

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 267 OF 2023 & IA NO. 243 OF 2025

Dated: 4th July, 2025

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

In the matter of:

SURYA ALLOY INDUSTRIES LIMITED

Through its Director

1/1 Camac Street, 3rd Floor,
Kolkata – 700016.

... Appellant

VERSUS

**1. WEST BENGAL ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary

Plot No. AH/5 (2nd & 4th Floor),
Premises No. MAR 16-1111, Action Area 1A
Newtown, Rajarhat
Kolkata - 700163

... Respondent No.1

2. DAMODAR VALLEY CORPORATION

Through its CMD

DVC Towers, VIP Road
Kolkata – 700054.

... Respondent No.2

Counsel for the Appellant(s):

Amit Kapur
Akshat Jain
Shefali Tripathi
Aditya H. Dubeyt
Sagnik Maitra
Avdesh Mandloi

Counsel for the Respondent(s):

C. K. Rai

Sumit Panwar **for Res.1**

Shri Venkatesh
Shryeshth Ramesh Sharma
Kanika Chugh
Ashutosh Kumar Srivastava
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Akash Lamba
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Aashwyn Singh
Mohit Gupta
Manu Tiwari
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Aniket Kanhaua
Suhael Buttan
Priya Dhankar
Anant Singh
Vineet Kumar
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Nihal Bhardwaj **for Res.2**

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The Appellant, Surya Alloy Industries Ltd, has filed the present Appeal challenging the Order passed by the West Bengal Electricity Regulatory Commission, in Case No. C-15/993 ("**Petition**") dated 12.08.2022, which related to the demand of Damodar Valley Corporation to pay additional energy charges during the restricted drawal period. The main ground on which the Impugned Order is subjected to challenge in this

Appeal is that the said Order contravenes Regulation 2.14.1 of the WBERC (Conduct of Business Regulations) 2013, which envisages that the Orders passed by the WBERC shall be signed by (all) the members who considered and/or heard the matter :-

Facts, not in dispute, are that, on 31.01.2022, the Petition, filed before the WBERC by the Appellant herein, was heard by a quorum consisting of the Chairperson and two other Members. On 28.04.2022, Mr. Durgadas Goswami, Member of the WBERC, retired. On 18.07.2022, an e-hearing was held, before the WBERC, as noted in Para 1.6 of the Impugned Order. On 01.08.2022, the Chairperson of the WBERC retired. On 12.08.2022, the Impugned Order was passed by the WBERC. The covering page of the impugned order notes the presence of the Chairperson (who had retired) along with another Member, but was signed by only one Member.

The limited issue to be decided in this Appeal is whether the WBERC acted in contravention of Regulations 2.14.1 & 2.14.2 of the WBERC (Conduct of Business Regulations), 2013 read with Section 86(3) of the Electricity Act, and whether the rule of natural justice, that “*one who hears must decide*”, is attracted.

II. BACKGROUND FACTS:

The Appellant herein filed WPA No. 3077 of 2019 before the Calcutta High Court challenging the validity of Regulation 4.4 of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011, as also the demand of additional energy charges on account of restricted drawal as contained in the bills for the months of June, 2015 till December, 2018.

In its order, in WPA No. 3077 of 2019 dated 12.02.2021, the Calcutta High Court observed that, in so far as the demand for additional energy charges was concerned, the matter was required to be decided by the West Bengal Electricity Regulatory Commission (in short “WBERC”), as the WBERC had decided a similar issue in respect of three months, being August, September and October, 2018, by its order dated 11.12.2020. The Appellant herein was permitted to approach the WBERC before 1st March, 2021 regarding their grievances in relation to the demand of additional energy charge on account of restricted drawal as contained in the bills for the months of June, 2015 to December, 2018. The Calcutta High Court further observed that, in the event the Appellant approached the WBERC within the time frame provided in the order, the WBERC shall, after hearing the parties, pass a reasoned order on the issues that may be raised before it within a period of six months from the date of being so approached; and the order that may be passed should be communicated to the parties within seven days of passing the order.

In so far as the vires of Regulation 4.4 of the WBERC (Terms and Conditions of Tariff) Regulations, 2011 was concerned, the Calcutta High Court observed that this point was kept open for being taken in subsequent proceedings if the Appellants were so advised. The Writ Petition was accordingly disposed of.

Pursuant to the aforesaid order of the Calcutta High Court the Appellant herein filed Case No. C-15-993 before the West Bengal Electricity Regulatory Commission (“WBERC” for short) seeking its intervention in the matter of arbitrary and unjustified demand on account of additional energy charges during the restricted drawal period. The impugned order passed by the WBERC dated 12.08.2022 records that Shri Sutirtha Bhattacharyya,

Chairperson and Shri Pulak Kumar Tewari, Member were present. The impugned order dated 12.08.2022 records the Commission's directions that (i) the Petition and Prayer made in the Petition under consideration was partially allowed; (ii) Damodar Valley Corporation ("DVC" for short) shall claim the energy charge rate as per the tariff order for the quantity of energy consumed by SAIL (the Appellant herein) as over drawal during the restricted periods of August, 2018 to October, 2018; (iii) DVC shall make necessary amendments in the bill raised to SAIL as per the direction given in (a) above; (iv) in case, SAIL has already made any payment towards the energy charge at a rate above the rate directed by the Commission in (a) above for over drawal during the restricted period between August, 2018 and October, 2018, the excess payment made by SAIL shall be adjusted by DVC with the future bills to be raised by DVC on SAIL; (v) In the event of shortage of power, it is the contractual obligation of DVC to provide energy to its members even by purchasing energy from other sources available in the grid; (vi) DVC should be very careful in future while imposing restriction of drawal of power on the consumers in the State of West Bengal, and shall adopt such methodology so that the consumers of DVC in the State of West Bengal do not suffer for closure of their plants and / or do not become coerced to seek for over drawal; and if DVC does not follow the direction as given above, DVC shall be liable to be penalized in future. The impugned order was, however, signed on 12.08.2022 only by Shri Pulak Kumar Tewari, Member, as Shri Sutirtha Bhattacharyya, Chairperson, had retired prior thereto on 01.08.2022

III. RELEVANT STATUTORY PROVISIONS:

Section 92 of the Electricity Act, 2003 relates to proceedings of the Appropriate Commission. Section 92(1) stipulates that the Appropriate

Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify. The West Bengal Electricity Regulatory Commission has specified rules of procedure regarding transaction of business in its meetings, including quorum at its meeting, by way of regulations which shall be referred to later in this order.

Section 92(2) stipulates that the Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member, chosen by the Members present from amongst themselves, shall preside at the meeting. Section 92(3) provides that all questions, which come up before any meeting of the Appropriate Commission, shall be decided by a majority of votes of the Members present and voting and, in the event of an equality of votes, the Chairperson or, in his absence, the person presiding shall have a second or casting vote. Section 92(4) stipulates that, save as otherwise provided in sub-section (3), every Member shall have one vote. Under Section 92(5) all orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorised by the Chairperson in this behalf. Section 93 relates to vacancies, etc. not to invalidate proceedings and, thereunder, no act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission. Section 97 relates to delegation and thereunder the Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the

Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under Section 79 and Section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary. The power of the State Regulatory Commission to adjudicate disputes is under Section 86(1)(f) of the Electricity Act. While such a power cannot be delegated, there does not seem to be any bar to the delegation of other powers and functions under the Act such as the power to determine tariff under Section 62 read with Section 64 of the Electricity Act.

The West Bengal Electricity Regulatory Commission (Conduct of Business) Regulation, 2013, made by the WBERC in exercise of the powers conferred by Section 181 read with other provisions of the Electricity Act, 2003, came into force on its publication in the Kolkata Gazette on 11.09.2013. Regulation 1.2.1 (c) of the said Regulations defines “Chairperson” to mean the Chairperson of the Commission. Regulation 1.2.1(f) defines “Member” to mean a Member of the Commission, and includes the Chairperson. Regulation 1.2.1(i) defines “proceedings” to mean all the proceedings of the Commission in discharge of its judicial functions under the Act, and it shall also include all the proceedings before any person if the said person is delegated to act by the Commission under Section 97 of the Act. Regulation 1.2.2 stipulates that words or expressions, used and not defined in these Regulations but defined in the Act, shall have the meanings respectively assigned to them in the Act or in the Regulations made thereunder by the Commission.

Regulation 1.4 relates to Quorum for meetings. Regulation 1.4.1 stipulates that the Quorum for a meeting of the Commission shall be at least

50% of the existing number of members of the Commission. Regulation 1.4.2 provides that the Chairperson or, if he is unable to attend a meeting of the Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting. Regulation 1.4.3 stipulates that all the questions, which come up before any meeting of the Commission, shall be decided by a majority of votes of the Members present and voting and, in the event of an equality of votes, the Chairperson or, in his absence, the person presiding shall have a second or casting vote. Regulation 1.4.4 stipulates that, save as otherwise provided in Regulation 1.4.3, every Member shall have one vote. Regulation 1.4.6 stipulates that all decisions, directions and orders of the Commission taken in a meeting of the Commission shall be in writing, and expressed in terms of the views of the majority of the votes of the Members present; the views of the dissenting Member, if any, will also be appropriately recorded. Regulation 1.4.7 requires the Secretary to maintain the Minutes Book and paste duly signed Minutes in the Minutes Book, the pages of which will be numbered serially in a continuous manner.

Chapter II of the WBERC Regulations are the General Rules concerning the proceedings before the Commission. Regulation 2.1 relates to the proceedings before the Commission. Regulation 2.1.1 enables the Commission, from time to time, to hold such proceedings which may or may not involve hearings or inviting written objections from the affected person through press notification or web notification etc. as it may consider appropriate in the discharge of its functions, but shall also be consistent with the provisions of the Act and the specific Regulations concerned to the

matter of the proceedings. Regulation 2.1.2 enables the Commission, from time to time, to hold such public consultation or circulate consultative papers on broad macro issues to solicit the views, comments, suggestions, critical assessment etc. from the public and other stakeholders etc. as it may consider appropriate in discharge of its function; the decision of the Commission to hold or not to hold such consultation on any issue shall be final and binding. Regulation 2.1.3 provides that the proceedings before the Commission may relate to any of the following matters; (a) determination of tariff; (b) issue of licence or amendments in the licence or cancellation of licence or any matter relating thereto; (c) adjudication or resolution of disputes; (d) regulation of purchase and procurement process of electricity or any matter relating thereto; (e) investigation of generating company or licensee etc. or any matter relating thereto including market domination; (f) complaint against contravention of Act or Rules or Regulations or directions or the order of the Commission including matters which fall under Section 129 of the Act; and (g) any other matter provided under the Act.

