IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.198 OF 2014

Dated: 28th September, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. T. Munikrishnaiah, Technical Member.

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat. **... Appellant**

AND

1. **GREEN INFRA CORPORATE WIND POWER LIMITED,**
NBCC Plaza, Tower – 2, 2nd Floor, Pushp Vihar, Sector – V, Saket, New Delhi – 110 017.

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**
6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355.

3. **UTILITY USERS WELFARE ASSOCIATION,**
Laxmi Ginning Compound, Opp. Union Co-op. Bank Limited, Naroda, Ahmedabad – 382 330. **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Vishal Gupta
Mr. Kumar Mihir for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

WITH
APPEAL NO.199 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat. **... Appellant**

AND

1. **GREEN INFRA WIND POWER LIMITED,**
NBCC Plaza, Tower – 2, 2nd Floor, Pushp Vihar, Sector – V, Saket, New Delhi – 110 017.

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**
6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355.

3. **UTILITY USERS WELFARE ASSOCIATION,**)
Laxmi Ginning Compound, Opp. Union Co-op. Bank Limited, Naroda, Ahmedabad – 382 330.) **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Vishal Gupta
Mr. Kumar Mihir for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

WITH
APPEAL NO.200 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,)
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat.) **... Appellant**

AND

1. **VAAYU (INDIA) POWER CORPORATION PRIVATE LIMITED,**)
Plot No.33, Daman-Patiala Road, Bhimpore, Daman – 396 210.)

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,** 6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355.

3. **STATE LOAD DISPATCH CENTRE,** 132, KV Gotri Sub-Station Compound, Nr. T.B. Hospital, Gotri, Vadodara – 390 007.

4. **GUJARAT ENERGY DEVELOPMENT AGENCY,** 4th Floor, Block No.11 & 12, Udyog Bhawan, Sector – 11, Gandhinagar – 382 017.

3. **UTILITY USERS WELFARE ASSOCIATION,** Laxmi Ginning Compound, Opp. Union Co-op. Bank Limited, Naroda, Ahmedabad – 382 330. **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Vishal Gupta
Mr. Kumar Mihir for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

WITH
APPEAL NO.291 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat. **... Appellant**

AND

1. **M/S. TADAS WIND ENERGY PRIVATE LIMITED,**
   8th Floor, C-22, G Block Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051.

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**
   6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355. **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Arijit Maitra.
Mr. Hasan Murtaza
Ms. Ruth Elwin for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. These appeals involve a common question of law and, hence, have been tagged together.

2. We shall first deal with Appeal No.198 of 2014. The Appellant – Gujarat Urja Vikas Nigam Limited is a company incorporated under the provisions of the Companies Act, 1956. The Appellant is an unbundled entity of the erstwhile Gujarat Electricity Board. The Appellant procures electricity on behalf of the distribution licensees in the State of Gujarat and, accordingly, enters into the Power Purchase Agreement ("**PPA**") with the generating companies including non conventional energy sources. Respondent No.1 is a company incorporated under the provisions of the Companies Act, 1956. Respondent No.1 is a wind energy generator and has established an

aggregate capacity of 20.8 MW of wind energy project in the State of Gujarat. Respondent No.2 – Gujarat Electricity Regulatory Commission ("**State Commission**") is the Regulatory Commission for the State of Gujarat exercising powers and discharging functions under the provisions of the Electricity Act, 2003 ("**the Electricity Act**").

3. By Order No.2 of 2006 dated 11/8/2006, the State Commission determined the price for procurement of power by the distribution licensees in Gujarat from wind energy projects for the control period of 3 years. The relevant portions of the said order could be quoted:-

> *"1. Tariff- Project Specific or generalized*
>
> .....
>
> *As regards normative para meters, the Indian wind energy Association (InWEA) submitted that for wind energy projects normative/generalised tariff, rather than project specific tariff, is the preferable approach as this will incentivise efficiency and selection of site, technology, financing package, etc. However project specific tariff design may be considered, in case of wind energy developer approaches the commission*

with a specific petition providing rational and justification for such project specific tariff.

The Commission considers that a general tariff for wind energy projects is desirable since it will provide an incentive to the investors for selecting the most efficient machines and the most suitable project locations (besides being non-discriminatory).

……

9. Advance Against Depreciation (AAD)

In the discussion paper, the Commission has not considered Advance Against Depreciation for purposes of tariff determination.

Since wind energy projects are getting accelerated depreciation benefits (under IT Act), AAD need not be allowed for tariff determination purpose.

……

15. Income Tax liability

In the discussion paper, the Commission considered the effect of the Income tax, Minimum Alternate Tax (MAT) and surcharge (being statutory liabilities) for tariff determination purpose. ***The Commission also considered the tax holiday available under Section 80-IA of the Income Tax Act and Income Tax benefit through Accelerated depreciation.***

The Commission is of the view that Income tax liability should be allowed at prevailing rate for tariff determination purposes.

……

16. Tariff Rate

……..

Tariff for wind energy projects

(i) For new projects

Based on the various parameters as discussed above, the levelised cost of generation including RoE using discounting rate at weighted average cost of capital i.e. 11.38%, works out to Rs. 3.37 per KWh.

……"

4. Thereafter, by Order No.1 of 2010 dated 30/1/2010, the State Commission decided on the tariff for wind power projects for 25 years for wind power projects that may be established in the State of Gujarat during the control period of 3 years w.e.f. 11/8/2009 i.e. till 10/8/2012. Material portion of the said order is as under:

"3.10 ……..

The provisions of Accelerated Depreciation are provided in the Income Tax Act, 1961 and Rules framed thereunder. A person who qualifies

under the above statutory provisions is entitled to get benefits of the Accelerated Depreciation. Hence, the Commission decides to determine the tariff taking into account the benefit of accelerated depreciation available under Income Tax Act, 1961 and Rules framed under it. Those who do not avail of such benefit may submit petitions on case-to-case basis.

……

4. Tariff Determination

In view of the foregoing discussions, the various parameters considered by the Commission for determination of tariff are given in the table below:

Parameters for determination of tariff

	Parameter (per MW basis)	**11th August 2006 Order**	**Decided by the Commission for the 2010 order.**
Project Cost			
1	Land+ Plant & Machinery + Erection cost (Rs. Lakh)	435	462
2	Evacuation Infrastructure (Rs.Lakh)	30	38
	Total Capex (Rs. Lakh)	465	500
Operational parameters			

3	Debt- Equity ratio	70:30	70:30
4	Cost of debt and Interest on loan (tenure 10 years)	10.25%	10.75%
5	Return on Equity	14%	14%
6	Normative O&M cost for first year	1.5%	6.5 lakhs/MW
7	Insurance	Nil	Nil
8	Escalation in O&M (per annum)	5%	5%
9	CUF (at 100% grid & m/c availability)	23%	23%
10	De-rating in CUF	Nil	Nil
11	Actual machine availability	100%	100%
12	Actual grid availability	100%	100%
13	Depreciation	4.5%	6% for initial 10 yrs and 2% from11th year onwards.
14	Project life (years)	20	25
15	Minimum Alternate Tax (MAT)	11.33%	16.995%
16	Corporate Income Tax	33.66%	33.99%
17	Interest on working capital (i) Receivable of one month (ii) O&M expenses for one month		11.75%

Based on the above parameters, the levelised tariff including RoE of wind energy generation using a discounting rate of 10.19% works out to Rs. 3.56 per kWh.

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

> *The Commission, therefore, determines the tariff for generation of electricity from wind energy projects at Rs.3.56 (constant) for its entire project life of 25 years i.e. from the first year to the twenty fifth year. This tariff shall be applicable for purchase of wind energy by Distribution Licensees/ other entities for complying with the renewable power purchase obligations specified in the regulation by commission from time to time. This tariff is applicable to wind energy projects which commission brand new wind energy plants and equipments from 11th August, 2009 onwards." (emphasis supplied)".*

5. In pursuance of the above order dated 30/1/2010, the Appellant and Respondent No.1 executed PPAs dated 28/3/2011, 4/8/2011 and 30/1/2012 for sale and purchase of electricity from the 20.8 MW wind power project to be established by Respondent No.1. As regards the tariff payable by the Appellant to Respondent No.1, the PPA, inter alia, provides as under:

> *"5.2 GUVNL shall pay a fixed rate of Rs. 3.56 per kWh for delivered energy as certified by SEA of Gujarat SLDC during the 25 years life of the project*

as determined by the Commission through Order No: 1 of 2010 dated 30th January 2010."

6. It is the case of the Appellant that in terms of the above order, Respondent No.1 specifically agreed to the applicable tariff as determined in the order dated 30/1/2010 which had taken into account the accelerated depreciation benefit. At the time of execution of the PPA, Respondent No.1 did not exercise the option of demanding the project specific tariff to be determined by the State Commission under order dated 30/1/2010 on the ground that it will not be entitled to or otherwise it does not wish to avail of the accelerated depreciation benefit under the Income Tax Act. According to the Appellant, there was otherwise no reservation made in any of the above PPAs that Respondent No.1 may claim modification of the tariff terms and conditions subsequently in regard to the claim for project specific tariff. It is the case of the Appellant that a firm, binding and concluded contract came into existence in terms of Section 86(1)(b) of the Electricity Act with the due approval of the State Commission

on the tariff. Thereafter on 29/8/2012 i.e. after considerable time of execution of the PPAs, Respondent No.1 approached the State Commission vide Petition No.1239 of 2012 and prayed for the following reliefs:-

> *"10. In the aforesaid facts and circumstances, the Petitioner prays that;*
>
> *A) This Hon'ble Commission be pleased to admit the petition;*
>
> *B) This Hon'ble Commission be pleased to hold and declare that the Petitioner is entitled to seek adjustment and / or variation of tariff fixed vide Order No. 1 of 2010 dated 30.1.2010 for non availing the benefit of accelerated depreciation and the further pleased to adjust and / or vary the tariff of the Petitioner;*
>
> *C) This Hon'ble Commission be pleased to direct the Respondent to modify/amend the Power Purchase Agreements dated 29.3.2011, 6.8.2011 and 30.1.2012 annexed at Annexure – A – Colly hereto by incorporating the tariff so determined / adjusted by this Hon'ble Commission pursuant to the present petition.*

D) This Hon'ble Commission be pleased to direct the Respondent to pay the difference in the tariff determined by this Hon'ble Commission vide Order No. 1 of 2010 dated 30.1.2010 and the adjusted tariff determined under this Petition from respective dates of Commissioning of the Wind Turbine Generators as per Annexure –A – Colly hereto;

E) Pass such other and further orders as may deem fit and expedient in the facts and circumstances of the present case."

7. The Appellant objected to the maintainability of the petition on the ground that Respondent No.1 having entered into the PPA with the Appellant which clearly specified the tariff stipulated in the State Commission's order dated 30/01/2010 is not entitled to seek any revision in tariff on the basis that it has chosen not to avail of the accelerated depreciation benefit under the Income Tax Act.

8. By order dated 13/6/2014, the State Commission decided the preliminary aspect of maintainability. The State Commission held that Respondent No.1 is entitled to claim project specific tariff even by subsequently choosing not to

avail of the benefit of accelerated depreciation in terms of the Income Tax Act. Being aggrieved by the said order, the Appellant has filed this appeal.

9. The facts of Appeal No.199 of 2014 and prayers made before the State Commission are similar and, hence, it is not necessary to reproduce them.

10. In Appeal No.200 of 2014, facts are slightly different though as stated earlier, the main issue involved is the same as in Appeal Nos.198 and 199 of 2014. Respondent No.1 in this appeal is Vaayu (India) Power Corporation Private Limited ("**Vaayu India**"). Vaayu India is a wind energy generator and has established an aggregate capacity of 51.2 MW of wind energy project in the State of Gujarat.

11. In pursuance of Order No.1 of 2010 dated 30/1/2010, the Appellant and Vaayu India executed PPAs dated 9/6/2010, 6/7/2010 and 6/1/2011 for sale and purchase of

electricity from aggregate 51.2 MW wind power projects to be established by Vaayu India. The PPAs inter alia, provided as under:

> *"5.2. GUVNL shall pay a fixed rate of Rs.3.56 per KWh for delivered energy as certified by SEA of Gujarat SLDC during the 25 years life of the project as determined by the Commission through Order No.1 of 2010 dated 30/1/2010."*

12. It is the case of the Appellant that in terms of the above averment, Vaayu India specifically agreed to the applicable tariff as determined in order dated 30/1/2010 which was determined taking into account the accelerated depreciation benefit. At the time of execution of PPAs, Vaayu India did not exercise the option of demanding the project specific tariff to be determined by the State Commission as per order dated 30/1/2010 on the ground that it will not be entitled to or otherwise, it does not wish to avail of the accelerated depreciation benefit under the Income Tax Act. There was no reservation made in the PPAs that Vaayu India may claim the

modification of the tariff terms and conditions in regard to the claim of project specific tariff.

13. In June, 2012, Vaayu India approached the State Commission vide Petition No.1211 of 2012. Vaayu India *inter alia* prayed that tariff of its project be determined in terms of the liberty granted by the State Commission in its order dated 30/1/2010 on the basis that it was not availing of the accelerated depreciation and that the PPAs executed by it with the Appellant be directed to be suitably amended to reflect varied tariff. The Appellant, as in the other petitions, objected to the maintainability of the petition on the same ground on which it had objected to the maintainability of the petitions covered by Appeal Nos.198 and 199 of 2014. By the impugned order dated 11/6/2014, the State Commission decided that Vaayu India is entitled to claim project specific tariff even by subsequently choosing not to avail of the benefit of accelerated depreciation in terms of the Income Tax Act. Being aggrieved by the said order, the Appellant has preferred this appeal.

14. Facts of Appeal No.291 of 2014 are similar to facts of Appeal No.200 of 2014. Respondent No.1 in this appeal is M/s. Tadas Wind Energy Private Limited ("**Tadas**"). Tadas is a wind energy generator and has established an aggregate capacity of 50.4 MW of wind energy project in the State of Gujarat.

15. In pursuance of Order No.1 of 2010 dated 30/1/2010, the Appellant and Tadas executed PPA dated 30/3/2012 for sale and purchase of electricity from 50.4 MW wind power projects to be established by Tadas.

16. It is the case of the Appellant that in terms of the PPA, Tadas specifically agreed to the applicable tariff as determined in order dated 30/1/2010 which was determined taking into account the accelerated depreciation benefit. At the time of execution of PPA, Tadas did not exercise the option of demanding the project specific tariff to be determined by the State Commission as per order dated 30/1/2010 on the ground that it will not be entitled to or otherwise, it does not

wish to avail of the accelerated depreciation benefit under the Income Tax Act. There was no reservation made in the PPA that Tadas may claim the modification of the tariff terms and conditions in regard to the claim of project specific tariff.

