

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**  
**(APPELLATE JURISDICTION)**

**APPEAL NO. 150 OF 2017& IA NO. 632 OF 2018**

**APPEAL NO. 185 OF 2019 & IA NO. 993 OF 2019**

**Dated : 6<sup>th</sup> August, 2021**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson**  
**Hon'ble Ravindra Kumar Verma, Technical Member (Electricity)**

**APPEAL NO. 150 OF 2017 & I.A. NO. 632 OF 2018**

**IN THE MATTER OF:**

1. Shri Rama Shankar Awasthi  
200, Green Wood Govt. Society, Omega-1  
Greater Noida – 201308
2. Kapil Kasana  
A-049, Sigma-4  
Greater Noida – 201308

**...Appellants**

**VERSUS**

1. Uttar Pradesh Electricity Regulatory Commission,  
Vibhuti Khand, Kisan Mandi Bhawan,  
Gomti Nagar, Lucknow- 226 010  
Uttar Pradesh
2. Noida Power Corporation Limited  
Commercial Complex,  
H-Block, Alpha-II Sector  
Greater Noida – 201308
3. M/s. Dhariwal Infrastructures Limited  
C-6 Tadali Growth Centre,  
M.I.D.C. Tadali, Chandrapur  
Maharashtra – 442406

4. Uttar Pradesh Power Transmission Corporation Limited  
Shakti Bhawan, 14, Ashok Marg,  
Lucknow-226001

[Ordered to be deleted by the order of this Tribunal dated 28.07.2021 in IA No. 651 of 2017]

5. Uttar Pradesh State Load Dispatch Centre  
Shakti Bhawan, 14, Ashok Marg,  
Lucknow- 226001

**...Respondents**

Counsel for the Appellant (s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Ashwin Ramanathan  
Ms. Parichita Chaudhary  
Ms. Neha Garg  
Ms. Rhea Luthra  
Ms. Saloni S.  
Mr. Sandeep Rajpurohit for App. 1 & 2

Counsel for the Respondent(s) : Mr. C. K. Rai  
Mr. Umesh Prasad  
Mr. Sachin Dubey  
Mr. Praveen Sehrawat  
Mr. Mohit Rai  
Mr. Neetish Kumar Pandey for R-1

Mr. Sajan Poovayya, Sr. Adv.  
Ms. Divya Chaturvedi  
Mr. Saransh Shaw  
Mr. Prateek Gupta  
Ms. Srishti Rai  
Ms. Arunima Kedia  
Mr. Sanjeev Kapoor  
Mr. Rajiv Srivastava  
Ms. Gargi Srivastava  
Ms. Garima Srivastava for R-2

Mr. Sanjay Sen, Sr. Adv.  
Ms. Mandakini Ghosh

Mr. Aditya Shankar  
Mr. Parinay Deep Shah  
Ms. Ritika Singhal  
Mr. Sameer Kumar  
Mr. R. Kumar for R-3

Mr. Mohd. Altaf Mansoor  
Mr. Parth Kachatta for R-4

Mr. Puneet Chandra for R-5

**IN THE MATTER OF:**

**APPEAL NO. 185 OF 2019 & IA NO. 993 OF 2019**

Shri Rama Shankar Awasthi  
200, Green Wood Govt. Society, Omega-1  
Greater Noida – 201308

...Appellant

**VERSUS**

1. Uttar Pradesh Electricity Regulatory Commission,  
Through its Secretary  
Vibhuti Khand, Kisan Mandi Bhawan,  
Gomti Nagar, Lucknow- 226 010  
Uttar Pradesh

2. Noida Power Corporation Limited  
Through its Chairman and Managing Director  
Commercial Complex,  
H-Block, Alpha-II Sector  
Greater Noida – 201308

3. M/s. Dhariwal Infrastructures Limited  
Through its Chairman and Managing Director  
C-6 Tadali Growth Centre,  
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Mr. Saransh Shaw  
Ms. Srishti Rai for R-2

Mr. Sanjay Sen, Sr. Adv.  
Mr. Parinay Deep Shah  
Ms. Ritika Singhal for R-3

## **JUDGMENT**

### **PER HON'BLE RAVINDRA KUMAR VERMA, TECHNICAL MEMEBR**

1. The Appeal No. 150 of 2017 has been filed by Shri Rama Shankar Awasthi & Ors. (Appellant) under Section 111 of the Electricity Act, 2003 challenging Order dated 20.04.2016 passed by the Uttar Pradesh Electricity Regulatory Commission (hereinafter called the '**State Commission**') passed in Petition No. 971 of 2014 wherein the State Commission has approved the Power Purchase Agreement of Respondent No.2, Noida Power Corporation Limited entered with Respondent No.3, M/s Dhariwal Infrastructures Limited for procurement of 187 MW power for a period of 25 years.

2. The Appeal No. 185 of 2019 has been filed by the same Appellant against order dated 05.02.2019 passed by the Uttar Pradesh Electricity Regulatory Commission passed in Petition No. 1235 of 2017 whereby the

State Commission has fixed the MYT Tariff for supply of 187 MW from 300 MW Unit-II of Respondent No. 3 to Respondent No.2 for FY 2016-17 to FY 2018-19.

**Facts of the Case in Appeal No. 150 of 2017 and Appeal No. 185 of 2019.**

3. The Appellants are consumers of the Respondent No.2, the distribution licensee for the area of Greater Noida. The Appellant No. 1 has a rented accommodation at 200, Green Wood Govt, Officers Colony, Omega -1, in Greater Noida in the State of Uttar Pradesh. The Appellant has taken the above premises on rent from 10/10/2015.
4. The Appellant No. 2 is a resident of A-049, Sigma-4, Greater Noida and is also a consumer of the Respondent No. 2.
5. The Respondent No.1 is the Electricity Regulatory Commission for the State of Uttar Pradesh exercising jurisdiction and discharging functions in terms of the Electricity Act 2003.
6. The Respondent No. 2, Noida Power Corporation Limited (Hereinafter referred as “**NPCL**”) is a Company incorporated under the provisions of the Companies Act, 1956. The Respondent No. 2 is a Distribution Licensee undertaking the distribution and retail supply of electricity in its area of distribution, namely, Greater Noida.
7. The Respondent No. 3 – M/s Dhariwal Infrastructure Limited is a generating company as defined under Section 2(28) of the Electricity Act and has established a coal based thermal power station of 2 x 300 MW capacity situated in District Chandrapur, Maharashtra.

**8.** Respondents No.4 and No.5 are the STU and SLDC of Uttar Pradesh and are responsible for grant of Open Access and Scheduling of power for which Open Access has been approved for all open access users, including the Respondent No. 2 herein for procurement of electricity from outside the State. However, Respondent No. 4 is ordered to be deleted.

**9.** The Respondent No. 2 and Respondent No. 3 entered into a Power Purchase Agreement (Hereinafter referred as “PPA”)dated 26.09.2014 for supply of 187 MW power as contracted capacity to the NPCL on a long term basis.

**10.** Thereafter, NPCL filed a petition being Petition No.971 of 2014 dated on 29.09.2014 before the State Commission for approval of the PPA with Respondent No.3 under Section 62 of the Electricity Act, 2003.

**11.** The State Commission passed a common order in Petition No. 971 of 2014 and Petition No. 903 of 2013 by order dated 27.01.2015rejecting approval of the PPA as long term power purchase was not through competitive bidding process.

**12.** Aggrieved by the same, NPCL filed Appeal before the Tribunal in Appeal No. 88 of 2015. This Tribunal by order dated 28.05.2015 remanded the matter back to State Commission for a fresh consideration. The Tribunal did not express any opinion on the merits of the matter, but only remanded back the matter to the State Commission with the directions to pass a reasoned order after hearing the parties afresh and after applying its mind to all the contentions raised by the parties independently and in accordance with law, arrive at its conclusions on the limited aspect that the State Commission consider whether the approval could be granted under Section 62 of the Electricity Act in the absence of the competitive bidding process undertaken earlier being unsuccessful.

**13.** Pursuant to the above, the State Commission held hearing on the petition filed by the Respondent No. 2 for approval of the PPA for procurement from the Respondent No. 3. By impugned order dated 20.04.2016, the State Commission has approved the PPA entered into between the Respondent No. 2 and Respondent No.3 for procurement of 187 MW power for a period of 25 years by fixing a tariff at Rs. 4.79/kwh, with a further condition that if the coal is not available through the coal linkage, the additional procurement would be considered subject to the approval of the State Commission.

**14.** The Appellants are aggrieved due to the fact that the entire proceedings have been conducted arbitrarily and without any involvement of the consumers or public, without considering whether electricity is available at a cheaper cost from other sources, no attempt was made to find out whether it was economical to procure electricity at this cost etc. The Appellants upon becoming aware of the present proceedings have preferred the present Appeals before the Tribunal challenging the orders dated 20/04/2016 and 05.02.2019 of the State Commission.

**15. Question of Law in 150 of 2017**

- i)** Whether the State Commission was justified in not giving any public notice before approving the PPA and creating vested rights which will affect the consumers at large?
- ii)** Whether the State Commission is justified in approving the PPA between two related parties without involving and calling for representations and objections from the stake-holders including the consumers?

- iii)** Whether the State Commission is justified in permitting the procurement of electricity by the Respondent No. 2 from its sister concern on assumptions and presumptions as to the requirement of electricity at this tariff and not being available in a more economical manner?
- iv)** Whether the State Commission is justified in granting approval to the PPA and creating vested rights affecting the consumers without examining the tariff being economical?
- v)** Whether the State Commission is justified in proceeding to accord approval of PPA contrary to the National Tariff Policy on the procurement of electricity through a competitive bidding process?
- vi)** Whether the State Commission is justified in not even examining or inviting representations on the availability of electricity at a cheaper cost to the consumers?
- vii)** Whether the State Commission is justified in approving the PPA between two related parties, without examining whether the indicative tariff is justified and particularly when there is no third person invited to offer supply of electricity?
- viii)** Whether the State Commission has considered the matter in line with the Electricity Act, particularly when the generating station of the Respondent No. 3 proposes to supply electricity to two or more states and the decision as to procurement can be taken up only after tariff determination?
- ix)** Whether the State Commission is justified in approving the PPA between the related parties, especially in a situation where the same generator had already entered into a PPA with another Discoms for



part capacity on the basis of Competitive Bidding as approved by Ministry of Power, while avoiding a similar approach subsequently?

**16. Question of Law in Appeal No. 185 of 2019**

- i) Whether the State Commission was justified in assuming jurisdiction for the determination of tariff in the present case?
- ii) Whether the State Commission is justified in not rejecting the claims for change in law of the Respondent No. 3, when there is no change in law in the present case falling under Section 62 of the Electricity Act?
- iii) Whether the State Commission is justified in not conducting prudence check on the capital cost claimed by the Respondent No. 3?
- iv) Whether the State Commission is justified in dealing with the present case akin to Case 1 bidding projects?

**17. Appellants in Appeal No. 150 of 2017 have submitted the following Written Submissions for our consideration.**

**18.** The Impugned Order has been passed pursuant to the judgement dated 28/05/2015 of the Tribunal in Appeal No. 88 of 2015 filed by the Respondent No. 2, wherein the Tribunal remanded the matter to the State Commission holding as under:

- (a) *The State Commission is required to give reasons for deciding between procuring power by way of competitive bidding process or through negotiated route under Section 62;*
- (b) *In the absence of reasons, the matter is required to be remanded for the State Commission to pass a reasoned decision;*
- (c) *The Tribunal did not express any opinion on the merits of the case and specifically held that nothing said by the Tribunal should be construed as an opinion on the merits of the matter.*

**19.** However, while passing the impugned order, the State Commission has not given any reasons for approving the power procurement under Section 62 as compared to a competitive bidding process. In fact, the State Commission did not even frame the issue of competitive bidding process as against Section 62 power procurement. The issue raised was only if the expected tariff under Section 62 is a competitive tariff from other sources, viz from the Exchange. Even on this ground, the State Commission has not even gone into the issue whether electricity is available or would be available at a lower tariff.

**20.** The impugned order is ex-facie erroneous and is liable to be set aside. The principle submissions on behalf of the Appellants are as under:

- (a) The impugned order has been passed in violation of principles of natural justice and behind the back of the consumers – the only affected parties.
- (b) The impugned order is bereft of any reasoning and is liable to be set aside, on the same principle as the Tribunal had held in the order dated 28/05/2015 in Appeal No. 88 of 2015.
- (c) The State Commission has erred in not following the National Tariff Policy which mandates that the procurement of thermal power by the distribution licensees has to be only through a bidding process under Section 63 of the Electricity Act.
- (d) The National Tariff Policy notified under Section 3 has the force of law and is required to be followed by the State Commission.

- (e) There is no inconsistency between the Electricity Act and the National Tariff Policy as is sought to be contended by the Respondents.
- (f) The contention of the Respondents that multiple bidding processes failed in the past is evidently false and only to justify the procurement of power from its own group company
- (g) The tariff discovered in the bidding process in Uttar Pradesh itself is much lower than the supply by the Respondent No. 3.
- (h) The Respondent No. 3 has itself offered to supply at a much lower tariff in a bidding process, both in Maharashtra as well as to the Respondent No. 2 itself.
- (i) The jurisdiction of the State Commission to approve the PPA in an inter-state project, without the tariff even being determined.
- (j) It is now transpired that petition and all affidavits filed were not on oath being not notarized and therefore the petition was not maintainable. This has come to light at the instance of the Respondent No. 2 itself.

**21. Order passed in violation of principles of Natural Justice and behind the back of the consumers, who are the only affected parties;**

- a) The Respondent No. 2 and 3 are sister companies. It is in their interest to purchase this power and both would obviously support one another.
- b) The power procurement is tied up for 25 years on long term basis, through a negotiated route and tariff to be determined under Section 62.

- c) The entire power purchase cost would be a pass through to the consumers. The only affected party and party being prejudiced are the consumers. The consumers have had no say. There was no notice issued to any consumer representative or any public notice. This is contrary to the requirement and also the practice followed while approving the PPAs for other generators including the State generators. The impugned order has been passed in complete violation of the principles of natural justice, which approves the power procurement from sister concern, the burden being on the consumers. The impugned order is liable to be set aside on this ground itself.
- d) The State Commission holds public hearings in the process of approval of PPAs in other cases, but for some reason has not done it in the present case. **[Reference: PPAs approved in cases of 9 other thermal generators by order dated 03/11/2014 in Petitions No. 830 of 2013 and batch]**
- e) The contention of the Respondents that the Electricity Act does not provide for any hearing in such cases is misconceived. Firstly, the approval of the PPA is after the tariff is certain and determined. This is because the approval has to necessarily consider the reasonability of the tariff. **[Ref: Tata Power Limited v Reliance Energy Limited (2009) 16 SCC 659, para 108]**
- f) However, in the present case the approval of the PPA is made first, which itself is erroneous. Further, the approval of the PPA affects the consumers of the Respondent No. 2 for the next 25 years. A lower generation tariff automatically results in lower

tariff to the consumers, and similarly, higher tariff is a higher burden on the consumers.

- g) The Respondent No. 2 as a distribution licensee is in no manner prejudiced. The entire power purchase cost is an automatic pass through in the retail supply tariff. It is for this reason that the only affected persons are the consumers.
- h) The requirement to follow natural justice is well settled. Unless there is a specific exclusion expressly or by necessary implication, hearing the affected parties in a judicial decision making process is mandatory.
- i) Further, unless in exceptional cases, the mandate to follow the principles of natural justice, hear opposite views and take a considered view is essential. The Appellant crave leave to refer to the decision in the following cases:
  - a. Canara Bank v Debasis Das, (2003) 4 SCC 557, para 19 to 22
  - b. Darshan Lal Nagpal v. Government of NCT of Delhi, (2012) 2 SCC 327, para 30 to 33; and
  - c. Nav Bharat Ferro Alloys Ltd v. A.P. Electricity Regulatory Commission, Appeal No. 173 of 2005 dated 02/03/2006, para 6 to 11.
- j) As submitted hereinabove, the only affected party is the consumers in the State. The Respondents No. 2 and 3 are related parties and both are interested in the procurement of power and at such high tariff.

- k) The reliance on hearings in the retail supply tariff orders and the generation tariff orders is also misconceived. Firstly, in the retail supply tariff orders, the entire approved power purchases are an automatic pass through. The retail supply tariff orders providing for the pass through of the power from Respondent No. 3 is also based on the impugned order only. This is also provided for in the National Tariff Policy and various decisions of the Tribunal, wherein it is held that approved power purchases cannot be postponed or restricted from recovery in the retail supply tariff.
- l) It is for this reason also that all stakeholders including consumers are invited to represent when the tariff of generating companies is involved. Even in Section 63 PPAs, where tariff claims are involved, consumers are heard. The *Energy Watchdog* case itself was dealing with appeals of consumers in the Supreme Court.
- m) Further, the impugned order approves the PPA for a period of 25 years and the decision to procure power from the Respondent No. 3 to the exclusion of others and without a bidding process is made. Thereafter, it is only the costs of the Respondent No. 3 to be examined and there is no competition involved.
- n) The retail supply tariff order also relied on the approval in the interim order, where the power purchase has been approved. In fact, in the tariff order of DIL, it is stated that the tariff has already been approved in the impugned order and the same would be followed for the tariff determination. The impugned

order is the basis on which the entire transaction is approved by keeping the consumers (only affected parties) outside the process.