Regulation 2.2 relates to Quorum. Regulation 2.2.1 stipulates that the Quorum for the proceedings before the Commission shall be at least 50% of the existing number of members of the Commission. Regulation 2.2.2 stipulates that the provisions of Regulations 1.4.2 to 1.4.5 shall apply *mutatis mutandis* to the proceedings before the Commission. Regulation 2.2.3 stipulates that all decisions/ directions and orders of the Commission shall be in writing in terms of the views of the majority of the Members present; the views of the dissenting Member shall also be appropriately recorded. Regulation 2.2.4 provides, in case the proceedings are done by a single Member or other authorized person in terms of the delegation

made under Section 97 of the Act, then the order will be signed by such Member or person only.

Regulation 2.3 relates to initiation of proceedings. Regulation 2.3.1 enables the Commission to initiate any proceedings suo motu or on a petition filed by any affected person who can file such petition in terms of the provisions of these Regulations and the Act. Regulation 2.3.2 provides that the petition so filed shall become a part of the proceedings only after the petition is admitted by the Commission in terms of these Regulations. Regulation 2.10 relates to hearing of the matter. Regulation 2.10.1 enables the Commission to determine the requirement, the extent, the stage, the manner, the place, the date and the time of the hearing of the matter including the persons who may be permitted in the hearing at its sole discretion subject to specific provisions in different Regulations of the Commission and Act and dispose of the matter as expeditiously as possible; however, the person who has filed the petition shall be called in the hearing. Regulation 2.10.2 enables the Commission to decide the matter on the pleadings of the parties or may call for the parties to produce evidence by way of affidavit or lead oral evidence in the matter; the Commission may provide or direct the party to provide translator for oral evidence, pleadings as may be considered necessary by the Commission. Regulation 2.10.3 provides that, if the Commission directs evidence of a party to be led by way of affidavit, the Commission may, as and when the Commission considers it to be necessary, grant an opportunity to the other party to give its points/objections provided the other party has filed his objections/ points. Regulation 2.10.4 enables the Commission, if it considers necessary or expedient, to direct that the evidence of any of the parties be recorded by an Officer or person designated for the purpose by

the Commission. Regulation 2.10.5 requires the parties, appearing before the Commission for hearing, to file written notes of arguments or submissions in the matter; the Commission, during hearing, will only rely on the issues that are covered in the written arguments only and relevant portion of the oral evidence of any person who has been summoned by the Commission for submission of evidence and who is not directly linked with the proceedings. Regulation 2.10.6 stipulates that when the Commission determines the requirement of hearing under Regulation 2.10.1 and grants an opportunity of being heard to a person, who is a party to any proceedings before the Commission, he may appear in person or may authorise any of his employees to appear before the Commission and to act and plead on his behalf.,

Regulation 2.14 relates to the orders of the Commission. Regulation 2.14.1 requires the Commission to pass orders, and the same shall be signed by the Members, who considered and/or heard the matter as the case may be; in case the Member who considered and/or heard the matter retires or resigns or is removed, the new Member shall sign the order subject to requirement of the same for constituting the quorum of the Commission; in case, a matter is considered and/or heard for several days, the Member, who considered and/or heard the matter remains absent in some of the days but remains present in most of the days when the matter was considered and/or heard, shall sign the order. Regulation 2.14.2 stipulates that the reasons given by the Commission in support of the orders including those by the dissenting Member, if any, shall form a part of the order and shall be available for inspection and supply of copies in accordance with these Regulations. Regulation 2.14.3 stipulates that all orders and decisions issued or communicated by the Commission shall be

certified by the signature of the Secretary or any other Officer empowered in this behalf by the Chairperson, and shall bear the official seal of the Commission.

IV. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Sri Amit Kapur, Learned Counsel for the Appellant and Sri C.K. Rai, Learned Counsel for the WBERC. It is convenient to examine the rival contentions, urged by Learned Counsel on both sides, under different heads.

V. IS THE TEST, OF “ONE WHO HEARS MUST DECIDE”, A RULE OF UNIVERSAL APPLICATION:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the Impugned Order passed by the WBERC has not been signed by all the Members of the WBERC who had heard and considered the Petition; the limited issue to be decided by this Tribunal, (without prejudice to the various grounds taken by the Appellant), is whether the WBERC has acted contrary to:-(a) Regulations 2.14.1 and 2.14.2 of WBERC (Conduct of Business) Regulations, 2013 read with Section 86(3) of the Electricity Act, 2003; and (b) the settled principle of natural justice that “*one who hears must decide*”; this aspect has been considered and examined by this Tribunal in a *catena* of judgments (as relied upon by the Appellant), viz:- (a) ***Global Energy Pvt. Ltd. v. KERC & Ors.* [2016 SCC OnLine 118]**; (b) ***DVC v. CERC* [2019 SCC OnLine APTEL 40]**; (c) ***JITPL v. CERC* [2019 SCC OnLine APTEL 82]**; (d) ***JITPL v. OERC* [2024 SC OnLine APTEL 7]**;

and (e) **MPPMCL v. CERC [2024 SCC OnLine APTEL 79]**; based on the above judgments, the following unequivocal principles emerge:- (a) it is mandatory for all Members of the State Commission/Central Commission, who have heard and considered the matter, to sign the final Order; (b) if, due to any reason (including retirement), if any Member who heard and considered the matter is not available for signing the final Order, and consequently such final Order is signed by the remaining Members, such Order will be rendered invalid; (c) in case any Member of the State Commission/Central Commission, who has heard and considered the matter, demits office by reason of superannuation, death, etc., the same would not permit the remaining Members from signing such final Order; this Tribunal, in the above judgments, considered provisions which were similar to Regulation 2.14.1 of the CBR Regulations; and a chart comparing Regulation 2.14.1 of the CBR Regulations with similar provisions which arose for consideration, in the Conduct of Business Regulations examined in the above judgments, was being furnished.

B. SUBMISSIONS URGED ON BEHALF OF WBERC:

Sri C.K.Rai, Learned Counsel for the WBERC, would submit that a perusal of the Tabular chart filed by the Appellant as Appendix A to the Written Submission would show that the Regulations, with respect to KERC (**Global Energy**), CERC (**DVC**), OERC (**Jindal**), are distinguishable with that of Regulation 2.14.1 of the WBERC Regulations, 2013.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

1. Regulation 31(1) of the KERC (General and Conduct of Proceedings) Regulations, 2000 (“KERC Regulations” for short) stipulated

that no Member shall exercise his vote on a decision unless he was present during all substantial hearings of the Commission on the matter; and a Member who has not participated in hearings and has not applied his mind to the issue involved is not entitled to vote. Regulation 31(2) stated that the Commission shall pass orders on the petition in writing and the Members of the Commission, who heard the matter and voted on the decision, will sign the orders. Regulation 31(3) stated that the reasons given by the Commission in support of the orders, including those by a dissenting Member, shall form part of the order and shall be available for inspection and supply of copies in accordance with these Regulations.

In **Global Energy Pvt. Ltd. v. KERC & Ors: 2016 SCC OnLine Aptel 118**, while three Members of the State Commission heard the matter, however the order was signed by only two Members. This was contended by the Appellant to be in the teeth of Regulation 31 of the KERC Regulations as such an order was not an order of the State Commission.

In this context, this Tribunal held that Regulation 31 speaks about orders of the Commission; it laid down a strict procedure, and put certain restraints on the Members to secure that all orders of the Commission meet with the accepted principles underlying judicial decision-making; those who hear the matter have a joint responsibility to conclude it; only they can vote on the decision as having participated in the substantial hearings, as they have applied their mind to the matter; the Commission has to pass orders in writing, and those who heard the matter and voted on the decision will sign the orders; the responsibility to sign the orders is fixed; as per Regulation 31(3), the orders have to be reasoned orders, and the reasons form part of the order; under Regulation 31(3), where a Member dissents, the dissenting Member has to give reasons for his dissent, and these

reasons shall form part of the order; Section 31(3) requires that the reasons given by the Members shall be available for inspection and supply of copies in accordance with the said regulations; it is clear from Regulation 31 that signing of order by those who heard the matter and voted on the decision is a must; even a dissenting Member must give reasons for his dissent and sign the reasons for the dissent, and they form part of the order; no Member can avoid the responsibility of signing the order; it is implicit in Regulation 31 that all those who heard the matter must be present in the meeting; this is in tune with the principle that all those who heard the matter must sign the order; the order may be unanimous or there may be a dissenting voice, but the requirement is that all the Members who heard the matter have to sign the order; and the conclusion was that an order which is not signed by all the Members who heard the matter will be *non est*.

After referring to the judgement of the Supreme Court in **United Commercial Bank Ltd, BSES Ltd., Karnal Improvement Trust, and Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation: AIR 1959 SC 308**, this Tribunal opined that the said judgments made it clear that the work of the Commission, which is of a quasi-judicial nature, is one of joint responsibility of all Members; the Commission as a body should sit together and the order of the Commission has to be the result of the joint deliberations of all Members of the Commission acting in a joint capacity; all Members of the Commission, who heard the matter, should sign the order; if the order is not signed by all Members, who heard the matter, it will be invalid as it will not be the order of the Commission; this was in line with the fundamental proposition that a person who hears must decide and divided responsibility is destructive of the concept of judicial hearing; if a Member dissents he must give reasons

for the dissent, and that shall form part of the order; Regulation 31 of the KERC Regulations, and the judgments of the Supreme Court which they had referred to, led them to conclude that the impugned order was *non est* and void as the matter was heard by three Members, and the order was signed by two Members; and this was against the basic principle that one who hears the matter should sign the order.

2. In DVC v. CERC: 2019 SCC OnLine APTEL 40, the Appellant contended that the matter had been heard by a bench consisting of four Members but out of four Members one Member retired; the order had been signed only by three Members, and the Impugned Order was passed; the impugned order was passed contrary to Regulation 62 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999; and it was mandatory on the part of the 1st Respondent/the Central Commission, the Chairperson and the Members of the Commission, who heard the matter and voted on the decision, to sign the orders.

Relying on its earlier judgement in **Global Energy Pvt. Ltd. v. KERC & Ors. [2016 SCC OnLine Aptel 118]**, and the judgement of the Punjab and Haryana High Court in **Excel Crop Care Ltd. v. The State of Haryana (VAT Appeal No. 16 of 2017 (O & M) decided on 23.03.2018)**, this Tribunal observed that, in view of the well settled law laid down by the Apex Court, this Tribunal and the High Court of Punjab and Haryana, the impugned order passed by the Central Commission was liable to be set aside, and the matter remitted back for re-consideration afresh in accordance with law.

3. In JITPL v. CERC: 2019 SCC OnLine APTEL 82, the contention of the Appellant was that the Coram consisting of three members had

signed the impugned Order, though the matter had been heard with the Coram of two members only; and the signing of the three members and releasing the order was contrary to the relevant CERC Regulations.