17. Thereafter, in November, 2013, Tadas approached the State Commission vide Petition No.1365 of 2013. Tadas *inter alia* prayed that relevant documents such as Income Tax Returns of Tadas be taken on record demonstrating that Tadas has not availed of the accelerated depreciation benefit; that the tariff be redetermined on the basis that Tadas has not availed of the benefit of accelerated depreciation after taking into account the actual financial and operational parameters presented in the petition; that direction may be given to amend Clause 5.2 of the PPA so that it would reflect the redetermined tariff and that without prejudice to the above prayers, the State Commission may be directed to exercise its powers under Section 62(1)(a) read with Section 94(1)(f) and review the tariff by taking into account that Tadas has not availed of the benefit of accelerated depreciation. The

Appellant, as in the other petitions, objected to the maintainability of the petition on the same ground on which it had objected to the maintainability of the petitions covered by Appeal Nos.198, 199 and 200 of 2014. By impugned order dated 20/9/2014, the State Commission decided that Tadas is entitled to claim project specific tariff even by subsequently choosing not to avail of the benefit of accelerated depreciation in terms of the Income Tax Act. Being aggrieved by the said order, the Appellant has preferred this appeal.

18. We have heard Mr. Ramachandran, learned counsel appearing for the Appellant. We have carefully perused the written submissions filed by the Appellant. Gist of the written submissions is as under:

(a) Clause 5.2 of the PPAs executed between the Appellant and Respondent No.1 indicates that Respondent No.1 duly exercised the option of accepting the tariff of Rs.3.56 per kWh on the basis that accelerated depreciation was

being availed of. This implies that Respondent No.1 did not, at the time of signing of the PPAs, choose to have the other alternative of seeking the project specific tariff provided in the order dated 30/1/2010 namely on the basis of the accelerated depreciation being not availed of.

(b) The provisions of the Income Tax Act and the Rules framed thereunder duly allow the project developer to avail of the accelerated depreciation benefit.

(c) Order dated 30/1/2010 gave two alternatives to Respondent No.1. Respondent No.1 had to choose one before signing the PPAs. Respondent No.1 chose the tariff of Rs.3.56 per unit which was determined taking into account the accelerated depreciation. The PPAs were signed in pursuance thereof. A valid, binding and enforceable contract then came into existence.

(d) There is no provision in the executed PPAs that Respondent No.1 had reserved the right to choose the

other alternative and seek the project specific tariff at a subsequent stage after the PPA.

(e) Respondent No.1 had as on the date of the execution of PPAs elected to accept the tariff of Rs.3.56 per kWh determined on the basis that accelerated depreciation was being availed of. Respondent No.1, therefore, cannot choose the other alternative. (See: ***National Insurance Co. Ltd. v. Mastan & Anr.***[1] and ***Joint Action Committee of Airline Pilots Association of India (ALPAI) & Ors. v. D.G. Of Civil Aviation & Ors***[2]**.**

(f) Respondent No.1 has sought direction to modify or amend the PPAs. The PPAs as executed cannot be read as implying any option which could be exercised subsequently to get a project specific tariff fixed on the basis that accelerated depreciation was not being availed of.

[1] (2006) 2 SCC 641
[2] (2011) 5 SCC 435

(g) A legal, binding and concluded contract with price agreed at Rs.3.56 per unit came into existence between the Appellant and Respondent No.1 under which Respondent No.1 agreed to avail of accelerated depreciation benefit. Clause 12.10 of the PPAs provides that the terms incorporated in the agreement shall supersede any negotiation, previous documents, assumptions, etc. Clause 12.8 thereof, prohibits unilateral amendment of the contractual terms. (See: ***Delhi Development Authority & Anr. v. Joint Action Committee, Allottee of SFS Flats & Ors***.[3])

(h) This is not a case of aligning of the PPAs with order dated 30/1/2010 but exercise of State Commissions' powers is sought to change the terms and conditions of the PPAs.

(i) The Appellant could and would have refused to sign the PPAs if Respondent No.1 had at the time of signing of the PPAs sought tariff on the basis of not availing of the accelerated depreciation because the project specific tariff

[3] (2008) 2 SCC 672 at paras 62, 66, 80 and 81

with accelerated depreciation being not claimed could be higher than Rs.3.56 per kWh because there are sufficient number of wind power developers signing the agreements on the basis of availing of the accelerated depreciation and accepting Rs.3.56 per kWh and because the Appellant has not signed any PPA with any wind project developer at the tariff without accelerated depreciation being availed of.

(j) The signing of the PPA is a commercial decision to be made by the utilities subject to the regulatory control in matters of tariff. Once the State Commission has determined the tariff and the Appellant has executed the PPA based thereon, there cannot be further making of an order by the State Commission modifying the tariff in deviation or modification of the PPA. In such cases, the PPA is aligned with the tariff determined.

(k) A project developer is to choose between the two options before signing the PPA and not after signing and coming into existence of the binding contract.

(l) The substantial question of law that arises for consideration in this matter is whether a valid PPA entered into between the parties based on order passed by the State Commission can be interfered with by another order of the State Commission or by making appropriate regulation for that purpose in exercise of powers of the delegated legislation.

(m) In ***PTC India Limited v. Central Electricity Regulatory Commission***[4] ("**PTC India**") and in ***Transmission Corporation of Andhra Pradesh Limited & Anr. v. Sai Renewable Power Private Limited & Ors.***[5], ("**Sai Renewable**"), the Supreme Court has held that inroad into contracts entered into between the parties is to be by a regulation notified under Sections 178 or 181 of the Electricity Act and it is not open to the parties to seek variation of the contracts. In ***PTC India***, the Supreme Court has held that the contractual terms can be intervened only by regulations

[4] (2010) 4 SCC 603
[5] (2011) 11 SCC 34

and not by orders or adjudicating exercise of powers. In ***Sai Renewable***, it is held that terms of PPA are binding. The orders of this Tribunal which say that Regulatory Commissions can issue orders modifying the terms and conditions of the PPA are in teeth of ***PTC India*** and ***Sai Renewable***.

(n) Decisions of the Supreme Court are law under Article 141 of the Constitution of India. It is not open to Respondent No.1 to urge that ***PTC India*** did not decide that in individual cases, the Regulatory Commission cannot intervene in the contracts.

(o) In ***Bangalore Electricity Supply Co. Ltd. v. Konark Power Projects Ltd. & Anr. (Civil Appeal No.5612 of 2012 decided on 28/4/2015)***, the Supreme Court has held that the scope for variation in tariff was only before execution of the PPA and not thereafter. It is, further held that there is no scope for the Appropriate Commission to vary the tariff agreed between the parties under the approved PPA.

(p) Decisions of this Tribunal in judgment dated 20/11/2014 in ***Appeal No.252 of 2013 in Gujarat Urja Vikas Nigam Ltd. V. M/s. Emco Ltd.*** and ***Gujarat Urja Vikas Nigam Ltd & Anr. v. Gujarat Electricity Regulatory Commission & Anr. in Appeal No.111 of 2012 decided on 30/4/2013 (Rasna)***, are *per incuriam* and not binding. (See: ***Union of India & Anr. v. Raghubir Singh (Dead) by LRs, etc.***[6] and ***State of Gujarat v. Gordhandas K. Gandhi & Ors.***[7]***).***

(q) Even *obiter dicta* of the Supreme Court is binding. (See: ***Municipal Committee Amritsar v. Hazara Singh***[8], ***Oriental Insurance Company Limited v. Meena Variyal & Ors.***[9] and ***Mohandas Issardas & Ors. v. A.N. Sattanathan & Ors.***[10]***).***

[6] (1989) 2 SCC 754
[7] AIR 1962 Guj. 128
[8] (1975) 1 SCC 794
[9] (2007) 5 SCC 428
[10] AIR 1955 Bom. 113

(r) In ***Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Anr.***[11], the Constitution Bench of the Supreme Court has stated that the regulations framed as per the statute which prescribe the terms of appointment, conditions of service and procedure for dismissing employees are described as "statute" fetters on freedom of contract. Thus, the regulation alone can intervene and make inroads into a concluded contract.

(s) Section 62(4) and Section 64(6) speak of revocation or amendment of tariff order. These sections are not applicable to individual cases.

(t) The cases relied upon by the wind energy generators are under Section 86(1)(e) and not under Section 62(1).

(u) On merits, ***EMCO's*** judgment of this Tribunal supports the Appellant. ***EMCO's*** judgment was dealing with solar power project where the PPA in clause 5.2 provides for an additional stipulation of the tariff of the subsequent

[11] AIR 1975 SC 1331

control period being applicable to solar projects commissioned after two years. Considering the said stipulation, the State Commission had decided in favour of EMCO based on the subsequent tariff order providing for two tariffs, one for the accelerated depreciation and one without availing of the accelerated depreciation, clearly holding that in case the first order is only to be considered, the principle of estoppel would be applicable. This Tribunal has upheld the said findings of the State Commission.

(v) In contrast, as mentioned above, the PPAs in the wind power project do not contain the later part quoted above of the implications of the wind power project being not commissioned during the control period. The PPAs in wind power projects only provides for the payment of Rs.3.56 per kWh. Having executed the PPAs and taken advantage of the same, it is now not open to Respondent No.1 to try to wriggle out of its terms or vary the terms of

the PPAs. The principle of estoppel would apply as held in ***EMCO's*** case.

(w) Respondent No.1 squarely falls within the scope of State Commission's decision mentioned above which was approved by this Tribunal. Wind power developers are, therefore, estopped from claiming any change in the PPAs or the tariff after having accepted Rs.3.56 per kWh based on accelerated depreciation being availed of and having signed the PPAs in pursuance thereof.

(x) In ***Green Infra Wind Farm Assets Ltd. v. Jaipur Vidyut Nirman Nigam Limited & Anr.*** in ***Appeal No.207 of 2014 decided on 13/8/2015***, this Tribunal has held that a PPA which is entered into in pursuance of a draft tariff order cannot be reopened, when the generator agrees under the PPA to sell power at a lower tariff. The interest of the consumer has to be kept in mind.

(y) The decision of the Supreme Court in ***India Thermal Power Limited v. State of M.P. & Ors***.[12] supports the Appellant. It states that besides the tariff decision, other aspects are not statutory but are contractual. In this case, once the tariff order was passed on 30/1/2010, the option of Rs.3.56 per unit or project specific tariff is a contractual decision and not statutory.

(z) The Income Tax Rules only provide for the outer date for deciding whether or not to take the accelerated depreciation benefit. It is not that the project developer was prohibited on the date of signing of the PPA to decide whether to take the accelerated depreciation benefit or not.

(aa) Accelerated depreciation benefit can be accumulated.

(bb) Tariff with accelerated depreciation benefit is not structured for absorbing 80 percent depreciation in the first year itself.

[12] (2000) 3 SCC 379

(cc) Accelerated depreciation considered is 10 percent on reducing balance.

(dd) The Appellant could not be compelled to sign the PPA. The Appellant did not want to sign the PPA with any project developer where the accelerated depreciation was not availed of and increased tariff was payable. When the project developers were willing to sign the PPA accepting Rs.3.56 per unit, it is not in the interest of the consumers at large to pay higher tariff and sign the PPA providing for project specific tariff.

(ee) Consumer interest is most relevant (See: ***NTPC Limited v. Central Electricity Regulatory Commission & Ors.***[13])

(ff) Respondent No.1 in Appeal No.291 of 2014 has raised the issue that the Appellant has not challenged the order of the State Commission admitting the petition and, therefore, cannot raise the issue of the maintainability of

[13] 2010 ELR (APTEL) 833

the petition. It is submitted that admission is only to examine the case and not to decide on the maintainability of the petition.

(gg) The State Commission has by the impugned orders decided on the maintainability issue as a preliminary issue and passed reasoned orders. In the circumstances, it is not open to the Appellant to raise the issue of the petitions being not maintainable.

(hh) In the circumstances, it is submitted that the impugned orders holding that Respondent No.1 is entitled to a revision in the tariff for not availing of the accelerated depreciation benefit are erroneous and liable to be set aside.

19. We have heard Mr. Vishal Gupta, learned counsel appearing for Respondent No.1 in Appeal Nos.198, 199 and 200 of 2014. We have carefully perused the written submissions filed by him. Gist of the submissions is as under:

(a) The wind energy generators opt for not availing of the benefit of accelerated depreciation as per the rules framed under the Income Tax Act, 1961. The said rules clearly provide that a generating company can avail of the benefit of accelerated depreciation. However, the said option has to be exercised before filing of the return of the Assessment Year in which the generation of power commenced. Thus, it is clear that once the generating plant reaches the commercial operation date, it will have to start generation and sell power to someone, in the present case, the distribution licensees of Gujarat and for that purpose will have to enter into PPA on the tariff determined by the State Commission. It is only after that and after supplying power for a year that the generating company will be in a position to exercise options as per law whether to avail of accelerated depreciation or not. Thus, the contention of the Appellant that the generating company should have exercised that option before signing the PPA is erroneous.

(b) The generic tariff order granting liberty to wind energy generators to approach the State Commission in the event they do not avail of benefit of accelerated depreciation has never been challenged by the Appellant and the said generic tariff order has attained finality.

(c) The State Commission has held that the wind energy generators have the liberty to file a petition for specific determination of tariff if they choose not to avail of the benefit of accelerated depreciation and also that the State Commission has powers and jurisdiction to re-open the PPAs in order to bring them in line with the tariff order. While holding so, the State Commission has relied upon the judgment of this Tribunal in ***Rasna*** where the facts were similar. In that case, this Tribunal held that solar power projects that are not availing of the benefit of accelerated depreciation could separately file a petition before the State Commission for determination of project specific tariff.

(d) In ***Rasna***, this Tribunal delivered the judgment on 30/4/2013. The Appellant did not challenge the said judgment. Rasna had filed a petition praying for determination of tariff to be paid by Pashim Gujarat Vij Company Ltd. On 10/7/2014, Rasna prayed that it may be permitted to withdraw the said petition. Pertinently, the Appellant objected to the withdrawal. The objection was overruled and Rasna was permitted to withdraw the petition on 10/7/2014.