- o) In this regard, the Respondents during the course of hearing have made certain submissions which are also grossly misconceived. The same are being replied to as under:

**Contentions raised by Respondents:**

- RE: *“Transaction at arm’s length”*
- RE: *“Related Party transactions permitted under law”*
- RE: *“No common board members between NPCL and DIL”*
- RE: *“State Discoms and State Generating Companies are also related parties”*
- RE: *“No impact on tariff, which is to be determined independently”*

**Response on behalf of the Appellant**

The Respondents No. 2 and 3 are private entities and admittedly related parties, which is also under Company Law and other commercial laws. It is incumbent upon the Respondents to have a transparent process. DIL did not even participate in the previous bidding process, and is given the contract on negotiated basis to the exclusion of others. The tariff at present is claimed over Rs. 6 per unit by NPCL. There is no examination of public interest or any reasoning given by the State Commission.

The fact that NPCL and DIL are related parties, has been placed on record by the Appellant for the reason, and in the context of the submission that no public hearing had taken place before

passing the PPA approval order, and that the impugned order therefore suffers from violation of the principles of natural justice.

Above facts are relevant, particularly for the reason that while the Respondents NPCL and DIL are related parties and have vested interest in approval of the PPA, the ultimate impact of any procurement by NPCL is on the consumers in its area of supply, who admittedly have not been heard at all.

**Contention raised by the Respondents:**

RE: *“Right to public hearing not available during the PPA approval proceedings under law”*

**Response on behalf of the Appellants**

Firstly, the Respondents have not relied upon any provision under law to show that the public hearing is barred or that no right is available to the consumers during PPA Approval. It is settled position of law that principles of natural justice and right to be heard is an inherent feature of the judicial process. Any party who may be affected by an order of a court ought to be heard. Unless there is a specific exclusion under the statute, the right to be heard cannot be done away with. The Appellant has already placed on record the judgments in support of this contention.

The Appellant has placed on record orders of the UPERC itself, where consumers have been heard during PPA approval process.

**Contentions raised by the Respondents:**

RE: *“Reliance on Petition No. 830 of 2013 is not correct since there were issues of inordinate delay in commissioning in those*



*projects, and therefore public hearing was required.”*

**Response on behalf of the Appellants:**

The Respondents have sought to dispute the reliance on Petition No. 830 of 2013 before the State Commission, where consumers were heard during PPA approval process. The Respondents have contended that there were issues of inordinate delay in commissioning and change of location in that matter, and therefore public hearing may have been considered necessary.

**Contentions raised by the Respondents:**

RE: *“Appellant did not raise any objection during determination of retail supply tariff of NPCL for FY 2016-17 held by State Commission in Petition No. 1077 of 2016.*

**Response on behalf of the Appellants:**

Firstly, in the retail supply tariff orders, the entire approved power purchases are an automatic pass through. This is also provided for in the National Tariff Policy and various decisions of the Tribunal, wherein it is held that approved power purchases cannot be postponed or restricted from recovery in the retail supply tariff.

It is for this reason also that all stakeholders including consumers are invited for representation when the tariff of generating companies is involved. Even in Section 63 PPAs, where tariff claims are involved, consumers are heard. The *Energy Watchdog* case itself was dealing with appeals of consumers in the Hon'ble Supreme Court.

Further, without prejudice to the above, it is submitted that the reliance on the public hearing held on 13.05.2016 is misplaced.

It is pertinent to note that the tariff petition for FY 2016-17 was filed prior to the PPA approval of DIL i.e. on 20.04.2016. Therefore, there was not even any proposal in this regard and consequently, there was no occasion for the said issue to be raised by the Appellants.

**22. The Order is DE-HORS any reasoning and is liable to be set aside;**

- (a) The previous order dated 27/01/2015 of the State Commission which had rejected the power procurement under Section 62 was challenged by the Respondent No. 2 in Appeal No. 88 of 2015 on the ground that the State Commission has not given any reason for rejecting Section 62 procurement as against competitive bidding process. The Tribunal, by judgment dated 28/05/2015, also set aside the order of the State Commission and remanded the matter for providing reasons for its decision, without expressing any opinion on the merits of the case.
- (b) The impugned order while reversing the previous decision, does not give any reasoning for selection of Section 62 as against competitive bidding process. The reasons sought to be given by the Respondent No. 2 in the proceedings before the State Commission.
- (c) Even assuming the case of the Respondent No. 2 that the State Commission need not follow the National Tariff Policy, the State Commission has to record reasons for such deviation. No such reasons have been recorded.
- (d) In fact, the State Commission has not even framed the issue of Section 62 versus Section 63 and decided on the same.

- (e) It is not open to the Respondent No. 2 to now contend that the reasons be considered by the Tribunal, as the Respondent No. 2 had previously sought remand on the ground that no reasons were given without seeking the Tribunal to consider the case on merit. The same principle would apply presently also.
- (f) A mere perusal of the impugned order as well as the order dated 15/01/2016 would establish that **there is no reasoning for selecting Section 62 process as against 63 process. The impugned order is liable to be set aside on this very ground, and by applying the earlier judgment of the Tribunal accepting the arguments of the Respondent No. 2.**
- (g) This aspect has also been noted by the Tribunal in the interim order dated 31/07/2017, as under:

*6. At this interim stage, we are not inclined to go into the merits of the case. But, we have no hesitation in expressing our prima facie opinion that the State Commission has not followed the directions given by this Tribunal in its Order dated 28/05/2015 in Appeal No. 88 of 2015. The State Commission was directed to give reasons as to why it had exercised discretion in favour of competitive bidding process. This Tribunal had not expressed any opinion on merits of the case. This was expressly clarified in the Order dated 28/05/2015. We also prima facie feel that while reversing its earlier decision in the impugned order, the State Commission should have stated why it had taken the earlier decision and why it was reversing it.*

- (h) In the earlier order dated 28/05/2015, the Tribunal had directed that the State Commission need to deal with the contention of the Respondents that earlier bidding processes were not successful. However, this issue is also not dealt with and the State Commission has merely proceeded by recording the submissions of the Respondents and not giving any reasons for accepting the same.

- (i) In this regard the contentions sought to be raised by the Respondents during the course of hearing are being responded to as under:

**Contentions raised by Respondents**

- RE: *“The Hon’ble Tribunal in the Remand Order had decided that both routes i.e. Section 62 as well Section 63 were available to the Respondents.*
- RE: *“The issue has been decided by the Hon’ble Tribunal in the BSES Judgment”*

**Response on behalf of the Appellant:**

(i) The contention on behalf of the Respondents in this regard is completely wrong and misleading. Firstly, the Tribunal itself in the Remand Order in judgment dated 28/05/2015, has clarified that no opinion was being given on the merits of the matter. The Tribunal in the present matter also in fact had taken a view at the interim stage that the impugned order suffers from lack of reasoning. The very purpose for which the matter had been remanded had not been fulfilled by the State Commission.

(ii) It is a miserable attempt by the Respondents to seek and mislead the Tribunal by contending that the Tribunal had already given its view on both routes of procurement being available. The Tribunal did not express any opinion on the merits. Further, the decision in *Energy Watchdog* which gives statutory and binding status to the National Tariff Policy was not even available then.

(iii) Further, the reliance placed on the BSES Judgment is misplaced. wherein the Tribunal while interpreting the earlier National Tariff Policy, 2006 held that the policy is not binding on the Regulatory Commission. The above decision of the Tribunal

was in fact challenged by the Ministry of Power, Government of India before the Hon'ble Supreme Court in Civil Appeal No. 4964-4965/2011, which is pending in the Hon'ble Supreme Court.

(iv) Moreover, the BSES Judgment was passed prior to the Energy Watchdog Judgment, wherein the Hon'ble Supreme Court has settled the position that the National Tariff Policy being issued under Section 3 is binding in nature. The Respondents have not disputed this fact.

- (j) In the circumstances mentioned above, it is submitted that the impugned order is liable to be set aside on this ground alone, as being bereft of any reasons.

**23.** The State Commission has erred in not following the National Tariff Policy which mandates that the procurement of thermal power by the distribution licensees has to be only through a bidding process under Section 63 of the Electricity Act.

**24.** The National Tariff Policy notified under Section 3 has the force of law and is required to be followed by the State Commission. The prior decision of the Tribunal holding that National Tariff Policy is merely a policy and is not binding is now overruled by the energy watchdog decision.

**25.** There is no inconsistency between the Electricity Act and the National Tariff Policy as is sought to be contended by the Respondents.

- (a) The National Tariff Policy mandates that the procurement of power by the distribution licensees from thermal generators has to be only through a bidding process under Section 63 of the Electricity Act. In fact, the National Tariff Policy, 2016 provides for different cases

where Section 63 is to be adopted and where Section 62 determination may be adopted.

**(b)** The National Tariff Policy in detail provides for the cases where Section 62 can be applied and where bidding process under Section 63 is to be adopted for generating projects. The cases where Section 62 can be applied are broadly as under:

- (i) Existing projects where tariff has been determined under Section 62 in the past. The National Tariff Policy only applies for procurements to be made.
- (ii) Expansion of existing projects, subject to 100% capacity expansion.
- (iii) New projects under State Government policy, wherein 35% of the capacity can be procured under Section 62 tariff determination.
- (iv) Coal Washery based generating projects.
- (v) Waste to Energy plants where 100% capacity is to be procured under Section 62 tariff.
- (vi) Renewable Energy projects, till the time guidelines under Section 63 are notified.
- (vii) Hydro projects, subject to certain conditions.

**(c)** In addition, Section 62 also applies for distribution tariff, which continues to apply.

- (d) It is an admitted position that the procurement of the Respondent No. 2 from the Respondent No. 3 does not fall under any of the above cases for Section 62 to apply.
- (e) The contention previously raised was that the National Tariff Policy is merely a policy and is not a binding force. This was based on the previous decisions of the Tribunal including in the case of BSES Rajdhani Power Limited v Delhi Electricity Regulatory Commission, Appeal No. 106 and 107 of 2009 dated 31/03/2010, wherein the Tribunal while interpreting the earlier National Tariff Policy, 2006 held that the policy is not binding on the Regulatory Commission.
- (f) The Tribunal had previously taken a consistent view that policies cannot have force of law and are not binding on the Regulatory Commission. This was also in the full bench decision in the case of [Uttar Haryana Bijli Vitran Nigam v. CERC & Ors], Appeal No. 100 of 2013, dated 07/04/2016, para 188, 190, 304(11)]
- (g) However, the position in law has been reversed by the Hon'ble Supreme Court in the case of *Energy Watchdog [(2017) 14 SCC 80]*, wherein the Hon'ble Supreme Court held that the Policy being under Section 3 of the Electricity Act has the force of law. Even Change in Law relief are allowed to generators based on the provisions of the National Tariff Policy.
- (h) Post the decision, the settled position in law is that the National Tariff Policy is to be followed. The Tribunal has also in various cases provided relief to generators on Change in Law, following the National Tariff Policy and the decision of the Hon'ble Supreme Court in the case of *Energy Watchdog*.

- (i) The National Tariff Policy amounts to delegated legislation under the Electricity Act. In the hearing before the Tribunal, this was also accepted by the Respondents.
- (j) The contention however now raised is that the National Tariff Policy, to the extent of Clause 5.2 is contrary to the Electricity Act, in Section 62 and 63 and therefore is bad in law. The contention is that Section 62 has been left redundant by the National Tariff Policy and therefore to that extent the Tariff Policy is bad in law. The above contention is erroneous.
- (k) Firstly, the following settled principles of law are relevant:
  - (a) The presumption is of validity of delegated legislation, unless it is established to the contrary.
  - (b) Delegated legislation cannot be struck down on the basis that it will not really serve to effectuate the purposes of the Act.
  - (c) There is no challenge to the validity or vires of the National Tariff Policy, such challenge can in any case be only under Article 226 of the Constitution.
- (l) The following decisions are relevant:
  - (a) *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27
  - (b) *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33
  - (c) *State of T.N. v. P. Krishnamurthy*, (2006) 4 SCC 517



**(m)** In the above context, it is relevant to note, that the Preamble of the Electricity Act itself provides that promotion of competition and protecting consumer interest as objectives that is to be achieved by the Act. This is further recognized in Section 61 of the Act. The preamble of the Electricity Act, 2003 reads as under:

*“An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.”*

**(n)** In view of the above, while the Act under Section 3 delegates power to the Central Government to frame a tariff policy, to serve the objects of the Act which includes promotion of competition, it is then for the delegate i.e. the Central Government to decide how the provisions of the Act are to be implemented to best serve the objects of the Act. As has been held in the above judgments, it is not open for courts to sit over the judgment or the wisdom of the legislature or the delegate.

**(o)** In any event, the contention of the National Tariff Policy is to be ignored as it leaves Section 62 redundant is also erroneous. As submitted above, the National Tariff Policy provides for the cases where Section 62 is to be applied and where Section 63 is to be applied. Neither sections are left redundant. Similarly, the contention that the UPERC Generation Tariff Regulations 2014, which has been framed only to provide for determination under Section 62 would become redundant is also erroneous and misleading. The National Tariff Policy provides for the case where Section 62 may be applied.

The aforesaid Regulations would also therefore apply only in those situations.

- (p) Section 62 and 63 only provide for the manner of tariff determination and the role of the Regulatory Commission in such determination process. The cases where the tariff can be cost plus or by way of bidding process is not provided for in the Electricity Act, and can certainly be provided by way of delegated legislation.
- (q) In any event, there can be no case for striking down a provision in the National Tariff Policy which mandates bidding process to be adopted, except in certain cases. Even the law governing public procurement mandates that bidding process is the rule and it is only in exceptional cases (such as single source of supply or imminent emergency) that negotiated procurement can be adopted. In this regard, the Appellant relies on the decision of the Hon'ble Supreme Court in the case of Nagar Nigam v. Al Faheem Meat Exports (P) Ltd., (2006) 13 SCC 382 as under:
- (r) Electricity is certainly goods which affects public interest [Ref: All India Power Engineers Federation & Ors v Sasan Power Limited, (2017) 1 SCC 487] The provision in the National Tariff Policy is consistent with the above principle of law, and it cannot be termed as bad in law.
- (s) In this regard, the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498 has held as under:

*37. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions "protecting interest of*

*consumers” and Section 61(d) requires that the interests of the consumers are to be safeguarded when the appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.*

- (t) It was also sought to be suggested that bidding process would result in electricity being made available only many years down the line. This is also ex-facie erroneous. It is for the party inviting the bids to specify the date from when the power would be required in the bidding documents. In many cases, the bids are invited for power procurement on immediate basis. In the case of Tamil Nadu to which the Respondent No. 3 supplies electricity, the supply was sought for on immediate basis in the bidding documents. There is no such restriction in the bidding guidelines.

**26. The jurisdiction of the State Commission to approve the PPA in an Inter-State Project, without the tariff even being determined.**

- (a) The State Commission has exceeded its jurisdiction in approving the PPA and the tariff in the present case.
- (b) Firstly, the power project of the Respondent No. 3 is situated in Maharashtra and the supply to Uttar Pradesh is on inter-state basis. Further, the Respondent No. 3 also supplies electricity to Tamil Nadu and therefore there is supply to two or more States.
- (c) Therefore, the power project squarely falls within the provision of Section 79(1)(b) of the Electricity Act and is within the exclusive jurisdiction of the Central Commission for regulating the tariff.

- (d)** In fact, the Respondent No. 3 has already invoked the jurisdiction of the Central Commission in so far as the inter-state supply to Tamil Nadu is concerned. The supply to the Respondent No. 2 in Uttar Pradesh is from the very same generating unit from which supply is also made to Tamil Nadu.
- (e)** Therefore, when the Central Commission has already exercised jurisdiction in the petition of the Respondent No. 3, it is not legally permissible for the Respondent No. 3 to invoke the jurisdiction of the Uttar Pradesh State Commission in so far as the Respondent No. 2 is concerned.
- (f)** The very basis of jurisdiction under Section 79(1)(b) is to have commonality of jurisdiction, one Authority in relation to all the States. This assumes importance as many aspects require common parameters to be applied, for example, the technical parameters of the generator such as Station Heat Rate, Auxiliary Consumption, the parameters for coal consumption, the nature of taxes to be considered for Change in Law etc.
- (g)** The expression 'composite scheme' in Section 79(1)(b) is in relation to the generator and not the procurer. If the generator falls within the meaning of 'composite scheme', it cannot change from one State to another.
- (h)** The reliance on Section 64(5) of the Electricity Act by the Respondents is also misconceived. Firstly, the Energy Watchdog case itself is after consideration of Section 64(5) and thereafter the Hon'ble Supreme Court upheld the jurisdiction of the Central Commission.