In this context, this Tribunal, after noting the submission that only two members were present when the matter was finally heard, and inadvertently the final order was signed by three members of the Respondent Commission, remitted the matter back for reconsideration afresh with the direction to the CERC to pass an appropriate order in accordance with law after affording a reasonable opportunity of hearing to the Appellant and Respondent Nos. 2 and 3, and dispose of the matter as expeditiously as possible.

4. In JITPL v. OERC: 2024 SC OnLine APTEL 7, the cases were heard by a Bench of the Commission comprising of three Members including the Chairperson, whereas the impugned order was signed by only two Members; this was for the reason that the order was reserved on 24.04.2018; but, before the order could be prepared and signed on 04.06.2019, i.e. after a gap of more than a year, one of the Members of the Commission had already retired.

On the preliminary legal objection of the appellant that the impugned order had been signed by only two Members, though three members of the Bench had heard the case; and the appropriate course for the Commission, upon superannuation of one of the Members of the Bench, was to hear the case *de novo*, this Tribunal referred to Sections 92 and 93 of the Electricity Act, and to Regulation 8, 20 and 76 of the OERC Regulations, and observed that, under Regulation 20(1), it was mandatory on the part of the Chairperson and the Members of the Commission, who hear the matter, to

vote on the decision to be taken therein and to sign the order; a similarly worded Regulation 31(2) of the Karnataka Electricity Regulatory Commission Regulations was considered by this Tribunal in **Global Energy Pvt. Ltd. v. KERC**: (Appeal No. 233 of 2016); there were two contrary views of this Tribunal on the issue under consideration; one view was in terms of the judgments in **Faridabad Industries Association case** and **Amausi Industries Association case** to the effect that, upon demitting of the office by one of the three Members of the Commission who had heard the matter, by reason of retirement etc., the order signed by remaining two Members of the Commission was valid and sustainable; the contrary view was that expressed in the subsequent two judgments of this Tribunal in **Global Energy case** and **Damodar Valley Corporation case**, that such an order is not legally sustainable and is *non est* in the eyes of law; it is an established principle that when there are two contrary and mutually inconsistent judgments of two co-ordinate benches of a court/tribunal on a particular issue, the judgment which has been delivered later in point of time holds the field; even otherwise, they were unable to endorse the view taken by this Tribunal in **Faridabad Industries Association case** and **Amausi Industries Association case**; Regulation 20(1) referred to the orders to be passed by the State Commission and laid down that the Chairperson as well as Members of the Commission who heard the matter, shall sign the orders; Regulation 20(2) provided that the reasons given by the Commission in support of the orders, including those by a dissenting Member, shall form part of the order and shall be available for inspection and supply of copies in accordance with these Regulations; it was mandatory that all the Members of the Commission who heard the matter shall sign the order thereby concluding the proceedings of the case before the Commission; even the opinion of a dissenting Member had to

form part of the final order of the Commission; no member had the option of avoiding to sign the order; it was a must for all the Members of the Commission, who heard the matter, to sign the order; the order may be unanimous or there may be a dissenting opinion also, but the requirement was that even the dissenting Member shall also sign the order; what could be deduced from Regulation 20 was that Members of the Commission who hear the case shall sit together and the final order has to be a result of their joint deliberations acting in a joint capacity; if, for any reason whatsoever, one of these Members is not available for the deliberations and the final order is prepared and signed by only remaining Members of the Commission, it would not be a valid and proper order of the Commission; and such an order would be in violation of the legal proposition enunciated by the Supreme Court in **Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation**, and reiterated in **Rasid Javed v. State of U.P.**, that a person who hears must decide, and the divided responsibility is destructive of the concept of judicial hearing.

This Tribunal further observed that the incorrect interpretation of law in **Faridabad Industries case** and **Amausi Industries case** was corrected by this Tribunal in its subsequent decisions in **Global Energy case** and **Damodar Valley Corporation case**; since the law laid down in the previous two judgments of this Tribunal had already been unsettled in the latter two judgments and rightly so, the doctrine of “*stare decisis*” espoused by the learned counsel for the respondents has no application; what Section 92(3) of the Electricity Act provided was that decision of the majority of the Members, who had heard the matter, shall be the final order of the Commission, and in the event of equality of vote on a matter, the Chairperson or, in his absence. the Member presiding shall have a second

or casting vote; it would be fallacious to state that this legal provision is applicable to the situation arising in the instant case and would validate an order of the Commission signed by only two Members when the matter was heard by three Members; such a view would be against the basic principle of judicial decision making that those who hear must decide the matter; Section 92 should be construed in a manner which would not render Regulation 20(1) of the OERC Regulations otiose; it is settled principle of law that Regulations notified are binding on the regulated entities till such time they are amended or set aside by the appropriate forum; in the instant case, the OERC Regulations were binding on the State Commission also; the “vacancy” and “defect in the constitution of the Commission”, referred to in Section 93 of the Electricity Act, related to the time when the matter was being heard by the Commission i.e. at the time of constituting the Bench to hear the matter; this could not be made applicable to a situation where there was no vacancy or defect in the constitution of the Commission at the time of hearing the matter, but vacancy arose subsequent to the completion of hearing of the matter; the respondent was precluded from invoking the doctrine of necessity in this case for the reason that the matter could have been heard afresh by a newly constituted Bench of the Commission subsequent to the retirement of one of the members who had earlier heard it.

While holding the impugned order of the Commission unsustainable, legally invalid and *non est*, this Tribunal clarified that where one of the Members of the Commission, who hear a matter, demits office by reason of superannuation, death etc. before passing of the final order, it is not permissible for the remaining Member/Members of the Commission to sign

the order; and, in such a situation, the matter shall be heard *de novo* and final order be passed/signed accordingly.

5. In **MPPMCL v. CERC: 2024 SCC OnLine APTEL 79**, the Appellant had contended that the Impugned Order was signed by the three Members of the Commission as against its being heard by four Members. In this context, this Tribunal held that the issue was covered by their earlier judgment in **Jindal India Thermal Power Ltd. v. Odisha Electricity Regulatory Commission**: (Appeal No. 297 of 2019 dated 07.02.2024); and this court was bound by its earlier decisions on the principle of law. The Central Commission was accordingly directed, after hearing all the contesting parties, to pass the order afresh within three (3) months.

D. COMPARISON OF THE REGULATIONS IN THE ABOVE REFERRED JUDGEMENTS WITH WBERC REGULATIONS:

WBERC (Conduct of Business) Regulations, 2013 [Present Appeal]	KERC (General and Conduct of Proceedings) Regulations, 2000 [Considered in <i>Global Energy Pvt. Ltd. v. KERC & Ors.</i> (2016 SCC	CERC (Conduct of Business) Regulations, 1999 [Considered in <i>DVC v. CERC</i> (2019 SCC OnLine APTEL 40)]	OERC (Conduct of Business) Regulations, 2004 [Considered in <i>JITPL v. OERC</i> (2024 SCC OnLine APTEL 7)]
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	OnLine APTEL 118)]		
<p>“2.14 Orders of the Commission:</p> <p>2.14.1 The Commission shall pass order and the same shall be signed by the Members, who considered and/or heard the matter as the case may be. In case the Member who considered and/or heard the matter retires or resigns or is removed, the new Member shall sign the order subject to requirement of</p>	<p>“31. Orders of the Commission</p> <p>(1) No Member shall exercise his vote on a decision unless he was present during all substantial hearings of the Commission on the matter.</p> <p>(2) The Commission shall pass orders on the Petition in writing and the Members of the Commission who heard the matter and voted on the</p>	<p>“Orders of the Commission</p> <p>62. The Commission shall pass orders on the Petition and the Chairperson and the Members of the Commission who hear the matter and vote on the decision shall sign the orders.</p> <p>63. The reasons given by the Commission in support of the orders, including those by the dissenting</p>	<p>“20. Orders of the Commission</p> <p>(1) The Commission shall pass orders on the petition and the Chairperson and the Members of the Commission, who heard the matter, shall sign the orders.</p> <p>(2) The reasons given by the Commission in support of the orders, including those by the dissenting member, if any,</p>

<p>the same for constituting the quorum of the Commission. In case, a matter is considered and/or heard for several days, the Member, who considered and/or heard the matter remains absent in some of the days but remains present in most of the days when the matter was considered and/or heard, shall sign the order.</p> <p>2.14.2 The reasons given by the Commission in support of the orders</p>	<p>decisions will sign the orders.</p> <p>(3) The reasons given by the Commission in support of the orders, including those by a dissenting Member, if any, shall form a part of the order and shall be available for inspection and supply of copies in accordance with these Regulations.</p> <p>(4) All orders and decisions issued or communicated by the</p>	<p>Member, if any, shall form a part of the order and shall be available for inspection and supply of copies in accordance with these Regulations.</p> <p>64. All orders and decisions issued or communicated by the Commission shall be certified by the signature of the Secretary or an Officer empowered in this behalf by the Chairperson and bear the</p>	<p>shall form a part of the order and shall be available for inspection and supply of copies in accordance with these Regulations.</p> <p>(3) The Commission shall have the powers to pass such interim orders in any proceeding, hearing or matter before the Commission, as the Commission may consider it to be appropriate.</p> <p>(4) All orders and decisions</p>
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<p><i>including those by the dissenting Member, if any, shall form a part of the order and shall be available for inspection and supply of copies in accordance with these Regulations.</i></p> <p>2.14.3 All orders and decisions issued or communicated by the Commission shall be certified by the signature of the Secretary or any other Officer empowered in</p>	<p>Commission shall be certified by the signature of an Officer empowered in this behalf by the Chairman and shall bear the Seal of the Commission.”</p>	<p>official seal of the Commission.</p> <p>65. All final orders of the Commission shall be communicated to the parties to the Proceedings under the signature of the Secretary or an Officer empowered in this behalf by the Chairperson or the Secretary.</p>	<p>issued or communicated by the Commission shall be certified under the signature of the Secretary or an Officer empowered in this behalf by the Chairperson and bear the official seal of the Commission.</p> <p>(5) All final orders of the Commission shall be communicated to the parties in the proceeding under the signature of the Secretary or an</p>
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<p><i>this behalf by the Chairperson and shall bear the official seal of the Commission.</i></p> <p>2.14.4 All orders of the Commission shall be available for inspection and supply of certified copy as per regulation 2.15.</p> <p>2.14.5 The Commission at its sole discretion may direct that the order or gist of the order may be published in the manner as may be directed.</p>			<p><i>Officer empowered in this behalf by the Chairperson or the Secretary.</i></p>
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E. ANALYSIS:

It is not in dispute that the petition filed by the Appellant before the WBERC was heard on 31.01.2022 by a quorum of three Members of the WBERC consisting of the Chairperson and two other Members. Consequent on the retirement of one of the Members, i.e. Durgadas Goswami on 28.04.2022, the petition was heard by two Members including the Chairperson in the e-hearing held thereafter on 18.07.2022. On 01.08.2022, the Chairperson also retired, and consequently the impugned order, passed by the WBERC on 12.08.2022, contained the signature of the remaining member. In other words, only one of the three Members, who originally heard the petition on 31.01.2022, signed the order.

