assistant Excise Commissioner & Ors vs Isaac Peter & Ors (1994) 4 SCC 104 (Para 25)*

15.9 Learned counsel further submitted that the State Commission is bound by the Act and the Regulations framed thereunder and due procedure as set out therein have been followed in the present case. The said Regulations do not provide for individual notice to be issued to each party when the State Commission is exercising its regulatory power of tariff fixation, terms and conditions for wheeling and banking which are to be uniformly applicable to all participants. As per the Regulations of the State Commission, public notice was issued and public hearing was held on 12.06.2017 in which many Appellants herein participated. In addition, submissions of solar and mini hydel generators were also

considered. Learned counsel emphasized that on consideration of all the material placed on record by all stakeholders, the order impugned was passed reducing the banking period to six months and imposing certain conditions on renewable energy generators. As such, there is no legal infirmity in the procedure followed by the State Commission.

15.10 Learned counsel further contended that while the perusal of the prayers in the original petitions filed by the ESCOM's indicate that the exercise in question was not restricted to one category of generations but to all RE generators. The said petitions were published on the website of the Respondents as well as the State Commission and was available in public domain to all stakeholders. Learned counsel further submitted that in the proceedings before the State Commission, the Respondents have placed material before the State Commission to justify the modifications in the banking facilities along with the Memo dated 02.02.2017 and a written response to comments of the public which was filed on 31.07.2017 and the same is noted in the various paras' in the impugned order. Learned counsel quick to point out that the State Commission, being an expert Regulatory body, is seized of all regulatory powers and has taken note of the harmful and onerous effect of annual banking facility and has passed the impugned Order. Hence, the contentions of the Appellants that the impugned order was passed in violation of principles of natural justice as solar generators were not given an opportunity of being heard is untenable and denied.

Our Findings:-

15.11 We have carefully considered the rival contentions of the learned counsel for the Appellants and the Respondents and thoroughly evaluated the material placed on record before us. What thus transpires from the bare perusal from the respective petition filed by the

ESCOMs that the petitions were in relation to the wheeling and banking facility given to wind generators and the Respondent Commission while issuing the public notice dated 13.05.2017 had also referred to the ESCOMs petitions to be in relation to wind generators only. The Respondent Commission while giving its consideration for modification of banking period had also referred to wind generation in Para 13 of the Order, however while passing the operative part of the impugned order, solar projects were also included for reducing their banking period. The Appellant's counsel contend that it is curious to see that even ESCOMs have not pleaded reduction of solar banking period but the Respondent Commission included all RE generation for modification in the impugned order. It is contended by the Appellants specifically the solar generators that the impugned order violates the principles of natural justice and ought to be set aside. In addition to the above, it is trite law that when a quasi judicial body seeks to affect adversely right of parties then it is incumbent duty to give notice as well as hearing to such affected parties which has not been done in the instant case. The aforesaid principle of law has been settled by the Hon'ble Supreme Court and this Tribunal in cases of Manohar vs. State of Maharashtra and High Tech Industries Vs. HPERC & Ors. Besides, such modification in banking and wheeling arrangement directed by the Respondent Commission violates the Doctrine of Legitimate Expectation as the developers/generators have made substantial investments and entered into commercial arrangements based on the assurance given to them by the State ESCOMs that the terms of banking shall be on annual basis and WBA shall be valid for 10 years from the date of execution. Hon'ble Supreme Court in a catena of Judgments has held that if based on a Government Representation a party alters its position then the said party has the legitimate right to

seek enforcement of the said representations. The apex court through its various judgments has also held that any change from an assured proposition infringes the doctrine of legitimate expectation and additionally held that the doctrine of legitimate expectation is an aspect of Article 14 and would be relevant when determining if an action by a statutory authority was arbitrary.

15.12 In the present case, it is also pertinent to note that any order of the regulatory body reversing or doing away with established principles i.e. concept of banking of power on annual basis with no restrictions on drawal of banked energy as provided for in Order dated 04.07.2014 undermines the principle of regulatory certainty and adversely impacts the economic viability of the Projects. As mandated under the Statute, the State Commission has to strike a balance between public and private utilities so as to safeguard the interest of the consumers. While taking note of the finding of the Commission in the impugned order, it is noticed that the alleged prejudice being caused to ESCOMs on account of annual banking facility has been considered and no analysis has been attempted to evaluate the financial loss to the small RE generators who have very little share of their banked energy in the total energy requirement of the ESCOMs. The judgment of the Hon'ble Supreme Court in APERC Vs. RVK Energy Pvt. Ltd. has clearly set out the required balance between the generating company and the consumers. Similar are the rulings of this Tribunal in its judgment dated 23.09.2016 in the case of TNDGCL Vs. Century Floor Mills. While taking note of the various KERC Regulations, it is evident that the provisions of these Regulations is crystal clear namely to comply with the principles of natural justice, principles of transparency and give an opportunity of hearing to the affected parties. In the instant case, the

Respondent Commission appears to have erred in not giving adequate notice and opportunity of hearing to all the individually affected parties which becomes quite relevant in view of the different dates of execution of WBAs as well as variance in nature of RE generation i.e. solar, wind and hydro. It is also not clear from the order that why KPTCL, which is designated as nodal agency in the State for facilitation of wheeling and banking facilities as per KERC Open Access Regulations, has not been involved in the proceedings of the State Commission.