- (i) Further, Section 64(5) can itself possibly apply only when there are only two States involved, namely, generator in one State and Procurer of the entire capacity in another State. In such a case, only one Regulatory Commission would be involved.
- (j) In the present case however, there are two procuring States at present (and could be more in future). There possibly cannot be more than one Regulatory Commission involved in such a case.
- (k) Further, the approval of PPA under Section 86(1)(b) cannot precede the determination of tariff. One of the primary parameters to be considered for approval of the PPA itself is the reasonability of the tariff. Therefore, it is not possible for the approval to be made in advance and thereafter the tariff to be determined.
- (l) The precise situation is also governed by Rule 8 of the Electricity Rules, 2005 which provides as under:

***“8. Tariffs of generating companies under Section 79.-The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.***

- (m) Therefore, it is only after the determination of tariff does the State Commission decide whether the PPA is to be approved and the power is to be procured or not.

**27. It is now transpired that petition and all affidavits filed were not on oath being not notarised and therefore the petition was not**

**maintainable. This has come to light at the instance of the Respondent No. 2 itself.**

- (a)** The Respondent No. 2 had contested the locus of the Appellant No. 1 to file the appeal, inter-alia on the ground that the lease deed relied on is defective as there is was no entry in the register of the Notary who has attested the deed. For this purpose, the Respondent No. 2 filed an Application IA No. 772 of 2016 to summon the register of the Notary to verify whether the entry is made or not.
- (b)** The specific pleading was that the veracity of the deed has to be verified only by verification of the entry in the Notarial Register. In para 3 it was stated that the deed looks suspicious. During arguments, it was the contention of the Respondent No. 2 that the deed was forged which would be evident from the verification of the entry in the Notarial Register.
- (c)** At the instance of the Respondent No. 2, the register of the Notary has been summoned by the Tribunal. The verification of the register showed that while there is no entry of the notarisation of the Lease Deed, there is also no entry of the notarisation of the Affidavit in support of the petition filed by the Respondent No. 2 before the State Commission. Also various other pleadings and submissions with supporting affidavits find no entry in the Register.
- (d)** It was the specific contention of the Respondent No. 2 that no entry in the register means that the deed is not properly executed. It was for this reason that the register was summoned.
- (e)** In the case of the Lease Deed, the Tribunal in the order dated 17/05/2017 granting leave to appeal proceeded on the basis that the

deed is not notarised and granted leave on the basis that the deed is to be otherwise proved. The Tribunal noted that the deed is not required to be notarised in law and the effect of non-notarisation or irregular notarisation does not make the deed defective.

- (f) However, the affidavits filed before the State Commission are required in law to be on oath. Filing on oath is one of the primary requirements of judicial filings, particularly in summary proceedings where there is no oral evidence or witness/deponents taking oath in court to verify their statements.
- (g) The requirement of filing affidavit in support on oath with the Petition is prescribed in Regulation 29 and 31 of the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004. Regulation 31(2) provides for the affidavit to be signed and sworn before a *person lawfully authorised to take and receive affidavits*.
- (h) Section 139 of the Civil Procedure Code provides for who can administer oath, which includes a Notary. In the present case, oath has not been administered by any other person. In terms of Section 8(1)(e) of the Notaries Act, the Notary is empowered to administer oath or take affidavits. However, for this necessary entries need to be made in the Register as prescribed, wherein the deponent is present and signs in the Register.
- (i) In the present case, it has now transpired that the pleadings including the petition with the affidavit was defective as not being properly notarised. This has come to light at the instance of the Respondent No. 2 itself.

- (j) The pleadings and affidavits being on oath is a fundamental requirement. The said fact having come to the knowledge now and particularly at the instance of the Respondent No. 2 itself, it is now not open to the Respondent No. 2 to contend that it be ignored.
- (k) The Bombay High Court in the case of Ayushakti Ayurveda Pvt Ltd v. Hindustan Level Ltd, (2003) 4 Mh L.J, 915 has held that when affidavit is not properly notarised, no value can be attached to it. (Para 12 page 921)
- (l) It is also relevant to mention that when the Respondent No. 2 has taken a particular course of action, it cannot be now permitted to avoid the consequences of the same simply because it is inconvenient to him now. (Reference: Umrao Singh v. Man Singh & Ors, ILR (1971) II Delhi 44 at page 46 last para continuing to page 47; Joint Action Committee of Airline Pilots' Association v. Director General of Civil Association, (2011) 5 SCC 435 para 12)
- (m) In the present case, the matter has been prolonged for about one year at the instance of the Respondent No. 2 to seek the Notaries Register. Submissions were also made that in the absence of the entry in the Register, the document is to be suspected. It was argued that the sanctity of judicial proceedings and majesty of the Tribunal need to be protected. The Respondent No. 2 avoided scrutiny of the matter on merits for about a year on this ground.
- (n) Now, when it has transpired that the very petition and related pleadings filed by the Respondent No. 2 were defective on account of non-notarisation or defective notarisation, the consequences has to be borne by the Respondent No. 2.



- (o) By application of the very same principles argued by the Respondent No. 2 and facts that have come to light at the instance of the Respondent No. 2, the petition filed itself did not confirm to the mandatory requirements of law, the affidavits were not on oath, the impugned order has to be set aside for this reason alone and at this stage.
- (p) The Tribunal in the order dated 17/05/2017 has held that this issue of the effect of an unsworn affidavit would be considered on merits at a later stage.
- (q) Therefore, on this issue itself, the impugned order is liable to be set aside.
- (r) While such dismissal on this ground may not constitute res-judicata and it may be open to the Respondent No. 2 to file a fresh petition in accordance with law, it cannot be argued that the defect can be cured after the impugned order is passed and in proceedings before the Tribunal at this stage.
- (s) The contention of the Respondents that this issue is not being raised by the Respondents now is also misconceived. The Respondents raised and pressed the issue at the stage of leave to appeal of the Appellants and is also considered in the order granting leave. It is now not open to the Respondents to contend that the said issue need not be gone into, when it affects the Respondents.
- (t) The Competitive Bidding Process in Uttar Pradesh provided tariffs much lower;

  - a) Even on the merits, there is no justification for procurement of electricity from the Respondent No. 2 at the tariff of almost Rs.

5 per unit, which is further fully escalable and also without considering transmission and other charges.

- b) The recent competitive bidding process conducted by the other licensees in Uttar Pradesh itself discovered tariffs of less than Rs. 4 per unit. Further, there were multiple generators who had bid to supply at tariff less than Rs. 4 per unit. The bidding was not taken forward as the electricity was not required by the distribution licensees itself. But the benchmark tariff prevalent in the bidding process was known.
- c) The contention of the Respondents that since it was not taken forward by the distribution licensees in UP, it cannot be looked into is grossly erroneous.
- d) The tariff was discovered in the bidding with firm and binding offers from the generating stations. In fact, even this tariff and procurement was not found to be reasonable and the distribution licensees did not procure the power. However, the benchmark tariff discovered in the bidding process was much lower.
- e) The difference in the tariff on this count itself would work out to savings of 20% on the power purchase cost of the Respondent No. 2, and benefit consumers. This additional burden in the present case is only to the benefit of the Respondent No. 2 and Respondent No. 3.
- f) Even assuming a competitive bidding process under Section 63 is not to be followed, the State Commission could have at the least invited other offers to supply electricity at a cost cheaper

than that indicated by the Respondent No. 3. This would have ensured cheaper electricity to the consumers which would serve public interest. There may be number of generators who are willing to supply at a cheaper cost.

- g) In this regard the contentions sought to be raised by the Respondents during the course of hearing are being responded to as under:

**Contentions raised by Respondents:**

- RE: *“Tariff under the PPA is aligned to market realities”*
- RE: *“Prevalent shortage of coal during 2010-2015”*

**Response on behalf of the Appellant:**

(i) The submissions made by the Respondent No.2 in this regard are misconceived. Firstly, the Appellant has placed on record substantial material evidencing the fact that power was available to NPCL at cheaper rates even at during 2010-2015, and further even as of today, the prevailing rates are substantially lower than that offered by the Respondents No.3.

(ii) The submission with regard to coal shortage to justify reliability of power from the Respondent No.3 is erroneous. Admittedly, even in the case of supply from Respondent No.3, the specific averment of the Respondent No.3 before the State Commission was that it cannot commit to fixed energy charges as the availability and price of coal are beyond the control of the Respondent No.3. Admittedly, the State Commission in the impugned order has given liberty to the Respondent No.3 to claim costs for additional procurement of coal. Hence, to say that only other projects were facing uncertainties with regard to supply of coal is wrong and misleading.

**Contentions raised by Respondents:**

- RE: *“The bids invited in 2016 were cancelled”*
- RE: *“Tariff under the present PPA may only be compared to similarly placed PPAs which have resulted into flow of power during the same period”*

**Response on behalf of the Appellant:**

It is not in dispute that the bids were cancelled by the

Government of UP in 2016, but the discovered tariff was less than the present one. The Respondent No.2 as well as the State Commission were aware of the prevailing market prices, and still consciously proceeded to procure under Section 62 at rates higher than that discovered in bidding.

**Contentions raised by Respondents:**

RE: *"Bid results were opened on 08.08.2016, i.e. after the PPA was entered into on 26.09.2014 and approval of the PPA i.e. 20.04.2016."*

**Response on behalf of the Appellant:**

Firstly, while the PPA was entered into in 2014, the said PPA did not come into force until the approval in 2016. It is not the contention of the Respondents that after 2012, the only price discovery was through this bidding process whose results were opened on 08.08.2016. Such an argument would also be grossly erroneous.

**Contentions raised by Respondents:**

- RE: *"No reliance can be placed on DBFOO bids because only the first year tariff is quoted therein"*
- RE: *"First year tariff of DIL was Rs. 4.16/unit, which is well within the range of the DBFOO bids"*

**Response on behalf of the Appellant:**

(i) This is misconceived. It is submitted that even under DBFOO bids, the fixed charges are quoted for the entire term of the PPA, and it is only the energy charges which may differ. As stated above, even in the present case, the Respondent No.3 has been given liberty to procure additional coal and claim relief for the same. Therefore, even in the present case there is no certainty of tariff.

(ii) Further, the reliance on DIL's first year tariff is misplaced. As was shown during the course of hearing, in the tariff filings before the State Commission, the Respondent No.2 has claimed Rs. 5.54 per unit for FY 2019-20, and Rs. 6.18 per unit for FY 2020-21. Further, the tariff so claimed is also excluding change in law and additional coal expenses.

**Contentions raised by Respondents:**

- RE: *"Pilot Scheme Tender cannot be relied upon"*

RE: *"The tariff discovered in the earlier rounds of the Pilot*

*Scheme were higher”*

**Response on behalf of the Appellant:**

(i) Firstly, there is no response to the fact that intent behind the pilot scheme by the Ministry of Power was to provide long-term PPAs to stranded thermal capacity in the country. The Ministry of Power acknowledges that there is an enormous surplus and stranded thermal capacity lying idle in the country which need to be helped. This is in contrast to the position taken by the Respondent No.2, that it is unable to procure 170MW power under bidding process.

(ii) Further, on the tariffs discovered in the earlier rounds, the Tribunal can take note of the fact that in Pilot Scheme-II tender in March 2019, the discovered tariff was Rs. 4.41/unit. Now while the Respondents conveniently seek to place reliance on the tariff being higher than that discovered in January 2020, it may be noted that the March 2019 tender was cancelled by the Ministry of Power, for the reason that the discovered tariff of Rs. 4.41/Unit was considered to be too high, and no distribution licensee had shown interest to procure at such high tariff. This fact has been widely reported in the media, and multiple sources from the Ministry of Power as well as PFC (nodal agency) have confirmed the same.

(iii) Further, the Respondent no.2 has sought to rely on the fact that the tariffs bid were at CTU interconnection point, and that transmission charges would have to be added till UP Periphery, and then further till NPCL Periphery. The Tribunal may take note of the submission of the Respondent No.2 in this regard, as even in the present PPA approval, the indicated tariff of Rs. 4.79/Unit is in fact only at the UP Periphery, and does not include STU charges for both Maharashtra as well as UP.

**28. The contention of the Respondents that Multiple Bidding Processes failed in the past is evidently false and only to justify the procurement of power from its own group company.**

- (a) It is also incorrect for the Respondent No. 2 to contend that all previous competitive bidding process failed and therefore there was no alternative but to procure under Section 62.

- (b)** Firstly, the Respondents have not given any details whatsoever of the previous bidding processes undertaken by the Respondents. These are only bald statements without any details.
- (c)** The Tribunal had also in its decision in Appeal No. 88 of 2015 directed the State Commission to go into the issue, but the same has not been gone into. Therefore, it is only a statement of the Respondents that previously bidding processes were undertaken 5 times, without any details or materials in support thereof.
- (d)** Even as per the case of the Respondents, they were more than 10 years back, in the year 2006-07. It is ex-facie erroneous for the Respondents to argue that since the bidding process 10 years back did not convert into a PPA, there was no option but to proceed with a Section 62 PPA.
- (e)** The issue of a previous bidding process not getting bidders had been placed before the State Commission only once previously, in Petition No. 683 of 2010. In the said process undertaken by the Respondent No. 2, it was only the Respondent No. 3 and one other unknown company who had participated. This other company M/s Guruji Power is unknown even till date, without any known generating station. Even in the said proceedings, it is stated to have offered only 30 MW. It is now clear as to how the process was taken up by the Respondent No. 2. No details have been given by the Respondent No. 2
- (f)** The State Commission had also rejected the process as it was only a single bidding, with the other being a related party.

- (g) In this regard the contentions sought to be raised by the Respondents during the course of hearing are being responded to as under:

**Contentions raised by Respondents:**

RE: “5 attempts to procure power through bidding process has been recorded by the State Commission in its Tariff Order dated 19.10.2012, and also by the Hon’ble Tribunal in the Remand Order dt. 28.05.2015

**Response on behalf of the Appellant:**

(i) Interestingly, while the Respondents have not produced any document on record showing the bids received or the results of the 5 failed attempts, the Respondents have sought to place reliance on an observation by the State Commission in a Tariff Order whereby the State Commission has observed that NPCL has been trying to procure power through bidding from 2008-09 and has made 4 attempts. The Respondents have contended that the question of whether these biddings had taken place or not cannot be raised now, since the Tariff order of the State Commission was not challenged.

(ii) In this regard, it is submitted that the Tribunal may take note of the fact that the Respondents have consciously not placed any bidding related documents on record, and are contending that the question of fact cannot be gone into. It is submitted that in absence of any material on record to show that the biddings have actually taken place, adverse inference may be made.

(iii) As regards, the reliance on the Tariff Order dated 19.10.2012, it is submitted that the State Commission in the tariff order was not considering any of the previous bids, and the observation was made in the context of NPCL being able to enter into a PPA with Essar

Power. Admittedly, the results of any of these alleged bidding processes were never placed before the State Commission. The Tribunal can in fact call for the records from the State Commission to confirm the same.

(iv) Similarly, while the Tribunal in the Remand order has in any case stated that it was not opining on the merits of the matter, the Respondents had never placed any of the bid results of the 5 alleged attempts before the Tribunal.

(v) Interestingly, while the Respondents have relied on a tariff order and the Remand order, it has not placed on record any order of the State Commission where these bids were placed before the State Commission.

(vi) The conduct of the Respondents in the matter evidently raises suspicion, since there is no transparency on record to bid related documents.

- (h)** The last bidding process was successful. There were 6 bidders who had participated. The tariff was discovered, which was much lower than in the present case, the tariff was adopted and the PPA was also executed.
- (i)** It is only that the contract has been now terminated in exercise of the contractual rights. It is always possible for any contract, whether under bidding or otherwise to be terminated. This does not mean that the bidding process was unsuccessful.
- (j)** It is also relevant to mention that in the above bidding process undertaken, the Respondent No. 3 did not participate at all. Therefore, even if the principle of fairness is to be followed, the Respondent No. 2 ought to have approached the other bidders to



procure electricity, which was at a much lower cost, than to approach its own sister concern who did not participate in the bidding process and is supplying at a much higher tariff.