If the test of '*one who hears must alone pass the order*' is applied, then, since the petition was initially heard by three Members and later by two, the fact that the impugned order was signed by the only one remaining member would necessitate the order to be set aside on the ground that the afore-said test is not satisfied.

In the afore-said judgments, on which reliance is placed on behalf of the Appellant, the test of '*one who hears should pass the order*' has been applied relying on the judgments of the Supreme Court in **Gullapalli Nageswara Rao & Ors. vs. APSRTC: AIR 1959 SC 308**) and **Rasid Javed vs. State of U.P: (2010) 7 SCC 781**. It is necessary for us therefore, to consider the law laid down in the afore-said judgments of the Supreme Court.

In **Gullapalli Nageswara Rao v. A.P. State Road Transport Corpn: AIR 1959 SC 308**, the petitioners were carrying on motor transport business for past several years by obtaining permits under the Motor

Vehicles Act, 1939, as amended by Act 100 of 1956, in respect of various routes. The amending Act inserted a new Chapter IV-A providing for the State Transport Undertaking running the business to the exclusion, complete or partial, of all other persons doing business in the State. Chapter IV-A provided for a machinery called the State Transport Undertaking, defined under Section 68-A(b) as an undertaking providing road transport service, to run the transport business in the State. In exercise of the powers conferred by Section 68-C of the Act, one Shri Guru Pershad, styled as the General Manager of the State Transport Undertaking of the Andhra Pradesh Road Transport, published a scheme for the purpose of providing an efficient, adequate, economical and properly coordinated transport service in public interest to operate the transport service mentioned therein with effect from the date notified by the State Government. Objections were invited within 30 days from the date of the publication of the proposal in the Official Gazette. 138 objections were received. Individual notices were issued by the State Government by registered post to all the objectors. Thereafter, the Secretary to Government, Home Department, in charge of transport, heard the objections. 88 of the objectors represented their cases through their advocates; three of them represented their cases personally and the rest were not present at the time of hearing.

After considering all the objections and after giving an opportunity to the objectors, their representatives and the representatives of the State Transport Undertaking, the State Government found that the objections to the scheme were devoid of substance. On that finding, the State Government approved of the scheme, and the approved scheme was published in the Andhra Pradesh Gazette. The Government of Andhra

Pradesh also established a Road Transport Corporation under the Road Transport Corporations Act, 1950 called the Andhra Pradesh Road Transport Corporation which was empowered to take over the management of the erstwhile Road Transport Department. The petitioners, who were plying their buses on various routes in Krishna District of Andhra Pradesh, apprehending that their routes would be taken over by the Corporation pursuant to the aforesaid scheme, sought the aid of the Supreme Court.

Under Section 68-D, the procedure prescribed for the approval of a scheme was that the State Transport Undertaking prepares a scheme providing for road transport service in relation to an area to be run or operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons, and publishes it in the Official Gazette; any person affected by the scheme may, within thirty days from the date of its publication, file before the Secretary to Government in charge of Transport Department objections and representations in writing with reasons in support thereof; after receiving the objections and representations, the Government fixes a date for the hearing and, after giving an opportunity to the persons of being heard in person or by authorized representatives, considers the objections and then modifies or approves the scheme.

The following procedure was, in fact, followed by the Government in this case. After the scheme was prepared and published in the Official Gazette, the petitioners and others filed objections before the Secretary to Government Transport Department, within the time prescribed. 138 objections were received and individual notices were issued by the Government by registered post to all the objectors fixing the date of the

hearing. The Secretary to Government, Home Department, in charge of Transport, heard the representations made by the objectors, some in person and others through their advocates, and also the representations made by the General Manager of the Road Transport Undertaking. The Secretary, after hearing the objections, prepared notes and placed the entire matter, with his notes, before the Chief Minister, who considered the matter and passed orders rejecting the objections and approving the scheme; and the approved scheme was thereafter issued in the name of the Governor.

Among the contentions, raised by the Petitioners before the Supreme Court, was that a judicial hearing implied that the same person hears and gives the decision; but in this case the hearing was given by the Secretary and the decision by the Chief Minister.

It is in this context that the Supreme Court observed that, while the Act imposed a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules imposed a duty on the Secretary to hear and the Chief Minister to decide; this divided responsibility was destructive of the concept of judicial hearing; such a procedure defeated the object of personal hearing; personal hearing enabled the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view; if one person hears and another decides, then personal hearing becomes an empty formality; and, therefore, the said procedure followed in this case offended the basic principle of judicial procedure.

In **Rasid Javed v. State of U.P., (2010) 7 SCC 781**, the appellants claimed that they had been operators on Saharanpur-Karnal route (inter-State route). In the Notification published under Section 102(1) of the Motor Vehicles Act, 1988, the State Government proposed to modify the scheme by providing that certain permit-holders shall be allowed to operate their buses along with the Uttar Pradesh State Road Transport Corporation (UPSRTC) on Saharanpur-Karnal route, provided they get their permits counter-signed by the State of Haryana for plying their buses in that State.

By the said notification, objections were invited from UPSRTC and the persons likely to be affected by the proposed modification. The Special Secretary and Additional Legal Remembrancer, Uttar Pradesh was appointed as the Hearing Authority to hear and decide the objections that may be received. Pursuant to the said notification, objections were received and the Hearing Authority, after hearing the affected parties, held in its order that the proposed modification be approved i.e. the private operators be allowed to ply their vehicles.

By a Notification published on 16-4-1999, the State Government, in exercise of the powers under sub-section (1) of Section 102 of the 1988 Act, proposed to make modification in the 1993 Scheme to the extent mentioned in Column 4 of the Schedule appended thereto. The notification provided that UPSRTC and any other person likely to be affected by the proposed modification may make representations within 30 days from the date of publication of the notification in the Gazette, and that the representations so received will be heard by the Hearing Authority, Shri Zamiruddin, Special Secretary and Additional Legal Remembrancer, Uttar Pradesh.

In pursuance thereof, various representations were received. The Hearing Authority, after hearing the parties concerned who made the representations, passed an order on 11-10-1999 approving the notified proposed modification and the objections presented by UPSRTC and other objectors were dismissed. The State Government however by a Notification dated 15-4-2000, in exercise of the powers under Section 102 of the 1988 Act read with Section 21 of the General Clauses Act, 1897, rescinded the Notification dated 16-4-1999.

It was contended, on behalf of the Appellants, that it was not open to the State Government to withdraw the Notification dated 16-4-1999 after it had been approved by the Hearing Authority by its Order dated 11-10-1999; the order passed by the Hearing Authority on 11-10-1999 was the order of the State Government under Sections 102(1) and (2) of the 1988 Act because, in the draft Notification dated 16-4-1999, the Special Secretary and Additional Legal Remembrancer was appointed as the authority to hear the objections and he was acting as the State Government under the U.P. Rules of Allocation of Business; the decision under Section 102(1) of the 1988 Act had to be taken by the same authority who heard the objections and there could not be divided responsibility of a quasi-judicial act. Reliance was placed in this regard on ***Gullapalli Nageswara Rao v. A.P. SRTC* [AIR 1959 SC 308]**.

It is in this context that the Supreme Court held that Section 102 made it manifestly clear that modification of the approved scheme may be done by the State Government in the public interest after giving opportunity of being heard in respect of the proposed modification to the STU and the persons likely to be affected by the proposed modification; the order dated 11-10-1999 of the Hearing Authority, approving the proposed modification

published in the Official Gazette dated 16-4-1999, was not an order of the State Government modifying the approved Scheme of 1993 under Section 102(1) of the 1988 Act, as the Special Secretary was given authority to hear the representations received by the State Government to the proposed modification, but no authority was given to him to approve the proposed modification or modify the approved scheme; the Notification dated 16-4-1999 did not empower the Hearing Authority to approve or modify the scheme; and he had only been empowered to hear the objections.

The Supreme Court further held that a person who hears must decide, and that divided responsibility is destructive of the concept of judicial hearing, is too fundamental a proposition to be doubted; this settled principle had also been highlighted in **Gullapalli Nageswara Rao [AIR 1959 SC 308]**; but based on such principle the limited authority of hearing given to the Hearing Authority by the State Government cannot be treated as enlarged in its scope; a delegate must confine his activity within the four corners of the powers invested in him; and, if he has acted beyond that, his action cannot have any legal sanction unless ratified by the delegator.

The Supreme Court also observed that a distinction must be maintained where the Hearing Authority is empowered by the State Government to hear objections and approve the proposed modification or modify the approved scheme, and a case where the Hearing Authority is authorised to hear the objections/representations relating to the proposed modification to the approved scheme; in the latter case, the authority delegated to the Hearing Authority is limited and he is not authorised to approve the proposed modification or modify the approved scheme; the present case fell in the latter category and accordingly the order of the Hearing Authority dated 11-10-1999 was in excess of the authority given to

him, and could not be construed as a final order of approval under Section 102(1) of the 1988 Act; and it was not open for the Hearing Authority to approve the proposed modification or modify the proposed scheme.

In **Gullapalli Nageswara Rao**, is that, while the Act imposed a duty on the State Government to give a personal hearing, the procedure prescribed by the rules imposed a duty on the Secretary to hear and the Chief Minister to decide. The law declared by the Supreme Court, in the said judgement, is that this divided responsibility was destructive of the concept of judicial hearing; it also defeated the object of a personal hearing which was to enable the authority concerned to watch the demeanor of the witnesses and clear any doubts during the course of the arguments; if one person hears and another decides, then personal hearing becomes an empty formality; and such a procedure would offend the basic principles of judicial procedure.

It is clear, therefore, that the test of 'one who hears must decide' has been applied by the Supreme Court in **Gullappalli Nageswara Rao**, to cases where the statutory provision required a personal/ oral hearing to be afforded.

This principle, laid down in **Gullapalli Nagaswara Rao**, was followed by the Supreme Court in **Rasid Javed** and it was held that the person who hears must decide, and divided responsibility is destructive of the concept of a judicial hearing. While there can be no dispute that this test of '*one who hears must pass the order*' would apply where the Appropriate Commission exercises its adjudicatory powers under Section 86(1)(f) of the Electricity Act, since a personal hearing is invariably provided in such cases to parties on either side, what necessitates examination is whether

the afore-said test of “*one who hears must decide*” would also apply to Petitions/Applications filed before the Regulatory Commissions, other than those falling under Section 86(1)(f) of the Electricity Act, such as where the Commission undertakes the exercise of determination of tariff under Section 62 read with Section 64 of the Electricity Act. We shall examine this matter in greater detail, a little later in this order.