15.13 Additionally, it is noted from the various previous orders of the Commission, WBAs & KERC Regulations etc. that the Commission may be entitled to modify / alter the conditions of an executed contract at the instance of either of the parties after giving an opportunity of hearing to both the parties whereas in the instant case, the amendments have been effected suo motto which is considered contrary to settled principles of law. It is an established fact that at the time of execution of WBAs, annual banking facility was provided as reflected in the orders of the Commission dated 11.07.2008 and 4.7.2014. All the WBAs stipulate that they may be amended by KERC only after hearing to both the parties (Clause 13.6/12.6) and, therefore, modification of the scheme of wheeling and banking cannot be undertaken in exercise of the statutory powers as has been done in the present case. In this regard, the findings of the apex court in PTC India Ltd. Vs. CERC case is quite relevant.

15.14 After careful consideration of all the material placed on record before us and the contentions of the learned counsel for the Appellant and Respondents, we are of the considered opinion that the impugned order has been passed by the Respondent Commission in gross violation of

the principles of natural justice, doctrine of promissory estoppels and legitimate expectation, etc..

16. Issue No.3:-

Learned counsel for the Appellants at the outset submitted that the findings of the Respondent Commission in the impugned order that admittedly during peak months, the purchase price of power is generally high and such price during the peak-time of the day would be even higher and this is why the ESCOMs are financially burdened due to Annual Banking Facility, is patently incorrect. Learned counsel quick to point out that the contentions of ESCOMs as well as Respondent Commission are unsubstantiated and no data/ analysis to establish the same has been provided either is petitions or in the impugned order. Learned counsel, to fortify their contentions relied upon the judgment of Hon'ble Supreme Court in Maharashtra State Board of Secondary and Higher Secondary Education vs. KS Gandhi (1991) 2 SCC 716 which categorically held that:-

> ***" If the facts are disputed, necessarily the authority or the Enquiry Officer, on consideration of the material on record, should record reasons in support of the conclusion reached".***

16.1 Learned counsel further contended that the petitions filed by ESCOMs made only vague references to high power procurement cost in fourth quarter of the financial year on account of the annual banking period and as such any amendment in the banking arrangement in the absence of evidence, to justify the same is unreasonable and legally unsustainable. On the contentions of the Respondents that the impugned order has been passed based on the result of well founded analysis, learned counsel for the Appellants contested that no evidence has been recorded in the impugned order towards the same. In fact,

the order has been passed by KERC only on the basis of bald averments made by the Respondent ESCOMs. They pointed out that the contentions of the ESCOMS fail on account of the following:

(a) information in the Reply filed by the Respondents was not before KERC, and, therefore, reliance on such information is of no consequence;

(b) the data included in the Reply is not backed by any records, and a submission that the same is available publicly is not sufficient;

(c) neither the Impugned Order nor the Respondents in their respective petitions have relied on the said data and accordingly, it does not reflect that the State Commission has reviewed this alleged data or that the amendments to the banking arrangements are premised thereon.

16.2 Learned counsel for the Appellants alleged that on the other hand, the Respondent Commission failed to analyse the burden of financial loss to the RE generators as the energy generated during peak season has to be surrendered and sold at a lower rate of 85% of the generic tariff and the same will have to be bought back from the Grid at a higher rate during the low generation season, as opposed to being allowed to withdraw its banked energy. Learned counsel vehemently submitted that the quantum of banked energy from RE generation is almost negligible as compared to the total energy being supplied by the ESCOMs in the grid. As such the financial implication on the RE generators due to reduced banking period would be much more than the alleged financial injury caused to the ESCOMs. Learned counsel further submitted that in view of these facts, RE generators ought to be protected under the executed WBA which have crystalised their rights to avail the annual banking facility, whereas, only the concerns of ESCOMs has been addressed by the State Commission without proper

analysis and justification. As such, the impugned order is pre judiced and deserves to be set aside on this ground.

