

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APL No. 908 OF 2023 & IA Nos. 1198 & 751 OF 2024

Dated: 10.02.2025

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

INDIA POWER CORPORATION LIMITED

Through its Whole Time Director

Plot No. XI-2 & 3, Block-EP,

Sector-V, Salt Lake City,

Kolkata – 700 091

... Appellant No.1

VERSUS

1. WEST BENGAL ELECTRICITY REGULATORY COMMISSION

Through its Secretary

Plot No. AH/5 (2nd & 4th Floor,)

Premises No.: MAR16-1111,

Action Area-1A, Newtown,

Rajarhat, Kolkata-700 163

...Respondent No.1

2. WEST BENGAL STATE ELECTRICITY TRANSMISSION COMPANY LIMITED

Through its Managing Director (mdwbsetcl@gmail.com)

Vidyut Bhawan, (8th Floor 'A'),

Block-DJ, Sector-II, Bidhannagar,

Kolkata- 700 091

...Respondent No.2

Counsel on record for the Appellant(s)

: Amit Kapur
Akshat Jain
Akanksha Tanvi
Abhimanyu Maheshwari
Shefali Tripathi

Aditya H. Dubey
Soumya Singh
Avdesh Mandloi
Shikhar Verma
Sagnik Maitra for App. 1

Counsel on record for the Respondent(s) : C.K. Rai for Res. 1

Shweta Sharma
Diggaj Pathak for Res. 2

JUDGMENT

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

1. The instant Appeal is preferred by the Appellant - India Power Corporation Ltd. challenging the Order dated 23.03.2023 ("**Impugned Order**") passed by the West Bengal Electricity Regulatory Commission ("**WBERC/Respondent No. 1/State Commission**") in Case No. OA-440/22-23, whereby the State Commission whilst including wind-solar hybrid power source under the ambit of Regulation 18.2.1(h) of the West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2022 ("**WBERC OA Regulations**"), has introduced a condition that if the annual combined Capacity Utilization Factor ("**CUF**") of the Project exceeds 30%, the concessional transmission charges, levied at the rate of 1/4th of the normal long term transmission charges, will not be applicable and full/normal transmission charges will have to be paid.

The facts in nutshell are as given below:

2. The Appellant, i.e., India Power Corporation Limited ("**IPCL**"), formerly known as Disergarh Power Supply Corporation Limited, is a deemed

distribution licensee, in terms of Section 14 of the Electricity Act and supplying power in the State of West Bengal.

3. The Respondent No. 1 is the West Bengal Electricity Regulatory Commission (“**WBERC/State Commission**”). The Respondent No. 2, West Bengal State Electricity Transmission Company Limited (“**WBSETCL**”), is a deemed transmission licensee under the fifth proviso of Section 14 of the Electricity Act and also functions as a State Transmission Utility and State Load Dispatch Centre in the State of West Bengal.

4. On 14.05.2018, Ministry of New and Renewable Energy (“**MNRE**”) issued the National Wind-Solar Hybrid Policy (*amended on 13.08.2018*) (“**Hybrid Policy 2018**”) to encourage setting up of new wind-solar hybrid plants as well as for hybridization of existing wind and solar power plants in order to minimize the variability in generation of power. In furtherance of the Hybrid Policy 2018, on 25.05.2018, MNRE issued Guidelines for transparent bidding process for Implementation of Scheme for Setting up of 2500 MW ISTS connected Wind-Solar Hybrid Power Projects (“**MNRE Guidelines 2018**”). As per the MNRE Guidelines 2018, SECI was designated as the nodal agency for implementation of the scheme.

5. On 08.03.2019, SECI issued a Request for Selection Document (“**RfS**”) for setting up of 1200 MW ISTS connected wind-solar hybrid power projects (Tranche-II) on Build Own Operate basis (“**BOO**”), according to which, SECI will enter into a Power Purchase Agreement with the successful bidder and Power Sale Agreement with the interested buying entity.

6. Thereafter, on 18.06.2019, SECI issued Letters of Award (“**LoAs**”) to Adani Renewable Energy Park (Gujarat) Limited (“**AREPGL**”) for projects of 300 MW each, totaling to a cumulative capacity of 600 MW, at the tariff of Rs. 2.69/- per kWh. From such 600 MW capacity, 500 MW was allocated to Punjab State Power Corporation Limited (“**PSPCL**”) in the State of Punjab

and 100 MW was allocated to IPCL in the State of West Bengal. Subsequently, SECI entered into a Power Sale Agreements (“**PSA**”) with PSPCL on 03.01.2020 for the supply of 500 MW of power and with IPCL for supply of 100 MW for a period of 25 years from the date of commissioning of the Project. Thereafter, on 21.01.2020, SECI entered into two Power Purchase Agreements for 300 MW each with Adani Green Energy Nine Limited (“**AGENL**”), being the special purpose vehicle of **AREPGL**.

7. Central Electricity Regulatory Commission (“**CERC/Central Commission**”) vide its order dated 21.05.2020 in Petition No. 307/AT/2020 adopted the tariff for the 600 MW wind-solar hybrid power projects. On 18.01.2021, WBERC vide its order dated 18.01.2021 in Case No. PPA-103/20-21 approved PSA signed by Appellant -IPCL with SECI. Thereafter, the Appellant-IPCL secured Long Term Open Access (“**LTOA**”) for 124 MW from the Nodal Agency in the State of West Bengal. On 10.06.2021, a Bulk Power Transmission Agreement (“**BPTA**”) for 124 MW was executed between IPCL and WBSETCL, out of which 100 MW is utilized for transmission of wind-solar hybrid power from AGENL through SECI under the PSA. Such 100 MW wind-solar hybrid power is injected into the grid through a common pooling substation at Fatehpur-II GSS from different locations in Jaisalmer district in the State of Rajasthan and delivered to IPCL’s 220/132/33 kV substation at J K Nagar substation in the State of West Bengal after transmission through ISTS and STU grid from the date of commercial operation of the Project, i.e., from 29.09.2022.

8. On 01.08.2022, State Commission issued the West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2022 (“**WBERC OA Regulations 2022**”), wherein as per Regulation 18.2.1(h), the transmission charges for ‘*pure wind*’ and ‘*pure solar*’ sources have been stipulated to be 1/4th of normal long-term transmission charges.