**VI. DO THE GOVERNING REGULATIONS REQUIRE THE
IMPUGNED ORDER PASSED BY A SINGLE MEMBER OF
THE WBERC TO BE UPHOLD?**

**A. SUBMISSIONS URGED ON BEHALF OF THE
APPELLANT:**

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the WBERC has contended that the above judgments of this Tribunal are distinguishable since this Tribunal did not deal with provisions similar to the second sentence contained in Regulation 2.14.1 of the 2013 Regulations, which provides that, in case the Member who heard or considered the matter retires or resigns, the new Member shall sign the order subject to the requirement of the same for constituting the quorum of the Commission; the above contention lacks merit since:- (a) the second sentence contained in Regulation 2.14.1 would only apply in situations where a new Member has been appointed, post the retirement/resignation/removal of an existing Member; in this case, admittedly no new Member was appointed following the retirement of the Chairperson; accordingly, the above provision would have no application here; (b) even otherwise, the above provision cannot be interpreted in a manner so as to allow Members of the WBERC, either existing or new, to sign orders without even hearing the

matter, since the same would be contrary to:- (i) the first sentence of Regulation 2.14.1 of the 2013 Regulations which mandates all Members, who have heard and considered the matter, to sign the Order; assuming arguendo, if there is an ambiguity qua a specific provision, then the same has to be interpreted by reading the statute holistically and not in a piecemeal basis; accordingly, the second sentence of Regulation 2.14.1 cannot be read or interpreted in a manner rendering the first sentence otiose; (ii) Section 86(3) of the Electricity Act obligates the State Commission to ensure transparency while exercising its powers and discharging its functions; and (iii) it is settled principle of natural justice that “*one who hears must decide*”, which would apply to all entities, bodies exercising judicial or quasi-judicial functions such as the WBERC.

With respect to the contention urged on behalf of WBERC, that its functions are not judicial but that of an administrative body acting as an “***Institution***” governed by its own rules and procedures, Sri Amit Kapur, Learned Counsel for the Appellant, would submit that this contention is devoid of merit; WBERC, while undertaking adjudicatory functions, exercises powers which are quasi-judicial in nature; accordingly, WBERC is bound by the principles of natural justice. Reliance is placed by the Learned Counsel on ***Global Energy Pvt. Ltd. v. KERC & Ors.*** [2016 SCC OnLine 118] wherein this Tribunal held that the work of the Commission, being of a quasi-judicial nature, is one of joint responsibility of all Members, by *inter alia*, placing reliance on the judgment of the Supreme Court in ***Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation***: AIR 1959 SC 308.

B. SUBMISSIONS URGED ON BEHALF OF THE WBERC:

Sri C.K. Rai, Learned Counsel for the WBERC, would submit that the Electricity Act does not provide for the requirement of an oral representation /oral hearing as an unfettered right before the State Commission; the Scheme of the Electricity Act and the Regulations framed there under make it amply clear that the State Commission is not duty bound to give an Oral hearing, and the consideration of written suggestions / objections are sufficient to fulfil the requirement of the principles of Natural Justice. (**Sec 64**)(Refer: **West Bengal State Electricity Regulatory Commission Vs Impex Ferro Ltd. & Ors 2015 SCC Online Cal 774**); therefore, applicability of the principle *“those who hears must decide”* is to be tested in the background of the above settled legal position wherein oral hearing is not mandatorily required to be given by the State Commission under the scheme of the Electricity Act, 2003; when the scheme of the Electricity Act excludes oral hearing as an unfettered right and gives discretion to the Commission to give oral hearing based on the facts of the case, it cannot be claimed that the principle *“those who hear must decide”* is mandatorily applicable to the proceedings of the Commission; in any event, Regulation 2.14.1 of WBERC (Conduct of Business) Regulation, 2013 removes all doubt to that effect; a plain reading of Regulation 2.14.1 would show that the Regulation expressly permits the exception to the principle of *“One who decides must hear”*; the settled rule of interpretation is that the provisions must be read in its entire context, to understand its true meaning and intent, rather than just relying on the literal meaning of a single phrase; the first phrase of Regulation 2.14.1 provides that the order shall be signed by the members who have considered and /or heard the matter; the second phrase expressly excludes application of the principle, *‘one who decides*

must hear' in respect of the functioning of the commission; it expressly authorised the new member to sign the order even without hearing the matter though it is made conditional, i.e., subject to the requirement for constituting the quorum; this provision of a new member to sign the order, despite the fact that he did not hear the matter, is brought with an intention to keep the regulatory process in continuity, and not take the clock back. (Section 61- making of Regulations, Section 62- determination of tariff, Section 64 – procedure for tariff order- tariff order within 120 days r/w Section 86 and other provisions relating to regulating the Sector within the State; and this is recognized by the Full bench judgment of this Tribunal dated 02/12/2013 passed in **O.P.1 of 2011; Para 12**).

Sri C.K. Rai, Learned Counsel for the WBERC, would further submit that the contention of the appellant that, since no new member joined, the second phrase would not come into play, is required to be rejected on the ground that application of the principle is to be tested in the background of the legal provisions; a reading of the second phrase provides that the Commission is not only authorised to continue the proceeding, but also conclude the proceeding by passing the order, despite one of its members having either retired or resigned; the provision does not require the Commission to take the proceeding back to the initial stage and re-hear the matter, more so when the scheme of the Act does not give unfettered right of hearing to the parties before the Commission; even if the new member would have joined, he could not have signed the order because the requirement of the quorum is already satisfied. (requirement of quorum is one in case the existing members are two); therefore, no change in factual situation would have occurred; a reading of the third phrase further clarifies that the principle of “one who decides must hear” is

not applicable as the member who did not hear the matter fully on all dates and heard it on a few days is also authorised to sign the order.

Sri C.K.Rai, Learned Counsel for the WBERC, would also submit that the decision of the Supreme Court, in **Gullapalli Nageswara Rao**, is not applicable to the facts of the present case inter-alia for the following reasons:- (i) the Scheme of the Electricity Act does not contemplate that the State Commission is mandatorily required to give an oral hearing; Regulation 2.14.1 provides that the Commission may proceed with the matter despite the other member having retired from Office; the Regulation further permits the order to be signed by the member who was not present on all the dates of hearing; and the Regulation further permits the new member to sign the order if the same is required for the purpose of fulfilment of the quorum.

C. ANALYSIS:

Rules of natural justice are not statutory Rules, and are applicable either where the statutory provisions explicitly stipulate or are silent. Rules of natural justice can operate in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with principles of natural justice, the courts should do so as it must be presumed that the Legislature intended that the statutory authorities act in accordance with principles of natural justice (**C. B. Gautam vs Union of India: (1993) 199 ITR 530 (SC) ; A. K. Kraipak v. Union of India, AIR 1970 SC 150**). Principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary (**Institute of Chartered Accountants of India v. L. K. Ratna (1987) 61 Comp Cas 266 (SC): (1986) 4 SCC 537; C.B.**

Gautam v. Union of India: (1993) 1 SCC 78; and M.P. Enterprises v. State of Uttarakhand, 2019 SCC OnLine Utt 1046). As long as the statute does not prohibit, either explicitly or by necessary implication application of the Rules of Natural Justice, the requirement of complying with the Rules of Natural Justice must be read into such statutory provisions. **(DIT (International Taxation) v. AAR, 2011 SCC OnLine AP 672; MRF Mazdoor Sangh v. Commissioner of Labour, 2013 SCC OnLine AP 188).**

Rules of natural justice are neither cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and regulations. **(Union of India v. Tulsiram Patel: (1985) 3 SCC 398).** The rules of natural justice are not constant: they are not absolute and rigid rules having universal application. The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the authority is acting, the subject matter that is being dealt with, and so forth. **(State of Kerala v. K.T. Shaduli Yousuff: (1977) 39 STC 478 (SC); Suresh Koshy George v. The University of Kerala: [1969] 1 S.C.R. 317; Russel v. Duke of Norfolk: [1949] 1 All. England Reports 108).** As the rules of natural justice are not embodied rules, what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case and the framework of the law. **(Maneka Gandhi v. Union of India: AIR 1978 SC 597; Suresh Koshy George; AIR 1978 SC 597 D.F.O., South Kheri v. Ram Sanahi Singh (1971) 3 SCC 864 = AIR 1973 SC 205).**

Principles of natural justice is not a mantra to be applied in a vacuum. Natural justice is not an unruly horse, no lurking landmine, nor a judicial

cure-all. The Court/Tribunal has to determine whether observance of the principles of natural justice was necessary for that particular case. (**Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee: (1977) 2 SCC 256; Tulsiram Patel (1985) 3 SCC 398; ECIL v. B. Karunakar: (1993) 4 SCC 727; Municipal Committee, Hoshiarpur v. Punjab State Electricity Board: (2010) 13 SCC 216**)). It should not proceed as if there are inflexible rules of natural justice of universal application. Each case depends on its own circumstances. Rules of natural justice vary with the laws prescribed by the legislature. (**Chingleput Bottlers v. Majestic Bottling Co.: AIR 1984 S.C. 1030**) or the subordinate Rule/Regulation making authority.

Not only can principles of natural justice be modified but, in exceptional cases, they can even be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion. (**Tulsiram Patel: (1985) 3 SCC 398; State of U.P. v. Sheo Shanker Lal Srivastava: (2006) 3 SCC 276**). If a statutory provision either specifically, or by necessary implication, excludes the application of any or all the principles of natural justice, then the court cannot ignore the mandate of the Legislature or the statutory authority and read, into the concerned provision, principles of natural justice. (**Union of India v. Col. J.N. Sinha: (1970) 2 SCC 458; Tulsiram Patel; (1985) 3 SCC 398**). The implication of natural justice being presumptive, it may be excluded by express words of the statute or by necessary intendment. (**Swadeshi Cotton Mills v. Union of India: (1981) 1 SCC 664; Tulsiram Patel: (1985) 3 SCC 398**).