16.3 Learned counsel further contended that the claim of the ESCOMs that in order to supply to consumers the banked power in the months of January to March, they are purchasing expensive power in short term market is without any basis as the variable energy tariff of backed down thermal power plants namely RTPS, BTPS and UTPS are highest in merit order, as can be seen from the BESCOM Tariff Order for FY 2017-18. Hence, backing down of thermal plants during wind season of May to September is solely on account of commercial reasons and not attributable to excessive wind power getting banked as claimed by the ESCOMs. Learned counsel also indicated that the tariff petitions are generally filed in November, 2017, therefore, the latest ARR & ERC are reflected in these petitions. As such, the petitions filed in 2016 & 2017 are prior to the tariff petitions filed in November, 2017 and have no validity in the eyes of law. About 80-90 % of the total generation from wind project happens during 4-5 months in a year and, therefore, it is virtually impossible for any consumer to exhaust the consumption in six months period and keeping this aspect in view, the annual banking was provided by the State Commission. Learned counsel for the Appellants alleged that for the first time that too by way of a written statement, the Respondents ESCOMs have provided some data before this Tribunal and this data is also for few selective projects pertaining to a few Appellants herein. Learned counsel further submitted that being an appellate court, this Tribunal is only to examine the legal veracity of the impugned order and not to re-hear the entire matter on factual issues, as if it were the Court of the original instance.

16.4 ***Per contra,*** learned counsel for the Respondent Commission submitted that in the statement of objections filed in support of the contention, the ESCOMs brought out before the Commission that the consumers of this State are being burdened by the annual banking scheme. Learned counsel contended that although an attempt was made to state that the introduction of 6-month banking will adversely affect the generators as they will, in reality, be forced to surrender a larger quantum of energy to the State at the reduced rate but the same are based wholly on projections and assumptions and are opposed to real scenario of actual generation vis a vis. banking and consumption during summer season resulting in drawal of high cost energy at the cost of ESCOMs. Learned counsel pointed out that in every single year, the Appellants herein have drawn the entire quantum of banked energy that it has accumulated over the year. It is also pertinent to note that the State of Karnataka requires round the clock power on a regular basis and the utilities cannot rely on unutilised banked energy alone to meet its power requirement due to the fact that the banked energy is infirm in nature.

16.5 Learned senior counsel for the Respondents ESCOMS submitted that the financial loss incurred by ESCOMs due to annual banking of power by RE generators during monsoon period and drawal of the same during summer period is being passed on to the consumers in the form of increased tariff. In order to meet the requirement of the banking, the ESCOMs are being forced to procure power from energy exchange, UI or under short term basis which is a costly power. All these materials were placed by the ESCOMs before the State Commission to justify the said modification along with Memo dated 2.2.2017 and a written response to comments of the public which was filed on 31.7.2017. Learned counsel submitted that an Appeal is a continuation of the

original proceedings and therefore the material that has now been placed before this Tribunal can also be considered to decide the appeal. Learned counsel to strengthen his arguments relied on the decision in the matter of *RachakondaNarayana v. Ponthala Parvathamma* (2001) 8 SCC 173 which held that the material which is germane to decide the dispute in hand cannot be ignore and ought to be considered.

16.6 Learned counsel contested that without any pleadings or grounds raised in their appeal memorandum and the primary documents not being placed on record by the said Appellants, the computation sheets ought not to be considered. Learned counsel for the Respondents reiterated that the contentions of the Appellants that the unutilized energy being surrendered is significant and as the same is being purchased at 85% of the generic tariff is untenable while evaluating same with the generation and consumption pattern in a particular year. Regarding the contentions of the Appellants that the State is purchasing short term power at higher cost to the detriment of the consumers when lower cost power is being made available by the wheeling and banking arrangement, is unsustainable in light of the factual figures. Learned counsel for the Respondents highlighted various paras' of the impugned order to content that the Respondents had placed sufficient material before the State Commission to justify the requisite modifications of banking facilities and allegations of the Appellant regarding inadequate data before the Commission is erroneous.

Our Findings:-

16.7 We have carefully considered the rival submission of both the parties and also took note of other material available on record. The main premise for issuing the impugned order modifying the banking period is

the adverse financial impact being faced by ESCOMs mainly because of high cost power procurement in the fourth quarter of the financial year so as to supply to consumers of RE generators in lieu of the banked energy during peak season. Appellants' counsel allege that the impugned order did not consider any data or analysis to establish the adverse financial impact of ESCOMs on account of only annual banking arrangement. The Appellants counsel further contend that the order has been passed by the Commission on the basis of bald averments made by the ESCOMs as the information now furnished in the reply by the Respondents was not placed before the State Commission and data so included in the reply is not backed by any record / evidence. While taking note of the findings and discussions in the impugned order and respective submissions of the learned counsel for both the parties, we find that while exercise at the level of the State Commission lacks in data, records, analysis etc., additionally there is no evaluation of the financial injury for the Appellants vis.-a-vis. the ESCOMs on account of such banking or reduction in banking period whatsoever. It is also recalled that similar petitions were filed by the ESCOMs in 2013 & 2014 based on so called prejudice caused to them due to annual banking but the State Commission after having thoughtful consideration rejected those petitions. In this regard, we find no additional material or analysis to justify the present decision of the State Commission in reducing the banking period to six months. While referring to the previous orders dated 11.07.2008, 22.03.2013, 09.10.2013, 04.07.2014 etc. wherein the Commission rejected the ESCOMs request for modification of banking period, it clearly emerges that without any additional ground or data to what has been submitted earlier, the impugned order appears to have been passed by extraneous consideration as also reflected on page nos..27 & 28 of the