9. After the full commissioning of the Wind Solar Hybrid RE Project on 29.09.2022, LTOA bill, inclusive of LTOA charges for 100 MW wind-solar hybrid power, was received by IPCL from WBSETCL in the month of October 2022, for payment of STU fixed charges in terms of WBERC's Tariff Order dated 30.07.2022 for the FY 2020-21 to FY 2022-23 ("**WBERC Tariff Order**"). IPCL sought clarification from WBSETCL, on the ground that as per Regulation 18.2.1(h) of the WBERC OA Regulations, transmission charges for wind and solar sources are to be levied at the rate of 1/4th of normal long-term transmission charges; in response, vide its letter dated 28.11.2022, WBSETCL, stated that as per Regulation 18.2.1(h) of the WBERC OA Regulations concessional transmission charges are for '*pure solar*' and '*pure wind*' sources, and since IPCL is procuring wind-solar hybrid power, such concession in terms of Regulation 18.2.1(h) of WBERC OA Regulations will not be applicable on IPCL, therefore, transmission charges at the full rate will have to be paid by IPCL.

10. The Appellant-IPCL, on 22.12.2022 filed a miscellaneous application before WBERC, being Case No. OA-440/22-23, seeking clarification/interpretation of Regulation 18.2.1(h) of WBERC OA Regulations in respect of applicability of concessional intra-state transmission charges for wind-solar hybrid power. On 23.03.2023, WBERC passed the Order in Case No. OA-440/22-23 ("**Impugned Order**") and held that Concessional transmission charges shall be applicable for Wind Solar Hybrid power procured by IPCL provided CUF does not exceed 30% as follows.

11. In terms of the Impugned Order, IPCL on 29.03.2023, requested WBSETCL to consider revising the last pending LTOA invoice dated 01.02.2023 based on 1/4th transmission charges and requested WBSETCL to revise the earlier LTOA bills issued to IPCL with effect from 01.08.2022

and refund Rs. 6,52,62,438.75/-, already paid by IPCL in excess up to the month of December 2022. However, on 30.03.2023, WBSETCL informed that it is in the process of seeking clarification from WBERC in context of the Impugned Order and on 02.05.2023, WBSETCL raised the bill on IPCL for the month of April 2023 towards STU fixed charges, amounting to Rs. 85,27,626.08/- and clarified that the concessional 1/4th transmission charges on 100 MW are applicable subject to combined annual Capacity Utilization Factor (“**CUF**”) of the Project not exceeding 30% and in case combined annual CUF exceeds 30%, then normal transmission charges will be applicable in accordance with the Impugned Order.

12. Aggrieved by the Impugned Order, IPCL has preferred the present Appeal on 25.09.2023 to the limited extent that the introduction of an extraneous condition to the effect that if the annual combined CUF of the Wind Solar Hybrid Project exceeds 30%, the concessional transmission charges levied at the rate of 1/4th of the normal long term transmission charges, as provided in Regulation 18.2.1(h) of the WBERC OA Regulations 2022, will not be applicable on IPCL and normal transmission charges at the full rate will have to be paid by IPCL.

APPELLANT SUBMISSIONS:

13. Mr. Amit Kapoor, learned counsel for the Appellant, submitted that while the impugned Order clarified that Regulation 18.2.1(h) of the WBERC Open Access Regulations ("**WBERC OA Regulations 2022**") and the concessional transmission charges are applicable to power procured from Wind Solar Hybrid RE Projects, however, it imposed an annual CUF ceiling of 30% exclusively for Wind Solar Hybrid RE Projects, which is contrary to the express provisions of Regulation 18.2.1(h) of the WBERC OA Regulations 2022. The imposition of this ceiling is ultra vires since the WBERC OA Regulations 2022 were notified as delegated legislation by the

Respondent No.1-WBERC under Section 181 of the Electricity Act; the Impugned Order was issued while exercising its powers under Section 86(1) of the Electricity Act. By introducing the 30% CUF ceiling through the Impugned Order, the Respondent No.1-WBERC has effectively sought to amend Regulation 18.2.1(h) of the WBERC OA Regulations 2022, contrary to the prescribed legal procedure for amending regulations and beyond the scope of its powers under Section 86(1) of the Electricity Act. This action of the WBERC violates the principles laid down by the Hon'ble Supreme Court in "***PTC India Limited v. CERC***", (2010) 4 SCC 603.

14. Learned counsel for the Appellant submitted that despite being statutorily obligated under Sections 61(e) and (h) and 86(1)(e) of the Electricity Act, 2003, to promote cogeneration and the generation of electricity from renewable sources, as well as to incentivize efficiency, the imposition of a condition by the Respondent No.1-WBERC limiting the CUF of hybrid RE sources to 30% contravenes the parent statute. Such a restriction artificially diminishes the competitiveness of hybrid RE sources in comparison to 'pure' wind and 'pure' solar energy sources. Sections 86(1)(e) and 61(e) of the Act do not envisage or permit sub-classification or differential treatment among renewable energy sources ("***Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission***", (2015) 12 SCC 611).

15. Learned counsel for the Appellant further submitted that WBERC/Respondent No.1, despite being cognizant of the fact that RFS issued by SECI, explicitly stipulated that the declared annual CUF shall in no case be less than 30%, has introduced the extraneous condition of 30 % ceiling on CUF for concessional transmission charges.

16. Learned counsel for the Appellant contended that since the minimum CUF to be maintained by the Project is 30%, and the annual combined CUF of the Project will exceed 30% thereby the Impugned Order deprives the

Appellant the benefit conferred under Regulation 18.2.1(h) of the WBERC OA Regulations 2022.

17. Learned counsel for the Appellant further contended that the stated objective of concessional transmission charges was to ensure RE sourced on an equal footing. While the CUF of hybrid RE power plants (~40%), though higher than that of standalone wind or solar power projects (22–35%), is significantly lower than the PLF of conventional power plants (>85%), as acknowledged by the WBERC-Respondent No.1 in the Impugned Order.

18. Learned counsel for the Appellant further pointed out that the extraneous condition added with respect to hybrid RE resources is not based on any scientific study carried out by any expert body; but is contrary to the MNRE guidelines and policies requiring minimum CUF for HPDs of 40% or 30%; and is discriminatory, in as much as the WBERC after having brought in Hybrid RE into the fold of ‘*pure*’ wind and ‘*pure*’ solar sources mentioned in Regulation 18.2.1(h), it has differentiated between hybrid RE sources and ‘*pure*’ sources without any basis whatsoever. Learned counsel further contended that purity of Wind and solar consisting of hybrid remain untouched as wind and Solar elements are not co-located and have separate points of injection into the Grid; Power from the wind and solar elements are scheduled separately; Renewable Purchase Obligation (“**RPO**”) compliance for the power procured from the solar and non-solar elements are fulfilled separately. The solar component from Hybrid RE is considered towards fulfillment of Solar RPO and Wind component from Hybrid RE is considered towards non-solar RPO.