Natural justice is not a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the

fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. No man shall be hit below the belt — that is the conscience of the matter (**Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee (1977) 2 SCC 256**). Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of the statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case. These principles do not apply to all cases and situations. (**R. S. Dass v. Union of India [1986] Supp SCC 617**). Whether any particular principle of natural justice would be applicable to a particular situation, and whether there has been any infraction of the application of that principle, has to be judged, in the light of the facts and circumstances of each particular case. The basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the material and reasons. (**K. L. Tripathi v. State Bank of India (1984) 1 SCC 43**). The application of natural justice depends upon the nature of the jurisdiction conferred on the authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in a particular case. (**K. L. Tripathi v. State Bank of India : 1984) 1 SCC 43, Union of India v. P. K. Roy AIR 1968 SC 850, Channabasappa Basappa Happali v. State of Mysore AIR 1972 SC 32**). To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him by non-observance of the principles of natural justice (**Syndicate Bank v.**

Venkatesh Gururao Kurati AIR 2006 SC 3542 and State Bank of Patiala v. S. K. Sharma AIR 1996 SC 1669). All that the courts have to see is whether non-observance of any of these principles in a given case is likely to have resulted in deflecting the course of justice. **(State of U. P. v. Om Prakash Gupta AIR 1970 SC 679).**

Since the Rule that *‘one who hears must decide’* is also a facet of the principles of natural justice, what necessitates examination is whether or not such a requirement is excluded by the Regulations framed by the WBERC. As noted hereinabove, Regulation 2.2.1 read with Regulation 1.4.1 of the 2013 Regulations stipulates that the quorum for a meeting of the Commission shall be at least 50% of the existing number of members of the Commission. Regulation 2.1.3 refers to several matters which may be considered by the Commission in its proceedings. These matters include determination of tariff, adjudication or resolution of disputes etc. The requirement of Rule 2.2.3 is for all decisions/ directions and orders of the Commission to be in writing.

Regulation 2.14 relates to orders of the Commission and it is necessary for us to read the sub-regulations together and as a whole in order to understand the scope and ambit of Regulation 2.14. The requirement of Regulation 2.14.1 is for the orders of the Commission to be signed by the Members, who considered and/ or heard the matter, as the case may be. Regulation 2.14.1 itself recognizes that the orders passed by the Commission can relate either to matters which it has considered or matters which it had heard or both. It contemplates matters being considered by the Commission without a hearing, or in other words without an oral hearing being afforded. Regulation 2.14.1 also contemplates a situation where the Member, who has either considered and or heard the

matter, retires or resigns or is removed, before the order is passed or signed. It provides that, in such a case, the new member shall sign the order if it is required for constituting the quorum. The said Regulation permits the signature of the new member, who has not heard the matter even on one occasion, to be obtained in case there is a shortfall in the quorum, only to ensure that the order of the Commission to be held to have been validly passed. The very fact that the Regulations permit the signature of the new member to be obtained in the absence of the required quorum, to ensure validity of the order passed by the Commission, even though he did not hear the matter at all, would go to show that even a member who has not heard the matter can sign the order in order to validate such an order of the Commission.

In cases, where the requirement of a quorum is fulfilled, despite the retirement, resignation or removal of one of the members who constituted the quorum which considered or heard the matter, the signature of the new member is evidently not required. Regulation 2.14.1, by necessary implication, provides for the existing members, who either heard or had considered the matter, to sign the order, even in cases where one of them has retired, resigned or has been removed after the hearing was completed but before the order was signed, provided of course that the requirement of a quorum to pass/ sign the said order is satisfied.

This is also clear from the third limb of Regulation 2.14.1 which stipulates that if the member, who considered and/ or heard the matter remains absent in some of the days but remains present on most of the days when the matter was considered and/ or heard, shall sign the order. While this Rule is not happily worded, and does suffer from some ambiguity, in as much as what would constitute “most of the days” is unclear, what it

specifically provides is that, even if the member concerned has not participated in the hearing on all the days when the hearings took place, he may still be entitled to sign the order. Regulation 2.14.1 is evidently a deviation from the rule of natural justice that “*one who hears must decide*”, for if a person has not heard the matter on all days, but has heard it only on some of the days, he cannot be said to have heard the matter in its entirety, and would, if the afore-said rule of natural justice were to be applied, then not be entitled to sign the order.

As noted hereinabove the quorum for any meeting of the WBERC should be at least 50% of the existing number of Members. Consequently, if there are only one or two Members holding office, a quorum of one would suffice. The orders of the Commission are required to be signed, in terms of Regulation 2.14.1, by the members who considered and/or heard the matter, as the case may be. Regulation 2.14.1 visualises a situation where orders of the Commission are signed by members who considered the matter without having heard the matter. Ordinarily, such would be the situation in a tariff determination exercise, since the suggestions/objections received from the public are required to be considered in a meeting of the members of the Commission, and neither the Electricity Act nor the Regulations require the general public to be personally heard in the matter, and require the applicant to be heard only when the application seeking determination of tariff is intended to be rejected by the Commission.

In such a case the consequences of applying the rule, of “*those who hear must sign the order*”, may result in absurd consequences. Take a case where two members heard the matter, and one retires before an order is passed by the Commission, and the only remaining member signs the said order. Even though this order would satisfy the requirement of a valid

quorum, but may nonetheless be required to be set aside on the ground that the rule of *“those who hear must sign the order”* has not been complied with, all that would be required is for the sole member who signed the order to hear the matter all over again, and pass and sign the very same order, which he had passed earlier; all over again. Such a requirement would, in effect, be a needless ritual or an empty formality.

Section 86(3) of the Electricity Act stipulates that the State Commission shall ensure transparency while exercising its powers and discharging its functions. Reliance placed on behalf of the Appellant, on the afore-said provision, is misplaced, more so as they have not been able to show how the WBERC, in passing the impugned order, has violated the transparency requirement of Section 86(3) of the Electricity Act.

In its order, in **“In the Matter of Tariff Revision (Suo-motu action on the letter received from the Ministry of Power)** (Judgement of Aptel in O.P. No.1 of 2011 dated 02.12.2013) , (on which reliance is placed on behalf of the WBERC), a Full Bench of this Tribunal directed that all the Commissions concerned, irrespective of the Regulations with regard to the quorum for a meeting, that Commission, even with a single Member despite that there are vacancies of other Members or Chairperson, can continue to hold the proceedings and pass the orders in accordance with the law. We cannot readily brush aside the submission urged on behalf of the WBERC that, in case of conflicting judgements, the judgement of the Full Bench of this Tribunal would bind a subsequent bench of this Tribunal, and not a judgement of a two member bench.

For the reasons afore-mentioned, it can be justifiably held that the above referred Regulation 2.14 excludes application of the Rule of Natural Justice that “*one who hears should alone pass the order*”.

VII. DOES THIS PARTICULAR RULE OF NATURAL JUSTICE APPLY EVEN WITH RESPECT TO TARIFF ORDERS PASSED BY THE COMMISSION?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS:

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that, even otherwise, the above principle qua signing of Orders by all those who considered and heard the matter would be applicable even when the WBERC exercises powers in relation to tariff determination, since such exercise of powers are also quasi-judicial in nature; and, in this regard, reliance is placed on (a) ***PTC India Ltd. v. CERC* [(2010) 4 SCC 63**; (b) ***BSES Rajdhani Power Ltd. v. DERC*: (2023) 4 SCC 788**; and (c) ***GUVNL v. Renew Wind Energy (Rajkot) Pvt. Ltd*: 2023 SCC OnLine SC 411**.

B. SUBMISSIONS URGED ON BEHALF OF THE WBERC:

On the requirement of reading principles of Natural Justice into the provisions of the Statute, Sri C.K. Rai, Learned Counsel for the WBERC, would submit that the rules of Natural Justice vary with varying constitution of statutory bodies, and the rules prescribed by the legislature under which the body must act; the question, whether the rules have been contravened in a particular case, must be judged not by any pre-conceived notion but in the light of the provision of the relevant Act and the Regulations (***Gullapalli Nageswara Rao and Ors. Vs Andhra Pradesh State Road Transport***

Corporation and Ors. 1958 SCC OnLine SC 49; Para 28); Section 82 deals with provisions relating Constitution of State Commission, and provides that the Commissions are a *body corporate* by the name with perpetual succession and common seal; Section 86 deals with the various functions of the state commission which are regulatory in character barring 86(1)(f) which is only adjudicatory. (**Refer: State of Gujarat & Ors. Vs . Utility Users Welfare Association & Ors. (2018) 6 SCC 21; Para 90**); therefore no rules of natural justice are applicable for tariff fixation/ price fixation which is originally legislative in character; it is due to the appellate provision in Section 111 of the Electricity Act, 2003, that it is made quasi-judicial under Section 62. (**PTC India Ltd. (2010) 4 SCC 603; and Kerala State Electricity Board Vs Principle, Sir Syed Institute for Technical Studies & Ors (2021) 14 SCC 118, – Tariff fixation is quasi legislative act**); the present case, however, does not arise from an adjudicatory proceedings under Section 86(1)(f), but is one referred by the High Court, and is a kind of sui generis case; therefore, reliance placed by the Appellant on the judgement of the Supreme Court, in **PTC India Ltd. (2010) 4 SCC 603** is of no relevance as the judgment does not deal with the requirement of an oral hearing as a principle of Natural Justice by the Commission; in this context reliance is placed on **Madhya Pradesh Industries Ltd. Vs Union of India & Ors: (1965) SCC Online SC 78** wherein the question which arose for consideration was whether the Central Government, acting judicially as a quasi-judicial tribunal, needed to give an oral hearing to the petitioner before passing the order; the Supreme Court, in that case, held that the opportunity to make representation before passing the order does not necessarily mean an oral personal hearing, it depends upon facts of each case and, ordinarily, it is in the discretion of the tribunal; and It can be

by way of a written representation which can also effectively meet the requirement of the principle of natural justice.

C. ANALYSIS:

While the rule that the person hearing the case must pass the order may well apply to proceedings under Section 86(1)(f), in terms of which the State Commission is required to adjudicate disputes between the licensees and generating companies, the question which would necessitate examination is whether, even in cases relating to tariff determination and passing of tariff orders, this rule would invariably apply?

In this context, it relevant to note that the exercise of tariff determination is undertaken by the Appropriate Commission under Section 62 read with Section 64 of the Electricity Act. Under Section 62(1) the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act for (a) supply of electricity by a generating company to a distribution licensee; (b) transmission of electricity; (c) wheeling of electricity; and (d) retail sale of electricity. Section 64 prescribes the procedure for tariff orders. Section 64(1) provides that an application, for determination of tariff under Section 62, shall be made by a generating company or a licensee in such manner, and accompanied by such fee, as may be determined by Regulations. Section 64(2) requires every applicant to publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission. Section 64(3)(a) stipulates that the Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the

public, issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order.

On the application being published in an abridged form by the Applicant, the obligation cast on the Appropriate Commission under Section 64(3) of the Electricity Act is to issue a tariff order after considering all suggestions and objections received from the public. Section 64(3) only obligates suggestions and objections to be invited from the public. It does not require a personal hearing to be provided to them, and such suggestions and objections can also be received in writing.