- (k) There is no reason to favour the Respondent No. 3 which is a sister concern at a tariff that is exorbitant.
- (l) In this regard the contentions sought to be raised by the Respondents during the course of hearing are being responded to as under:

**Contentions raised by Respondents:**

- RE: *“Project of the L2 bidder is yet to be commissioned and the L3 bidder had only offered 50MW.*
- RE: *“L2 and L3 bids were based on captive coal blocks which were later on deallocated in terms of the Hon’ble Supreme Courts judgments dated 25.08.2014 read with the decision dated 24.09.2014 (Manohar Lal Sharma v. Principal Secretary & Ors.)*

**Response on behalf of the Appellant:**

(i) The submissions made by the Respondents to justify why they did not approach L2 and L3 bidders are wrong and misconceived. Regarding the contention that the L2 bidder has not yet commissioned, it is submitted that the argument proceeds on an assumption, that the contract has been offered to L2, it would have still not commissioned. Similarly, for the L3 bidder, the submission is that only 50MW was offered. But, while NPCL had admittedly not approached the other bidders, now it seeks to justify the same by making assumptions that certain issues would have come in the way had these contracts been offered to them.

(ii) Even with the issue of coal block cancellations, the Tribunal may take note, that even in the present approval order, the State Commission has granted DIL the liberty to procure additional coal on

account of shortage. Admittedly, DIL has in fact approached the State Commission seeking approval to procure additional coal. Therefore, the argument that the L2 and L3 bids were based on captive coal blocks which got cancelled, is simply based on an assumption. It was obviously for the bidders to arrange their commercial affairs to fulfil their obligation to supply to NPCL. NPCL cannot assume that these bidders would have failed in to do so.

**Contentions raised by Respondents:**

RE: *“Proposal from Athena Power, could not be accepted on account of the Judgment of the Hon’ble Tribunal given on the Appeal filed by Essar Power”*

**Response on behalf of the Appellant:**

The Respondents have not even approached any of the other parties, and is making submissions on based on assumptions. In fact, the requirement of a bidding process is precisely for this reason to avoid presumptions and to have a transparent process.

- (m) It is submitted that more than 55000 MW of thermal capacity has been tied up under a Competitive Bidding Process under Section 63 of the Electricity Act since the bidding process has started till the year 2015-16 (Data compiled by the CERC and Forum of Regulatory). This is spread over the various distribution licensees all over the country, and not restricted to any region.
- (n) It is inconceivable that while more than 55000 MW has been tied up under Section 63 bidding process, it is only the Respondent No. 2 which has been unable to tie up 187 MW of capacity under a bidding process, and has no option to procure power from its sister concern at a higher tariff.
- (o) Over and above this, there is substantial surplus and untied capacity available in the market, estimated at about 30,000 MW. These are

capacities that would obviously be able to participate in a bidding process. It is for this reason that the Respondent No. 2 does not even want to attempt procuring power through a bidding process.

- (p) Further, the bidding process in other cases have resulted in much lower tariff. The bids participated by the Respondent No. 3 itself in the case of Respondent No. 2 provided for a much lower tariff.
- (q) In this regard the contentions sought to be raised by the Respondents during the course of hearing are being responded to as under:

**Contentions raised by Respondents:**

RE: *“Only a small portion (55,000MW) of the total installed capacity (i.e. 303GW) in the country has been tied up through competitive bidding”*

**Response on behalf of the Appellant:**

- (i) The contention of the Respondent No.2 in this regard is misconceived. The total installed capacity as mentioned by the Respondent No.2 i.e. 303 GW power includes projects that were existing prior to the Electricity Act coming into force.
- (ii) It is submitted that what is relevant to consider is only the capacity tied up after the National Tariff Policy 2006.
- (iii) The total installed capacity of 303 GW also includes the capacity of all central generating stations under Section 62 as well. This certainly cannot give a proper view of the capacities that were eligible to be tied under bid processes, and the capacities tied up thereafter.
- (iv) It is respectfully submitted that in order to get a proper view of

the capacity that has been tied up under bidding processes, the Tribunal would only have to consider that capacities tied up after 2006.

- (r) The Respondent No. 2 has no intention of undertaking a bidding process for procurement of power, is evident from the following:
- a. In the order dated 27/01/2015, the State Commission directed the Respondent No. 2 to initiate a Case -1 Bidding Process immediately, but the Respondent No. 1 did not do so and insisted on bilateral procurement from the Respondent No. 3.
  - b. When the order dated 31/07/2018 in Petition No. 1325/2018, said the Medium-Term procurement and tariff was approved by the State Commission, the Respondent No. 2 undertook to initiate a bidding process for procurement of power, but no such process has been undertaken.
  - c. In the order dated 13/11/2017 in Petition No. 1130/2017, the State Commission had rejected the procurement of additional 200 MW from the Respondent No. 3 on bilateral basis and directed the Respondent No. 2 to initiate a competitive bidding process. But this has also not been complied with by the Respondent No. 2.
- (s) It is evident from the above that the Respondent No. 2 has no intention of initiating a bidding process for procurement of power. In this regard the contentions sought to be raised by the Respondents during the course of hearing are being responded to as under:

**Contentions raised by Respondents**

- RE: *"Petition No. 1130/2017 - Case of proposal of 200MW from Unit 1 of DIL is different from the present Supply of 170MW from Unit 2"*

- RE: *“Order dated 13.11.2017 has not been challenged by NPCL, therefore interest of DIL is not served”*

**Response on behalf of the Appellant:**

(i) The Respondents have submitted that at the time when the proposal for 200MW was made, the supply under the present PPA for 170MW had already commenced w.e.f. 18.11.2016. While the Respondents have not denied the fact, that they did not comply with the order of the State Commission directing it to go for bidding, the only submission is that since the supply under the present PPA had commenced, the load requirement was already substantially met.

(ii) The submission in this regard is false, since the proposal to procure 200MW from DIL was placed by NPCL before the State Commission. Therefore, there was a power requirement which sought to be fulfilled by this procurement.

(iii) Thereafter, when the State Commission has directed NPCL to undertake bidding process, NPCL is now suggesting that the load requirement was already substantially met through the present PPA for 170MW.

(iv) The submission of NPCL is full of contradiction. While it seeks to submit that the procurement of 170MW and 200MW are circumstantially different, it has failed to respond to the specific issue that why it has not undertaken any bid process after the specific direction of the State Commission in Petition No. 1130/2016.

(v) The fact that NPCL has not challenged the order dated 13.11.2017, is being relied upon by NPCL to contend that DIL is not benefitted. However, there is no answer to why NPCL is not seeking to procure this power through a bidding process.

### **Contentions raised by Respondents**

RE: *"In Petition No. 1325/2018, NPCL had submitted to the State Commission that it did not have adequate transmission capacity from primary sub-stations, which it was attempting to get from UPPTCL. This was accepted by the State Commission"*

### **Response on behalf of the Appellant**

(i) NPCL had invited bids for medium-term power procurement for 100 MW from 01.12.2018 to 31.03.2020, which was successful. At this point when the State Commission had enquired as to why NPCL was not tying up power under long term arrangement instead, NPCL has submitted that there were issues of transmission constraints in the STU, which precluded it from procuring non-term power.

(ii) The submissions of NPCL in this regard are full of contradictions. Admittedly, it was NPCL who had approached the State Commission with the proposal to procure 200MW power from its sister concern in Maharashtra.

(iii) There were no transmission constraints when the additional power was being sought to be procured from its sister concern under Section 62, however now when the State Commission enquires as to why long term power is not being tied up through bidding, NPCL seeks to justify the same by submitting that there is an alleged transmission constraint.

(iv) Therefore, NPCL has time and again sought to avoid tying up power through competitive bidding.

**29. The Respondent No. 3 has offered to supply power at much lower tariff. There is no reason why the supply to Respondent No. 2 which is a sister concern should be about Rs. 5 per unit.**

- (a)** The Respondent No. 2 had in the year 2018 floated a competitive bidding process for procurement of power on Medium Term Basis. In this process, the Respondent No. 3 had participated, and quoted generation tariff of Rs. 3.11 per unit.
- (b)** Even after added, STU charges and losses for both Maharashtra and Uttar Pradesh, CTU charges and losses, the landed tariff in Noida was only Rs. 4.55/- per unit. Even then the Respondent No. 3 was not successful as lower tariffs were quoted by others. This was adopted by the State Commission by order dated 31.07.2018.
- (c)** In the present case, the tariff of Rs. 4.79/- itself is exorbitant, which does not even include STU charges and losses for both Maharashtra and Uttar Pradesh. Adding the STU charges and losses make the tariff even higher.
- (d)** The difference between Rs. 3.11 per unit and Rs. 4.79 per unit would itself amount to more than 30% savings in the power purchase cost by the Respondents and savings to the consumers at large. This would amount to about Rs. 150 crores per year benefit to the consumers, and thousands of crores over the life of the PPA.
- (e)** The contention of the Respondents that the Medium Term cannot be compared with Long Term is also misconceived. The medium term is also for more than a year. In any event, the tariff stream considers the escalation index and therefore the medium term can also be considered with the escalation index for the future years.
- (f)** It is also relevant to note that even for the first year in the present case, the supply is not at the generation tariff of Rs. 3.11/- per unit.

- (g)** It is revealed that the Respondent No. 3 has offered to supply electricity to the Maharashtra distribution licensee at a tariff of Rs. 2.99 including trading margin
  - (h)** There is no reason for the Respondent No. 2 to procure at Rs. 5 per unit plus other charges from the Respondent No. 3, therefore the entire attempt is only to benefit the Respondent No. 2 and 3 group and pass on the full burden to the consumers at large.
  - (i)** The entire burden of power purchase is being passed on to the consumers, the Respondent No. 2 has successfully avoided scrutiny on merits for one year on the grounds of deed not being notarized. The entire financial gain is to the Respondent No. 2 and Respondent No. 3 and its group as a whole, at the cost of the consumers at large.
  - (j)** There is sufficient electricity available on the short and long term market at competitive prices and there is no justification for procurement of high cost power.
  - (k)** Consumer interest ought to be supreme, but consumer interest has been totally neglected and rendered irrelevant by the impugned order and the actions of the Respondent No. 2 and 3.
- 30.** On 29/07/2020, the Respondent No. 2 – Noida Power Company Ltd. has filed its written submissions. It has been noticed that the Respondent No.2 has sought to mislead the Tribunal on factual aspects during the hearing. The present submissions are only limited to the extent of showing the factual mis-statements made by the Respondent No. 2. This is explained hereunder:



**31.** On the issue of comparison of tariffs, the Respondent No.2 had sought to rely on the fact that the tariffs that had been relied upon by the Appellants were at CTU interconnection point, and that transmission charges would have to be added till UP Periphery, and then further till NPCL Periphery. In fact, to justify the tariff of its sister concern, the Respondent No.2 has even added the CTU and STU charges to these discovered tariffs and compared the same. The relevant extracts from the written submissions dated 07/06/2020 filed by the Respondent No.2 are hereunder:

**32. Notably, PFCCL had issued 3 (three) Pilot Scheme Tenders for the procurement of 2500 MW of power on medium term basis in 3 (three) consecutive years i.e., 2018, 2019 and 2020 and the Appellant has conveniently and selectively chosen to only rely upon the Pilot Scheme Tender floated by PFCCL in January, 2020 since the tariff discovered therein was lower than the tariff discovered in the years 2018 and 2019. In this regard, the tariff discovered and the landed cost at UP periphery in all the 3 (three) Pilot Scheme Tenders floated by PFCCL for the procurement of 2500 MW of power on medium term basis is tabulated herein below:**

<b>All figures in Rs./kWh</b>	<b>Pilot Scheme-I in May 2018</b>	<b>Pilot Scheme-II in March 2019 (Tender Cancelled)</b>	<b>Pilot Scheme-II in Jan 2020</b>
<b>Discovered Tariff at CTU Interconnection Point (L1 Tariff)</b>	4.24	4.41	3.26
<b>Landed Tariff at UP periphery</b>	5.11	5.23	4.06
<b>Landed Tariff at Respondent No.2/NPCL periphery</b>	5.49	5.62	4.40

*\*PTC trading margin = Rs.0.05/kWh for Pilot Scheme-I, PTC trading margin =Rs.0.0173/kWh for Pilot Scheme-II included in the above landed cost calculation.*

**32.** The Respondent No. 2 argued that their tariff is competitive (which in itself was factually incorrect). However, now in the submission filed on 29/07/2020 the Respondent No. 2 has taken the position that the tariff of Rs. 4.79/- does not include the STU charges and is not at the NPCL periphery. Thus, for comparison, the Respondent No. 2 has compared its

tariff with other tariff at NPCL periphery, but however contends that its tariff itself does not include STU charges, which would be charged additionally.

**33.** The Respondent No. 2 has now sought to clarify that the tariff by its sister concern does not include STU Charges. The relevant extract is hereunder:

*Re. Tariff of Rs.4.79/kWh does not include UP State charges and losses*  
86. It is submitted that Respondent No. 2/NPCL has nowhere claimed that the indicative levelized tariff of Rs. 4.79/kWh at UP Periphery was inclusive of UP State charges and losses ("STU Charges and Losses"). Such indicative levelized tariff of Rs. 4.79/kWh at UP Periphery implies that it consisted only of CTU Charges and Losses and as such, no STU Charges and Losses are included. It is therefore only the contention of the Appellant who is erroneously comparing tariffs at different points of time and at different points in grid, i.e., generator bus, UP periphery or NPCL Periphery.

**34.** Comparing the above two submissions, it is evident that the Respondent No. 2 has sought to mislead the Tribunal on the STU charges being part of the tariff quoted by DIL for comparing with other tariff. It is respectfully submitted that the tariffs discovered through bid processes at all points of time have been much lower than the tariff from DIL.

**35.** Further, the Respondent No. 2 has also sought to justify the tariff of its sister concern by relying on the fact that it had a firm fuel supply linkage as against the coal shortage situation in the market for other developers. Again, the statement is misleading as it is an admitted fact, that not only did DIL refuse to commit to fixed energy charges, but also the State Commission has given liberty to DIL to come back for approval for procurement of additional coal in case of shortage. Admittedly, DIL has approached the State Commission for the same.

**36.** In view of the above, it is respectfully prayed that the above facts may be taken into consideration by the Tribunal while deciding the matter.

**37. The Appellant in Appeal No. 185 of 2019 has submitted the following Written Submissions for our consideration.**

**Re : Jurisdiction vis-à-vis the State Commission**

**38.** The State Commission had vide order dated 19.02.2018, held that the it had jurisdiction to determine tariff under Section 64(5) of the Act. Firstly, the State Commission failed to appreciate that the said order was passed without hearing the public at large, and therefore the issue of maintainability was open for the consumers to raise at the time of public hearing.

**39.** The chronology of events as stated in the impugned order would show that the State Commission heard the matter on the issue of jurisdiction on 06.02.2018, and vide order dated 19.02.2018 opined that the Commission holds jurisdiction in terms of Section 64(5).

**40.** The Public Hearing in the matter was held on 30.10.2018, when the Appellant also participated and submitted its objections including a preliminary objection on the issue of maintainability. The State Commission vide the impugned order has however held that it had already taken a view on the issue of jurisdiction vide its order dated 19.02.2018, and has reiterated that view.

**41.** It is not even a disputed fact that the order dated 19.02.2018 was passed without hearing the public at large. Further, the said order was only passed at the interim stage. The impugned order finally disposes of the petition and also deals with the issue of jurisdiction. It is well settled that any issue decided at the interim stage can always be raised in appeal

against the final order. [Ref: Satyadhyan Ghosal and Ors.V.Sm. Deorajin Debi and Anr. AIR 1960 SC 941 para 8, 9, 10, 12, 15]

**42.** Further, the question of jurisdiction goes to the root of the matter and can be raised at any stage.

**43.** It is submitted that the decision of the State Commission to assume jurisdiction in the matter is erroneous. Admittedly, DIL has a composite scheme for generation and sale of electricity in more than one state. In this regard, the issue with regard to jurisdiction of the Central Electricity Regulatory Commission or the State Commissions on matters involving inter-state supply was initially decided by the full bench of the Tribunal in the case of Uttar Haryana Bijli Vitran Nigam Ltd v. Central Electricity Regulatory Commission & Ors, Appeal No. 100 of 2013 dated 07/04/2016, which held that mere sale of electricity to two or more States would render the transaction within the exclusive jurisdiction of the Central Commission and not that of the State Commission.

**44.** In fact, the facts in the case of GMR in the above case entirely apply to the present case. GMR had a PPA for supply to Orissa at Section 62 tariff, PPA with Haryana and Bihar was through a bidding process. Considering commonality in approach and that the supply was to two or more States, it was held that the Central Commission had exclusive jurisdiction in the matter.