19. Learned counsel for the Appellant further submitted that the Appellant in the Petition before the WBERC, has indicated that the CUF of the hybrid RE Project was projected to be in the region of 30%, but such an indication was based solely on the fact that, at the time of filing the Petition before the

WBERC, the Project had supplied 66.61 MUs of power to IPCL, which approximately translates to a CUF of 30.49%. The furnishing of such data cannot be construed as an undertaking, as IPCL neither expressly nor impliedly committed that the CUF of the Project would not exceed 30% before the WBERC.

20. The Respondent No.1 seeks to justify the Impugned Order claiming that the concessional tariff was applicable only to renewable energy sources with a CUF below 30% (in the range of 17–30%), that finds no basis in the WBERC OA Regulations 2022, instead the CERC RE Tariff Regulations, 2024, explicitly specify that the CUF for standalone wind and solar power projects can be up to 35%; the SECI Request for Selection (“RfS”) document dated 13.09.2024 for setting up ISTS-connected offshore (standalone) wind power projects in India prescribes a minimum annual CUF of 40%.

21. Learned counsel for the Appellant stated that the Impugned Order is contrary to the provisions of the Green Energy Open Access Rules, 2022 notified by the MOP under Section 176 of the Electricity Act, 2003 as while finalizing the WBERC Open Access Regulations 2022, the WBERC incorporated the provisions of the Green Energy Open Access Rules, 2022 in compliance with the requirements of Section 181 of the Electricity Act. It is a settled principle that regulations notified by a State Commission must be in conformity with the Electricity Act and the rules framed thereunder. The WBERC Open Access (OA) Regulations 2022 do not define ‘pure’ wind and ‘pure’ solar sources or any other specific renewable energy source. Regulation 2.1(bb) of the WBERC OA Regulations 2022 adopts the definition of ‘green energy’ as provided in the Green OA Rules. It is evident that the only category of renewable energy recognized under the provisions of the WBERC OA Regulations 2022 is ‘green energy,’ which is akin to electricity generated from renewable sources. Consequently, the procurement of renewable energy from any source, including those comprising wind and

solar elements such as Hybrid RE, having a CUF lower than that of conventional sources, would qualify for concessional charges under Regulation 18.2.1(h) of the WBERC OA Regulations 2022, without the imposition of any extraneous condition.

22. Alleging that the Appellant has followed the due process of law in the present proceedings, learned counsel for the Appellant submitted that the Appellant filed a petition before the WBERC, which culminated in the Impugned Order, solely for the purpose of seeking clarification of Regulation 18.2.1(h) of the WBERC Open Access Regulations. The Appellant did not consider Respondent No. 2 to be a 'proper party' or a 'necessary party' for the purpose of such proceedings and, therefore, did not implead Respondent No. 2 in the said petition. There is no procedural requirement to array Respondent No. 2 as a Respondent in a clarificatory petition filed before the State Commission/WBERC. The Respondent No.2 itself filed a Miscellaneous Application on 02.06.2023, before the State Commission/WBERC seeking clarification/review of the Impugned Order without impleading IPCL as a party. If the WBERC had deemed it necessary, it would have directed notice to WBSETCL and ordered its impleadment in the original proceedings.

23. Without prejudice to the foregoing, learned counsel for the Appellant submitted that rules of procedure are handmaidens of justice, which shall not obstruct justice. A party cannot be refused or denied its substantive relief, on account of procedural technicalities (judgment of the Hon'ble Supreme Court in "**Rani Kusum v. Kanchan Devi**" (2005) 6 SCC 705).

24. Learned counsel for the Appellant objected the maintainability of cross objections filed by Responded No 2 – WBSETCL and placed reliance on the judgment of this Tribunal in "**Uttar Haryana Bijli Vitran Nigam Ltd. v. CERC & Ors.**" 2014 SCC OnLine APTEL 170] ("UHBVNL Judgment"), judgment of the Hon'ble Supreme Court in "**Adani Power Ltd. v. CERC &**

Ors.”, (2015) 12 SCC 216) (“Adani Power Judgment”), and contended that this Tribunal is not bound by the procedure laid down by the CPC (“**Dhanraj Singh Choudhary v. Nathulal Vishwakarma**”,(2012) 1 SCC 741).

25. Arguendo, even if it is open for WBSETCL to selectively support the Impugned Order (introduction of the 30% limit) while simultaneously challenging certain findings (making the concessional tariff applicable to Hybrid-RE) without filing a formal Cross-Objections, this Tribunal may not pass an Order placing IPCL in a position more disadvantageous than had it not preferred the appeal and learned counsel placed reliance on the judgment in “**UOI v. Vijay Krishna Uniyal**”, (2018) 11 SCC 382 and “**Jyoti Plastic Works P. Ltd. v. UOI & Ors.,**” 2020 SCC OnLine Bom 2276.

WBERC/Respondent No.1 Submissions

26. Mr C.K.Rai, learned counsel for the Respondent No.1- WBERC, submitted that the Appellant contended before the State Commission that the concessional transmission charge, being 1/4th of the normal long-term transmission charges, should be extended to them since hybrid power projects also exhibit a low CUF in the range of 17-30% and liable to be protected from high landed cost as paying the transmission charge based on capacity contract will effectively increase their transmission charge per unit of generation 4 to 6 time from the sources who do not suffer from such natural variations and relied on the intent of the Commission behind granting concessional tariff as articulated in the Statements of Reasons (SOR).

27. Regarding the contention of the Appellant that the imposition of the 30% ceiling on CUF is extraneous, learned counsel for the Respondent No.1 submitted that the Appellant itself has relied upon 30% CUF in its petition before the State Commission. The averments made by the Appellant in the petition were i) Regulation 18.2.1(h) is silent over the applicability on the power generated from Wind-Solar Hybrid RE Projects ii) the terms "Pure

Wind" and "Pure Solar" are not defined in the Regulation; iii) Statements of Reason (SOR) para 79.2 speak about the intent of the concessional transmission charge to protect the higher landed cost as the CUF of Wind-Solar Hybrid source is comparatively lower, from 17 to 30% and thus if not given concessional transmission charge their transmission charge will increase 4 to 6 times per unit of generation in comparison to other open access customers; iv) the CUF of the Appellant's hybrid source is approximately 30% and is expected to remain around this level due to seasonal variations; v) by the same reasoning of low CUF and high landed cost given in the SOR, the transmission charges for such hybrid source of the Appellant must also qualify for concessional transmission charge.