Would such a tariff determination exercise require a member of the Commission, who had participated in the first meeting, to participate in each and every such meeting of the commission where the exercise of tariff determination is under deliberation? Would absence of a member in one or more of such meetings vitiate the tariff determination exercise, and consequently the tariff order itself, on the ground that the test of “*one who hears must sign the order*” is not satisfied? Would the afore-said Rule of Natural Justice necessitate compliance even if the Regulations provide otherwise? These are among the several questions which arise for consideration. While some of them have already been considered earlier in this order, we shall now consider the rest.

**a. NATURE OF POWER EXERCISED BY
REGULATORY COMMISSIONS:**

The enumerated functions of the State Commission, as stipulated under Section 86 of the Electricity Act. are determination of tariff, regulation of electricity purchase and procurement process of distribution licensees, facilitating intra-State transmission, issuing licences to persons, promoting

cogeneration and generation of electricity from renewable sources, levy fee, specify or enforce standards, fix trading margins. All these functions are regulatory in character rather than adjudicatory. The real adjudicatory function is only provided in sub-clause (f) whereupon the Commission has the option of adjudicating the disputes between the licensees and generating companies, or to refer such disputes to arbitration. There is also an advisory role to be performed by the State Commission as specified in sub-section (2). **(State of Gujarat & Ors. Vs . Utility Users Welfare Association & Ors. (2018) 6 SCC 21; PTC India Ltd. (2010) 4 SCC 603; and Kerala State Electricity Board Vs Principle, Sir Syed Institute for Technical Studies & Ors (2021) 14 SCC 118).**

From Sections 61, 62 and 64 of the Electricity Act, it is clear that tariff fixation like price fixation is legislative in character. The dual nature of functions performed by the Regulatory Commissions are decision-making, and specifying terms and conditions for tariff determination **(PTC India Ltd. v. CERC; (2010) 4 SCC 603)**. The source of power to determine tariff under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Electricity Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61), is the general regulatory power of the Commission under Section 79(1)/86(1); This source of power to regulate includes the power to determine or adopt tariff; and Section 62 deals with “determination” of tariff, which is part of “regulating” tariff.**(Energy Watchdog v. CERC, (2017) 14 SCC 80).**

Both decision-making and regulation-making functions are assigned to the Regulatory Commissions. A quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law. Price fixation exercise is legislative in

character, unless, by the terms of a particular statute, it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act. **(PTC India Ltd. v. CERC [(2010) 4 SCC 63; Shri Sitaram Sugar Co. Ltd. v. Union of India: (1990) 3 SCC 223).**

The Commission performs a quasi-judicial function while determining tariff. A tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority. **(BSES Rajdhani Power Ltd. v. DERC: (2023) 4 SCC 788; PTC India Ltd. v. CERC, (2010) 4 SCC 603).** If any of the parties are aggrieved by any of the clauses in the tariff order, they are at liberty to seek its amendment or revocation under Section 62(6) of the Electricity Act. Further, the said Tariff order is also appealable under Section 111 of the Electricity Act before the Appellate Tribunal, and thereafter before the Supreme Court under Section 125. The tariff order made under Section 64 is quasi-judicial in nature and it is binding, *as-it-is*, on the parties unless it is amended or modified. **(BSES Rajdhani Power Ltd. v. DERC: (2023) 4 SCC 788; GUVNL v. Renew Wind Energy (Rajkot) Pvt. Ltd: 2023 SCC OnLine SC 411).**

In **West Bengal State Electricity Regulatory Commission Vs Impex Ferro Ltd. & Ors 2015 SCC Online Cal 774**, the dispute was whether the respondent-writ petitioners had a right of oral hearing before the appellant-State Commission in the matter of determination of retail tariff under Section 64 of the Electricity Act.

In this context, the Division Bench of the Calcutta High Court held that Section 64 of the Electricity Act made it clear that an application filed by a licensee for fixation of tariff under Section 62 is to be published in such form

and manner as may be specified by the appropriate Commission; in response to such publication, members of the public (including consumers) are entitled to submit suggestions and objections before the Commission; the Commission, upon receipt of such suggestions/objections (if any) from the public, shall, within 120 days from receipt of the tariff application, consider such suggestions/objections and pass a tariff order accepting the application with such conditions or modifications as may be specified in the said order or reject such application after assigning reasons in support thereof; in the event, the Commission rejects the tariff application, a reasonable opportunity of hearing is to be given to the licensee; the Order under Section 64 is subject to an appeal before the Appellate Tribunal under Section 111 at the behest of an aggrieved party where the parties shall be given an opportunity of hearing by the Tribunal while disposing of such appeal; Regulation 2.4 of the WBERC 2011 Regulations made it clear that suggestions or objections to the application for determination of tariff must be in written form only, and not by way of oral representation; the scheme of the Act and the regulations framed thereunder made it clear that the State Commission was not duty bound to give oral hearing to objectors to the tariff application, but only to the licensee in the event it chooses to reject its application; oral hearing is reserved for the parties at the appellate stage under Section 111 of the Act; in **PTC India Ltd**, the Apex Court held that exercise of tariff fixation under Section 62 is a quasi-judicial act, and as such fixation of tariff is made appealable under Section 111 of the said Act; no doubt, principles of natural justice are attracted whenever a decision is taken by a quasi-judicial authority affecting the rights of a person; however, what procedure is to be adopted by the authority so that the same is just, fair and reasonable and satisfies the principles of natural justice would depend on the facts of each case including the scheme of the

legislation under which such decision is taken, nature of enquiry, subject matter which is dealt with, nature of the decision taken and prejudice, if any, caused to the affected person by such procedure adopted under the statute; the scheme of the Electricity Act and the WBERC 2011 Regulations made it evident that only the licensee is to be given oral hearing during tariff determination under Section 64 of the Electricity Act in the event his application for tariff fixation is rejected; and any objector to the application is entitled to make written representation only.

Relying on **Rex v. Local Government Board, Ex parte Arlidge (1914) 1 K.B. 160**, the Division Bench of the Calcutta High Court further held that natural justice is not a strait jacketed formula; oral hearing may be a constituent of natural justice, but is not an inalienable facet in all cases; even otherwise, whether it is oral or written objection, as long as such opportunity is provided, there is no question of violation of principles of natural justice; the procedure contemplated oral hearing only if the decision was to reject application for tariff fixation submitted by the licensee; and the statutory scheme under which the decision is taken, nature and subject matter of enquiry, nature of the decision taken and prejudice, if any, caused to a party in course of such decision making process, if only written representation is considered, are relevant parameters to decide whether oral hearing is a mandatory requirement in a decision making process.

After referring to **Gorkha Security Services v. Government (NCT of Delhi), (2014) 9 SCC 105**, **Chief General Manager, Calcutta Telephones District, Bharat Sanchar Nigam Limited v. Surendra Nath Pandey, (2011) 15 SCC 81**, **Oriental Bank of Commerce v. R.K. Uppal, (2011) 8 SCC 695**, and **Carborundum Universal Ltd**, the Division Bench of the Calcutta High Court observed that the scheme of the

legislation, in the instant case, gave rise to an irresistible inference that the objection of consumers and other members of the public before the State Commission under Section 64 were to be made in written form only, and no right of oral hearing was reserved in their favour; although determination of tariff under Section 64 has been held to be a quasi-judicial act, it cannot be said to be an adversarial exercise so far as the respondent-writ petitioners are concerned, since they have not been charged with any accusation which they are required to defend; on the other hand, the decision making process partakes the nature of a statutory inquiry where the authority is called upon to arrive at an informed decision as to tariff fixation after considering the objections or suggestions of all stakeholders, including the consumers who may be affected by such decision so taken; the nature of such enquiry is, therefore, not adversarial in nature as in the course of a disciplinary proceeding against a particular delinquent; as the Commission is required to arrive at an informed decision, relating to tariff fixation, within a time frame under a statutory scheme which requires considering written objections/representations only of the objectors including consumers, it is difficult to hold that it was the intention of the legislature to provide oral hearing to objectors/consumers at the time of determination of tariff by the State Commission under Section 64 of the Electricity Act.

It is no doubt true that the Supreme Court in **BSES Rajdhani Power Ltd. v. DERC: (2023) 4 SCC 788; PTC India Ltd. v. CERC, (2010) 4 SCC 603; and GUVNL v. Renew Wind Energy (Rajkot) Pvt. Ltd: 2023 SCC OnLine SC 411**, has held that the tariff determination by the Appropriate Commission is a quasi-judicial exercise. As held by the Division Bench of the Calcutta High Court, in **West Bengal State Electricity Regulatory**

Commission Vs Impex Ferro Ltd. & Ors 2015 SCC Online Cal 774, it does appear that the observations of the Supreme Court in the afore-said judgements, that tariff determination is a quasi-judicial exercise, were made in the context of such an order being made appealable to this Tribunal under Section 111 of the Electricity Act.

The observations, in the afore-said judgments of the Supreme Court, cannot be read out of context to contend that, despite the specific stipulation in various clauses of Section 64 of the Electricity Act, an oral hearing must be provided even in a tariff determination exercise which culminates in a tariff order being passed with modifications or on imposition of such conditions as the Commission deems appropriate, for, if an oral hearing was to be provided in such cases also, nothing prevented Parliament from explicitly providing therefor, and not confining the requirement of an oral hearing only to a situation where the application filed by a licensee, for determination of tariff, is intended to be rejected by the Commission.

b. RULES OF NATURAL JUSTICE DO NOT OBLIGATE AN ORAL HEARING BEING PROVIDED IN ALL CASES:

Realism must inform “reasonable opportunity”. If the decision-making body, after fair and independent consideration, reaches a just conclusion, there is no error in law. (**Ramjee: (1977) 2 SCC 256**). Principles of natural justice cannot be stretched too far. (**Bar Council of India v. High Court of Kerala (2004) 26 SCC 311**). They are not codified canons, but are principles ingrained in the conscience of man. Natural justice is the administration of justice with a common-sense It is the substance of justice

which should determine its form. (**Canara Bank v. V.K. Awasthy, (2005) 6 SCC 321**). What particular rule of natural justice should be applied, and what its content should be in a given case, must depend to a great extent on the facts and circumstances of the case, and the framework of the statute under which the enquiry is held. (**V.K. Awasthy, (2005) 6 SCC 321**).

In order to sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused by the non-observance thereof, (**Syndicate Bank v. Venkatesh Gururao Kurati, (2006) 3 SCC 150**).; **K.L. Tripathi v. State Bank of India (1984) 1 SCC 43**).; **Rajendra Singh v. State of M.P., (1996) 5 SCC 460**).; **Aligarh Muslim University v. Mansoor Ali Khan, (2000) 7 SCC 529**). and **S.K. Sharma, (1996) 3 SCC 364**). All that the Courts must examine is whether non-observance of any of these principles, in a given case, is likely to have resulted in deflecting the course of justice. (**State of U.P. v. Om Prakash Gupta, (1969) 3 SCC 775**).). No interference is called for where procedural violations, if any, have not caused any prejudice to the delinquent. (**UCO Bank v. M. Venuranganath, (2002) 5 ALT 162 (D.B.)**).and **C. Pattabhirama Sastry v. Bank of Baroda, (1998) 4 ALT 803**).