**45.** Thereafter, the Hon'ble Supreme Court in the case of Energy Watchdog v. Central Electricity Regulatory Commission & Ors, (2017)14 SCC 80 has further expanded the scope of Section 79(1)(b) to hold that even sale to a single State would be within the jurisdiction of the Central

Commission, provided that the generator is in a different State and the procurer is in a different State. The Hon'ble Supreme Court held as under:

*“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections ©, (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”.*

**46.** While the Hon'ble Supreme Court in the above Judgment has clearly held that in case of inter-state supply, the Central Commission would have the jurisdiction, there were still issues regarding the interpretation of the Judgment, and the above position was further upheld by the Tribunal in its decision in the case of KSK Mahanadi Power Company Limited v. Andhra Pradesh Electricity Regulatory Commission & Ors. Dated 31.10.2018 in Appeal No. 230 of 2017.

**47.** The Tribunal in the above judgment has analysed the Energy Watchdog Judgment of the Hon'ble Supreme Court, and has taken due note of the fact that in that case, the generation and sale of electricity was

not restricted to either the State where the generation was taking place, or where the distribution was taking place under the PPA. The Tribunal while interpreting the meaning of “composite scheme” in terms of the Energy Watchdog Judgment, observed that the electricity was being supplied by the generating company to other States as well i.e. Tamil Nadu, Uttar Pradesh and Telangana apart from Andhra Pradesh.

**48.** In the present case, admittedly, the supply from DIL is not restricted to either the State of Maharashtra or the State of Uttar Pradesh. DIL has a long term PPA to supply power, 187MW, to NPCL, licensee in the State of Uttar Pradesh (State 2) and another long term PPA to supply power 100 MW to TANGENCO, licensee in the State of Tamil Nadu (State 3). Thus, from the current scheme of arrangement, at least three states are involved mere based on location, apart from the intervening States.

**49.** In fact, this issue of jurisdiction was also raised in the proceedings before the Central Commission on issues relating to TANGEDCO. The Central Commission vide order dated 01/07/2019 in Petition NO. 327/MP/2018 held that the generator fell within the definition of composite scheme and also that Section 64(5) of the Electricity Act.

**50.** Further, as regard to the reliance placed on Section 64(5) by the State Commission, it is submitted that the said provision applies in case where the inter-state supply is between two states i.e. there cannot be scheme involving the territories of more than two states. The sale by a generator of its whole capacity to the distribution licensee of another state would be covered under Section 64(5). In such a situation, the State Commission where the distribution licensee is located would only replace the Central Commission without any other Regulatory Commission having jurisdiction over the generator and distribution licensee. However, where a

generator supplies electricity to two or more States, there cannot be more than one Regulatory Commission involving the generator and the distribution licensees involved.

**51.** In this regard, it may be relevant to note, that in the present case, the supply to TANGEDCO as well as NPCL are from the very same unit of DIL. By an erroneous interpretation of Section 64(5), what DIL has sought to do is to approach two different forums for determination of tariff for supply from the same unit. While in the present case the supply to TANGEDCO is under a section 63 bid tariff, however, the Tribunal would have to decide whether it is open to a generator to claim application of two different sets of Regulations, for the supply from the very same generating station.

**52.** The argument made in response to the above by the Respondents is that the supply to TANGEDCO being under Section 63, cannot be subjected to Section 64(5), which is only applicable to supply being made under Section 62. The issue is when TANGEDCO PPA is already before the Central Commission, there cannot be two Regulatory Commissions to deal with the same generator involving two or more States.

**53.** The very purpose of the Central Commission having jurisdiction in such cases is that there is a common approach on such generators. The generator in such a situation cannot be allowed to indulge in forum shopping. This is the rationale behind the orders of the Tribunal and the Hon'ble Supreme Court on the question of jurisdiction.

**54.** The contention raised by the Respondents is that Section 64(5) is an exception to Section 79(1)(b) as it begins with a non-obstante clause. The exception only comes into play when "two states" are involved in the scheme of generation and supply. This is to be contrasted with the



language under Section 79(1)(b) where more than one, any number of States could be involved.

**55.** While the Respondents have argued, that the term “two states” cannot be interpreted as “only two states”, the said argument is erroneous and will lead to various difficulties and impracticalities.

**56.** It is respectfully submitted that there is good reason for such interpretation. A harmonious construction of Section 79(1)(b) and Section 64(5) can only be made in a manner which does not confer jurisdiction to two Regulatory Commissions over the supply from the same unit of a generator. This is particularly in view of the fact, that the composite scheme as envisaged under the Act, is qua the generator. Therefore, the supply from a particular generator can be termed as a composite scheme if there is inter-state supply to “two or more states”.

**57.** The Tribunal may also consider the impracticality in the interpretation of Section 64(5) as suggested by the Respondents. In fact, the difficulties that arise on account of such interpretation can very well be seen in the present case itself. In this regard, the Tribunal may take note of how the Respondent No.3 has made change in law claims.

**58.** In the case of TANGEDCO, the Change in Law claims is to be considered by the Central Commission, based on the issues of coal supply, taxes etc. and applying the norms and parameters of the CERC's Regulations for computing the change in law impact and for NPCL, it is State Commission. The same generating unit will have two forums for such decision, each applying different norms and parameters. Therefore, commonality emphasized in the Judgment of Hon'ble Supreme Court is lost.



**Re: Treating claims of DIL as done in Case-1 procurement under Section 63 Competitive Bidding.**

**59.** The State Commission has, in the impugned order, held that the claims of DIL in relation to additional coal, taxes and duties etc. would be considered as in the case of a Case -1 project under the bidding guidelines under Section 63 of the Electricity Act. The State Commission has, inter-alia, held as under:

*“3.2.6 In the above hearing the Commission vide Order dated 26.03.2018, clarified that the Commission would like to determine the tariff as per its earlier orders but the extra cost on account of procurement of additional coal and change in law shall be dealt separately, as done in case-1 procurement.*

**60.** This is perverse, since the State Commission is granting the best of both worlds to DIL. For the selection of DIL as a generator to supply electricity to NPCL, the negotiated route was approved by the State Commission citing Section 62. However, the tariff is not determined based on the actual costs and applying prudence check, as required under Section 62. The levelized tariff offered by DIL, without prudence check has been accepted.

**61.** Over and above, the benefit of change in law as is applicable to a Section 63 project has been given by the State Commission to DIL. The change in law in case of Section 62 is much limited as compared to Section 63.

**Re: Determination of tariff under Section 62 without determination or prudence check of Capital cost and without applying any of the norms and parameters.**

**62.** Without prejudice to the above submissions, it is submitted that the determination of generation tariff by the State Commission under Section 62 is governed by the Regulations framed for this purpose under Section 61 of the Act i.e., the UPERC (Terms and Conditions of Generation Tariff), Regulations, 2014.

**63.** Unlike Section 63, where the generator offers a tariff stream under a competitive bidding process which is to be “adopted” by the Commission, the Commission is to “determine” the tariff under Section 62 of the Electricity Act. The Commission is to decide on the prudence of such expenditure, and allow such costs strictly in terms of the Regulations.

**64.** In the present case, the State Commission had approved the PPA between DIL and NPCL on the basis of a commitment given by DIL, that since the generating station is already established, there would be a firm cost of power, and any variation above that would be absorbed by the generator.

**65.** While the State Commission in approving the PPA, had considered the levelized tariff of Rs. 4.79/kwh as the ceiling tariff, it was however imperative to undertake the exercise of determination of tariff under Section 62 separately in terms of the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014.

**66.** The UPERC Regulations, provide for the components of tariff, which are to be determined by the State Commission. The relevant extract of the Regulations read as under:

*“17. Components of Tariff:*

*(1) Tariff for sale of electricity from a thermal power generating station shall comprise of two parts, namely, the recovery of annual capacity (fixed) charges and energy (variable) charges.*

(2) *The annual capacity (fixed) charges shall consist of:*

*(a) Interest on loan capital*

*(b) Depreciation;*

*(c) Return on equity;*

*(d) Operation and maintenance expenses including insurance; and*

*(e) Interest on working capital:*

*Provided that special allowance in lieu of R&M where opted in accordance to Regulation 22(5) and/or separate compensation allowance in accordance to Regulation 25(iv)(d), wherever applicable shall be recovered separately and shall not be considered for computation of working capital.*

(3) *The energy (variable) charges shall be derived on the basis of landed fuel cost (LFC) of a generating station and shall constitute the following cost:*

*(a) Landed fuel cost of primary fuel; and*

*(b) Cost of secondary fuel oil consumption:*

*Provided that any refund of taxes and duties along with any amount received on account of penalties from fuel supplier shall have to be adjusted in fuel cost.*

*(4) For the purpose of determination of tariff the landed fuel cost of primary and secondary fuel shall be based on actual weighted average cost of primary fuel and secondary fuel of the three preceding months, and in the absence of landed costs for the three preceding months, latest procurement price of primary fuel and secondary fuel for the generating station, before the start of the tariff period for existing stations and immediately preceding three months in case of new generating stations shall be taken into account.”*

**67.** While there has been no determination of any component of tariff, the State Commission in terms of the Regulations was to also work out other parameters such as Capital Cost, Debt-Equity Ratio etc., which exercise also has admittedly not been done in the present case. For example, the Regulations provide as under:

**“19. Capital Cost:**

(1) *Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff for new and existing projects.*

.....

**24. Debt-Equity Ratio:**

*(1) In case of all generating stations, debt-equity ratio as on the date of commercial operation shall be 70:30 for determination of tariff. Where equity employed is more than 30%, the amount of equity for determination of tariff shall be limited to 30% and the balance amount shall be considered as the normative loan.*

**68.** In this regard, the approach taken by the State Commission for determination of tariff is without following due process and is illegal. None of the parameters in terms of the Regulations have been determined by the State Commission.

**69.** The State Commission has merely noted that the ceiling tariff of Rs. 4.79/kwh as approved was based on the estimated capital cost of Rs. 1941 Crores. Further, the submission of DIL was that the capital expenditure was revised to 1927.65 Crores which it intended to capitalize by FY 2018-19. The actual expenditure as on cut-off date was Rs. 1903 Crores.

**70.** While the claim for additional capitalization was in any way misconceived, since the entire approval of the PPA was based on the firm commitment of DIL that its plant was already commissioned, and there was no risk of variation in cost. The State Commission has grossly erred in holding that the claim for additional capitalization would be considered during truing up, in terms of the Regulations.

**71.** The approach adopted by the State Commission seems to be that since the actual capital cost of Rs. 1903 Crores as claimed by DIL is less than Rs. 1941 Crores based on which the ceiling tariff of Rs. 4.79/kwh was approved, the same may be approved. It cannot be that the actual capital cost incurred by the Appellant would not be subject to scrutiny by the State

Commission merely because it is less than that as approved for a ceiling tariff.

**72.** On the objection raised by the Appellant with regard to prudence check being not done for Capital Cost, the State Commission held that prudence check was done at the time of passing the PPA approval order. It was the duty of the State Commission to scrutinize the same and check whether the expenditure incurred was prudent or not.

**73.** In this regard, it may be relevant to note that the Appellant had in fact filed an RTI with the State Commission seeking information on the prudence check (if any) that may have been conducted by the State Commission or any prudence check committee constituted by UPERC and any public notice or public hearing held by UPERC.

**74.** The Reply to the RTI by the State Commission dated 08.07.2016 revealed that neither had there been any prudence check committee constituted by the State Commission, nor had any public notice or public hearing been held by the State Commission. The reply to the RTI Application further stated that information on prudence check was in the State Commissions' order itself, which clearly did not mention any prudence check.

**75.** Even the contention that prudence check was done at the time of PPA approval is misconceived. The State Commission in the impugned order has proceeded on the basis that while approving the PPA, it had conducted various prudence checks/benchmarking exercises based on different aspects viz. completed Project Cost, Benchmarking of Capital Cost with CERC Norms and comparison with Case -1 tariffs supplying power to the UP Discoms. Evidently, the completed project cost was not

available at the time of approval, as the actual expenditure which has been incurred till cut-off varies from that as considered while approving the PPA.

**76.** Further, merely comparing the tariff with the prevailing rates can by no stretch of imagination be termed as Prudence Check of the capital cost. The tariff is to be determined based on the actual prudent capital cost, subject to the ceiling of the capital cost approved of Rs. 1941 crores. However, in the present case the neither has the State Commission conducted any prudence check on the actual capital cost claimed, nor has the Respondent No.3 placed on record any document providing the details of its capital cost.

**77.** In this regard, the Respondents during the course of hearing have made certain submissions which are misconceived. The same are being replied to as under:

**Contentions raised by Respondents:**

- RE: *"The State Commission carried out prudence check in the proceedings for PPA approval vide order dated 29.09.2015 and 15.01.2016"*
- RE: *"The Respondent No.3 had provided a tariff stream of 25 years to the State Commission at the time of the PPA approval order which was compared to contemporary power plants and the benchmark norms of the CERC"*

**Response on behalf of the Appellant:**

The contention that due prudence check was conducted at the time of approving the PPA assumes importance. The Tribunal may take note, that while no public hearing took place at the time of the PPA approval, the Respondents take a stand that the Regulations do not provide for public hearing at the time of PPA

approval, and only provide for public hearing at the time of tariff determination.

However, interestingly for the purpose of tariff determination, the State Commission as well the Respondents herein take a stand that prudence check with respect to considering CERC benchmark norms was done at the time of PPA approval, wherein admittedly the consumers were not heard.

Therefore, effectively the consumers have not been heard, when the entire cost of procurement is ultimately burdened on the consumers.

**Contentions raised by Respondents:**

RE: *"In terms of Regulation 19(6) of the UPERC Tariff Regulations 2014, there cannot be a determination of cost of each and every nut and bolt. The Regulations only provide for considering benchmark norms specified by CERC"*

**Response on behalf of the Appellant**

As regards to the process of tariff determination, according to DIL, there cannot be an exercise to find out cost of each and every component of the plant.

Regulation 19(6) only provides for prudence check of capital cost. Apart from this, none of components of tariff have been decided in terms of the Regulations.

As stated above, the fixed charges in terms of the Regulations consist of:

- (a) *Interest on loan capital*
- (b) *Depreciation;*

- (c) *Return on equity;*
- (d) *Operation and maintenance expenses including insurance;  
and*
- (e) *Interest on working capital:*

Admittedly, there is no determination of Interest on loan capital, Return on Equity etc. In fact, the details of loans taken or equity infused were never made available by DIL.

The Tribunal may also consider the above in the context of the fact that the generating plant of DIL had been purchased by it from another developer.

The State Commission has not even gone into the price at which it had been purchased, and the return which DIL would be entitled to on the same.

Thereafter for variable cost, the Regulations provide for determination of the landed cost of coal, and cost of secondary fuel etc.

Admittedly, none of the above aspects have been gone into by the State Commission. The only response on behalf of DIL has been that in terms of Regulation 19(6), only the CERC benchmark norms are to be considered for prudence check of capital cost.

Therefore, according to DIL, if the capital cost is under the benchmark ceiling, the State Commission shall not conduct any other prudence check.

The Tribunal would have to take a view whether the State Commission ought to have decided the above aspects particularly in view of the fact, that the supply is under a Section 62, MoU route, wherein the tariff is to be determined by the Commission.

There is also no question of any benchmark with regard to the Variable



charges. The variable charges are only on the basis of actuals, subject to the ceiling given in the PPA order. The State Commission has however considered the project as a bid project for tariff, however there being no bidding for the selection of the generator.

**Re: Tariff left open ended to be dealt separately.**

**78.** The State Commission while purportedly determining tariff under Section 62, has held vide order dated 26.03.2018 that claims relating to Change in law and extra cost on account of procurement of additional coal would be dealt separately, as done in Case-1 procurement.

**79.** The determination being under Section 62, the question of change in law would arise for only after the determination of tariff. There can be no question of dealing with issues of change in law in separate petitions, when the claim is for the period prior to the tariff determination. Further, in any case, the claim for change in law can certainly not be treated as done in Case-1 biddings.

**80.** The State Commission has left no certainty in regard to tariff. This is particularly when the tariff is determined under Section 62. The entire basis of the PPA being approved was the capped tariff of Rs. 4.79/kwh, which itself was very high. The same is sought to be overcome by change in law petition.

**81.** Admittedly DIL has itself offered to supply at a much lower price to NPCL in separate bidding process, in which the DIL was not even successful as it was not the lowest. In the circumstances, the State Commission has erred in leaving the tariff open ended to the prejudice of the consumers and for the benefit of the Respondents, who are sister companies.

**82.** It is submitted that the approval of the PPA, was based on a firm commitment of tariff, and the only exception was with respect to procurement of additional coal in case of shortage, for which DIL would have to take prior approval from the State Commission. This being the case, the State Commission ought to have rejected any claim from change in law, which was contrary to the commitment given

**83.** Further, it is not understandable as to how can there be change in law in relation to variable charges in a petition under Section 62 of the Electricity Act. When the tariff is being determined on a cost-plus basis, the question of change in law does not arise separately. The costs and expenses as on the date of the tariff being determined is to be taken into account, subject to the ceiling cost as determined in the order approving the power purchase.

**84.** This is also evident by the fact that the present tariff claimed by NPCL for this generator is Rs. 6.18/- as is evident from the latest tariff filing before the State Commission.