(e) A bench of this Tribunal is bound by a judgment of another coordinate bench of this Tribunal ***(S.I. Rooplal & Anr. v. Lt. Governor through Chief Secretary, Delhi & Ors[14], Collector of Central Excise, Kanpur v. Matador Foam & Ors.[15], Union of India & Ors. v. Col. G.S.Grewal[16], Lala Shri Bhagawan & Anr. v. Shri***

[14] (2000)1 SCC 644
[15] (2005)2 SCC 59
[16] (2014)7 SCC 303

Ram Chand & Anr[17] and ***Tribhuvandas Purshottamdas Thakur v. Ratilal Motilal Patel***[18]**).**

(f) In ***EMCO,*** this Tribunal has relied on ***Rasna*** and has taken a similar view. In several cases this Tribunal has held that State Commission has power and jurisdiction to re-open the concluded PPAs between generating companies and distribution licensees ***(Judgment dated 02/12/2013 in Appeal No.132 of 2012 "Junagadh Power Projects Pvt. Ltd v. Gujarat Urja Vikas Nigam Ltd & Ors.", Judgment dated 31/5/2012 in Appeal No.29 of 2011 "Tarini Infrastructure Ltd. v. Gujarat Urja Vikas Nigam Ltd.", Judgment dated 10/02/2012 in Appeal No.35 of 2011 "Konark Power Projects Ltd. v. Bangalore Electric Supply Co. Ltd. & Anr", Judgment dated 28/9/2006 in Appeal No.90 of 2006 "Rithwik Energy Systems Limited represented by its Director v. Transmission Corporation of Andhra Pradesh Ltd."*** and ***Judgment dated 22/8/2014 in***

[17] AIR 1965 SC 1767
[18] AIR 1968 SC 372

Appeal No.279 of 2013 "Gujarat Urja Vikas Nigam Ltd. v. Gujarat Electricity Regulatory Commission & Ors.")

(g) The Appellant's submission that the above judgments are *per incuriam* in view of the law laid down by the Constitution Bench in ***PTC India*** is misconceived. It is wrong to interpret ***PTC India*** to mean that the Supreme Court has held that the PPAs can only be re-opened by the State Commission by framing regulations and PPAs cannot be re-opened by passing an order.

(h) On a plain reading of ***PTC India,*** it is clear that the Constitution Bench has observed that PPAs cannot be re-opened across the board by an order. The Constitution Bench has not stated that in no case PPAs can be opened by an order.

(i) It is a settled position of law that a judgment of a Court cannot be interpreted like a statue and has to be read

and understood as per its plain meaning ***(R. Gandhi v. Union of India & Anr.***[19] and ***Union of India & Ors. v. Krishan Lal Arneja & Ors.***[20]***)***

(j) It is also a settled position of law that a judgment is an authority for what it actually decides and not for every observation contained therein **(*The State of Orissa v. Sudhansu Sekhar Misra & Ors***[21]**).**

(k) The Supreme Court in ***Punjab Land Development & Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, Chandigarh & Ors.***[22] has in detail explained how a judgment of a court has to be read and understood in the context of law on *per incuriam.*

(l) An analysis of judicial precedent, *ratio decidendi* and the ambit of earlier and later decisions is to be found in the

[19] (1999) 8 SCC 106
[20] (2004) 8 SCC 453
[21] (1968) 2 SCR 154
[22] (1990) 3 SCC 682

House of Lords' decision in ***F.A. & A.B. Ltd. v. Lupton (Inspector of Taxes)***[23]**.**

(m) To accept the contention of the Appellant that all the judgments of this Tribunal cited by the wind energy generators are *per incuriam* in view of ***PTC India***, this Tribunal will have to deduce the *ratio decidendi* of ***PTC India***.

(n) In ***PTC India***, the Constitution Bench was dealing with fixation of trading margin for trading licensees by the Central Electricity Regulatory Commission by framing regulations. The challenge was to the regulations framed by the Central Commission. The Constitution Bench upheld this Tribunal's view that this Tribunal cannot go into the validity of the regulations framed by the Central Commission. In this context the Constitution Bench examined the power of the Central Commission to frame regulations. While examining this aspect in paragraphs

[23] (1972) AC 634

58 and 66, the Constitution Bench observed that the effect of framing regulations is that it can override the existing contracts which cannot be done "across the board" by an order passed by the Central Commission. The issue, as to whether the State Commission or the Central Commission has power or jurisdiction to re-open the PPAs or not, was not before the Constitution Bench.

(o) It is contented by the Appellant that even if it is assumed that the Constitution Bench was not dealing with the issue as to whether PPAs could be re-opened or not, the observations of the Constitution Bench in paragraphs 58 and 66 will have to be read as an *obiter dicta* of the Constitution Bench which is binding on all the Courts. This submission is erroneous. These observations only pertain to overriding of existing contracts across the board and, therefore, are limited to that situation.

(p) Reliance placed on ***Sai Renewable*** is also misplaced. In that case, the earlier tariff orders passed by the State Commission provided for revision of tariff after a

stipulated time. The Supreme Court also noticed that the PPAs so executed on the earlier tariff order also had a clause that the tariff will be revised after a stipulated period. The Supreme Court came to the conclusion that the State Commission has powers and jurisdiction to revise the tariff and the existing PPAs are required to be suitably modified. Thus this case clearly lays down that the tariff can be revised/amended since the Electricity Act permits such revision and consequently the PPAs can be modified. The basis of ***Sai Renewable*** was not that PPAs contained a clause envisaging revision in tariff. Pertinently the Supreme Court came to the conclusion that the Electricity Act permits revision of tariff. Therefore, a clause in PPAs is not the only basis of ***Sai Renewable***.

(q) Section 62(4) and Section 64(6) enable the State Commissions to amend the tariff determined under Section 62(1). In the present case, it is undisputed that the liberty was granted by the State Commission in the

tariff order dated 30/1/2010 and the said order attained finality.

(r) The only difference between the present case and ***Sai Renewable*** is that in this case the PPAs are silent. However, the fact remains that the said PPAs remain under the jurisdiction of the State Commission as the tariff determined by the State Commission under Section 62(1)(a) applies to them which will mean that Section 62(4) and Section 64(6) also apply to them and the tariff can be amended as per the said provisions. Further, the liberty granted by the State Commission also remains intact as it remained unchallenged and has attained finality. Apart from the above, the PPAs also do not stipulate that the tariff cannot be revised or the wind energy generators i.e. Respondent No.1 has given up its right to exercise the liberty granted by the State Commission to seek specific determination of tariff in the event it chooses not to avail of the benefit of accelerated depreciation. Thus, the reliance placed by the Appellant

herein on ***Sai Renewable*** is misplaced. ***Sai Renewable,*** in fact, is against the Appellant.

(s) Another aspect of ***Sai Renewable*** is required to be noticed by this Tribunal. ***Sai Renewable*** notices ***PTC India***. However, after relying on ***PTC India,*** the Supreme Court has not come to the conclusion that ***PTC India*** is an authority on the proposition that the PPAs, cannot be re-opened by an order. Thus this fact also clearly shows that ***PTC India*** does not hold that the PPAs cannot be re-opened by an order.

(t) Reliance placed by the Appellant on all other judgments on the general law of contract and promissory estoppel is misplaced in view of the law that specific statute will prevail over the general law. Section 174 of the Electricity Act says that the provisions of the Electricity Act will have overriding effect.

(u) The judgment of the State Commission in **M/s. *Cargo Motors Pvt. Ltd. V. Gujarat Urja Vikas Nigam***

Limited & Ors. in Petition No.1031 of 2010 decided on 7/8/2010 is not applicable to this case as facts in ***Cargo Motors*** were completely different from the facts of the present case.

(v) The Appellant is trying to curtail the power and jurisdiction of the State Commission to deal with PPAs. The effect of such interpretation will be contrary to the object of the Electricity Act. If such interpretation is accepted the State Commission or the Central Commission will not be able to correct or modify the PPA even if it is against law and requires to be corrected and modified by exercising the regulatory powers. The interpretation which will have the effect of denuding the Electricity Regulatory Commission of such an important regulatory power is not warranted. In the circumstances, the appeals are devoid of merits and deserve to be dismissed.

20. Gist of the written submissions filed on behalf of Respondent No.1 in Appeal No.291 of 2014:

(a) The question whether it was necessary for Respondent No.1 to claim benefit of accelerated depreciation when it was available has been covered by judgment of this Tribunal in Appeal No.111 of 2012 where in terms of judgment dated 30/4/2013, this Tribunal has negated such a contention raised by the Appellant arising from a similar dispensation rendered by the Gujarat Commission.

(b) In a series of judgments rendered by this Tribunal, it has been held that a PPA/concluded contract could be reopened by the Regulatory Commission. [See ***Full Bench decisions of this Tribunal in Junagadh Power Project Pvt. Ltd., Rithwik Energy System Ltd., Tamil Nadu Generation & Distribution Corporation Ltd. v. Penna Electricity Ltd. & Anr. decided on***

10/7/2013 in Appeal No.112 of 2012, GVK (Govindwal Sahib) Ltd. v. Punjab State Electricity Regulatory Commission & Anr. in Appeal No.70 of 2009 decided on 13/1/2011).

(c) The Appellant should not treat these matters as adversarial as they deal with quasi judicial functions of Respondent No.2 to determine / re-determine tariff under Section 62 of the Electricity Act.

(d) Accelerated depreciation allows entities to write off more assets against revenue and consequently to report lower income and pay less tax. This principle has been factored in by the Gujarat Commission in its generic tariff order dated 30/1/2010 while designing the generic tariff. However, Respondent No.1 has not availed of the accelerated depreciation and, hence, an anomaly will arise if Respondent No.1 who has not availed of accelerated depreciation is compelled to sell electricity

generated at lower tariffs which has been designed by factoring in the benefit of accelerated depreciation.

(e) The PPAs will not remain equitable if a separate tariff without factoring in accelerated depreciation is not granted to Respondent No.1. The Appellant is not entitled to take advantage of the PPAs which in any case do not preclude Respondent No.1 from claiming a separate tariff without factoring in accelerated depreciation.

(f) In ***PTC India***, the Supreme Court has not laid down a general proposition that contract can be interfered with by only making regulations and not otherwise. The Supreme Court explained that a subordinate legislation can override the existing contracts including PPAs which could not have been done across the board by an order of the Central Commission. The Supreme Court held that there could be an order/decision under the Electricity

Act even in the absence of a regulation. The Supreme Court was examining the width of a delegated legislation which if made will have a general application across the board affecting several entities all over the country, which the Central Commission did not wish to do on case to case basis by way of orders affecting each and every entity which trades in electricity all over the country. The ratio of ***PTC India*** needs to be understood in the context of trading of electricity by several inter-state traders, who enter into contracts with the sellers and purchasers of electricity, as contra-distinguished with the need to determine the tariff for Respondent No.1 wind energy generator in the present case. The function to determine tariff or to amend the existing tariff does not have a contractual character. In fact, it is statutory in nature. Hence, PPAs entered into between the Appellant and Respondent No.1 cannot denude Respondent No.2 of its power to exercise its statutory functions to determine / re-determine or amend the tariff. Section 64(6) of the Electricity Act specifically contemplates that a tariff order

can be amended or revoked. A contract adopting a tariff determined by a statutory regulatory provision cannot eclipse the powers vested under the statute. Procedure relating to tariff order under Section 64 or the power to amend the tariff under Section 62(4) has to be carried out by passing an order and not by notifying a regulation as contended by the Appellant. ***PTC India*** has, therefore, no application to the present case.

(g) A decision is an authority for what it actually decides. Judgment of a court is not to be construed as a statute. (See ***State of Haryana v. Ranbir @ Rana***[24] and ***ADM Jabalpur v. Sivakant Shukla***[25])

(h) ***Sai Renewable*** has confirmed that the Regulatory Commission having approved and regulated the purchase of power in terms of PPA can re-fix the regulatory purchase price by resorting to tariff fixation under

[24] (2006) 5 SCC 167 – para 12, 13, 14
[25] (1976) 2 SCC 521

Sections 62, 64 and Section 86(1)(a) of the Electricity Act. The said judgment vindicates Respondent No.1's position.

(i) In ***India Thermal Power***, it is held that PPAs are statutory only to the extent of determination of tariff. Therefore, the Appellant's contention that Respondent No.2 would forego its statutory function to determine the tariff under Section 62, including the power to amend the tariff of Rs.3.56 per kWh as contained in PPA dated 30/3/2012 would be contrary to the view expressed by the Supreme Court in ***India Thermal Power***, as the statutory provision of determination of tariff as contained in the PPA would not stand diluted either by virtue of PPA having been concluded or by virtue of original tariff order dated 30/1/2010 being *sub-silentio* as far as exercise of re-determination of tariff of Rs.3.56 per kWh as contained in concluded PPA.

(j) Since there is no conflict of opinion in different Benches of this Tribunal on the question of power of the Regulatory Commission to reopen concluded PPAs, there is no need to make a reference to a larger Bench. In view of the aforesaid, there is no substance in the appeal. The appeal be, therefore, dismissed.

21. We have heard Ms. Srivastava, learned counsel appearing for the State Commission. We have carefully perused the written submissions filed by the State Commission. Gist of the submissions is as under:

(a) If a renewable energy generator avails of the benefit of accelerated depreciation, its tax burden is reduced in the initial years of commissioning and, it provides cash flow for loan repayment. Therefore, it assumes importance in tariff determination proceedings. In the instant case, the wind energy generator availed of the benefit of accelerated depreciation and, thereafter by order dated

30/1/2010, the levelised tariff was determined as Rs.3.56 per kWh. In this order, the Commission stated that the wind energy generators who do not get such benefit may file a petition in that respect and a project specific tariff may be determined taking into consideration all relevant facts.

(b) Wind energy generators, who after commencing operation at the time of filing of Income Tax Return, decide not to avail of the benefit of accelerated depreciation for their commercial reasons are required to file a petition before the Commission for project specific determination without taking into account the benefit of accelerated depreciation. However, since, their projects have already commenced operation, the power supply by them is necessarily being undertaken under a PPA executed with the buying utility. Therefore, when a project specific petition is filed by them, the existing PPA to the extent of applicable tariff is required to be realigned by taking into account the option exercised by the project developer for

not availing of the benefit of accelerated depreciation under the Income Tax Act. The remaining provisions of the PPA remain unaffected. When this happens, effect is to be given to it in the tariff determined by the State Commission by realigning the existing PPA. Such a realignment does not amount to reopening of the PPA.

(c) Since the option as regards accelerated depreciation is to be exercised at the time of filing of Income Tax Returns and after business operations have commenced, the buying utility cannot be heard to contend that if it had known that the benefit of accelerated depreciation was not being availed of by the project, then it would not have entered into the PPA.