28. The Appellant's entire petition was predicated on the assertion that its CUF shall be in the range of 30%. The Appellant specifically argued before the State Commission that, as its CUF is expected to remain around 30%, it should also be granted the benefit of concessional transmission charges, similar to other sources with lower CUF. These contentions of the Appellant have been accepted by the State Commission in the Impugned Order.

29. Learned counsel for the Respondent No.1 submitted that the Appellant, having relied upon the SOR and the 30% CUF ceiling to interpret the intent of Regulation 18.2.1(h) and to claim the concessional 1/4th transmission charges on the basis that the CUF of its Hybrid RE sources would be around 30%, cannot now be allowed to contend that the 30% CUF ceiling is an extraneous condition that should be removed. The Appellant's claim in the Appeal is barred by the principle of estoppel due to the following admitted facts:

- i) The Appellant, IPCL, relied upon the SOR and the intent of Regulation 18.2.1(h) as discussed therein, wherein a lower CUF is recognized as an essential criterion for availing the benefit of concessional transmission charges, despite this reliance, the

Appellant now challenges the CUF criterion in the Impugned Order, based on which it got the benefit of concessional transmission charges;

- ii) The Appellant contended that a lower CUF would result in a significant increase in the transmission charge per unit of generation, ranging from 4 to 6 times;
- iii) IPCL acknowledged that the concessional transmission charge will put solar and wind sources on an equal footing with other open access sources;
- iv) IPCL, in its petition, explicitly stated that its annual CUF from its Wind-Solar Hybrid RE resource shall be in the range of 30% and, it should be protected against high landed costs, therefore it must also qualify for the benefit of Regulation 18.2.1(h).

30. Learned Counsel for the Respondent No 1 - State Commission submitted that contrary to admitted position of the Appellant before State Commission, now the Appellant asserts that the combined CUF of its project will exceed 30% and that the Commission has erred in incorporating the CUF factor in the Impugned Order; Appellant is attempting to introduce an entirely new case in the Appeal, which is impermissible under the settled legal principles. Therefore, having relied before the State Commission, upon the intent of Regulation 18.2.1(h) and having availed the benefit of concessional transmission charges based on its interpretation of the said Regulation and its intent as discussed in the SOR and upheld in the Impugned Order, the Appellant cannot be permitted to now reverse its position to question the same SOR and the interpretation relied in the petition and accepted by the State Commission in the Impugned Order. The Appellant's claim that it is entitled to concessional transmission charges irrespective of its CUF is barred by the principle of *approbate and reprobate*.

31. Learned counsel for the Respondent No.1 further asserted that having previously asserted in its pleadings that its CUF is expected to be around 30% based on seasonal trends, the Appellant cannot now, in the Appeal, contend that its CUF will exceed 30% and seek the full benefit of concessional transmission charges for Hybrid sources irrespective of CUF. This claim, which was expressly rejected by the Commission in the SOR, the Regulation, and the Impugned Order, cannot be granted. The same shall be in the teeth of the Regulation, which is binding upon the parties, as highlighted in “***PTC India Ltd. VS CSERC & Ors.***” (2010) 4 SCC 603.

32. Learned counsel for the Respondent No.1 further contended that the Claim of 30% CUF, condition which was so intrinsic before commission that the entire case of the Appellant was based on that condition, has now been claimed as extraneous before this Tribunal. It is also submitted by the learned counsel that 30% CUF condition is inseparable from the remaining part of the order and therefore cannot be claimed as an extraneous condition. The order cannot be said to be partly good and partly bad, as noted in “***Adani Gas Limited Vs Union of India and Ors***”, (2022) 5 SCC 210 and “***Suzuki Parasrampuriah Suitings (P) Ltd. Vs. Official Liquidator***”, (2018) 10SCC 707].

33. The Appellant sought clarification/interpretation under the "power to remove difficulties" provision in the Regulation and based on the Appellant's pleadings, the State Commission interpreted and clarified that Wind-Solar Hybrid RE sources with a CUF of 30% would be eligible for the benefits under the Regulation. The 30% CUF condition is an essential and inseparable requirement for the inclusion of Hybrid RE sources under the concessional transmission charge scheme. Therefore, challenging the 30% CUF condition while accepting the Hybrid is not permissible as wind solar Hybrid project was allowed the concessional transmission charges only because of their claim of lower CUF.

34. Learned counsel for the Respondent No.1 relied on the Supreme Court judgment in “**Hindustan Zinc Ltd. Vs RERC**”, (2015)12 SCC 611, and submitted that the powers conferred under Sections 39 (State Transmission Utility and functions), 40 (Duties of transmission licensees), 42 (Duties of distribution licensees and open access), and 66 (Development of market) have a completely different scope from that of Section 86(1)(e) and operate independently. These provisions function in distinct areas, with Section 86(1)(e) specifically addressing the promotion of renewable energy sources by facilitating connectivity and the sale of electricity to any person, as well as prescribing a percentage of consumption by distribution licensees. Therefore, no inconsistency arises between Regulation 18.2.1(h) of the Open Access Regulations 2022, which pertains to sources under Section 40(c)(ii), and Section 86(1)(e). Additionally, Section 86(1)(e) or Section 61(h) of the Electricity Act, 2003 does not mandate the provision of concessional transmission charges to discoms or licensees for the procurement of renewable power.

35. Learned counsel for Respondent No 1-State Commission submitted that Supreme Court judgments in “**Ministry of Chemicals and Fertilizers, Govt of India Vs. Cipla Ltd**”, (2003)7SCC1 and “**Hindustan Zinc Ltd. Vs RERC**”, (2015)12 SCC 611, has held that the provisions in the Hybrid Policy and Guidelines which is not even a policy under section 3 of the Electricity Act cannot be read and interpreted as a statutory provision. The definition of ‘green energy’ given in the Green Open Access Rules has nothing to do with section 40 of the Electricity Act. The section 40, second proviso also speaks of reduction of cross subsidy and the interpretation sought by the appellant if accepted would amount to encouraging cross subsidisation of transmission tariff, then the consumers of State Discom (WBSEDCL) would have to bear the transmission cost for the consumers of the IPCL.

36. Learned Counsel also submitted that the term “shall be guided” used in Sections 61, 79 and 86 of the Electricity Act is not to be read as “must”. It has persuasive flavour. The policies are only guiding factors and if there are any framed regulations, then they will rank above them being subordinate legislation, as highlighted in “**Maruti Suzuki India Ltd. Vs Haryana Electricity Regulatory Commission & anr**”, 2015 SCC OnLine Aptel 127.