**85.** In the facts and circumstances, it is respectfully submitted that the Appellant is entitled to the prayers as sought for in the Appeal. The Impugned Order is liable to be set aside.

**86. Appellant filed additional written note when the matter was heard afresh. Gist of the same is as under:**

**RE : “Earlier Bidding Process”**

**87.** Appellant contends that the entire case of the Respondents for opting Section 62 over Section 63, is that there were “*five unsuccessful attempts*”

to bidding". Not a single piece of evidence has been placed by the Respondents to support their claim. The Respondents seek to rely on the tariff order dated 19.10.2012 passed by the State Commission wherein NPCL itself has averred that it had made four attempts to procure power through competitive bidding. There is no examination or finding of the State Commission, but the State Commission has merely taken note of the said submission of NPCL.

88. The issue being factual in nature, NPCL has chosen not to place on record the tender documents to establish its claim that such attempts were actually made. Further, the State Commission itself while approving the PPA for M/s Essar Power Limited, the fifth round of bidding as claimed by the Respondents, in its order dated 04.09.2012 observed that the bidding was earlier done "twice". This being the finding, the contention of five bidding process is evidently false. Further, even with regard to the "two" earlier bidding processes, the same evidently appear staged to favour the sister concern generator. The third time the bidding process was transparent, DIL did not even participate. The process was also fully completed and NPCL thereafter terminated the PPA with Essar Power, citing non-fulfilment of condition subsequent.

**RE: "Scope of National Tariff Policy binding"**

89. According to Appellant, while the Electricity Act, 2003 does not mandate either Section 62 or Section 63 to be used for procurement, both the provisions are only means for tariff determination. The National Tariff Policy provides for in which case either of the provisions is to be used. The following judgments of the Hon'ble Supreme Court hold that National Tariff Policy being delegated legislation under Section 3 is to be used as an aid to interpreting the Act, and has force of law:

- 
- (i) *PTC India Ltd. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603 Para 18 and 19.
  - (ii) *Energy Watchdog v. CERC & Ors.* (2017) 14 SCC 80 (Para 28 and 29).

**90** The Respondents have relied on 3 judgments of the Hon'ble Tribunal to contend that the National Tariff Policy is not binding. However, the Judgment in *BSES Rajdhani Case* is passed prior to *Energy Watchdog* Judgment, and change in Tariff policy. Moreover, the said judgment has been challenged by the Ministry of Power before the Hon'ble Supreme Court. In the Remand Judgment of the Tribunal in the present case, in Appeal No. 88 of 2015, the Tribunal itself has recorded that it is not expressing any opinion on merits. The Tribunal's judgment in Appeal No. 41 of 2018 (*Hinduja*) is stayed by the Hon'ble Supreme Court, and the issue in the Appeal was completely different.

**RE: Whether bidding can be mandated**

**91.** According to Appellant, the Electricity Act, 2003 being enacted under the Constitution of India, has to be interpreted in consonance with Article 14 of the Constitution of India, which mandates transparency and non-discriminatory methods to be adopted. In this regard, the Appellant place reliance on the Judgment in the case of *CPIL v. Union of India*, (2012) 3 SCC 1, Para 95 and 96.

**92.** The Respondent's reliance on the Judgment of the Hon'ble Supreme Court in *Natural Resources Allocation in RE, Special Reference No. 1 of 2012*–[(2012) 10 SCC 1] dated 27/09/201 is misplaced. The Hon'ble Supreme Court has held (vide Para 119, 149, 174, 183, 199 and 200) that while Article 14 does not mandate auction/bidding as an economic policy, it is left to the executive to decide the best way to allocate natural resources.

In the present case, the executive has issued the national tariff policy which provides for all future procurement to be done through competitive bidding, except in some circumstances.

**RE: “Applicability of Section 64(5)”**

**93.** Appellant further contends that the Respondents’ reliance on this Tribunal’s Judgment in Appeal No. 327 of 2018 dated 19/08/2020 in ***MPPMCL v. MPERC & Anr.*** is misplaced for the following reason:

- (a) Central Commission did not exercise jurisdiction, for any of the States.
- (b) Supply to third state (Haryana) was from a different unit of the generating plant, therefore there would be no practical difficulties in implementing orders of two different Commissions.
- (c) The supply to Haryana was on ad-hoc interim basis under an interim order of the Hon’ble Supreme Court, and not under a PPA.
- (d) The State Commission was determining tariff for home state obligation in Chhattisgarh under the National Tariff Policy, which provides for such determination by the State Commission.
- (e) The Tribunal has held that the power supply is one of the cheapest sources, and is likely to reduce in the future, and therefore keeping consumer interest in mind.

**94.** The Appellants have also given an example of FGD which is being installed by DIL in the present case. For seeking approval of the capital expenditure to be incurred in this regard, DIL has approached both the CERC as well as the UPERC.

**95.** According to Appellant, in case both the Commissions determine different costs for installation of FGD, it would amount to recovery of more tariff from one set of consumers and less from another set of consumers, for the same capital expenditure, which has to be allowed as a pass through. The only response of the Respondents to this is that if the recovery is different in both the states, it is for the generator to bear. This explanation of the Respondents is illogical. Admittedly, the cost of FGD is to be a pass through for DIL, then how can two sets of consumers pay separate tariffs for the same?

**RE: “No response of the Respondents on certain issues”**

**96.** According to Appellant, the issue **non-determination of norms** such as interest on loan, interest on working capital, O&M etc. have not been determined by the State Commission. This again has not been responded to by the Respondents. There is no response to the fact that the State Commission itself has been hearing the consumers in other cases where PPAs are approved. It is only selectively in this case that the State Commission has chosen not to hear the consumers.

**97.** The State Commission itself has conducted public hearing in other cases of PPA approval, but has made an exception in the present case. Further, the Tribunal may kindly note that the Respondents have not responded to the issue of notary raised by the Appellant.

**98.** Similarly, the State Commission has directed NPCL to proceed with a bidding process on three occasions, in the orders dated 27.01.2015, 13.11.2017 and 31.07.2018, there is no response on why this has not been followed.

**99. Mr. C. K. Rai, Learned Counsel for the Respondent No. 1 (UPERC) in Appeal No. 150 of 2017 has submitted the following Written Submission on 04.07.2018 for our consideration.**

In the present Appeal, the Appellant has raised the following questions for kind consideration of this Tribunal: -

- (a) Whether Impugned Order has been passed in a mechanical manner?**
- (b) Whether the Impugned Order passed in violation of principles of natural justice on the ground that public hearing not held?**
- (c) Whether the State Commission is justified in approving the PPA between two related parties?**

**Whether Impugned Order has been passed in a Mechanical manner:-**

**100.** The contention of the appellant that the impugned order has been passed in a mechanical manner and without any reasons is entirely erroneous and without any basis. In this regard it is important to place the facts of the case in a correct perspective. It is submitted that Petition no. 971 of 2014 was filed by Respondent no. 2 /NPCL for Approval of Power Purchase Agreement between NPCL and M/s Dhariwal Infrastructure Ltd./Respondent no. 3 seeking *inter alia* for the following reliefs:-

- “ (a) Accord the Approval for purchase of power of 187 MW at generation bus from CTU connected Unit-2 -1X x300 MW thermal power station of M/s Dhariwal infrastructure Ltd in Chandrapur, Maharashtra for a period of 15 years;*
- (b) Approve the draft power purchase agreement as annexed at annexure A;*
- (c) Pass such other or further orders as this Hon’ble Commission may deem fit and proper in the facts and circumstances of the case”*

**101.** The State Commission initially vide the order dated 27/01/2015 rejected the prayer of the respondent number 2 on the ground that for long-term power purchase, competitive route under section 63 of the Electricity Act 2003 is available and therefore directed the respondent number 2 to take concrete steps for long-term power purchase agreement (PPA) through bidding route under section 63 of the Electricity Act, 2003. The relevant paragraph of the order dated 27/01/2015 is reproduced hereunder:-

*“6.... Although NPCL has made some effort to tie up power through long-term but despite clear directions from the commission for long term supply contract through the competitive route, it has opted the MOU route. The commission does not find any reason to consider such PPA in wake of the fact that for long-term power purchase only competitive route is available and hence disallows the subject PPA..... The commission is constrained to observe that the delay in compliance of the commission's orders has been on the part of NPCL. However, the commission directs further extension of BG for one month as a last opportunity and expects NPCL to take concrete steps for long-term PPA through bidding route.*

*7. NPCL is directed to initiate the bid process under new case 1 bidding guidelines immediately. In this regard NPCL shall submit monthly progress report to the commission. During this period, NPCL may procure requisite quantum of power through short-term for which it would require to file separate petition. The matters are disposed of.”*

**102.** Being aggrieved with the above said order dated 27/01/2015, the Respondent No. 2/NPCL filed an appeal bearing Appeal number 88 of 2015 in this Tribunal inter alia on the ground that approval of procurement of power through negotiated agreement is not in any manner affected by the guidelines issued by Ministry of power directing the competitive bidding process for long-term power procurement and that earlier 5 attempts made by the NPCL to procure power through competitive bidding route has not resulted in an effective arrangement for getting the necessary quantum of power.



**103.** This Tribunal vide judgment and order dated 28/5/2015, set aside the order dated 27/01/2015 passed by the State Commission and remanded the matter back to the state commission for fresh consideration of all the submissions of the parties.

**104.** The relevant extracts of the Remand Order dated 28/05/2015, in compliance to which the impugned proceeding was held and the Impugned Order was passed, are reproduced below:

***“23. The State Commission will have to address the Appellant’s contention that it had made five attempts to procure power through Competitive Bidding Process, but that did not result in an effective arrangement for getting the necessary quantum of power required on long term basis; that the last attempt made by the Appellant which resulted in the signing of the PPA did not result in the commencement of supply of power from 30.4.2014 as envisaged by PPA; that need of the Appellant is to have long term arrangement forthwith instead of speculating purchase for the supply at a later date through Competitive Bidding Process and that the State Commission itself had repeatedly impressed upon the procurement of power on the long term basis forthwith instead of procurement of power on short term basis. The State Commission has also not taken into account the Appellant’s contention that Respondent No.2 is willing to supply the required capacity at an indicative fixed charges/capacity charges working out to Rs.1.99 per kWh exclusive of reimbursement of income tax, CTU, SLDC charges for transmission of power from the generating station which will be on an actual basis and the project cost and other tariff elements leading to the above capacity charges which shall be further subject to prudence check by the State Commission under Section 62 of the Electricity Act. While leaning in favour of Competitive Bidding route under Section 63 of the Electricity Act and rejecting the negotiated route under Section 62 thereof, the State Commission should have examined the PPA entered into between the Appellant and Respondent No.2. The State Commission has not done so. Its reasoning is solely based on interpretation of MoP Guidelines. It has held that after 5.1.2011 for long term power purchase only competitive route is available. We have already noted the Appellant’s contention that the State Commission’s interpretation of MoP Guidelines is totally incorrect and illegal. Submissions of the Appellant in this regard have not been taken into consideration by the State Commission.*”**

***24. Reasons introduce clarity and also give assurance to the litigants that their case is considered. In the circumstances, we are of the opinion that this matter needs to be remitted to the State Commission so that submissions of the parties can be considered afresh. While remitting the case, we would like to make it clear that we have not expressed any opinion on the merits of the case of the parties. Nothing said by us in this judgment should be treated as expression of our opinion on the***

merits of the case of the parties. **The State Commission will apply its mind to all contentions raised by the parties independently and in accordance with law and arrive at its conclusions.**

25. In the result, the impugned order is set aside. **The matter is remanded to the State Commission for fresh consideration of all the submissions of the parties, independently and in accordance with law. All contentions raised by the parties are kept open. The appeal is disposed of in the aforesaid terms.**

(Emphasis Supplied)

**105.** It is clear from the above, that the State Commission was required to decide NPCL's proposed power procurement from Respondent No. 3/DIL *inter-alia* in the light of the facts and considerations discussed above. In compliance to the remand order dated 28/05/2015 passed by this Tribunal, the State Commission commenced hearing in the matter on 11.08.2015 which continued on 23.09.2015 wherein the State Commission thoroughly examined NPCL's proposal to procure long-term power from DIL through bilateral negotiated route at a tariff to be determined under Section 62 of the Electricity Act, 2003 (hereinafter referred to as "**Electricity Act**").

**106.** For the purposes of evaluating and ascertaining whether the State Commission should grant its approval to the PPA under Section 62 or direct the parties to resort to the competitive bidding process envisaged under Section 63 of the Electricity Act read with the Tariff Policy, the State Commission put specific queries to the parties and sought them to demonstrate the comparative advantages of the proposed transaction. The Order dated 29.09.2015 passed by State Commission is extracted below:

*"Learned Counsel Sri Shanti Bhushan, Sr. Advocate made submissions on behalf of NPCL.*

***The Commission desired to know that whether the cost of electricity from this project is competitive with the available cost of power from other sources and with the power available from exchange. NPCL was also asked that how would NPCL ensure that the commitments made by the concerned generator would be adhered to and whether they have made any such condition in their agreement to the effect that if the commitments are not fulfilled, the impact thereof will not be***

***passed on to the consumers. The Commission further enquired about the FSA and 100 percent coal linkage of the generator.***

***NPCL was directed to submit detailed reply on above along with supporting documents.***

***4. The next hearing shall be on 4.11.2015 at 11:30 Hrs.”***

*(Emphasis Supplied)*

**107.** Thus, in the order dated 29/9/2015, the State Commission desired to know that whether the cost of electricity from the project is competitive vis-a-vis the cost of power available from other sources and vis-à-vis the power available from exchange. NPCL was also asked that how would NPCL ensure that the commitments made by the concerned generator would be adhered to and whether they have made any such condition in their agreement to the effect that if the commitments are not fulfilled, the impact thereof will not be passed on to the consumers. The Commission further enquired about the FSA and 100 percent coal linkage of the generator. NPCL was directed to submit detailed reply on above along with supporting documents.

**108.** In reply, NPCL submitted before the Commission that the first year fixed charge of Rs. 2.14/ kwh and the term of PPA as 25 years. The levelized tariff has been calculated as Rs. 4.79/kwh. NPCL has mentioned that this levelized tariff is lower than the discovered levelized tariff of Rs. 5.73/kwh – Rs. 4.886/kwh under Case -1 bidding as adopted by the Commission vide order dated 24.6.2014 in petition no. 911 of 2013. NPCL has further stated that the capital cost of Rs. 6.47 Cr./MW for DIL is lower than quite number of contemporary power plants like Anupur TPS (2 x 600 MW) – Rs.6.67 Cr./MW, Bongaingaon TPS (3 x 250 MW) Rs. 6.85 Cr./MW, Chandrapur TPS (2 x 500 MW) MSPGCL Rs. 6.50/MW) etc. NPCL has also mentioned that its capital cost also compares favourable with CERC's benchmark capital cost (for Greenfield thermal projects of 2 units of 500 MW uti size) or Rs. 4.71 Cr./ MW for thermal power plants, as per CERC's

order of 4 June 2012. When compared to CERC benchmark of Rs. 4. 71 Cr./MW (which does not include the cost of land, MGR Railway siding unloading equipment at jetty, and rolling stock, Locomotive and transmission line till the tie point), cost at Rs. 4.57 Cr/MW is more competitive. In addition, the capital cost benchmark as per the CERC, having been computed using December 2011 indices as the base, is more than 3 years old.

**109.** On comparison with short term power market NPCL has further submitted before the Commission that short term power market which has been traded at Rs. 4.28 to Rs. 4.33 per kwh through traders and Rs. 3.50 to Rs 3.67 per kwh through power exchange during the last three years. NPCL has submitted that availability of power on exchanges is not reliable and depends on various factors like sudden changes in weather, availability of fuel, availability of transmission corridor etc. Therefore, procurement of base load power from short term contracts and power exchanges is not reliable. Reliability of supply is the most important factor for procurement of base load power and therefore it must be procured through long term PPAs. For meeting the seasonal variations of demand, procurement of power can be done through power exchanges where it can make the best use of price variations.

**110.** In the order dated 15.1.2016 the Commission after considering the submissions of NPCL as mentioned at para 12 and 13 herein above passed the following order:-

“ .....