(d) In ***India Thermal Power.***, the Supreme Court has held that if a contract incorporates certain terms and conditions in it, which are statutory then, the said contract to that extent is statutory. Contracts to the

extent they contain statutory terms and conditions are necessarily to be aligned or realigned, as the case may be, to bring them in conformity with the statutory mandate. Therefore, the provision in the PPA as regards tariff taking into account accelerated depreciation which is a benefit available under the Income Tax Act is statutory in nature and, is necessarily to be realigned by reason of statutory intervention when the project developer opts not to avail of the said benefit at the time of filing Income Tax Returns. In this connection, reliance is also placed on ***judgment of this Tribunal dated 19/1/2010 in Appeal No.44 of 2009 in Gujarat Paguthan Energy Corporation Ltd. v. Gujarat Urja Vikas Nigam Ltd. & Anr. and companion appeal; judgment dated 22/2/2010 in Appeal No.77 of 2009 in Gujarat Urja Vikas Nigam Limited v. Essar Power Ltd. and companion appeal***.

(e) ***Judgment dated 2/12/2011 passed in Appeal No.194 of 2010 in Paschim Gujarat Vij Company Limited v.***

Gujarat Electricity Regulatory Commission & Ors. supports the contention that any provision in the PPA is necessarily to be read as per the tariff order dated 30/1/2010 and the Appellant cannot be heard to contend that since the provision as regards the effect of a subsequent request for project specific tariff has not been recorded in the PPA, the same cannot be given effect to.

(f) In ***PTC India***, the making of inroads into an existing PPA has been stated in the context where regulations have been framed by the Central Commission by exercising its powers under the Electricity Act and which require aligning of the PPA with the said regulations. The Supreme Court has held that such overriding of existing contracts and aligning them with the regulations cannot be done across the board by an order of the Central Commission under Section 79(1)(j). In this case, the effect of operation of a statutory provision under the Income Tax Act is being given which the State

Commission is bound in law to give. Hence, argument of reopening of PPA is not relevant to the present case.

(g) A decision of the Supreme Court based on specific facts does not operate as a precedent in future cases (***Fida Hussain & Ors. v. Moradabad Development Authority & Anr.***[26]) The facts of the present case are distinct from the facts in ***PTC India***.

(h) The impugned orders are valid as it is passed taking into account the provisions of the Income Tax Act. Reliance placed on ***judgment of this Tribunal in Appeal No.111 of 2012*** is apt. The State Commission has rightly also relied on ***EMCO Ltd.*** Reliance placed by the Appellant on the judgment in ***M/s. Cargo Motors*** has rightly been found to be wrong as the facts of the present case are distinct from the facts of the said case. There is in the circumstances no infirmity in the impugned judgments. The appeals are, therefore, liable to be dismissed.

[26] (2011) 12 SCC 615

22. Counsel for the parties have taken us through the provisions of the Electricity Act, several judgments of this Tribunal and of the Supreme Court. We have heard them extensively. Shorn of unimportant peripheral facts, the legal issue which arises for our consideration is whether a valid PPA entered into between the parties based on the tariff order passed by the State Commission can be reopened by another order of the State Commission so as to vary or amend the tariff. The Constitution Bench judgment in ***PTC India*** occupies the centre stage. Both sides have interpreted it differently. We shall soon advert to it.

23. Though we propose to decide the larger issue raised in these appeals, in our opinion, these appeals can be decided on facts. Hence, we shall revisit facts of Appeal No.198 of 2014 because the facts of other appeals are similar. The tariff order is the same. Conclusions drawn by us on facts in Appeal No.198 of 2014 will govern other appeals as well.

24. In facts of Appeal No.198 of 2014, by Order No.2 of 2006 dated 11/8/2006 the State Commission determined the price for procurement of power by the distribution licensees in Gujarat from wind energy projects for the control period of 3 years at Rs.3.37 per kWh. It was stated in the said order that project specific tariff design may be considered, in case of wind energy developer who approaches the State Commission with a specific petition providing justification for such project specific tariff. Thereafter by Order No.1 of 2010 dated 30/1/2010, the State Commission decided on the tariff for wind power projects for 25 years, for wind power projects that may be established in the State of Gujarat during the control period of 3 years at Rs.3.56 per kWh. It was stated in the order that the said tariff was determined taking into account the benefit of accelerated depreciation under the Income Tax Act and the Rules and for the project that does not get such benefit the State Commission would, on a petition in that respect determine a separate tariff taking into account all the relevant facts. Thereafter the Appellant and the wind energy generators i.e.

Respondent No.1 in the appeals executed PPAs for sale and purchase of electricity from wind power projects established by the wind energy generators. Clause 5.2 of the said PPAs is material. It reads thus:

> *"5.2 – GUVNL shall pay a fixed rate of Rs.3.56 per Kwh for delivered energy as certified by SEA of Gujarat SLDC during the 25 years life of the project as determined by the Commission through order No.1 of 2010 dated 30th January 2010".*

25. Thereafter the wind energy generators filed petitions before the State Commission seeking variation of tariff fixed vide Order No.1 of 2010 dated 30/1/2010 taking into account the accelerated depreciation benefit on the ground that they do not wish to avail of the benefit of accelerated depreciation. Objection was raised by the Appellant to the maintainability of the petitions on the ground that the wind energy generators having entered into PPAs with the Appellant which clearly specified the tariff stipulated in the State Commission's order dated 30/1/2010 are not entitled to seek any revision in tariff

on the basis that they have chosen not to avail of the accelerated depreciation benefit under the Income Tax Act. The said objection was rejected and the petitions were held maintainable by the impugned orders.

26. In this connection, it is necessary to read Order No.2 of 2006 and Order No.1 of 2010. Order No.2 of 2006 dated 11/8/2006 stated that "*though as submitted by Indian Wind Energy Association, for wind energy projects normative / generalized tariff rather than project specific tariff is the preferable approach.... However, projects specific tariff design may be considered in case of wind energy generator approaches the Commission with a specific petition providing rational and justification for such project.*" Similarly, Order No.1 of 2010 dated 30/1/2010 clearly stated that "*.....the Commission decides to determine the tariff taking into account the benefit of accelerated depreciation available under the Income Tax Act, 1961 and the rules framed under it. Those who do not avail of such benefit may submit petitions on case to case basis.*" After setting out the tariff rate, this Order further

goes on to say that "*for a project that does not get such benefit, the Commission would on a petition in that respect determine a separate tariff taking into account all the relevant facts.*" This order was not challenged by the Appellant. It has assumed finality. After accepting the said order, the Appellant entered into PPAs with wind energy generators. The Appellant, therefore, accepted that wind energy generators could approach the State Commission with petition for project specific tariff in case they do not wish to avail of the benefit of accelerated depreciation. It would not, therefore, be open for the Appellant to now object to the petitions filed by the wind energy generators for the same relief. While entering into the PPAs, the Appellant ought to have taken care and inserted the relevant clause/term prohibiting the wind energy generators from approaching the State Commission. The Appellant cannot be heard to say that the wind energy generators, who were already granted liberty by the State Commission's order, should have inserted a clause giving them liberty to approach the State Commission. The Appellant by accepting the order dated 30/1/2010 agreed that the PPAs could be reopened.

The Appellant cannot resile from this stand. Since all the appeals have similar facts on this ground alone they deserve to be dismissed. However, since the Appellant has raised the issue that a PPA incorporating tariff fixed by generic tariff order cannot be reopened by the State Commission by passing an order so as to vary the tariff, we shall deal with it. For that purpose, it is necessary to understand the role of a Regulatory Commission.

27. Before the Regulatory Commissions were created, the State Electricity Boards were entrusted with the responsibility of arranging the supply of electricity in the States. The State Electricity Boards were also vested with the power to fix tariff. The Statement of Objects and Reasons of the Electricity Act states that over a period of time, the performance of the State Electricity Boards deteriorated. They were unable to take decisions on tariff in a professional and independent manner. To address these issues, the Electricity Regulatory Commission Act was enacted in 1998. It provided for Electricity Regulatory Commissions at the Central and the

State levels. With the objective *inter alia* of distancing the regulatory responsibilities from the Government to the Regulatory Commission, the Electricity Act was enacted. In short, the idea was to create an independent statutory Commission to determine tariff as per the provisions of the Electricity Act. The preamble to the Electricity Act indicates that the Electricity Act was enacted to consolidate the existing laws relating to generation, transmission, distribution, trading and use of electricity and for taking measures *inter alia* for rationalization of electricity tariff. It provides for Regulatory Commissions at Central and State levels and for clarity defines the term 'Appropriate Commission'. Section 2(4) defines Appropriate Commission as under:

"***2. Definitions.*** –

xxx xxx xxx

(4) "Appropriate Commission" means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in sub-section (1) of Section 76 of the State Regulatory Commission referred to in

section 82 or the Joint Commission referred to in Section 83, as the case may be."

In this judgment, therefore, Regulatory Commission is at times referred to also as Appropriate Commission or Central or State Commission.

28. Chapter 10 of the Electricity Act relates to Regulatory Commissions. It provides for Central Commission and State Commissions. The functions of the Central Electricity Commission, which we need to highlight here, are as under:

*"**79. Functions of Central Commission. :** (1) The Central Commission shall discharge the following functions, namely:-*

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government

specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

xxx xxx xxx

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary".

29. The functions of the State Commission, which we need to highlight for the present case, are as under:

"86. Functions of State Commission. *- (1) The State Commission shall discharge the following functions, namely: -*

(a) determine the tariff for generation, supply, transmission and wheeling of electricity,

wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

xxx xxx xxx

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

xxx xxx xxx

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;"

30. Thus, the Regulatory Commissions are to regulate the tariff and to fix the tariff as laid down by the Electricity Act. They have also to determine trading margin. There can be no dispute about the fact that determination of trading margin or fixing a cap on trading margin is different from determination of tariff. Clause 4(ix) of the Objects and Reasons of the Electricity Act indicates that the Electricity Act recognizes trading as a distinct activity and Regulatory Commissions were authorized to fix ceiling on trading margins if necessary. The Statement of Objects and Reasons, preamble and the provisions of the Electricity Act make it clear that the core function of the Regulatory Commission is determination of tariff. It is a statutory function. Law does not permit anyone to take over that function. Determination of tariff is not contractual. It is not based on mutual agreement. The tariff determined by the Regulatory Commission is incorporated in

the PPA. The Regulatory Commission retains the control over it all throughout even during the period of PPA entered into between the parties because it has not only to fix the tariff but also to regulate it and "regulate" is a word of wide import. The Regulatory Commission does not become *functus officio* after the tariff is fixed. We will now go to the provisions which relate to determination of tariff.

31. Section 61 relates to tariff regulations. It empowers the Appropriate Commission to specify the terms and conditions for the determination of tariff. It states the factors which should guide the Appropriate Commission in this exercise. It is an enabling provision for framing of regulations by the Appropriate Commission.

32. Section 62 is important. So far as it is relevant, it reads as under:

"62. Determination of tariff *:- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition

among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

xxx xxx xxx

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified."

33. What is pertinent to note is that Section 62 provides for determination of tariff for supply of electricity by a generating company to a distribution licensee, for transmission of electricity, for wheeling of electricity and for retail sale of electricity. Section 62(1)(a) states that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act for supply of electricity by a

generating company to a distribution licensee. The proviso thereto states that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.

34. Thus, tariff can be fixed for supply of electricity by **a generating company** to **a distribution company** (emphasis supplied) by the Appropriate Commission. In case of shortage of supply of electricity, the Appropriate Commission can fix the minimum and maximum ceiling of tariff for sale or purchase of electricity pursuant to an agreement entered into between **a generating company** and **a licensee** or between licensees (emphasis supplied). Section 62(2) says that the Appropriate Commission may require **a licensee** or **a generating company** to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff (emphasis supplied). Thus, the Electricity Act

contemplates fixation of tariff in respect of an individual generating company. Though most tariff orders are generic in nature, the Electricity Act contemplates fixation of tariff of an individual generating company also. Sub-section (4) of Section 62 says that no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. This section must be read against the background of preceding provisions to which we have made a reference. If Section 62(1)(a) speaks of fixation of tariff of an individual generating company, it is not possible to hold that Section 62(4) contemplates amendment of a generic tariff order and not amendment of tariff determined in respect of an individual generating company. Section 63 speaks of determination of tariff by the Appropriate Commission by bidding process. Section 64 sets out the procedure for tariff order which the Appropriate Commission has to follow. Section 64(6) is material. It reads as under:

"64. Procedure for tariff order, -

xxx xxx xxx

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

35. This provision must also be read against the background of Section 62 which permits amendment of tariff of an individual generating company. So read, it is clear that under Section 64(6) also a tariff of an individual generating company can be amended. The amendment contemplated in Section 62(4) and 64(6) can be amendment of the tariff of an individual generating company or amendment of a generic tariff order. These provisions do not expressly confine themselves to a generic tariff order. It is not open for us to incorporate any such term in Section 62(4) and 64(6) which the legislature has chosen not to incorporate. This leads us to conclude that the power to amend a generic tariff order as also to amend project specific tariff vests in the Regulatory Commission. The Regulatory Commission can do so by an order.

36. We must mention here that counsel for the Appellant contended that the Regulatory Commission can amend tariff order under Sections 62(4) and 64(6), but the amendment can be made only to a generic tariff order. He submitted that there can be no project specific amendment of tariff. For the reasons which we have noted hereinabove, we reject this submission. Counsel also submitted that in this case there is no amendment to the generic tariff order dated 30/1/2010. The tariff determined by generic tariff order dated 30/1/2010, which is accepted and incorporated in the PPAs, is sought to be amended, which is not permissible. It must be noted that in this case the PPAs refer to the generic tariff order dated 30/1/2010 by which tariff was fixed and liberty was granted to wind energy generators, who do not avail of accelerated depreciation to approach the State Commission with a petition for fixation of project specific tariff. Pursuant to the said liberty, by reopening the PPAs, tariff fixed by generic tariff order dated 30/1/2010 is sought to be amended, which

cannot be faulted. Project specific determination of tariff is already upheld by us. Hence, this submission of the counsel for the Appellant deserves to be rejected.