Respondent No.2 - Submissions

37. Mr Buddy Ranganathan, learned senior counsel for the Respondent No.2, submitted that the argument raised by the Appellant is that as the term "pure" is not defined in the WBERC OA Regulations 2022, it should be interpreted to include hybrid energy sources and combining pure wind and pure solar sources does not render them impure; however, the WBERC OA Regulations 2022 are very clear and it gives the benefit of concessional tariff only to *pure wind* and *pure solar* sources.

38. The principle of literal interpretation was explained by this Tribunal in “**NTPC Limited vs. CERC & Ors.**” in Appeal No. 304 of 2016 dated 28.08.2023 where it was held that the literal rule is the golden rule of construction of statutes. Learned senior counsel for the Respondent No.2 contended that in the 4th Edition of Black’s Law Dictionary, "pure" is defined as "absolute; complete; simple; unmixed; unqualified." Similarly, in the 10th Edition, it is defined as "not mixed with anything else." Accordingly, the term "pure" cannot be interpreted to include hybrids.

39. Learned senior counsel for Respondent No. 2 placed reliance on Supreme Court judgment in “**State of Orissa Vs. Titaghur Paper Mills Co. Ltd**”, reported in 1985 Supp SCC 280, and submitted that the dictionary meaning of a word cannot be looked at where that word has been statutorily defined but where there is no such definition, the court may take the aid of dictionaries to ascertain the meaning of a word in common parlance and as

such when courts can have the recourse to dictionaries has been dealt with in “**Coca-Cola Company of Canada Ltd. Vs. Pepsi-Cola Company of Canada Ltd.**”, (“1942 SCC Online PC 7”)

40. Learned senior counsel for the Respondent No. 2 further contended that argument of the Appellant is that merely because the injection schedules for wind and solar energy are separate, they should not be treated as a combined source is wrong as the product of electricity which is sold by the generator is together; the bidding process and parameters for wind and solar hybrid energy are conducted jointly; the PPA, price as well as CUF details are all together.

41. Regarding the contention of the Appellant that the Impugned Order is inconsistent with the policies framed for the promotion of renewable energy at the central level, learned senior counsel for Respondent No 2 submitted that this argument pertains solely to the vires of the regulation and, as such, falls within the jurisdiction of the High Court through judicial review, rather than this Tribunal.

42. The reliance placed by the Appellant on the definition of "renewable energy sources" under the Electricity Amendment Rules, 2022 is misconceived; the said Rules define “renewable energy sources” as hydro, wind, solar, bio-mass, bio-fuel, bio-gas, waste including municipal and solid waste, geothermal, tidal, forms of oceanic energy, or combination thereof. Thus, the combination (hybrid) is a separate source as per the Electricity Rules as well.

43. Learned Senior counsel for the Respondent has filed Cross objections to the Appeal and made elaborate submissions with regard to its maintainability and merits of Cross objections and placed reliance on various judgements, viz Supreme court judgment dated 31.03.2015 in Civil Appeal No.10016 of 2014 in the case of “**Adani Power Limited vs. Central**

Electricity Regulatory Commission” ; “Dheeraj Singh vs. Greater Noida Industrial Development Authority & Ors.” (2023 SCC OnLine SC 768); “Urmila Devi & Ors. vs. Branch Manager, National Insurance Company Ltd. & Anr.” (2020 11 SCC 316); “Dheeraj Singh vs. Greater Noida Industrial Development Authority & Ors.” (2023 SCC OnLine SC 768); “Urmila Devi & Ors. vs. Branch Manager, National Insurance Company Ltd. & Anr.” (2020 11 SCC 316).

44. Learned senior counsel for the Respondent No. 2 submitted that the cash flow of WBSETCL is significantly affected, as it has been nearly five months since CUF declaration (of more than 30%) has come from IPCL, yet IPCL has not made any payment. The WBSETCL has not raised the arrear bill for 3/4th of the LTOA charges due from IPCL for the year 2023–2024, amounting to approximately ₹18.5 crores and requested this Tribunal to permit Cross Objections and grant relief as prayed for by the Respondent No 2. Learned senior Counsel also submitted that Respondent No. 2 has chosen to accept the Impugned Order, as it stands, in its entirety; however, if the 30% CUF Condition is to be done away with as contended by the Appellant then this Tribunal may consider Cross Objection of the Respondent No 2 on the merits.

Analysis and Discussion

45. Heard Mr. Amit Kapoor, learned counsel for the Appellant, Mr. Buddy Ranganathan, learned Senior Counsel for the Respondent No 2, and Mr. C.K.Rai, learned counsel for the Respondent No.1 at length. The State commission, vide Impugned Order has directed that Concessional Transmission charges shall be applicable to Appellant’s Wind Solar Hybrid RE power provided, the combined annual CUF does not exceed 30%, as given hereunder:

5.0 The STU charges for the 100 MW of wind-solar hybrid RE power procured by IPCL under a long term PPA dated 15.01.2020 with Solar Energy Corporation of India and duly approved by the Commission vide order dated 18.01.2021 in Case No. PPA-103/20-21 shall be 1/4th of the normal long-term transmission charges of STU provided that the combined annual CUF does not exceed 30%. In case the combined annual CUF exceeds 30% then normal STU charges shall be applicable.

46. The main dispute raised by the Appellant is with regard to condition put forth in the Impugned Order for a ceiling CUF of 30% from the Wind Solar Hybrid RE project (“**Hybrid RE Project**”) for the applicability of concessional transmission charges @1/4 of the long-term open access charges in the state grid, even after including the Hybrid RE project under the ambit of Regulation 18.2.1(h) of WBERC OA Regulations, 2022. Conversely, learned Senior Counsel for the Respondent No. 2 and learned counsel for Respondent No. 1 have vehemently contested the removal of ceiling of 30% CUF for Hybrid RE project for applicability of Concessional Transmission charges, as Appellant themselves have contested their case before the State Commission for applicability of Concessional transmission charges because CUF of Hybrid RE Project is approximately 30% and have argued that the exclusion of the Hybrid RE Project from the concessional transmission charges framework has resulted in prejudice to the Appellant.

47. Learned Senior Counsel for the Respondent No 2 has also filed a cross objection to the appeal, and made elaborate submissions both on the merits and on the maintainability of Cross Objections, which were strongly contested by the learned counsel of the Appellant. Learned Senior Counsel for the Respondent No 2 also submitted that the Impugned Order, having been passed without affording an opportunity of hearing to Respondent No. 2, is *non-est* in the eyes of law and is required to be modified and/or quashed and/or set aside in its entirety; however Respondent No. 2 has chosen to

accept the Impugned Order, as it stands, in its entirety; however, if the 30% CUF Condition is to be done away with as contended by the Appellant, then this Tribunal may consider Cross Objection of the Respondent No 2 on the merits.