order. It is also noted from the records that the variable energy tariff of backed down thermal plants namely RPTS, BTPS, UTPS etc. are highest in merit order, as reflected from Tariff Order for FY 2017-18 pertaining to BESCOM. As such, it transpires that backing down of thermal plants during wind season of May to September is solely on account of commercial reasons and not attributable to excessive wind power getting banked. In the proposed reduced period of six months banking, it is virtually impossible for any consumer to exhaust the consumption of all banked energy in a mere six months period and resultantly RE generators would have to surrender unused power at a reduced rate to the ESCOMs and purchase power in lean generation period at rates higher than their own cost of generation.

16.8 In view of the forgoing reasons, we are of the considered view that for taking such a decision of modifying the Wheeling and banking arrangement, sufficient data, analysis and evaluation have to be considered which in the instant case is virtually lacking. As the similar request of ESCOMs for reduction in banking period of RE generators was rejected by the State Commission in 2013-14 and since then no additional data or analysis or ground has been generated by the ESCOMs, the findings of the State Commission in the impugned order without judicious analysis and evaluation do not appear justified.

17. <u>Summary of Our Findings</u>:-

17.1 While taking critical evaluation of the contentions and objections of the Respondent Commission as well as Respondent ESCOMs, we hold that they do not establish any supervening public interest that prevailed to modify the banking arrangement even prior to the 10 years period as available to the Appellants concerned. Neither in the impugned order nor in the statement of objections filed by the KERC or Respondents,

no satisfactory reasons of public interest warranting such one cited amendment in WBAs is cited. As such, in the absence of supervening public interest established by the KERC reducing the banking period and forcing other restrictions in the banking or drawal of energy in a pre-matured manner giving the promises / assurances go by before the expiry of the validity period of 10 years guaranteed by the previous orders of the Commission. The Appellants who have invested and executed the commercial agreements cannot be left in lurch in the mid-stream. Thus, the tests in various judgements rendered by the Hon'ble Supreme Court (in Pawan Alloys etc.) are not satisfied by the KERC to disown the Doctrine of Promissory Estoppel and Legitimate Expectation.

17.2 It is relevant to note that the change of circumstances pleaded by the State Commission as well as ESCOMs to contend that the Doctrine of Promissory Estoppel is not applicable to the Appellants in as much as the installed capacity of the RE generation has increased manifold in last 10-15 years and it is anticipated to add RE capacity much more by the end of Financial Year 2019-20 would not be countenanced as the increase in RE capacity has happened with the consent of the State Govt., KERC and the ESCOMs. Thus, having permitted such an increase in the RE capacity, having achieved the objective of increasing RE generation, the benefits granted to the power projects cannot be withdrawn against the legitimate interest of the Appellants more particularly in view of the various previous orders issued by the State Commission. The RE power plants have longer useful life spanning across 25 years, whereas WBAs are executed only for 10 years. Keeping these aspects in view, the physical support in form of annual banking would need to be reduced gradually, if necessary, only after

expiry of the executed WBAs to avoid financial shock to the developers / Appellants herein.

17.3 From the consideration and findings in the aforesaid paras, we opine that the impugned order passed by Karnataka Electricity Regulatory Commission modifying the terms and conditions of banking arrangements in the concluded contracts is not sustainable in the eyes of law. The same appears to have been passed without adhering to the principles of natural justice, doctrine of promissory estoppels & legitimate expectation etc.. Besides, the order is not supported by sufficient / requisite data and analysis. Hence, the impugned order is liable for setting aside and the batch of appeals deserves to be allowed.

ORDER

Having regard to the factual and legal aspects of the matter, as stated supra, the instant Appeals filed by the Appellants are allowed.

The impugned order passed by Karnataka Electricity Regulatory Commission dated 09.01.2018 in Petition Nos. 90/2016, 100/2016, 104/2016, 47/2017 and 130/2017 is hereby set aside.

The matter stands remitted back to the first Respondent, KERC with the direction to pass the appropriate order in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of six months after receiving the copy of this judgement.

The Appellants and the Respondents herein are directed to appear before the first Respondent, KERC personally or through their counsel without notice on 29.04.2019.

In view of the disposal of the batch of Appeals, the relief sought in the IAs does not survive for consideration and accordingly stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **March, 29th , 2019.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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