37. We must now come to the power of the Central Commission and State Commissions to make regulations. Section 178 relates to the powers of Central Commission to make regulations. Section 181 relates to the powers of the State Commissions to make regulations. Section 178 states that the Central Commission may, by notification, make regulations consistent with the Electricity Act and the rules generally to carry out the provisions of the Electricity Act. Sub-section (2) thereof sets out matters which such regulations may provide for. Section 181 states that the State Commissions may, by notification, make regulations consistent with the Electricity Act and the rules generally to carry out the provisions of the Electricity Act. Sub-section (2) thereof sets out matters which such regulations may provide for.

38. These provisions indicate that Appropriate Commissions can make regulations to facilitate carrying out of the provisions of the Electricity Act. Under Section 178(2)(s) and Section 181(2)(zd), the Appropriate Commission can fix terms and conditions for determination of tariff under Section 61 of the Electricity Act. This position is not disputed by the counsel for the parties. At this stage, it is necessary to refer to the observations of the Supreme Court in ***BSES Ltd. v. Tata Power Co. Ltd. & Ors.***[27] Though the Supreme Court was referring to the Electricity Regulatory Commissions' Act, 1998, some of its observations are relevant for the present case as they state what is tariff and state what is the role of the Appropriate Commission. There is no dispute about the fact that the Appropriate Commissions' status continues to be the same even under the present Electricity Act and, hence, we quote the following observations of the Supreme Court from the said judgment.

[27] (2004) 1 SCC 195

"16. *The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. "Utility" has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that the terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (a) to (g) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff*

whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff."

39. In ***Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited & Ors.***[28], the Supreme Court held that the power and/or jurisdiction of the Central Commission to frame tariff and/or carry out revision thereof is not in dispute. The Supreme Court observed that the Central Commission has the exclusive jurisdiction to frame not only tariff but also any amendment, alterations and additions in regard thereto. Following observations of the Supreme Court are also material.

[28] (2009) 6 SCC 235

"34. While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission strict sensu 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 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 or res judicata will have no application."

These observations of the Supreme Court support the contention of the wind energy generators that the concept of regulatory jurisdiction provides for revisit of the tariff.

40. It must be noted that in ***U.P. Power Corporation Limited***, the Central Commission had framed regulations permitting the Central Commission on its own being satisfied that there is need to review the tariff of any utility to initiate the process of revision in accordance with the procedure as may be prescribed. This only reinforced the powers of the Central Commission.

41. It is also necessary to refer to ***India Thermal Power Ltd***. where Madhya Pradesh Electricity Board (MPEB) invited offers from private investors for prequalification in establishment of power projects. Letters of Intent were issued to Indian Thermal Power Ltd. (ITPL) in respect of power projects. In the PPAs, there were clauses regarding method and amount of payment. In order to secure payment, MPEB had to open letters of credit. MPEB had to maintain an escrow account with its bank as may be mutually agreed by the parties. Decision was taken by the Government of Madhya Pradesh to prioritize the projects for providing escrow protection on the

basis of least tariff criterion and after considering an optimum mix of liquid fuel, hydel and coal based projects. This was challenged. It was argued before the Supreme Court that PPAs were entered into under Sections 43 and 43-A of the Electricity (Supply) Act and as such they were statutory contracts and therefore MPEB had no power or authority to alter their terms or conditions. The Supreme Court negatived this contention holding as under:

> ***"11.*** *It was contended by Mr Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2)*

provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate 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. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory."

It is submitted by counsel for the Appellant that this decision helps the Appellant. Counsel submitted that it states that besides the tariff decisions, other aspects are not statutory but are contractual. Once the tariff order was passed on 30/1/2010, the option of Rs.3.56 per unit or project specific tariff is a contractual decision and not statutory and, therefore, the State Commission cannot alter the same.

42. We are unable to accept this submission. In our opinion, this submission is based on misinterpretation of ***India Thermal Power Ltd.*** In that case, the Supreme Court was considering the Electricity (Supply) Act, 1948. The Supreme Court obviously, therefore, had no occasion to consider Section 62(4) of the Electricity Act which permits amendment of tariff and Section 64(6) thereof which further reiterates that tariff order can be amended. If the submission of counsel is accepted, Section 62(4) and Section 64(6) will become redundant. The Appropriate Commission cannot be

denuded of its power to amend the tariff order. In this case, the Supreme Court held that if a contract incorporates certain terms and conditions which are statutory then to that extent it is statutory. The Supreme Court further held that PPAs can be regarded as statutory only to the extent they contain certain provisions regarding determination of tariff. Determination of tariff is a statutory function. In our opinion, therefore, the statutory Commission alone will have jurisdiction in relation to any alteration or amendment of tariff by resorting to statutory provisions namely Section 62(4) and 64(6). Such alteration or amendment cannot be done mutually by parties. The PPAs entered into between the Appellant and Respondent No.1 cannot denude the State Commission of its power to exercise its statutory function to redetermine or amend the tariff. A contract adopting a tariff determined by a statutory regulatory provision cannot eclipse the powers vested in the State Commission under the statute to amend it. There is no dispute about the fact that amendment of tariff under Sections 62(4) and 64(6) can be done by an order. These provisions are included in the

Electricity Act having regard to the peculiar nature of the power sector where exigencies of a situation may demand the regulator to take certain measures to safeguard the interest of a particular segment of the power sector. There is nothing either in Sections 62(4) or 64(6) or in any other provisions of the Electricity Act which put fetters on the regulator preventing it from passing an order under Sections 62(4) or 64(6) to amend tariff determined by the State Commission and incorporated in a PPA. It is also necessary to refer at this stage to Section 173 of the Electricity Act which gives the Electricity Act an overriding effect. ***India Thermal Power Ltd.,*** therefore, does not help the Appellant. Facts of that case and issues involved therein are totally different from the facts of the present case.

43. At this stage, it would be appropriate to view this case from another angle. Drawing support from ***India Thermal Power Ltd.***, Ms. Srivastava, learned counsel for the State Commission has rightly argued that PPAs to the extent they contain statutory terms and conditions are to that extent

statutory and are necessarily to be aligned or realigned as the case may be to bring them in conformity with the statutory mandate. Therefore, the provision in PPAs as regards tariff, taking into account accelerated depreciation which is a benefit available under the Income Tax Act, is statutory in nature and is necessarily to be realigned by statutory intervention by the statutory regulator i.e. the Appropriate Commission when wind energy generator opts not to avail of the said benefit.

44. It would also be appropriate at this stage to deal with the submission of the counsel for the Appellant that there are two clauses in the PPAs namely, clauses 12.8 and 12.10 which prohibit amendment thereof. Clause 12.8 reads thus:

> *"**12.8 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, GUVNL may consider any amendment or change that the Lenders may require to be made to this Agreement."*

45. We have already noted that no terms in the contract can override a statutory provision. If there is a power to amend tariff under Sections 62(4) and 64(6), the parties by contract cannot set it at naught. Parties cannot confer jurisdiction or oust jurisdiction by contract which is statutorily vested in an authority. This clause therefore refers to terms of the agreement which are contractual. Tariff stands outside the purview of contract. Determination of tariff is a statutory function. Tariff is not determined by agreement. Therefore, the statutory Commission will have jurisdiction in relation to any alteration or amendment of tariff as per the provisions of the Electricity Act. We have dealt with this issue extensively. We have referred to all the relevant provisions. In our opinion, it cannot be inferred from this clause that it fetters the power of the Appropriate Commission to redetermine tariff.

46. Clause 12.10 of the PPAs is also relied upon. It reads thus:

"12.10 Entire Agreement, Appendices: *This Agreement constitutes the entire agreement between GUVNL and the Power Producer, concerning the subject matter hereof. All previous documents, undertakings, and agreements, whether oral, written, or otherwise between the Parties concerning the subject matter hereof are hereby cancelled and shall be of no further force or effect and shall not affect or modify any of the terms or obligations set forth in this Agreement, except as the same may be made part of this Agreement in accordance with its terms, including the terms of any of the appendices, attachments or exhibits. The appendices, attachments and exhibits are hereby made an integral part of this Agreement and shall be fully binding upon the Parties.*

In the event of any inconsistency between the text of the Articles of this Agreement and the appendices, attachments or exhibits hereto or in the event of any inconsistency between the provisions and particulars of one appendix, attachment or exhibit and those of any other appendix, attachment or exhibit GUVNL and the Power Producer shall consult to resolve the inconsistency."

This clause also does not further the Appellant's case. The words "…… *All previous documents, undertakings, and agreements, whether oral, written, or otherwise between the*

Parties concerning the subject matter hereof are hereby cancelled and shall be of no further force or effect and shall not affect or modify any of the terms or obligations set forth in this Agreement, ….." can never include the previous tariff order dated 30/1/2010 which fixes tariff and grants liberty to the wind energy generators to move the Appropriate Commission for project specific tariff. Parties cannot by contract cancel a generic tariff order. This clause pertains to other documents and not to generic tariff order. We are, therefore, of the opinion that the two clauses in the PPAs do not help the Appellant.

47. The provisions enabling the Appropriate Commission to amend a tariff order appear to have been made with a purpose. Section 61 gives clear idea as to what factors have to be taken into consideration by the Appropriate Commission while determining tariff. Balance between safeguarding consumer interest and recovery of the cost of electricity in a reasonable manner has to be struck. The factors which would encourage competition, efficiency, economical use of the

resources, good performance and optimum investments will have to be taken into account. Pertinently the promotion of cogeneration and generation of electricity from renewable sources of energy has to be kept in mind. In a case where exigencies of a situation demand, the Appropriate Commission may have to amend the tariff order. Take for instance, a State ravaged by floods or such other natural calamity. There could be a case where there is a change in law under which certain benefit becomes available to an entity or renders certain terms of the PPA contrary to law. The PPA may have to be aligned to bring it in conformity with the law. Such a measure may also be necessary to prevent closure of renewable energy generation projects as has been held by this Tribunal in some judgments to which we shall soon advert. Tariff order cannot be amended at the drop of a hat but exigencies of a situation may demand such exercise of power. Appropriate Commission being the regulator has been entrusted with the duty of passing of tariff order and its revocation or amendment in appropriate cases by an order. It has exclusive jurisdiction to determine tariff and also to amend it. Apart from the fact that

in law, we do not see any fetters on the power of the regulator, we feel that putting such restriction on the regulator will not be in the interest of power sector.

48. It was contended by Mr. Ramachandran, learned counsel for the Appellant that the Electricity Act focuses attention on consumer interest. It is the consumer who has to be looked after. The State Commission and this Tribunal have to ensure that consumer interest is protected as that is of prime importance. While it is true that consumer interest should always be protected, we are unable to agree with Mr. Ramachandran that consumer interest will always override all other considerations or interest of other stakeholders. After all, the power sector functions on the joint efforts of all stakeholders and health of all stakeholders should be the concern of the regulator though as far as possible primacy must be given to consumer interest. The policies of the State lay great emphasis on renewable energy sources. The State

has recognized that those who generate renewable energy must be encouraged to enable them to remain in the power sector and flourish. Such encouragement undoubtedly cannot be at the cost of consumers. It is for the regulator to find ways to strike a balance. It is pertinent to note that Section 61 states what factors the Appropriate Commission has to take into consideration while specifying the terms and conditions for the determination of tariff. The promotion of cogeneration and generation of electricity from renewable sources of energy is one of those factors as set out in sub-clause (h). Under sub-clause (d), the Appropriate Commission has to safeguard consumer interest and at the same time take into account the recovery of cost of electricity in a reasonable manner. Section 86 notes the functions of the State Commission. Section 86(1)(e) states that the State Commission shall promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area

of a distribution licensee. This provision by fixing percentage of electricity to be purchased from renewable sources of energy lends assurance to them. These provisions indicate the legislature's anxiety to protect and encourage renewable sources of energy. It is, therefore, not possible to hold that the regulator has to only take the consumer interest into account. At the cost of repetition, it must be stated that balance has to be struck between the two. Some of the judgments to which we have made a reference make this position clear.

49. It is submitted by the Appellant that the judgment of the Constitution Bench in ***PTC India*** completely covers its contention that a valid PPA entered into between the parties incorporating tariff based on an order passed by the State Commission cannot be interfered with by another order of the State Commission so as to vary the tariff. It can only be done by making an appropriate regulation for that purpose in exercise of powers of delegated legislation.

50. We are unable to accept this submission. In our opinion ***PTC India*** is not the case on point. We need to give some background of ***PTC India*** and refer to the questions formulated by the Constitution Bench because that will explain why we have come to this conclusion. In that case PTC India, the Appellant therein was aggrieved by the fixation of trading margin/capping of trading margin under the Central Electricity Regulatory Commission (fixation of trading margin) Regulations, 2006. Challenge was raised to the *vires* of the said regulations. It was urged *inter alia* that capping of trading margin defeats the entire idea of having electricity traders. It was urged that statistical data shows that trading margin is not a return guaranteed to a trader and the actual margin which the trader gets is lower than the prescribed cap. It was urged that these facts were not appreciated by the Central Commission, while capping the trading margin as not to exceed 4.01 paise per kWh on the electricity traded. It was urged that Section 79 of the Electricity Act authorizes the Central Commission only to fix the trading margin and since the said regulations are purportedly made under Section 79,

they are beyond the powers of the Central Commission and are thus *ultra vires* the Electricity Act. Initially the *vires* of the said regulations was challenged before this Tribunal. This Tribunal held that it has no jurisdiction to examine the *vires* of the said regulations and that the appropriate course of action for PTC India is to seek judicial review under the Constitution. PTC India, therefore, approached the Supreme Court. The three Judges Bench of the Supreme Court referred the matter to the Constitution Bench on the question whether this Tribunal has jurisdiction to decide the question as to the validity of the said regulations. The Constitution Bench, while dealing with the reference, framed the following questions of law for determination:-

*i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 ("**the 2003 Act**") has jurisdiction under Section 111 to examine the validity of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act.*

ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

iii) Whether capping of trading margins could be done by CERC (the Central Commission) by making a regulation in that regard under Section 178 of the 2003 Act?

51. Before the Supreme Court while accepting that this Tribunal has no jurisdiction to deal with the challenge raised to the *vires* of the said regulations it was urged on behalf of the Central Commission that it had initiated proceedings against 14 traders for non compliance with the license conditions. It was pointed out that competition among the traders to capture the surplus power for sale has resulted in rising prices and that Central Commission had framed the said regulations because some traders were operating on high margins and trading margins being component of final prices paid by the consumers required regulations to protect the consumers.