48. Considering the elaborate submissions made by learned counsels, we will deliberate the rival contentions into various sub-paragraphs and firstly deliberate on the provisions of the WBERC OA Regulations, 2022, and the issue of imposition of a 30% CUF ceiling for the applicability of Concessional Transmission Charges on Hybrid RE Project, and if need arises the rival contentions raised with regard to Cross objections and its maintainability shall be dealt with .

Provisions under WBERC OA Regulations 2022.

49. The West Bengal Electricity Regulatory Commission, in the exercise of its power conferred under section 181 read with clause (d) of subsection (2) of section 39, clause (c) of section 40, sub-sections (2), (3) and (4) of section 42 and section 66 of the Electricity Act 2003, has notified West Bengal Electricity Regulatory Commission (open access) Regulations, 2022 (hereinafter referred to as “**WBERC OA Regulations 2022**”) on 01.08.2022 to be applicable thereafter. These Regulations shall apply to open access Customers and applicants for open access embedded in the State Grid, depending upon their connectivity with inter-state transmission system or intra-State Transmission system. There is no dispute that WBERC OA Regulations, 2022 are applicable for receipt of 100 MW power from Hybrid RE project of AGENL by the Appellant.

50. Regulation 18 (charges for open Access) of WBERC OA Regulation, 2022 defines ‘Transmission charges’ as the charges for the conveyance of electricity for transmission lines and associated system of a transmission licensee and are to be recovered from transmission system users as per the

provisions of the Tariff Regulations. Regulation 18.2.1 (h) stipulates that “transmission charges for pure wind and pure solar sources shall be 1/4th of the normal long term and medium term open Access” (herein after referred to as “**Concessional Transmission charges**”). It is a fact that in WBERC OA Regulations, 2022, the term ‘Green Energy’ has the same meaning as defined in Green OA Rules as electrical energy generated from renewable sources of energy including hydro and storage or any other technology as may be notified by the Government of India, as contended by the Appellant. However, a bare reading of the Regulation shows that the applicability of Concessional Transmission Charges under Regulation 18.2.1 (h) extends only to Pure wind and Pure Solar and not to all the Green Energy sources; however it is also a fact that what is to be considered under pure wind and pure solar is not provided within the WBERC OA Regulations, 2022.

Statement of Reasons for Framing WBERC OA Regulations 2022

51. The Regulations, framed by a State Commission under Section 181 of the Electricity Act following a mandatory consultative process with stakeholders, is, ordinarily, accompanied by a Statement of Reasons recording the objections raised by the Stakeholders, and the reasons for which the Commission has either accepted or rejected such objections. The statement of Reasons serves as a tool to ascertain the legislative or regulatory intent. The statement of reasons can be legitimately used for ascertaining the object which the legislature had in mind (**Sanghvi Jeevraj Ghewar Chand vs. Secretary, Madras Chillies, Grains and Kirana Merchants & Workers Union: AIR 1969 SC 530**). The Statement of Reasons can be pressed into service for the limited purpose of understanding the object which the statute/ statutory regulation seeks to achieve. (**Tata Engineering and Locomotive Co. v. Gram Panchayat, Bhaji v. Sub-Divisional Officer and Kumar Jagdeesh Chandra Sinha v.**

Eileen K Patricia D' Roziareh; Viyyat Power Pvt. Limited v. Kerala State Electricity Board Limited, 2018 SCC OnLine APTEL 87).

52. The Objects and Reasons of an Act may be taken into consideration in interpreting the provisions of the statute/Regulation in case of doubt. **(Doypack Systems (P) Ltd. v. Union of India, (1988) 2 SCC 299)**. In the matter of WBERC OA Regulations 2022, WBERC has issued the Statement of Reasons. Under Regulation 18.2.1 (g) (h), WBERC had dealt with the request of various stakeholders with regard to applicability of Concessional Transmission charges for RE Projects, in which the developers of RE generation, the Appellant, and IEX had requested for exemption of payment of transmission charges for evacuation of power from renewable sources, while on the other hand, distribution licensee like WBSETCL commented that reduction of transmission charges for Wind and Solar shall increase the financial burden of other consumers of Distribution Company. The Commission's reasoning with respect to applicability of concessional transmission charges under Regulation 18.2.1 (h) in the Statement of Reasons is as given below:

"79.2 Commission's Stand

The transmission charges under clause 18.2.1(h) are meant for Long term Open Access and Medium Term Open Access only. The reason is not to promote a particular renewable segment but to protect the solar and wind sources from higher landed cost. As the utilisation factor (CUF) of solar and wind are comparatively lower (ranges from 17% to 30%), paying the transmission charge based on capacity contract will effectively increase their transmission charge per unit of generation 4 to 6 time from the sources who do not suffer from such natural variations. The proposed reduction in transmission charge and wheeling charge will put the solar and wind sources in same footing to other open access sources. This

concessional transmission charges shall be applicable for pure solar or pure wind open access sources. For others like hybrid RE or storage, etc no such concessional tariff shall be applicable.

Transmission charge for pure wind and pure solar sources shall be 1/4th of normal long- term and medium-term open access."

53. If we have to understand the intent of the State Commission under Regulation 18.2.1 (h) while granting concessional Tariff for "Pure Solar" and "Pure Wind" and what does pure solar and pure wind would mean; it is evident from the Statement of Reasons that concessional transmission charges are applicable for pure solar and pure wind RE sources considering that their CUF falls within the range of 17% to 30%. Furthermore, the Commission has explicitly stated that concessional transmission charges shall not be applicable to Hybrid RE sources, energy storage systems, or any other category of RE generation beyond Pure Solar and Pure Wind.