*12. From the above discussions, it is evident that although NPCL has submitted a commitment on fixed charges for 25 years but has not submitted firm view on variable cost for the term of the PPA as promised by them during the hearing. The undertaking submitted by the generator is only for the period till fuel supply agreement is executed. In view of the fact that whole case of NPCL is based on the levelized tariff of Rs. 4.79/kwh (for the*

*period of 25 years), it becomes necessary to firm up the fixed as well as the variable part of the tariff. The table showing fixed charges for 25 years and confirmation that there would be no upward revision in the project cost ensures sanctity of fixed charge. Similarly the component of variable charge also require to be as per the commitment of levelized tariff of Rs. 4.79/kwh for the period of 25 years except for the variation due to CERC escalation rates, over and above the escalation rates taken in calculation of levelized tariff of Rs.4.79/kwh, which would be additionally allowed in variable charge. Such limitation on variable charge would mean that for the whole term of PPA if there ever is any short supply from SECL and the Seller has to procure fuel from alternative sources then he would bear the additional cost, if any, over the prevailing SECL price plus CERC escalation. In this manner, the consumer may be ensured to get power at a cheaper rate through this PPA as promised by the parties.”*

**111.** For further certainty and clarity and to protect consumers from increasing costs of power in the PPA approved under Section 62, the State Commission vide the same Order directed NPCL to file submissions and relevant material with respect to the variable part of the tariff as per the levelized tariff of Rs. 4.79 / kWh for the period of 25 years. In accordance with the terms of the Remand Order, the State Commission also directed NPCL to file all deviations / insertions made in the PPA along with reasons thereto before the State Commission. Therefore, it is manifestly clear that the State Commission conducted a thorough and exhaustive process to protect consumer interests and ensured there were no lacunae which could be abused / misused by the parties.

**112.** Subsequently, on 19.02.2016 NPCL tendered its submissions in relation to the variable charges. NPCL stated that a commitment for a period of 25 years was unsustainable as risks related to fuel are beyond the control of any generator. However, in order to ensure that consumer interest is protected, NPCL submitted as follows:

- a) Levelized tariff of Rs. 4.79/kWh was arrived at considering the fixed charges and the variable charges (taking into account the current CIL prices with 100% linkage and the UPERC Tariff

Regulations);

- b) Variable charges of a generating station is derived on the basis of (a) landed cost of primary fuel; and (b) cost of secondary fuel oil consumption. Cost of both are recurring costs and are uncontrollable factors;
- c) To benefit consumers, NPCL and DIL have undertaken not to escalate fixed charges and limit it to the extent provided in submissions dated 20.11.2015;
- d) In the event of shortfall in coal supply from the domestic linkage from CIL, DIL would procure additional fuel either by e-auction or competitive bidding, only after seeking prior approval from the UPERC; and
- e) The mechanism for additional fuel supply is transparent and at arm's length and necessary changes would be promptly made as soon as the PPA is approved by the UPERC.

**113.** Hence, it is submitted that the State Commission has fully complied with the statutory mechanism and directions in the Remand Order and any allegation by the Appellant that the Impugned Order is *sans* reasons and has been passed in a cursory manner without conducting a comparative cost analysis, is devoid of any merit and contrary to the materials on record.

**114.** On 01.04.2016, the submissions made by NPCL on 19.02.2016 were extensively dealt with and deliberated upon by the State Commission. In view of the firm commitments and undertakings tendered by NPCL i.e. (a) seeking prior approval before procuring fuel from alternate sources and (b) that there would be no upward revision of the project cost, the State Commission only after satisfying itself that the proposed power procurement is in consumers' interest, granted its approval to the PPA. The



State Commission however placed a further and additional safeguard and directed DIL to ensure that coal available under the FSA would be first utilized for supply of 187 MW to NPCL. This further reduced any fuel-related risk which the consumers of the State would have been exposed to. The State Commission approved the deviations in the PPA and approved the PPA dated 26.09.2014 after seeking commitments / undertakings from the parties and ensuring that the impact of any additional cost will not be passed onto the consumers. Relevant part of the proceedings held on 01.04.2016, recorded in the Impugned Order passed by the State Commission is extracted below:

*“...the Commission allows that in case of any shortfall in the quantity of coal supply from the domestic linkage from SECL, DIL and NPCL in consent **may approach the Commission for prior approval of procurement of fuel from alternative sources. However, it would be ensured by DIL that coal available under FSA would first be utilized for supply of 187 MW to NPCL**”*

(Emphasis Supplied)

**115.** Thus, the State Commission has acted in accordance with law and discharged its statutory obligations in a bonafide manner while acting in compliance to the Remand Order passed by this Tribunal. That the Impugned Order has to be read and appreciated in the entirety of the proceedings in order to assess the manner in which it has been passed. Hence, it is respectfully submitted that the contention of the appellant that the impugned order is passed in a mechanical manner and without any reasons is entirely erroneous and liable to be rejected

### **Non-adherence to the Principles of Natural Justice / Public Hearing not held:-**

**116.** On the issue of public hearing, it is important to note the observation of this Tribunal in the remand order dated 28/05/2015. The relevant

observation of this Tribunal made in the order dated 28/05/2015 is reproduced hereunder:-

*24. Reasons introduce clarity and also give assurance to the litigants that their case is considered. In the circumstances, we are of the opinion that this matter needs to be remitted to the State Commission so that submissions of the parties can be considered afresh. While remitting the case, we would like to make it clear that we have not expressed any opinion on the merits of the case of the parties. Nothing said by us in this judgment should be treated as expression of our opinion on the merits of the case of the parties. The State Commission will apply its mind to all contentions raised by the parties independently and in accordance with law and arrive at its conclusions.*

*25. In the result, the impugned order is set aside. **The matter is remanded to the State Commission for fresh consideration of all the submissions of the parties, independently and in accordance with law.** All contentions raised by the parties are kept open. The appeal is disposed of in the aforestated terms."*

**117.** Thus, it is submitted that in the remand order it has been specifically mentioned by this Tribunal that the submissions of the parties are to be considered afresh and not that the public hearing needs to undertaken as done in the tariff matters under the Regulations.

**118.** A consumer cannot claim to have a grievance with respect to the source of power from where its distribution licensee seeks to procure electricity. Consumers' concern, at the highest, can only be with respect to the price at which power is being procured. No prejudice is caused to the consumer and none of its valuable rights are affected with the tying up of procurement with a particular generator as long as the tariff has not been finally fixed. Therefore, as a natural sequitur the consumers cannot claim to be heard at this stage.

**119.** In the light of the above, its understanding of the Remand Order was to hear submissions of the parties involved i.e. NPCL and DIL at the stage of approving the PPA.



**120.** The tariff determination under Section 62 (1) (a) read with Section 64 (5) of the Electricity Act is a comprehensive process which involves public consultation so as to ensure all interested persons can raise their objections. The Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 (hereinafter referred to as “**UPERC Regulations**”) provides for public consultation before the tariff can be finalized. Relevant part of the UPERC Regulations is extracted below:

*“136. The licensee or the generating company shall publish within three (3) days of submission of its application, a notice in at least two (2) daily newspapers widely circulated in the area of generation or supply, outlining the proposed tariff and calling for objections from the interested persons and the State Government.”*

**121.** Also, the State Commission vide Order dated 26.03.2018 has observed as follows:

*“ ....*

*The Commission clarified that the Commission would like to determine the tariff as per its earlier orders but the extra cost on account of procurement of additional coal and change in law shall be dealt with separately as is done in case-1 procurement. The Commission also clarified that the tariff stream submitted by the Petitioner need to be scrutinized in the Commission and deficiency notes if any shall be communicated to the Petitioner to which the Petitioner will have to reply at the earliest. After this process is completed the matter will be heard again and the Commission will take a call on the admittance of the tariff petition.”*

**122.** Thus, prior to determination of the tariff all stakeholders, including the Appellant, will have sufficient opportunity to raise their concerns and objections. The State Commission appreciates and acknowledges that consumers play an important role in the determination of tariff. The State Commission shall therefore, as it is statutorily bound to, take into account all the submissions of the consumers during the tariff determination exercise and submits that it would never give a go-by to the statutory scheme and extant regulations. Thus, the apprehension of the Appellant

that it has been unable to voice its objections to the grant of PPA is misconceived as it has ample opportunity to present its concerns / issues before the State Commission at the appropriate stage.

### **Related Party Transaction**

**123.** With respect to contention of the appellant that NPCL and DIL cannot enter into a PPA for procurement of power as the two are sister concerns, the State Commission respectfully submits that the Electricity Act, 2003 (hereinafter referred to as “**Electricity Act**”) does not prohibit / restrict sister concerns from entering into a PPA.

**124.** In view of the failed attempts of NPCL to procure power from long term sources, NPCL sought to enter into a PPA through the bilateral negotiated route under the provisions of Section 62 with DIL as the tariff was competitive and DIL was prepared to supply power without any delay as its plant was ready and commissioned.

**125.** This Tribunal in Appeal no. 88 of 2015, while passing the remand order dated 28/05/2015 has also expressly noted that respondent no. 3 is an affiliate company of respondent no. 2 and the bid of the respondent no. 3 was earlier rejected by the State Commission on that count. That conscious of the above fact this Tribunal in the remand order directed the state commission to examine the PPA entered upon between the respondent no. 2 and 3 on merits and further directed the commission to consider that in past 5 attempts by respondent no. 2 to procure power through Competitive Bidding Process has failed. The relevant paragraph of the remand order dated 28/05/2015 is reproduced hereunder:-

*“19. Learned counsel for the State Commission supported the impugned order. **Counsel submitted that Respondent No.2 is an affiliate company of the Appellant and its bid was earlier rejected on that count. Counsel submitted that the State Commission has discretion to choose either Section 62(1)(a) of the Electricity Act to give approval to negotiated***

**PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National Tariff Policy read with Section 63 of the Electricity Act. The State Commission has chosen the competitive bidding route for which it cannot be faulted.**

.....

**23. The State Commission will have to address the Appellant's contention that it had made five attempts to procure power through Competitive Bidding Process, but that did not result in an effective arrangement for getting the necessary quantum of power required on long term basis; that the last attempt made by the Appellant which resulted in the signing of the PPA did not result in the commencement of supply of power from 30.4.2014 as envisaged by PPA; that need of the Appellant is to have long term arrangement forthwith instead of speculating purchase for the supply at a later date through Competitive Bidding Process and that the State Commission itself had repeatedly impressed upon the procurement of power on the long term basis forthwith instead of procurement of power on short term basis. The State Commission has also not taken into account the Appellant's contention that Respondent No.2 is willing to supply the required capacity at an indicative fixed charges/capacity charges working out to Rs.1.99 per kWh exclusive of reimbursement of income tax, CTU, SLDC charges for transmission of power from the generating station which will be on an actual basis and the project cost and other tariff elements leading to the above capacity charges which shall be further subject to prudence check by the State Commission under Section 62 of the Electricity Act. While leaning in favour of Competitive Bidding route under Section 63 of the Electricity Act and rejecting the negotiated route under Section 62 thereof, **the State Commission should have examined the PPA entered into between the Appellant and Respondent No.2. The State Commission has not done so.** Its reasoning is solely based on interpretation of MoP Guidelines. It has held that after 5.1.2011 for long term power purchase only competitive route is available. We have already noted the Appellant's contention that the State Commission's interpretation of MoP Guidelines is totally incorrect and illegal. Submissions of the Appellant in this regard have not been taken into consideration by the State Commission...**

**(Emphasis supplied)**

**126.** Hence, in the facts of the present case wherein vide the Remand Order this Tribunal directed the State Commission to address the contention of NPCL that it had made repeated attempts to procure power through competitive bidding which were unsuccessful. The State Commission was mandated to factor in the background in which the PPA between NPCL and DIL was entered in to.

**127.** It is further submitted that vide various proceedings the State Commission had directed NPCL to make arrangements for procurement of power on long term basis as it ensures availability of power at optimum rates for consumers in future. As power could not be procured through competitive bidding, NPCL executed the PPA with DIL as DIL was in position to supply power immediately. Given the fact that it was essential that NPCL have a long term power procurement arrangement in place as procuring power from short term sources would eventually lead to high tariffs and be detrimental to consumer interests, the State Commission, after examining the case from all aspects approved the PPA between two sister concerns. In doing so the State Commission has safeguarded the interests of both NPCL as well as consumers.

**128. Ms. Divya Chaturvedi, Learned Counsel for the Respondent No. 2 in Appeal Nos. 150 of 2017 and 185 of 2019 has submitted the following Written Submissions on behalf of Noida Power Company Ltd. for our consideration.**

The Appellant has *inter-alia* raised the following issues in the aforesaid two appeals, which are summarized as under:

- (i) Respondent No.2/NPCL can procure power through competitive bidding only under Section 63 of the Electricity Act, 2003 ("**Electricity Act**");
- (ii) Procurement of power under Section 63 of the Electricity Act is also the mandate of National Tariff Policy 2016, which has been recognized to have the force of law by the Hon'ble Supreme Court in the Judgment dated 11.04.2017 issued by the Hon'ble Supreme Court in Civil Appeal Nos.5399-5400 of 2016: Energy

Watchdog vs. Central Electricity Regulatory Commission & Ors.  
 (“**Energy Watchdog Judgment**”);

- (iii) Respondent No.2/NPCL and Respondent No.3/DIL, being sister concerns, have executed the PPA under Section 62 of the Act to the exclusion of other generators;
- (iv) The State Commission has failed to follow transparency, principles of natural justice and a public process before approving the PPA, which was a related party transaction between Respondent No.3/DIL and Respondent No.2/NPCL;
- (v) The exercise of jurisdiction of the State Commission under Section 64(5) of the Electricity Act for determination of generation tariff of Respondent No.3/DIL’s project for supply to Respondent No.2/NPCL is not correct;
- (vi) There was no prudence check on the capital cost *vis-a-vis* other sources of power to ascertain whether any other generator with a lower capital cost is willing to supply power; and
- (vii) The State Commission has failed to conduct the prudence check during the determination of tariff of Respondent No.3/DIL’s project.

**129.** During the course of hearings and since the Appeal No.150 of 2017 has been filed, Appellant has also raised the issue of Notarization of PPA Approval Petition before the State Commission *albeit* without seeking to amend the grounds raised in Appeal No.150 of 2017.

**Re. Decision to procure power under Section 62 of the Electricity Act was on account of exceptional circumstances in the present case**

**130.** It is noteworthy that Respondent No.2/NPCL had estimated its energy requirement to rise up to 4267 MUs by the year 2022 on the basis of

load forecast study conducted by PWC Limited. Respondent No.2/NPCL was thus required to arrange for power procurement of up to 1059 MW to meet the power demand of its consumers by 2022. In view of the same, the State Commission had from time to time and starting from as early as 2009, emphasized on the urgent need for Respondent No.2/NPCL to formalize a firm long-term power procurement arrangement for meeting the load requirement of consumers in the licensed area since in the absence of a long-term PPA, Respondent No.2/NPCL was entirely dependent on short-term power procurement, including power procured on day-ahead basis. This occasionally caused an acute shortage of power for the consumers of Respondent No.2/NPCL in its licensed area at Greater Noida as well as uncertainty in terms of sourcing of power and availability of transmission corridor. In view of the same, the State Commission had emphasized on the urgent need for Respondent No.2/NPCL to formalize a firm long-term power procurement arrangement for meeting the load requirements of consumers in the licensed area in the following Orders:

- (i) Tariff Order dated 19.10.2012 in Petition No.640 of 2009, wherein it has been held that:

*“The Commission is of the view that NPCL should ensure that the entire quantum of required power supply is tied up through optimum long-term Power Purchase Agreements (PPAs) ....”*

- (ii) Tariff Order dated 31.05.2013 in Petition No.858 of 2012, wherein it has been held as follows:

*“With growing demand in NPCL’s area and long term supply being available from UPPCL remaining constant at 45 MW only, the Commission observes that NPCL will have huge demand-supply gap and will be procuring most of its power on a short term basis from bilateral/ other sources. Thus, it is imperative that NPCL ties –up for long/ medium term power for the maximum possible quantum.”*

- (iii) Order dated 30.05.2014 in Petition No.903 of 2013, wherein it was held that:



*“The Commission directs NPCL to seriously consider the issue of ensuring long term supply of power to the consumers of their area within the existing provisions and bring that proposal to the Commission, which may be lasting and long term”*

- (iv) Order dated 10.09.2014 ‘In the matter of Petition under Sections 86 (1)(c) & (f), 35 and 36 of Electricity Act, 2003 and Open Access for conveyance of up to 45 MW power being procured from alternate sources at UPPTCL’s 132 KV Surajpur Substation for Noida Power Company Ltd.’ wherein it was held that:

*“NPCL is directed to make Long Term PPA for its power requirement within six months.”*

- (v) Order dated 23.09.2014 on the presentation of ARR for FY 2014-15 and Truing-up of FY 2012-13 made by Respondent No.2/NPCL, wherein it was recorded that:

*“5. Long-term PPA:*

*...*

*It was also discussed that NPCL must enter into LTPPAs with parties which can provide supply of power on immediate basis taking into consideration the ongoing transmission constraints also...”*

- (vi) Order dated 01.10.2014 in Petition No.914 of 2013, wherein the State Commission has held as follows:

*“With such a huge and ever growing demand in the area, NPCL is still procuring the entire power only from the short-term sources. Presently as the short term power rates are low, the consumers are being benefited by sourcing the power from short term sources. However, such situation would not last forever and NPCL in such cases may have to buy the costlier power to serve its consumers. Having a long term power sources ensures that the availability of power at the optimum rates for its consumers for future. The same will also benefit the NPCL to optimally plan all its resources. The Commission notes that NPCL in past has tried to tie up with the long term power sources.”*

### **Re. Five Failed Attempts to Procure Power Through Competitive Bidding from FY 2008-09 onwards**

**131.** In view of the increasing demand and the aforesaid repeated directions issued by the State Commission, Respondent No.2/NPCL decided to enter into long-term PPAs and accordingly, Respondent No.2/NPCL made 5 (five) attempts to procure power on a long-term basis through competitive bidding process during the period FY 2008-09 to FY 2010-11. However, due to various reasons, the procurement of power through long-term sources could not be finalized in the first 4 (four) attempts.