52. One of the contentions raised before the Constitution Bench was that where the Act requires the discharge of a function by a specific order, then a regulation cannot be

framed to achieve that very purpose merely because there is a power to frame regulations. Therefore, trading margin can be fixed only by an order under Section 79(1)(j) and 86(1)(j) and not by a regulation. While dealing with this question, the Constitution Bench considered the scheme of the Electricity Act. The Constitution Bench observed that actual fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. The Constitution Bench, however, made it clear that 'trading margin' has a different statutory context. After discussing what is delegated legislation, the Constitution Bench concentrated on Section 79, sub-clause (j) of sub-section (1) whereof refers to fixation of trading margin. The Constitution Bench observed that functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178 whereunder it can make regulations. Referring to the power vested in the Central Commission to regulate tariff, the

Constitution Bench observed that to regulate is an exercise which is different from making of the regulations. Making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps under Section 79(1). However, if there is a regulation then the measures under Section 79(1) have to be in conformity with such regulation under Section 178. Applying this to fixation of trading margin contemplated under Section 79(1)(j), the Constitution Bench observed that making of a regulation is not a pre-condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j). However, if the Central Commission fixes a cap on the trading margin by issuing a regulation under Section 178, then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.

53. The Constitution Bench then discussed the reasons why a regulation has been made under Section 178 in the matter of capping of trading margin. The Constitution Bench observed that instead of fixing a trading margin (including capping) on a

case to case basis, the Central Commission thought it fit to make regulation which has a general application to the entire trading activity which has been recognized for the first time under the Electricity Act (emphasis supplied). These observations have to be read against the then prevalent circumstances which are reflected in the judgment of the Constitution Bench and which we have enumerated hereinabove namely that the competition amongst traders to capture surplus power had resulted in rising prices. Some traders were operating on high margin requiring the Central Commission to initiate proceedings against 14 traders for non-compliance with the licence conditions. It must also be borne in mind that inter-state traders have multiple contracts with sellers and purchasers of electricity. To meet this situation, regulation under Section 178 was issued. The said exercise was found more feasible and proper instead of fixing a trading margin on a case to case basis. A regulation which would have general application to the entire trading activity was preferred to fix a trading margin rather than an order of the Central Commission fixing trading margin on case to case

basis. It is in this context that the Constitution Bench further observed that making of a regulation under Section 178 became necessary because a regulation under Section 178 has the effect of interfering with and overriding the existing contractual relationship between regulated entities and that regulation under Section 178 is in the nature of subordinate legislation which can even override the existing contracts including the 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) (emphasis supplied). It is pertinent to note that the idea was to override the existing contracts **across the board** having regard to the circumstances mentioned by us hereinabove. It must also be kept in mind that the Constitution Bench has accepted that a trading margin could be fixed on a case to case basis by an order under Section 79(1)(j). The words "**case to case basis**" and '**across the board**" used by the Constitution Bench indicate that the stress was on the nature of the trading activities. The Constitution Bench, thereafter, discussed the

test of "general application" and referred to cases which show that the regulations can operate **across the board** and are therefore preferred in certain situations like giving benefit of advance against depreciation to power sector utilities, for changing the rates of depreciation prescribed under format of the balance sheet provided under the Companies Act, etc. While considering the width of the power conferred on the Central Commission under Section 178, the Constitution Bench observed that all contracts coming into existence after making of the said regulations have also to factor in the capping of the trading margins and, therefore, these regulations are in the nature of subordinate legislation and such regulatory intervention **across the board** could have been done only by making regulations under Section 178 and not by making an order under Section 79(1)(j) of the Electricity Act.

54. It bears repetition to state that fixing/capping of trading margin is not the same thing as fixing of tariff. Indisputably

tariff can be fixed by orders of the Appropriate Commission. Trading margin can be fixed by an order under Section 79(1)(j) or by a regulation issued under Section 178 by the Central Commission as clarified by the Constitution Bench. Terms and conditions for fixation of tariff can be fixed by regulations. Fixation of tariff is statutory and not contractual. Fixation of tariff is a process. Procedure for passing of tariff order is laid down under Section 64. Upon the receipt of application for fixation of tariff the Appropriate Commission has to consider all suggestions and objections received from the public, give hearing to the applicant and determine the tariff. Tariff is fixed by the Appropriate Commission and then incorporated in the PPA. The tariff order unless amended or revoked has to continue to be in force for such a period as may be provided in the tariff order. As already stated there are two provisions under the Electricity Act i.e. Section 62(4) and Section 64(6) which permit the Appropriate Commission to amend or revoke the tariff by an order. Tariff which is fixed by the Appropriate Commission and then incorporated in the PPA can only be varied by resorting to these statutory provisions even after the

PPA is executed. There is not even a whisper in the Electricity Act that this power cannot be exercised after the PPA is executed. That is because the nature of power sector requires the regulator to retain control over tariff during the period of PPA. Moreover, Section 174 of the Electricity Act gives it an overriding effect. As stated by the Constitution Bench statutory contexts of tariff determination and fixation of trading margin are different. Nowhere has the Constitution Bench said that tariff incorporated in the PPAs cannot be modified by an order made by a statutory Commission in exercise of its statutory powers under Sections 62(4), 64(6) and Section 86(1)(b) of the Electricity Act. The question whether PPA could be reopened for modification of the tariff determined by a tariff order and incorporated in it, was not before the Constitution Bench. It would be therefore wrong to apply the observations of the Constitution Bench made in the context of fixation of trading margin to tariff determination and its variation.

55. It is well settled by a catena of judgments of the Supreme Court that judgment of a Court is not to be treated as a statute but must be read and understood as per its plain meaning. While reading ***PTC India***, we must keep observations of Earl of Halsbury L.C in ***Quinn v. Leatham*** in mind. The observations run as under:

> "*Now before discussing the case of Allen v. Flood(1898) A.C.1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*"

Thus a judgment must be read as applicable to the particular facts proved or assumed to be proved because the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

56. In ***Sudhansu Sekhar Misra,*** the Supreme Court has observed that what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. After quoting the observations of Earl of Halsbury reproduced hereinabove, the Supreme Court observed that it is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

57. If ***PTC India*** is read keeping in view the above principles, it is clear that observations made therein relate to its peculiar facts. The Constitution Bench was considering *inter alia* whether capping of trading margin could be done by making a

regulation in that regard under Section 178 of the Electricity Act. It was urged that trading margin could be fixed only by an order under Sections 79(1)(j) and 86(1)(j). The Constitution Bench was therefore dealing with fixation of trading margin which is admittedly completely different from fixation of tariff. Statutory context of both is different. All observations made therein are related to fixation of trading margin. The observations that a regulation under Section 178 as a part of regulatory framework intervenes and even overrides existing contract which could not have been done **across the board** by an order of the Central Commission under Section 79(1)(j), cannot be treated as exposition of law on fixation of tariff and it's amendment after reopening PPA under Section 62(4) and 64(6) of the Electricity Act.

58. It is also necessary to refer to ***Sai Renewable***. In ***Sai Renewable***, the State Commission had initiated *suo motu* proceedings for determination of tariff applicable to the non-conventional energy generation projects. Vide its order dated 20/3/2004, the State Commission fixed the energy purchase

rates at base price of Rs.2.25 as on 1/4/2014 and the escalation index of 5% per annum, but the escalation was to be simple and was not to be compounded. An application for review was filed by the developers before the State Commission. The order was clarified to some extent vide order dated 7/7/2004. Both the orders were challenged before this Tribunal. This Tribunal while granting some reliefs to the Appellants therein held that the PPA was a statutory document and the State Commission had no authority to interfere with the same. This order was challenged before the Supreme Court. The Supreme Court considered the relevant statutory provisions and judgments and held that the State Commission had fallen in error of law in coming to the conclusion that it had no powers either in law or otherwise of reviewing the tariff. The Supreme Court set aside the State Commission's order and remanded the matter to it for determination of tariff. It is urged by the Appellant's counsel that this judgment is not applicable to the present case because in that case there was a clause in the PPA wherein the parties had reserved their right to revise the tariff.

59. It is not possible to agree with the Appellant's counsel that only because there was a clause in the PPA where the parties had reserved the right to revise tariff, the Supreme Court held that the State Commission had power to revise the tariff. In paragraph 64, the Supreme Court discussed the Regulatory Commission's powers and functions. Referring to Sections 61 and 62 read with Sections 86(1)(a) and (b), the Supreme Court observed that these provisions clearly demonstrate that the Regulatory Commission is vested with the function of determining the tariff for generation, supply, transmission and billing of electricity, etc. as well as regulation of electricity purchase and procurement process of distribution licensees, including price at which electricity shall be procured from the generating companies. After noticing the Constitution Bench judgment in ***PTC India***, the Supreme Court observed as under:

> *"68. In addition to the statutory provisions and the judgments aforereferred, we must notice that all the PPAs entered into by the generating companies with*

the appropriate body, as well as the orders issued by the State in GOMs Nos. 93 and 112, in turn, had provided for review of tariff and the conditions. The Tribunal appears to have fallen in error of law in coming to the conclusion that the Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so-called incentives. Every document on record refers to the power of the authority/Commission to take a review on all aspects including that of the tariff.

69. One of the relevant consideration for determining the question in controversy is to examine whether the matter falls within the statutory or contractual domain. From various provisions and the documents on record it is clear that the Regulatory Commission is vested with the power to revise tariff and conditions in relation to procurement of power from the generating companies. It is also clear from the record that in terms of the contract between the parties, APTRANSCO had reserved the right to revise tariff, etc. with the approval of the Regulatory Commission."

Following observations of the Supreme Court are also material.

"101. In BSES Ltd. v. Tata Power Co. Ltd., the Court clearly held that after creation of the Regulatory Commissions under the provisions of the Electricity

Regulatory Commission Act, 1998, the Commission has clear power and jurisdiction to fix tariff. The Court should not adopt an interpretation which should neither be strict nor narrower so as to oust the jurisdiction of the Regulatory Commission, as it would defeat the very object of enacting the said Act."

It is clear that the observations that the State Commission has power to review the tariff order is based on the relevant provisions of law, relevant judgments and the terms of the PPA. As stated earlier, these observations were made after noticing ***PTC India*** and after quoting therefrom. It is, therefore, not open to the Appellant to contend that these observations were made only because there was a clause in the PPA where the parties had reserved the right to revise tariff.

60. In ***Cellular Operators Association of India & Ors. v. Union of India & Ors.***[29], the Appellants therein approached Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") under Section 14 of the Telecom Regulatory

[29] (2003) 3 SCC 186

Authority of India Act, 1997 ("TRAI Act") challenging the decision of the Government permitting Fixed Service Providers to offer WLL with limited mobility. TDSAT dismissed the application holding *inter alia* that its jurisdiction is not wider than that of the Supreme Court and within the parameters of that jurisdiction, the Tribunal cannot interfere with the decision of the Government. On appeal, the Supreme Court set aside the said order. The Supreme Court held that TDSAT had wider jurisdiction than the Supreme Court as under Section 18 of the TRAI Act, it could interfere in appeal filed against TDSAT's order only on a substantial question of law whereas TDSAT's jurisdiction under Section 14 of the TRAI Act was wider. No doubt that the relevant provisions of the Electricity Act and TRAI Act are not in *pari materia*. But, the observations made by the Supreme Court while considering the nature of jurisdiction of regulatory bodies are relevant. The said observations are as under:

> *"The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They*

may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees."

61. We must now refer to the decision of the Supreme Court in ***Konark*** on which reliance is placed by the Appellant. In that case PPA dated 4/4/2002 was entered into between Konark who had established a biomass based power generating plant and Karnataka Power Transmission Corporation Limited (KPTCL). In the said PPA, tariff was decided among the parties in Clause 5.1 and 5.2. By a supplemental agreement dated 29/10/2005, the tariff was slightly increased. In 2004, the State Commission notified the KERC (Power Procurement for Renewable Sources by Distribution Licensees) Regulation 2004 ("**2004 Regulations**"). In the said regulations in proviso to Regulation 5.1 it was provided that the PPAs approved by the State Commission prior to the notification of these regulations shall continue to apply for such period as mentioned in those PPAs. In 2011,

the State Commission framed a new set of regulations viz KERC (Power Procurement from Renewal Sources by Distribution Licensees and Renewable Energy Certificate Framework) Regulations ("**2011 Regulations**"). The proviso to Regulation 9 thereof was identical to the proviso to Regulation 5.1 of the 2004 Regulations. As the price of Biomass Fuel increased Konark filed a petition before the State Commission seeking amendment to PPA so as to increase the tariff. The petition was dismissed. Konark filed appeal to this Tribunal. This Tribunal allowed the appeal holding that the State Commission has power to modify the tariff despite concluded PPA in larger public interest. The Bangalore Electricity Supply Co. carried the matter to the Supreme Court. The argument of the Bangalore Electricity Supply Co. was that once PPA is entered into between the parties and approved by the State Commission in view of the first proviso to Regulation 9 of the 2011 Regulations, tariff approved by the State Commission would continue to remain as it is till the end of the contract period. It cannot be varied as there was no power vested in the Commission under 2004 Regulations. ***Konark's*** case was

that Regulations 5.2, 5.3, 5.4 and Sections 61, 62 and 86(1)(b) and 86(1)(c) of the Electricity Act empower the State Commission to do so. The Supreme Court upheld the contention of the Bangalore Electricity Supply Co. entirely on the interpretation of the regulations. The Supreme Court, in our opinion, did not consider the larger question whether concluded PPAs can be reopened by the State Commission by resorting to statutory provisions namely, Section 62(4) and 64(6) of the Electricity Act. The Supreme Court observed that the whole issue lies within the narrow compass of power of the Commission under Regulation 5.1 of the 2004 Regulations as well as Regulation 9 of the 2011 Regulations. The Supreme Court further observed that Regulation 5.1 does not empower the Commission to vary the tariff after its determination. Proviso to Regulation 9 of the 2011 Regulations creates embargo in so far as PPAs approved by the Commission which were covered by the previous regulations ("**2004 Regulations**"). The Supreme Court further observed that while reading Regulation 5.1 of the 2004 Regulations along with Regulation 9 of the 2011 Regulations and its provisos,

what emerges is, whatever terms agreed between the parties should continue to remain in force without any alteration at least for a period of ten years as provided under Paragraph 5.1 of the original agreement dated 4/4/2002 at the rate at which it was agreed and modified under Supplemental Agreement dated 29/10/2005. The Supreme Court referred to Regulations 5.2, 5.3 and 5.4 of 2004 Regulations as well as Sections 61 and 62 of the Electricity Act to examine Konark's contention that power to vary the tariff vests in the Commission and observed that under the said regulations such power will operate prior to fixing the tariff. Having regard to the embargo placed on the Commission by the said regulations the Supreme Court observed that once PPAs are concluded the tariff cannot be varied. It is pertinent to note that the Supreme Court expressed its distress in the penultimate paragraph that the Commission as well as the Tribunal had failed to apply the stipulations contained in the regulations. We may quote the relevant portion of the said paragraph as under.