Meaning of "Pure"; Is Wind Solar Hybrid Project same as Pure Wind and Pure Solar

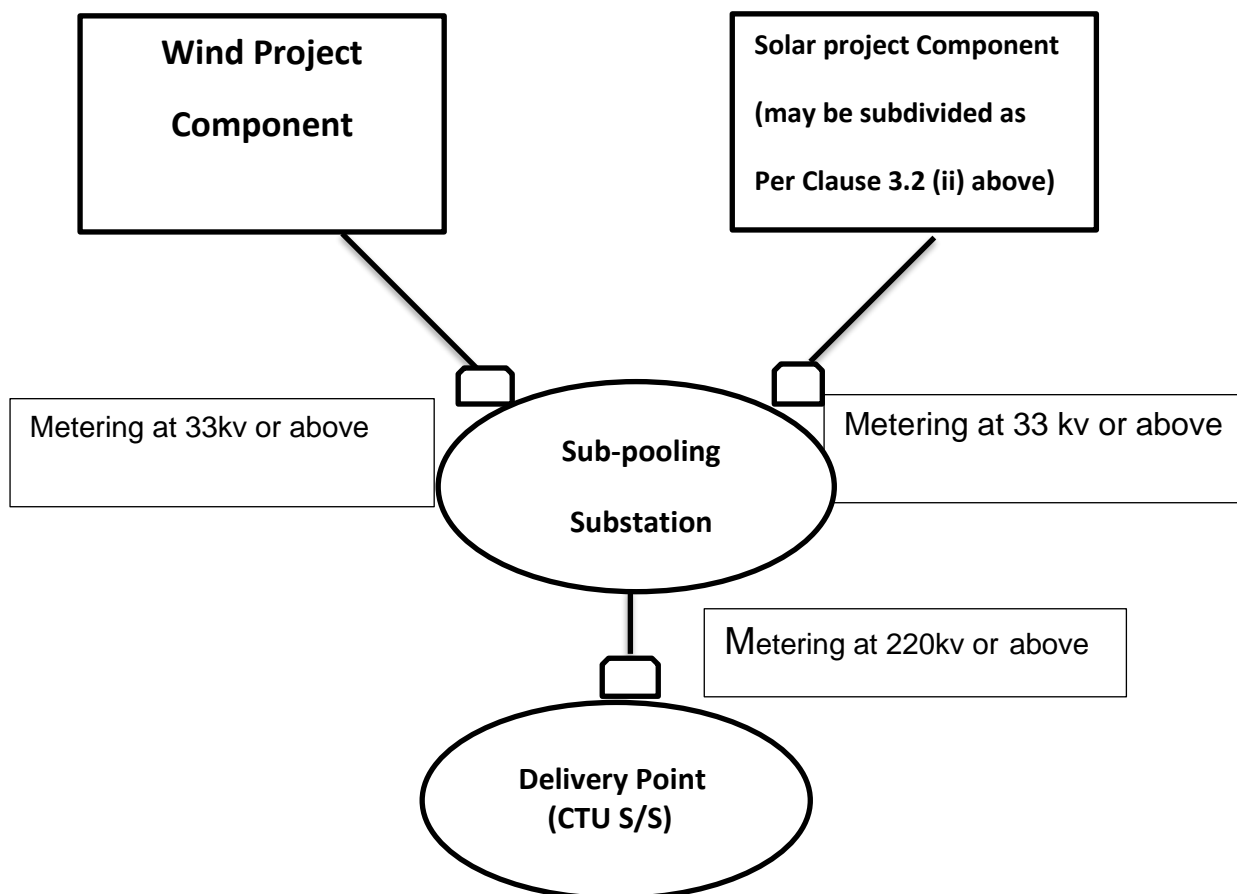
54. From the Regulation 18.2.1 (h), the words that concessional transmission charges shall apply in case of 'pure Wind' and 'pure Solar' is clear; however, the words 'Solar' and 'Wind' suffixed with 'Pure' is not defined. It is settled law that dictionary meaning of a word cannot be looked at where it has been statutorily defined or judicially interpreted, but where there is no such definition or interpretation, the court can take the aid of dictionary to ascertain the meaning of a word in common parlance, bearing in mind that the word is used in different senses according to its context and a dictionary gives all the meaning of a word and the court has, therefore, to select the particular meaning which is relevant to the context in which it has to interpret that word ("**State of Orissa Vs. Titagur Paper Mills Co. Ltd**", **reported in 1985 Supp SCC 280**, and "**Coca-Cola Company of Canada**

Ltd. Vs. Pepsi-Cola Company of Canada Ltd.”, “1942 SCC Online PC 7”) In Black’s Law Dictionary (4th Edition) "pure" is defined as "absolute; complete; simple; unmixed; unqualified" while its 10th Edition defines it as "not mixed with anything else" (like pure silver). Thus, in our view, Pure Solar would mean from solar alone, and not mixed with other sources and likewise Pure wind, would mean from wind alone, and not mixed with other sources.

55. Learned counsel for the Appellant has contended that in Hybrid RE sources, the purity of Solar and Wind sources is maintained, as in the present case, the wind and solar elements are not co-located, have separate point of injection into the Grid, wind and solar elements are scheduled separately and RPO obligations are also met separately. The question in the present *lis* is whether the Wind Solar Hybrid RE sources are same as *pure wind* and *pure solar* for the applicability of concessional transmission charges as per Regulation 18.2.1 (h) of WBREC OA Regulations 2022. In the present case, the referred Wind Solar Hybrid project has been bid out as hybrid RE project with combination of wind and solar elements, and combined CUF of both the elements put together is considered as CUF from the Hybrid RE Project.

56. In the MNRE guidelines 2020, it has been specifically mentioned in the background that combining different sources of renewable energy reduces their individual variability and gives better output and results in more efficient utilization of transmission infrastructure and land resource. It is a well-established fact that Solar energy generation is most effective during the day while wind energy often peaks at night or during different seasons. By integrating both sources, a hybrid system can provide a more consistent and stable output besides improved efficiency, and efficient use of land. A hybrid system often requires only a single grid connection point, thereby minimising grid infrastructure costs. In the present case also, as per the RFS document, it is understood that though the solar and wind will have separate points of

injection into the grid at interconnection point, bidders are required to adopt only the following specified configuration for interconnection with the grid.



57. Thus, from the above configuration, it is clear that though the point of injection is different for both wind and Solar elements of the Hybrid RE project, they are pooled into sub-pooling substation and it is noted from the Rfs Document that hybridisation of power is to be mandatorily achieved prior to the injection of power into the delivery point. Accordingly, though both wind and Solar components are scheduled separately, CUF of the project is taken by considering the output of Solar element and wind element put together for such Hybrid RE project. Moreover, a Wind Solar Hybrid RE project has been bid out as a combination of Wind and Solar elements where the rated power capacity of one resource is at least 25% of the rated power capacity of other resource.

58. Thus, based on the foregoing observation and deliberations, intent of the Regulator, as evident from the statement of reasons with respect to Regulation 18.2.1(h) of WBERC OA Regulations 2022, and applying the principle of literal interpretation of term 'pure', in our view, the Wind Solar Hybrid RE sources are not same as *pure* wind and *pure* solar RE sources.