In this context, it is useful to note that an oral hearing cannot be claimed as a matter of right, even where the statutory provision provides for an opportunity of being heard. The opportunity of being heard need not, necessarily, be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal ring depends upon the facts of each case and, ordinarily, it is in the discretion of the Tribunal. (**Madhya Pradesh Industries Ltd. v. Union of India AIR 1966 SC 671**; **Gudimetla Venkata Reddy v. State of A. P., 2009 SCC OnLine AP 942**). Courts cannot insist that, under all

circumstances, a personal hearing has to be afforded to the person concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion, it would lead to chaotic conditions. The requirement of principles of natural justice, of affording an opportunity to be heard before an adverse order is passed, is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. An order passed, after taking into consideration the points raised, shall not be held to be invalid merely on the ground that no personal hearing had been afforded. **(Union of India v. Jesus Sales Corporation (1996) 4 SCC 69; Gudimetla Venkata Reddy v. State of A. P., 2009 SCC OnLine AP 942).**

The procedure, for determination of tariff under Section 62, commences with an application being filed under Section 64(1) by the generator or the licensee seeking determination of tariff. The said application is required to be made in the manner, and accompanied by such fees, as may be stipulated by the Regulations made by the Appropriate Commission. Section 64(2) requires every application to be published in such abridged form and manner, as may be specified by the Appropriate Commission i.e. by way of Regulations. Section 64(3) contemplates receipt of suggestions and objections to the application from the public which the Appropriate Commission is required to consider before passing the tariff order. A timeframe of 120 days, from the date of receipt of the application under Section 64(1), is stipulated for the Commission to issue the tariff order. Section 64(3)(a) enables the Commission to issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order. Section 64(3)(b) confers power on the

Appropriate Commission to reject the application for reasons to be recorded in writing, if such application is not in accordance with the provisions of the Electricity Act and the rules and regulations made there-under or the provisions of any other law for the time being in force. Under the proviso to Section 64(3)(b), an applicant shall be given a reasonable opportunity of being heard before rejecting his application. Section 64(4) requires the Appropriate Commission, within seven days of making the order, to send a copy of the order to the Appropriate Government, the Central Electricity Authority, the concerned licensees and to the persons concerned.

From the afore-said provisions, it is clear that the tariff determination exercise is, ordinarily, required to be undertaken and completed within a specified timeframe, and for a tariff order to be passed within 120 days from the date of receipt of an application from the licensee under Section 64(1), or for the said application to be rejected.

The proviso to Section 64(3)(b) makes it clear that it is only in cases where it intends to reject the application, is the Commission required to comply with the following requirements before passing an order of rejection:- (i) it should record reasons in writing specifying (a) that the application made under Section 64(1) is not in accordance with the provisions of the Electricity Act and the Rules and Regulations made there-under, or (b) the application made under Section 64(1) is not in accordance with the provisions of any other law for the time being in force. In addition, the Appropriate Commission is also required to give the applicant a reasonable opportunity of being heard before rejecting his application. Since the requirement of a hearing is to be provided, by the proviso to Section 64(3)(b), to the applicant only where his application is sought to be rejected, it is implicit that no such opportunity of being heard is mandatorily

required to be given where the Commission passes a tariff order under Section 64(3)(a) either accepting the application made by the licensee under Section 64(1) in toto, or with such modifications or on imposition of such conditions as the Commission deems appropriate. Even this requirement of an opportunity of being heard, in terms of the proviso to Section 64(3)(b), is statutorily mandated to be given only to the applicant, i.e. the licensee which make an application under Section 64(1), and not to the general public, as held by the Division Bench of the Calcutta High Court in **West Bengal State Electricity Regulatory Commission Vs Impex Ferro Ltd. & Ors 2015 SCC Online Cal 774**. Further, the requirement of an oral hearing is implicitly excluded, even with respect to the applicant licensee, in cases other than where his application is to be rejected by the Commission under Section 64(3)(b) of the Electricity Act.

It is only where the Commission intends to reject the application, is it required to fulfill the twin tests of (i) providing the applicant a reasonable opportunity of being heard and (ii) assigning reason in writing that (a) the application is not in accordance with the provisions of the Electricity Act and the Rules and Regulations made there-under or (b) the application is not in accordance with the provisions of any other law for the time being in force.

Unlike an adjudicatory order passed under Section 86(1)(f) of the Electricity Act, which may be required to be preceded by a hearing being afforded to the parties concerned, reading such a requirement, into the provisions of the Electricity Act and the Rules and Regulations made there-under, may not be justified where the order passed by the Commission relate to matters other than those specifically falling under Section 86(1)(f) of the Electricity Act.

Further, as noted hereinabove, Section 64(3) of the Electricity Act requires the Commission to pass a tariff order within 120 days from the date of receipt of an application after considering the suggestions and objections received from the public. In case the test of “*one who hears must alone decide*” is extended even to tariff petitions, then compliance with the statutory requirement of passing a tariff order within the specified timeframe of 120 days, and communicating the order within seven days of its passing, may be violated in cases where the Chairman or the Member of the Commission are likely to retire after receipt of the application under Section 64(1) and before completion of the period of 120 days after receipt of the application.

We are of the view, therefore, that this rule of natural justice may not apply in situations where the Commission undertakes a tariff determination exercise under Section 62 read with Section 64 of the Electricity Act, unless the applicable Regulations expressly stipulate an oral hearing to be provided to the applicant, before orders are passed by the Commission on the tariff application, either accepting or modifying the tariff order or imposing conditions while passing the tariff order.

VIII. ARE THE ACTIONS OF THE WBERC SAVED BY SECTION 93:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

On the contention of WBERC that its actions are saved by Section 93 of the Electricity Act. Sri Amit Kapur, Learned Counsel, would submit that this submission is devoid of merit, since ‘*vacancy*’ or ‘*defect in the constitution of the Commission*’ would necessarily relate to the time when

the matter was being heard by the WBERC; in the present case, there was no such vacancy or defect at the time of the hearing; the vacancy arose subsequent to the completion of the hearing; and, accordingly, Section 93 of the Electricity Act has no application. Reliance is placed on **DVC v. CERC: 2019 SCC OnLine APTEL 40**; and **JITPL v. OERC: 2024 SC OnLine APTEL 7**.

B. ANALYSIS:

In **JITPL v. OERC: 2024 SC OnLine APTEL 7**, on which reliance is placed on behalf of the Appellant, this Tribunal observed that the “vacancy” and “defect in the constitution of the Commission”, referred to in Section 93 of the Electricity Act, related to the time when the matter was being heard by the Commission i.e. at the time of constituting the Bench to hear the matter; and this could not be made applicable to a situation where there was no vacancy or defect in the constitution of the Commission at the time of hearing the matter, but vacancy arose subsequent to the completion of hearing of the matter.

Section 93 of the Electricity Act, 2003 stipulates that no act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission. Section 82 relates to constitution of the State Commission, and Section 82 (1) stipulates that every State Government shall, within six months from the appointed date, by notification, constitute, for the purposes of Electricity Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission. Section 82 (2) stipulates that the State Commission shall be a body corporate. Section 82 (4) provides that the State Commission shall

consist of not more than three Members, including the Chairperson. Section 82(5) provides that the Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in Section 85. Section 93 applies only in situations where there exists a vacancy in the Commission or there is a defect in the constitution of the Commission itself. In either of these two eventualities, no proceedings of the Commission shall be invalidated or questioned.

It is unnecessary for us to delve on this aspect any further, since, as shall be detailed hereinafter, the obligation cast on the WBERC, to hear the parties and pass a reasoned order, is in terms of the directions of the Calcutta High Court and, since three Members of the Commission had initially heard the matter pursuant to the directions of the Calcutta High Court, the order ought to have been passed and signed by all the three Members, and not just by one of them. The fact that two of them had retired in the interregnum, would require the remaining member to hear the matter afresh and pass a reasoned order.

IX. JUDGEMENT OF THE CALCUTTA HIGH COURT IN WPA NO. 3077 OF 2019 DATED 12.09.2021: ITS EFFECT:

The Calcutta High Court, (whose jurisdiction the Appellant invoked by filing WPA No. 3077 of 2019), had, by its order dated 12.09.2021, permitted the Appellant to approach the WBERC regarding their grievance in relation to demand of additional energy charge on account of restricted drawal as contained in the bills for the months of June 2015 to December 2018, and had observed that, in the event the Appellant approaches the WBERC, the

Commission should, after hearing the parties, pass a reasoned order on the issue that may be raised before it.

The WBERC was obligated, in terms of the order of the Calcutta High Court, not only to hear parties but also to pass a reasoned order pursuant thereto. Since a Bench of three Members of the WBERC had, in compliance with the afore-said judgement of the Calcutta High Court, initially heard the Appellant, the said three Member Bench was obligated in law to pass the order, and since two of the three Members had retired, the remaining member ought to have heard the matter again by himself, and then passed a reasoned order on merits. It is only because the WBERC was required, in compliance with the directions of the Calcutta High Court, to hear the parties, that the test of ‘one who hear should pass the order’ would apply.

Notwithstanding absence of any such obligation either under the Electricity Act or the Regulations made by the WBERC, the directions in the judgement of the Calcutta High Court necessitated compliance, and the Commission was obligated, in terms of the said judgement, to hear the parties or in other words, afford the parties an oral hearing before passing a reasoned order. Consequently, the rule of natural justice, that “one who hears should pass the order” as laid down in **Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation: AIR 1959 SC 308**, would apply, and in as much as this test has not been satisfied in the present case, the impugned order necessitates being set aside. Suffice it to make it clear that this order shall not be understood as obligating the Commission, in cases other than those where they are required to provide an oral hearing in compliance with the directions of Courts or this Tribunal, to comply with the rule of natural justice that *‘one who hears should alone*

decide', while passing tariff orders under Section 62 read with Section 64 of the Electricity Act.

X. CONCLUSION:

For the afore-mentioned reasons, the order impugned in this Appeal is set aside and the matter is remanded to the WBERC which shall hear the matter afresh and pass a reasoned order in terms of the directions of the Calcutta High Court in its order in WPA No. 3077 of 2019 dated 12.09.2021. The Appeal, and all the IAs therein, stand disposed of accordingly.

Pronounced in the open court on this the **4th day of July, 2025**.

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~