"Unfortunately, the Commission as well as the Tribunal have failed to apply the stipulations contained in the Regulations in the proper perspective. In fact, the Tribunal even while making reference to Regulation 9 has completely omitted to refer the proviso and has gone by the substantive part of Regulation 9(1) of the 2011 Regulations. The said glaring omission of the Tribunal, in applying the proviso, has resulted in the passing of the impugned order of remand to the Commission."

Thus, this judgment rests on interpretation of the regulations and embargo contained therein. It is not applicable to the instant case because there are no regulations framed by the State Commission for determination of tariff for renewable energy sources. The State Commission while determining tariff vide its Order No.1 of 2010 dated 30/1/2010 has clearly provided for a liberty to those wind energy generators who do not avail of the benefit of accelerated depreciation to approach the State Commission with a petition to determine the tariff on that basis. The said order was never challenged by the Appellant and hence has assumed finality. The wind energy generators therefore rightly filed a petition

before the State Commission. The said order had already granted liberty to the wind energy generators. Hence, there was no need for them to insist on any term in the PPAs expressing the liberty. It was the Appellant who should have insisted on such term. Facts of this case are totally different. ***Konark*** has no application to it.

62. Reliance placed by the Appellants on the judgment of the Constitution Bench in ***Sukhdev Singh*** also appears to us to be misplaced. In that case the Constitution Bench was concerned with regulations framed by the statutory bodies under the provisions of the relevant Acts concerning the service conditions of their employees. The Oil & Natural Gas Commission Act 1959, the Industrial Finance Corporation Act 1948 and the Life Insurance Corporation Act 1948 make provisions for framing of regulations *inter alia* providing for the manner in which an employee can be removed. The questions which fell for consideration of the Constitution Bench were, whether an order for removal from service contrary to regulations framed under the above mentioned Acts would

entitle an employee to a declaration against the statutory Corporation of continuance in service or would only give rise to claim for damages and whether an employee of a statutory Corporation is entitled to claim protection of Articles 14 and 16 against the Corporation. In short, the question was whether these statutory Corporations are authorities within the meaning of Article 12. Obviously, keeping in view the purport behind these regulations concerning the mode of removal of the employees, the Constitution Bench observed that the regulations containing the terms and conditions of appointment are imperative. It was observed that form and content of the contract is prescriptive and statutory. Taking this view forward it was observed that the statutory bodies have no free hand in framing the conditions and terms of service of the employees; that the statutory bodies are bound to apply the terms and conditions as laid down in the regulations and that the statutory bodies are not free to make such terms as they think fit and proper. Referring solely to the said regulations which prescribe the terms of appointment, conditions of service and procedure for dismissing the

employees, the Constitution Bench observed that **these regulations** in the statute are described as "statute" fetters on freedom of contract (emphasis supplied). The Constitution Bench was concerned with the regulations before it. The Constitution Bench held that if there are regulations in place then the contracts have to be in consonance with them and not in derogation thereto. As rightly pointed out by the counsel for the renewable energy generators here there are no regulations affecting exercise of jurisdiction for determination of tariff. On the contrary, the generic tariff order dated 30/1/2010 permits determination of tariff on a project specific petition if a party has not availed of the benefit of accelerated depreciation. Since here the power to determine the tariff or amend the tariff is traceable to statutory provisions, no restrictions can be placed on it. In the circumstances, ***Sukhdev Singh*** has no application to the facts of this case.

63. Our attention is drawn to several judgments of this Tribunal where this Tribunal has taken a view that a PPA can be reopened by the Appropriate Commission. We must refer to

some of them. In ***Rasna***, Rasna generating company was allocated 1 MW of solar power capacity by Government of Gujarat. On 29/1/2010 the State Commission decided generic tariff for purchase of electricity from solar power projects. This order stated that the projects which do not get the benefit of accelerated depreciation under the Income Tax Act may approach the State Commission by filing a separate petition for determination of project specific tariff. Rasna entered into PPA dated 8/12/2010 with Gujarat Urja (Appellant herein) and agreed to fixed generic tariff determined as per order dated 29/1/2010. The PPA was assigned by the Appellant to Paschim Gujarat through a tripartite supplemental Agreement dated 8/6/2011. On 31/12/2011 Rasna's plant was commissioned. On 20/2/2012 Rasna filed petition under Sections 62 and 64 of the Electricity Act before the State Commission for determination of specific tariff on the ground that it would not be availing of accelerated depreciation benefit as permitted by the order dated 29/1/2010. The State Commission held that the petition was maintainable. The said order was challenged before this

Tribunal. This Tribunal held that the State Commission had determined the tariff through Order No.2 of 2010 on 29/1/2010. While determining the tariff the State Commission had held that the projects that are not availing of the benefit of accelerated depreciation could approach the State Commission for determination of project specific tariff. This Tribunal further held that subsequent execution of PPA would not in any manner put an embargo on the jurisdiction of the State Commission to determine project specific tariff when the PPA itself recognized the fact that the tariff shall be as per Order No.2 of 2010 dated 29/1/2010 and particularly when the said order also recognized the right of the developers who are not willing to get the benefit of accelerated depreciation to approach the State Commission for determining the specific tariff for those projects. This Tribunal rejected the contention that if Rasna did not want to avail of accelerated depreciation benefit the same should have been intimated to the Appellant before signing of the PPAs on the ground that there was no such reservation either in the Order No.2 of 2010 or in the PPA entered into between the parties.

This Tribunal observed that Rasna was not mandated under any provision of law to disclose to the Appellant that it would not be availing of the benefit of accelerated depreciation before signing of the PPA. It was observed that it is the discretion of the project developer not to avail of the said benefit and move the State Commission for project specific tariff on that ground as permitted by the State Commission in the Order No.2 of 2010 dated 29/1/2010. The said tariff order was statutory order binding on the project developers and licensees such as the Appellant. This Tribunal further observed that if the option of signing or not signing the PPA was contingent on the developers exercise of option, then that option would have been specifically sought for by the Appellant and it would have ensured that the same was incorporated in the PPA, which was not done. This Tribunal rejected the contention that the State Commission does not have the power to override the contract entered into between the parties on the ground that the PPA itself was signed pursuant to the order passed by the State Commission determining tariff applicable to such PPAs. This Tribunal relied on its judgments in ***Appeal No.35 of***

2011 dated 10/2/2012, Appeal No.70 of 2010 dated 13/1/2011 and ***Appeal No.179 of 2010 dated 23/4/2010*** where it is held that the State Commission has powers to modify or vary the tariff as well as the terms of agreement for purchase of power. In the circumstances this Tribunal held that there is no bar on Rasna to get the project specific tariff determined by the State Commission after signing the PPA on account of not availing of the accelerated depreciation benefits. It is pertinent to note that in Rasna, this Tribunal delivered the judgment on 30/4/2013. The Appellant did not challenge the said judgment. Rasna had filed a petition praying for determination of tariff to be paid by Paschim Gujarat Vij Company Ltd. On 10/7/2014, Rasna prayed that it may be permitted to withdraw the said petition. The Appellant objected to the withdrawal. The objection was overruled and Rasna was permitted to withdraw the petition on 10/7/2014.

64. In ***EMCO***, EMCO a developer had established a 5 MW Solar plant at Fatehpur Gujarat. On 29/1/2010 the State Commission determined tariffs for procurement of power from

solar energy projects for control period of two years. The fixed tariffs took into account the benefit of accelerated depreciation under the Income Tax Act. It was clarified in the order that for a project that does not get such benefit the Appropriate Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts. By the order dated 29/1/2010, the State Commission decided the tariff for the solar power projects on the basis that they would get the accelerated depreciation benefit. PPA was executed between the Appellant herein and EMCO for sale and purchase of electricity from 5 MW Solar Power Projects. On 27/1/2012, the State Commission issued second tariff order for the control period 29/1/2012 to 31/3/2014. Tariff was determined on the basis that accelerated depreciation was availed of and also on the basis that accelerated depreciation was not availed of. EMCO's project was commissioned on 2/3/2012. On 8/8/2012 the State Commission determined the tariff for wind power projects with or without additional depreciation benefits. However, final tariff order was passed only after considering the accelerated depreciation benefits.

EMCO filed a petition before the State Commission praying for determination of tariff which is applicable to the solar power projects not availing of the accelerated depreciation in accordance with tariff order dated 27/1/2012. The State Commission allowed EMCO's petition and held that EMCO is entitled to tariff at the rate of Rs.11.25 per unit as it is not availing of the accelerated depreciation. The said order was challenged in this Tribunal. This Tribunal observed that EMCO's solar project could not be commissioned during the control period specified in the State Commission's order dated 29/1/2010. Therefore, in terms of the PPA, EMCO is entitled to tariff as determined by the State Commission for the next control period as per order dated 27/1/2012. This Tribunal observed that by the said order the State Commission has determined tariff for solar projects which avail of accelerated depreciation benefit and which do not avail of the same. Therefore, the tariff determined for solar projects not availing of accelerated depreciation benefit would be applicable to EMCO. This Tribunal also referred to its judgment in ***Rasna*** to which we have made reference hereinabove. It bears

repetition to state that the said judgment (***Rasna***) relates to solar tariff under the first tariff order dated 29/1/2010 wherein this Tribunal has held that the option of choosing the tariff without accelerated depreciation is available with the solar developer. This Tribunal held that ***Rasna*** would squarely apply to EMCO. This Tribunal concluded by observing that if the intention of the Appellant was to sign the PPAs only with those developers availing of the benefit of accelerated depreciation, the Appellant should have incorporated the same in the PPA, which is not done. It may be stated here that this Tribunal categorically held that its decision in ***Cargo Motors*** is not applicable as the facts of that case differ from the facts before it.

65. In **Junagadh Power Projects**, the Appellants were biomass based generating companies. On 17/5/2010 the State Commission passed an order determining tariff for procurement of power by distribution licensees from biomass based generating plants. The State Commission fixed a generic fuel cost at Rs.1600/MT with an escalation of 5% per

annum and accordingly fixed the tariff for biomass projects for 20 years of operation. Based on this order PPAs were signed between the parties. This tariff was subsequently modified by the State Commission in respect of biomass power projects with air cooled condensers by allowing increase in tariff by its order dated 7/1/2011. The Appellants filed petitions in the State Commission requesting for re-determination of price of biomass fuel in view of the significant hike in the market price of biomass fuel. The Appellant also sought implementation of order dated 7/2/2011 passed by the State Commission for increase in the tariff for their projects. The State Commission by the impugned order rejected the prayer of the Appellants with regard to re-determination of price of biomass fuel. However, it directed that the PPAs may be amended in view of increase in tariff on account of use of air cooled condenser in the power plants. The State Commission declined to re-determine the price of biomass fuel as it would result in review of the tariff order dated 17/5/2010 which is not permissible and such review had been rejected in a review petition filed by another biomass developer. The State Commission was also of

the view that as biomass price is uncontrollable due to unorganized market, it was the duty of the project developers to ascertain the availability of fuel. Aggrieved by the said order to the extent it rejected the prayer to re-determine the biomass fuel price, the Appellants therein filed appeals in this Tribunal. The Full Bench of this Tribunal, upon consideration of relevant provisions of the Electricity Act, National Electricity Plan, Tariff Policy and the relevant judgments of the Supreme Court and of this Tribunal came to a conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. Highlighting the importance of the State Commission this Tribunal observed that it has the duty to incentivize the generation of electricity from renewable sources of electricity and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State

Commission could revisit the fuel price to avert closure of such plants. This Tribunal sounded a word of caution that in such an intervention the State Commission has to balance the interest of the consumers as well as of the generating company. This Tribunal took note of the fact that the Appellants therein had accepted the generic tariff determined by the State Commission and entered into a long term PPA for 20 years and observed that in the changed circumstances if the price of biomass fuel in the market has increased to the extent that it has resulted in partial closure of the biomass plants, it is the duty of the State Commission to interfere with the tariff agreed in the PPA according to its generic tariff order dated 17/5/2010 and re-determine the fuel price and tariff. Undoubtedly it is the uncontrollable nature of biomass fuel price which weighed with this Tribunal. This Tribunal did observe that the Appellants therein were not requesting for revision in return on equity, capital cost of project, depreciation or any other controllable parameters. However, the facts remains that this Tribunal held that in a given fact-situation the State Commission can interfere with the tariff

agreed in the PPA. There is no positive assertion in this judgment that in no case where controllable parameters are involved, tariff order cannot be amended. This is because exigencies of a situation which may require such a course to be followed cannot be predicted.

66. In ***Rithwik*** also this Tribunal accepted that PPAs can be reopened. The Appellants therein had set up Biomass based generation plants. The question which is relevant for the present purpose and which was dealt with by the State Commission was whether Article 1.4 of the PPA entered into between the Appellants therein and APTRANSCO could be substituted by a new clause restricting the operation of the non-conventional energy projects upto 100% PLF only after deducting capacities for auxiliary consumption and captive consumption from the installed capacity of the biomass plants. The State Commission issued a direction that excess energy delivered over and above 100% PLF during the period of 30 minutes time block cannot be purchased. The said action of the State Commission was challenged. One of the issues

which the State Commission had to consider was whether the State Commission had jurisdiction to entertain the petitions. The State Commission held that the PPA is not outside the regulatory jurisdiction of the State Commission and that it can issue directions to the parties concerned to modify the PPA if found necessary. The said order was challenged before this Tribunal. On the facts before it, this Tribunal observed that the principle of 30 minutes time block was not incorporated in the modification approved by the State Commission and therefore it could not have brought the concept in the impugned order and permitted it to be applied for calculating the delivered energy. This Tribunal further observed that PPA is for a period of 20 years. In the circumstances it should not be modified for curtailing incentive of non-conventional energy generators. This Tribunal referred to its judgment in Appeal Nos.1,2,5 etc of 2005 dated 2/6/2006 in ***Small Hydro Power Developers Association & Ors. v. Andhra Pradesh Electricity Regulatory Commission & Ors.,*** where it was held that the Commission has no jurisdiction to reopen the PPAs once they are approved by it. This Tribunal observed

that the said decision was rendered in a case where PPAs were reopened by the Commission and modified to the detriment of the non conventional energy generators. It was further observed that a distinction however must be drawn in respect of a case, where the contract is reopened for the purposes of encouraging and promoting renewable sources of energy projects pursuant to the mandate of Section 86(1)(e) of the Electricity Act which requires the State Commission to promote cogeneration and generation of electricity from renewable sources of energy. Paragraph 35 thereof to the extent it is relevant reads as under:

> *"The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that non-conventional sources of energy are environmentally benign and do not cause environmental degradation. Even the tariff regulations u/s 61 are to be framed in such a manner that generation of electricity from renewable sources of energy receives a boost. Para 5.12 of the National Electricity Policy pertaining to non-conventional sources of energy provides that adequate promotional measures will have to be taken for development of technologies and a sustained*

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

It may be mentioned here that judgment in ***Small Hydro*** was challenged in the Supreme Court (***Sai Renewable***). The Supreme Court held that the State Commission can reopen the PPAs.