Inclusion of Hybrid RE sources under the ambit of Regulation 18.2.1 (h) of WBERC OA Regulation 2022 for the applicability of Concessional Transmission charges.

59. The WBERC OA Regulation 2022 were notified as delegated legislation by the WBERC under section 181 of the Electricity Act. From a perusal of the statement of reasons for the referred Regulations, it is clear that concessional transmission charges were applicable for pure wind and pure solar projects considering that CUF from such projects is in the range of 17% to 30 % and paying the transmission charges based on capacity contract will effectively increase their transmission charges per unit of generation 4 to 6 times that of sources which do not suffer from such natural variations, and as mentioned earlier the hybrid RE sources were specifically excluded from the applicability of such concessional transmission charges. Once Regulations are framed and duly notified, WBERC, while exercising its adjudicatory powers, is bound by such regulations.

60. We note from contentions of learned counsel for Respondent No 1, WBERC, that the whole case of the Appellant before the State commission for inclusion of Wind Solar Hybrid RE generators under the ambit of Regulation 18.2.1 (h) is premised over the submissions that as CUF from the Wind Solar Hybrid RE sources is also in the range of 30% like wind sources, and Solar sources it must also qualify for reduced transmission charges, and accordingly, the State Commission in exercise of its powers under Regulation 36 (powers to remove difficulty), has included Solar Wind

Hybrid Generation under the ambit of Regulation 18.2.1 (h), and as such, the State Commission has not thereby amended the said Regulation.

61. The State Commission having specifically excluded the Hybrid RE sources from applicability of concessional transmission tariff from the ambit of Regulation 18.2.1 (h), by the Impugned Order has made specific provision for Hybrid RE sources within the purview of Regulation 18.2.1 (h), albeit with a ceiling CUF of 30 % for the applicability of Concessional Transmission charges, which, in our view, may amount to amendment of Regulation, in response to the clarification sought by the Appellant. The Supreme court judgement in “ ***PTC India Ltd vs CERC (201) 4 SCC (603)***”, **has held** that “ *the measures which Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable*”. The procedure to amend Regulations framed by Regulators under their legislative functions typically involves a structured and formal process like initiation of amendment, public consultation, stakeholder engagement, publication of Final Regulation etc. Though by virtue of Regulation 37 of WBERC OA Regulations, 2022, the State Commission has specified the powers to amend as “ *The commission at any point , at its own discretion or otherwise may vary, modify add or amend any provisions of these Regulations*”; however, it is a settled law that such legislative power is to be exercised by the State Commission following due process of law. Inclusion of procurement of power by the Appellant from Hybrid RE under the Regulation 18.2.1 (h) albeit with a ceiling CUF of 30% for the applicability of concessional transmission charges, may amount to an amendment of Regulation, which can only be done following due process of Law. As this issue is not the subject matter of challenge in the appeal, we refrain from saying anything more, though, in our view, as per applicable Regulations, Wind Solar Hybrid RE project would not fall within the ambit of Regulation 18.2.1(h) for the applicability of Concessional transmission

charges, without the amendment of the WBERC OA Regulations to this effect.

62. In view of above observation, we do not find it necessary to deliberate whether the ceiling of 30% of CUF on the Hybrid RE sources for applicability of concessional transmission charges, as per the Impugned Order, needs to be removed being extraneous to the provisions of Regulation 18.2.1 (h).

Impugned Order is contrary to the provisions of Green Energy OA Rules notified by MOP under section 176 of the Electricity Rules; inclusion of wind solar Hybrid RE sources with 30 % of CUF in WBERC OA Regulation is contradictory to the policies of Renewable energy at Central Level.

63. Learned counsel for the Appellant has contended that MNRE's National wind solar Hybrid Policy seeks to encourage new Hybrid RE plants and hybridization of existing wind and solar plants; the RFS document issued by SECI for the project prescribes a minimum CUF of 30 %; Green OA rules 2022 do not permit differential treatment inter-se diverse sources of renewable energy and therefore 30 % ceiling imposed on wind solar hybrid RE project is contrary to all these policies. The Impugned Order deters Hybrid RE from complying with statutory provisions of Section 61 (e) rewarding efficiency, 61 (h) & 86 (1) (e) [promotion of renewable energy] of Electricity Act. As such we note from the Electricity Amendment Rules, 2022, that Renewable energy sources means the hydro, wind, solar, bio-mass, bio-fuel, bio-gas, waste including municipal and solid waste, geothermal, tidal, forms of oceanic energy, or combination thereof, with or without storage and such other sources as may be notified by the Central Government from time to time. Thus, besides only hydro and wind, combination of these and other sources is also recognised under Renewable energy sources. It is a fact that from time to time, various

incentives/concessions are provided to different categories of renewable energy sources based on various considerations as part of promoting various categories of renewable sources. We are not able to appreciate the contention of the Appellant that not extending the concession granted to one category (type) of renewable energy source (say only Wind /only solar) to another category (type) of renewable energy sources (say hybrid RE sources) shall be in contravention of provisions of various different policies and Electricity Act as far as promotion of Renewable Energy / or improving efficiency is concerned. We find merit in the contention of Respondent No 1, that provisions in the Hybrid Policy and Guidelines, on which reliance has been placed by the Appellant, which is not even a policy under section 3 of the Electricity Act 2003, cannot be read and interpreted as a statutory provision (**Ministry of Chemicals and Fertilizers , Govt of India Vs. Cipla Ltd (2003)7SCC1; Hindustan Zinc Ltd. Vs RERC(2015)12 SCC 611.**

64. We are, as such, not required to delve further into this issue as contentions raised by the Appellant are purely one of the vires of the Regulation and as held in by the Supreme Court in its judgement in “**PTC India Ltd vs CERC (201) 4 SCC (603)**” that such challenges to the validity of a regulation fall within the domain of *judicial review* and can only be challenged before the *Hon’ble High Court*, not before this Tribunal, as reproduced hereunder.

“Summary of our Findings

92. ...

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

...

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.”

65. In view of above deliberations, we do not find any merit in the Appeal as regards the removal of ceiling of 30% of CUF for the applicability of Concessional Transmission charges for the Appellant’s Hybrid RE Project being extraneous to the Regulation 18.2.1(h) of WBERC OA Regulations 2022. Having arrived at above conclusion, we do not find it necessary to deliberate on the maintainability and contents of the cross objections filed by Respondent No 2 or on the issue of violation of principal of natural justice as the Impugned Order was passed without putting Respondent No.2 on notice. The captioned Appeal is hereby dismissed along with all associated IAs, if any.

Pronounced in open court on this 10th Day of February, 2025.

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE/~~NON-REPORTABLE~~

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