67. In ***Gujarat Urja Vikas Limited*** (Appeal No.279 of 2013) this Tribunal again reiterated the same view. It was held that a party which seeks redetermination of tariff by reopening the PPA must establish that it has a legal right to seek the said relief and PPAs can be reopened only for the purpose of giving thrust to the renewable energy projects and not for curtailing the incentives. It is not necessary to multiply judgments on this issue. Suffice it to say that this Tribunal has in several judgments taken a view that PPAs can be reopened.

68. In our opinion judgment of this Tribunal in ***Green Infra*** on which the Appellant's counsel has placed reliance has no application to the present case. In that case the Appellant therein, a wind energy generator had set up a wind energy based power plant and agreed to sell the entire generation of power plant to Respondent No.1 therein, the distribution licensee. On 8/6/2012, the State Commission issued a draft tariff order for FY 2012-13 and invited objections. The draft order stated that a generator claiming higher depreciation benefit would have to furnish an undertaking in advance to the buyer regarding higher depreciation benefit not being availed of. The Appellant therefore gave an undertaking dated 27/8/2012 that the Appellant will avail of higher depreciation benefit and will follow the same for each financial year with a certificate that higher depreciation benefit has been claimed/availed of in that financial year. On 6/9/2012 on the basis of draft tariff order PPA was entered into for 20 year. On 7/9/2012, the State Commission passed final tariff order and determined the levelised generic tariff for wind power projects for FY 2012-13 and held that both the tariffs i.e. with or

without availing of accelerated depreciation would be valid tariff for the purpose of signing PPA by distribution companies. As per this order the determined tariff was higher if depreciation was not availed of. The Appellant then took a stand that the undertaking dated 27/8/2012 given prior to the signing of the PPA was no longer valid as it was given in terms of the draft tariff order dated 8/6/2012. The Appellant then gave a revised undertaking dated 13/9/2012 stating that it will not avail of higher depreciation benefit. The Appellant sought amendment of the PPA. The Appellant contended that it was forced to furnish the earlier undertaking for sale of power at lower tariff. The Appellant contended that the final tariff order will prevail over the draft tariff order, hence undertaking given pursuant to the draft tariff order be declared null and void. The State Commission rejected the Appellant's submissions. This Tribunal upheld the State Commission's order. This Tribunal held that the draft tariff order had legal sanctity as PPA was entered into pursuant to the same. There was no material difference between the draft tariff order and final tariff order. This Tribunal further held

that there was no documentary evidence on record including PPA to show that there was exercise of undue influence. This Tribunal in the circumstances rejected the prayer for modification of the PPA. The observations of this Tribunal in ***Green Infra*** will have to be read in the context of its peculiar facts. The Appellant therein had given a solemn undertaking. Allegations of undue influence were found to be without merit. The question which fell for consideration was regarding the sanctity of draft tariff order. Such are not the facts here. ***Green Infra*** is therefore not applicable to the present case.

69. Mr. Ramachandran, learned counsel for the Appellant submitted that the wind energy generators had elected to accept the tariff of Rs.3.56 per kWh on the basis that they had availed of accelerated depreciation. They cannot now choose the other alternative. He relied on doctrine of election relying on ***National Insurance Co. Ltd.*** and ***Joint Action Committee of Airline Pilots Association***. Mr. Sen, learned senior advocate on the other hand submitted that the wind energy generators have not actually received the benefit of

accelerated depreciation and, therefore, they will not be hit by doctrine of election. Counsel further submitted that there is no estoppel against statute. In this connection, he relied on ***Sneh Gupta v. Devi Sarup & Ors.***[30] and ***P.R. Deshpande v. Maruti Balaram Haibatti***[31]. We find substance in these submissions. Assuming doctrine of election can be applied to the process of tariff determination under the Electricity Act if the wind energy generators have not actually taken the benefit of accelerated depreciation as contended, it cannot be applied to this case. But, what appeals to us most is Mr. Sen's contention that even *de hors* the provisions of the tariff order dated 30/1/2010, the wind energy generators have a statutory right to apply for determination/revision of tariff under Section 62 of the Electricity Act and that right has not been curtailed by a regulation. The Appropriate Commission exercising jurisdiction under Section 62 read with Section 86(1)(b) would then be required to examine whether keeping in view the principles of tariff determination provided under Section 61 or in a regulation framed thereunder, the existing tariff requires

[30] (2009) 6 SCC 194
[31] (1998) 6 SCC 507

redetermination. Doctrine of election will not apply when reliance is placed on a provision of a statute for redetermination of tariff. Reliance placed on ***Sneha Gupta*** and ***P.R. Deshpande*** appears to us to be apt. This submission is, therefore, rejected.

70. It is urged by the counsel for the Appellant that if the Appellant had known that the benefit of accelerated depreciation was not being availed of by the wind energy generators, it would not have entered into the PPAs. It is urged that option should have been exercised at the time of execution of the PPAs. It is not possible to accept this submission. Section 32 of the Income Tax Act provides for depreciation. Section 32 so far it is relevant reads as under:

> ***"S.32 : Depreciation***. - *In respect of depreciation of –*
>
> *(i) buildings, machinery, plant or furniture, being tangible assets;*
>
> *(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other*

business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed –

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed."

71. Rule 5 of the Income Tax Rules lay down inter alia, the method of calculation of depreciation. So far as it is relevant, it reads thus:

"***R.5. Depreciation.*** *- (1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year.*

(1A) The allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of assets acquired on or after the 1st day of April, 1997,

shall be calculated at the percentage specified in the second column of the Table in Appendix I-A of these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time during the previous year:

Provided that the aggregate depreciation allowed in respect of any asset for different assessment years shall not exceed the actual cost of the said asset:

Provided further that the undertaking specified in clause (i) of sub-section (1) of section 32 of the Act may, instead of the depreciation specified in Appendix I-A at its option be allowed depreciation under sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income under sub-section (1) of section 139 of the Act.

(a) For the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1997; and

(b) For the assessment year relevant to the previous year in which it begins to generate power in case of any other undertaking:

Provided also that any such option once exercised shall be final and shall apply to all the subsequent assessment years." (emphasis supplied.)

It is clear from the above provisions particularly 2nd proviso to Rule 5(1A) that wind energy generators could not have exercised option before commercial operation date. Such option was required to be given only after one year of generation before filing of the return of the assessment year. It is only when the generating plant reaches the commercial operation date, it will have to start generation and sell power to someone. For that purpose, wind energy generators have to enter into a PPA on the basis of the tariff determined by the State Commission. It is only after supplying power for a year and before the due date of filing of Income Tax Return that the generating company will be in a position to exercise option as per law whether to avail of accelerated depreciation or not. Thus, the contention of the Appellant herein that the generating company should have exercised that option before signing of the PPA is erroneous. Mr. Ramachandran, learned counsel for the Appellant submitted that the Income Tax Rules only provide for the outer date for deciding whether or not to take accelerated depreciation benefit. The project developer was not prohibited on the date of signing of the PPA from

deciding whether or not to take the accelerated depreciation benefit. We are unable to agree with this submission. Assuming the Income Tax Rules provide the outer date, whether to accept the accelerated depreciation benefit or not is a commercial decision. It is only when the generating company reaches commercial operation and after supplying power for a considerable period that the generating company will be in a position to take a commercial decision and exercise its option whether to avail of the accelerated depreciation benefit or not. The project developer cannot be compelled to exercise the option at the time of signing of the PPA. This submission is, therefore, rejected.

72. In the ultimate analysis, therefore, we are of the view that the Appellant's contention that the wind energy generator's petitions praying for determination of project specific tariff on the ground that they are not availing of the accelerated depreciation benefit are not maintainable deserves to be rejected and is accordingly rejected. Execution of a PPA subsequent to the generic tariff order accepting the tariff fixed

therein would not bar wind energy generator from filing a petition for modification of tariff on the ground that it is not availing of the accelerated depreciation benefit, because the said order categorically gives such an option to the wind energy generator. Moreover, the said order is not challenged and has, therefore, become final. The wind energy generators' petitions are, therefore, maintainable. Even otherwise, keeping the facts of this case aside, we find no fetters in law on the power of the Appropriate Commission to undertake such exercise. We have already referred to the provisions of the Electricity Act which permit the Appropriate Commission to amend the tariff order. These statutory provisions have a purpose. They are meant to give certain amount of flexibility to the Appropriate Commissions. They have been empowered to amend or revoke the tariff because exigencies of a situation may demand such an exercise. In the circumstances, we hold that there is no bar on the Appropriate Commission preventing it from entertaining a petition for modification of tariff after execution of a PPA. In other words, the Appropriate Commission has the power to reopen a PPA and modify the

tariff by an order. We, therefore, find no substance in these appeals. The Appeals are dismissed. Needless to say that hearing of the petitions shall now proceed and the petitions shall be disposed of on merits in accordance with law.

73. Pronounced in the Open Court on this 28th day of September, 2015.

T. Munikrishnaiah
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/~~NON-REPORTABALE~~**

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.198 OF 2014

Dated: 28th September, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. T. Munikrishnaiah, Technical Member.

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat. **... Appellant**

AND

1. **GREEN INFRA CORPORATE WIND POWER LIMITED,**
NBCC Plaza, Tower – 2, 2nd Floor, Pushp Vihar, Sector – V, Saket, New Delhi – 110 017.

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**
6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355.

3. **UTILITY USERS WELFARE ASSOCIATION,**
Laxmi Ginning Compound, Opp. Union Co-op. Bank Limited, Naroda, Ahmedabad – 382 330. **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Vishal Gupta
Mr. Kumar Mihir for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

WITH
APPEAL NO.199 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat. **... Appellant**

AND

1. **GREEN INFRA WIND POWER LIMITED,**
NBCC Plaza, Tower – 2, 2nd Floor, Pushp Vihar, Sector – V, Saket, New Delhi – 110 017.

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**
6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355.

3. **UTILITY USERS WELFARE ASSOCIATION,**)
Laxmi Ginning Compound, Opp. Union Co-op. Bank Limited, Naroda, Ahmedabad – 382 330.) **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Vishal Gupta
Mr. Kumar Mihir for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

WITH
APPEAL NO.200 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,)
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat.) **... Appellant**

AND

1. **VAAYU (INDIA) POWER CORPORATION PRIVATE LIMITED,**)
Plot No.33, Daman-Patiala Road, Bhimpore, Daman – 396 210.)

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,** 6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355.

3. **STATE LOAD DISPATCH CENTRE,** 132, KV Gotri Sub-Station Compound, Nr. T.B. Hospital, Gotri, Vadodara – 390 007.

4. **GUJARAT ENERGY DEVELOPMENT AGENCY,** 4th Floor, Block No.11 & 12, Udyog Bhawan, Sector – 11, Gandhinagar – 382 017.

3. **UTILITY USERS WELFARE ASSOCIATION,** Laxmi Ginning Compound, Opp. Union Co-op. Bank Limited, Naroda, Ahmedabad – 382 330. **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Vishal Gupta
Mr. Kumar Mihir for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

WITH
APPEAL NO.291 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Sardar Patel, Vidyut Bhavan Race Course, Vadodara – 390 007, Gujarat. **... Appellant**

AND

1. **M/S. TADAS WIND ENERGY PRIVATE LIMITED,**
   8th Floor, C-22, G Block Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051.

2. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**
   6th Floor, Gift One, Road 5C, Zone 5, Gift City, Gandhinagar, Gujarat – 382 355. **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Anushree Bardhan
Ms. Poorva Saigal.

Counsel for the Respondent(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Arijit Maitra.
Mr. Hasan Murtaza
Ms. Ruth Elwin for **R-1.**

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for **R-2.**

J U D G M E N T

PER HON'BLE SHRI T. MUNIKRISHNAIAH – TECHNICAL MEMBER

1. I agree with the decisions made by the Hon'ble Chairperson on this Appeal. Further, I want to add the following paras:

(a) This Tribunal has given various judgments and held that the State Commissions can re-open the Power Purchase Agreements to safeguard the Renewable Energy Sectors. Further, Ministry of New and Renewable Energy has fixed certain percentage of consumption of power by the obligated entities such as Distribution Licensees and other Bulk Consumers to fulfill Renewable Power Purchase Obligations set by the directions of the respective State Commissions. Accordingly, the obligated entities have to fulfill the Renewable Power Purchase Obligations. Due to any reason, if the development of Renewable Sector enters into problem, then due to non-

availability of actual renewable power, the obligated entities have to purchase renewable energy certificate to fulfill the RPO Obligations and also to meet their actual demand, they have to purchase equivalent power from conventional energy generators. It is therefore necessary to protect and encourage renewable energy generators.

(b) Further, it is also to mention here that due to development of renewable energy power sector, the consumers at large, will be benefitted by way of green/clean energy and thereby the global pollution will be reduced due to reduction in equivalent generation by way of conventional energy and thereby the depletion of the existing fossil fuels like coal, oil and gas can be averted.

2. Section 86(1)(e) of the Electricity Act clearly specifies the duties of the State Commission.

> ***"86. Functions of State Commission.- (1)*** *The State Commission shall discharge the following functions, namely,-*
>
> *xxx* *xxx* *xxx*

(e) *promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee."*

3. In view of these situations to safeguard the Renewable Energy Sector, this Tribunal has given several instructions to the State Commissions to take necessary steps for the development of Renewable Energy Sector. At the same time, the State Commission has to look after the welfare of the consumers at large and a balance has to be struck between the consumers and renewable energy sector. To achieve this objective, the State Commission has to reopen the PPAs sometimes executed by the renewable energy generators and distribution licensees.

4. Pronounced in the Open Court on this 28th day of September, 2015.

T. Munikrishnaiah
[Technical Member]

√**REPORTABLE/~~NON-REPORTABALE~~**