**132.** The fact that there were 4 (four) failed bidding attempts made by Respondent No.2/NPCL since FY 2008-09 is an established fact, which was accepted/acknowledged by the State Commission as well as this Tribunal (in Appeal No.88/2015) previously. The State Commission in its Tariff Order dated 19.10.2012 in Petition No.640 of 2009 had duly acknowledged the above fact that since FY 2008-09, due to lack of sufficient bids, procurement of power through long-term sources could not be finalized. In this context, the relevant extracts of the Tariff Order dated 19.10.2012 are extracted hereunder for ease of reference:

“ ...

*12.11.6 It is understood that NPCL **since FY 2008 – 09**, the Petitioner has made four attempts to procure power through long term competitive biddings, but due to lack of sufficient valid bids, procurement of power through long-term sources could not be finalized. ...**The fifth attempt was made in FY 2010-11...**”*

**133.** In view of the above, it is therefore evident that, the Appellant has erroneously alleged in its written submissions filed in Appeal No.150 of 2017 that the failed attempt to procure power through competitive bidding by Respondent No.2/NPCL was 10 (ten) years back, i.e., in 2006-2007. Respondent No.2/NPCL had continuously floated bids for procurement of



power since FY 2008-2009. However, the procurement of power was not possible till FY 2010-11 due to lack of sufficient bids.

**134.** The fifth attempt to procure power on long-term basis was in FY 2010-11 and such attempt became futile as recently as 22.08.2013 when the PPA entered into between Respondent No.2/NPCL with M/s. Essar Power (Jharkhand) Limited (“**EPJL**”) on 09.05.2012 for procurement of 240 MW power (“**EPJL PPA**”) had to be terminated on 22.08.2013 by the Respondent No.2/NPCL on the ground of non-fulfilment of “Conditions Subsequent” by EPJL for a period of 15 (12 + 3) months, as per the terms of the PPA. Thus, Respondent No.2/NPCL had made five attempts to procure power since 2008-09 and till 2013. In spite of multiple efforts, Respondent No.2/NPCL was left in a lurch, i.e., without a long-term PPA and was left absolutely dependent on short-term power purchases to meet its universal supply obligations as a distribution licensee against a peak demand of around 285 MW for FY 2016-17 on a monthly basis. It is also noteworthy that Respondent No.2/NPCL had been receiving 45 MW of power from Uttar Pradesh Power Corporation Limited (“**UPPCL**”). However, subsequently, UPPCL discontinued the supply of 45 MW of power to Respondent No.2/NPCL with effect from 12.02.2014.

**135.** The issue with respect to the EPJL PPA and the subsequent termination had stretched out till 22.08.2013. Thereafter, Respondent No.2/NPCL explored the possibility of entering into a PPA with Respondent No.3/DIL and consequently filed the PPA Approval Petition on 29.09.2014 before the State Commission. Therefore, evidently, the Appellant has erroneously alleged that Respondent No.2/NPCL is relying upon a failed bid attempt 10 (ten) years back to enter into a PPA with its sister-concern.

**136.** It is submitted that in view of the aforesaid background, Respondent No.2/NPCL had no other viable alternative at that time other than entering into the PPA with Respondent No.3/DIL. The Appellant has however erroneously contended that Respondent No.2/NPCL had other alternatives (as detailed hereunder) instead of entering into the PPA with Respondent No.3/DIL, which was a sister-concern of Respondent No.2/NPCL.

Re.: Respondent No.2/NPCL could not have approached other bidders upon termination of EPJL PPA

**137.** The Appellant has submitted that Respondent No.2/NPCL ought to have approached other bidders who had submitted their bids during the 5<sup>th</sup> bidding attempt pursuant to the EPJL PPA being terminated. The Appellant has erroneously contended that irrespective of the cancellation of the coal blocks of L2 and L3 bidders, the bidders had to arrange their commercial affairs to fulfil their obligation to supply power to Respondent No.2/NPCL.

**138.** It is pertinent to note that initiation of competitive bidding and/or even successful completion of the competitive bidding does not stipulate any guarantee of commencement of supply of power as the selected project/bidder may not be able to ensure timely commission of the power project for variety of reasons as in the case of the PPA executed by Respondent No.2/NPCL with EPJL.

**139.** It is to be noted that post award of the Contract to the L1 Bidder, i.e. EPJL, the competitive bidding process under Section 63 of the Electricity Act was concluded. The suggested tying up of long-term power with L2 or L3 Bidder after L1 Bidder failed to fulfil the terms of the PPA, would have resulted in a PPA under Section 62 of the Electricity Act only. Since there was no provision in the bid documents for tying-up capacity with

unsuccessful bidders after completion of the bidding process. Thus, it is to be noted that the Appellant also accepts that after the failed attempt to tie-up power through competitive bidding, it was logical for Respondent No.2/NPCL to tie-up capacity under Section 62 of the Electricity Act.

**140.** The termination of EPJL PPA was only finalised 2 (two) years pursuant to the bids floated by Respondent No.2/NPCL. Respondent No.2/NPCL, pursuant to being unsuccessful to procure long term power under competitive bidding route in 5 (five) attempts since 2008-09 even in spite of execution of PPA with EPJL, also explored the project execution status of the remaining bidders (excluding EPJL) from the bid conducted by Respondent No.2/NPCL. It was found that various power plants were facing uncertainty on account of reasons such as cancellation of coal block and there was no certainty of commencement of power flow from the said generators.

**141.** Respondent No. 2/NPCL while exploring the alternative bidder found that there was no certainty of commencement of power flow from L2 Bidder (i.e., Visa Power Chhattisgarh) and there was no assured fuel supply arrangement on account of cancellation of coal block from L3 Bidder (i.e., Jaiprakash Nigrie MP). On the contrary, the Project of the Respondent No. 3/DIL had been commissioned on 02.08.2014 and the Long-term Access (“**LTA**”) and executed Fuel Supply Agreement (“**FSA**”) required for commencement of the supply of power to Respondent No. 2/NCPL were already in place.

**142.** Pertinently, the project of the L2 bidder is yet to be commissioned and the L3 bidder had offered only 50 MW of power against Respondent No.2/NPCL’s demand of 240 MW. Further, both the L2 and the L3 bids were based on captive coal blocks, which have been deallocated in terms

of Hon'ble Supreme Court's Judgment dated 25.08.2014 read with the decision dated 24.09.2014 passed in Writ Petition (Crl.) No. 120 of 2012 with Writ Petitions © Nos. 463, 515 of 2012 and 283 of 2013: Manohar Lal Sharma vs. Principal Secretary & Ors. ("**Cancellation Judgment**").

**143.** The Appellant is proposing to tie-up power from captive coal block projects even if their allocation is cancelled and the projects are to source fuel from domestic open market/e-auctions/imports, etc. It is submitted that fuel supply related risk and readiness of the Project are some of the important criteria for exploring the possibilities for selection of alternative bidders.

**144.** It is humbly submitted that due to the lack of any long-term PPAs fructifying, the consumers of Respondent No.2/NPCL were already suffering and the same is evident from the directions issued by the State Commission to Respondent No.2/NPCL on 19.10.2012, 31.05.2013, 30.05.2014, 10.09.2014, 23.09.2014 and 01.10.2014 for procurement of long-term power. Therefore, R.2 felt it appropriate to explore an alternate option to arrange the long-term power under Section 62 of the Electricity Act from a commissioned project with assured fuel supply and Long-term Access to Northern Region and where the chances of failure of fructifying of the contract were minimal. Floating another bid for procurement of power would have led to further delay in procurement of power on long-term basis.

**Re.: Respondent No.2/NPCL could not have approached Athena Power**

**145.** Appellant's reliance on the proposal of a 3<sup>rd</sup> party, i.e., Athena Power to supply power at a cheaper tariff than EPJL is entirely misplaced. It is

submitted that pursuant to Respondent No.2/NPCL submitting its petition for approval of PPA after the fifth attempt of Respondent No.2/NPCL before the State Commission, it received a letter from Athena Power proposing to supply power to Respondent No.2/NPCL on long-term basis at a levelized tariff of ₹ 3.667/kWh which was less than the tariff quoted by EPJL. Notably, the State Commission on 30.05.2011 passed an order in an Application filed by the Respondent No.2/NPCL permitting it to take necessary steps as per the provisions of the Standard Bidding Documents of Request for Proposal. Based on the aforesaid order dated 30.05.2011, Respondent No.2/NPCL sent a letter to all bidders including EPJL, requesting them to submit the revised financial bid to match or offer the lower tariff than the levelized tariff of ₹ 3.667/kWh quoted by Athena Power (3<sup>rd</sup> party). This Tribunal by way of its judgement dated 16.12.2011 in Appeal No.82 of 2011: Essar Power Limited vs. UPERC & Ors. Filed by EPJL challenging the said Order dated 30.05.2011 cancelled the letter sent by Respondent No.2/NPCL to the bidders and remanded the matter to the State Commission with the direction to dispose the petition for adoption of discovered tariff under competitive bidding route as per the Section 63 of the Electricity Act. Therefore, Respondent No.2/NPCL could not have procured power from Athena Power instead while the PPA with EPJL was subsisting.

**146.** Further, from the data available in the public forum, it is understood that Athena Power's Chhattisgarh thermal power project has till date been unable to secure a coal linkage and the same was abandoned by the promoters after only 80% of Unit 1 and 30% of Unit 2 of the Project could be completed till September, 2016. In this context, Andhra Pradesh State Electricity Board Assistant Executive Engineers' Association ("AAEEA") has written a letter to the Energy Secretary in April, 2020, opposing the

proposed move of Andhra Pradesh generating company to acquire the aforesaid power project of Athena pursuant to the same being abandoned by the promoters.

**Re. 5(d): 55,000MW power being tied up through competitive bidding till FY 2015-16**

147. Apart from the aforesaid specific instances pointed out by the Appellant erroneously to contend that Respondent No.2/NPCL could have explored other options instead of entering into a PPA with Respondent No.3/DIL, the Appellant has also relied upon a general figure of 55,000 MW (allegedly as per the data compiled by the Central Electricity Regulatory Commission and Forum of Regulators) power tied-up through competitive bidding since inception of the bidding process till FY 2015-16. It is submitted that this contention of the Appellant is entirely bereft of the situation that was being faced by Respondent No.2/NPCL at that time. The Appellant appears to have picked up the selective figure of 55,000 MW having been tied-up through competitive bidding without disclosing to this Tribunal that only a small portion (55,000 MW) of the total installed capacity (i.e. 303 GW) in the country has been tied-up through competitive bidding. Further, there is no clarity as to how much power out of the aforesaid 55,000 MW has been tied-up by thermal power plants and how much power has been tied-up by renewable power projects.

**Re. 5(e): Availability of 30,000 MW of surplus power**

148. Additionally, the Appellant's submission regarding 30,000 MW power being available as surplus in the country is erroneous and misplaced. The said figure of 30,000 MW power under Case-1 projects lying uncontracted has been noted in the Report issued by the Forum of Regulators in November, 2017 ("**FoR Report**"), wherein it has in fact been noted that the

aforesaid uncontracted power is being sold in the open market on merchant basis.

**149.** The aforesaid FoR Report (page 18) noted that this Tribunal has clarified that option to procure power under both Section 62 and Section 63 of the Electricity Act is available. The FoR Report has further noted the following key points:

- (i) Various risk factors such as risk of delay in project commissioning, quality of equipment procured, adequacy & quality of fuel, adequacy & availability of transmission corridor for power evacuation, less power off-take by buyer, financial health of Discoms along with market movement and changes in the policy environment make the viability of the competitively bid projects very sensitive (page 12);
- (ii) Since FY 2010, the quoted tariffs have seen an increasing trend in the subsequent years. In 2012, there was a steep increase from earlier bids of under Rs. 4.00/kWh to about Rs. 5.00/kWh. Such rise in tariff can largely be attributed to the identified risk factors and inclusion of higher risk premium (page 12);
- (iii) Bidders include part of fixed cost into variable charges & vice-versa (page 13);
- (iv) It is very difficult to compare projects under competitive bidding route with the ones under regulated route and there are instances when the tariff under regulated route is cheaper than similarly placed competitive bidding projects.

**150.** The availability of surplus power for a procurer at a particular location in the grid in any particular period under long-term, medium-term and short-term route is dependent on a number of factors. It is immaterial how much



power may generally be available as surplus in the country which may be located in different parts of the grid across the nation and any power from a particular source may be not available to a procurer at competitive rates due to various reasons such as unavailability of long-term open access/transmission corridor, failure to satisfy conditions subsequent and subsequent termination of the PPA entered by the generator, inability to supply power at a competitive tariff due to risks associated to a specific project, lack/inadequacy of fuel supply arrangement, etc.

**Re. 5(f): Respondent No.2/NPCL's alleged intention to never procure power through competitive bidding**

**151.** The Appellant has further contended that Respondent No.2/NPCL has no intention to undertake a bidding process for procurement of power while referring to certain orders passed by this State Commission. In this context, the Appellant has referred to the PPA Rejection Order dated 27.01.2015 in Petition No. 971/2014 ("**Rejection Order**"), which itself was challenged before the Tribunal and remanded to the State Commission for fresh adjudication as per the Remand Order dated 28.05.2015. The Appellant has further relied upon the Orders dated 13.11.2017 and 31.07.2018 passed by the State Commission during the pendency of the present matters.

**152.** The Order dated 13.11.2017 was passed by the State Commission in Petition No.1130/2016 for proposed supply of power by Respondent No.3/DIL from Unit 1 of its Project (whereas the current Appeal is with respect to Unit 2 of the Project) to Respondent No.2/NPCL. Pertinently, while Respondent No.2/NPCL had already started receiving the power under the PPA from Unit2 of the Project with effect from 18.11.2016, the



parties had subsequently initialled another PPA for supply of 200 MW power from Unit1 of the Project, proposed to commence from 01.04.2018.

**153.** In the present case, i.e., supply of 170 MW net Contracted Capacity from Unit 2 of the Project, the Respondent No.2/NPCL had failed to secure a long-term contract under competitive bidding even after attempting 5 (five) times under Section 63 of the Electricity Act between the period of 2008-2013. Whereas, in the second case, i.e., the proposal for supply of 200 MW capacity from Unit 1 of the Project, the State Commission in its Order dated 13.11.2017 directed the Respondent No.2/NPCL to first exhaust the route of competitive bidding available to it under Section 63 of the Electricity Act and then approach the State Commission with a fresh petition if the said attempt has failed. Notably, at the time of Petition No. 1130/2016 being filed by Respondent No.2/NPCL it had already tied up a substantial portion of its demand under the present PPA for the supply of power from Unit 2 of the Project and thus, addressed the aspect of reliability of power supply in the licensed area to a substantial extent. Thus, the case of proposed supply of power from Unit 1 of the Project was circumstantially different from that of the supply of power from Unit 2 of the Project under the PPA. Therefore, the State Commission had rightly exercised the power conferred on it under the Electricity Act to allow either procurement of power under Section 62 or Section 63 of the Electricity Act while approving the PPA vide its PPA Approval Order.

**154.** Subsequently, Respondent No.2/NPCL had invited bids for medium-term power procurement for 100 MW from 01.12.2018 to 31.03.2020 (for 16 months) and the same was successful. The State Commission in its Order dated 31.07.2018 in Petition No.1325/2018 passed in the context of the aforesaid procurement had enquired from Respondent No. 2/NPCL as to why it has not tied-up power under long-term arrangement instead.

Respondent No.2/NPCL in response had submitted that it did not have adequate transmission capacity from the primary sub stations, which it was attempting to get from Uttar Pradesh Power Transmission Corporation Limited (“**UPPTCL**”). This justification has been accepted by the State Commission in its Order dated 31.07.2018, which has attained finality. Accordingly, it is apparent that the Appellant has selectively relied upon isolated findings of the State Commission in unrelated matters. By no stretch of imagination can Respondent No.2/NPCL’s failure to procure more power on long-term basis be used to negate a long-term procurement under which Respondent No. 2/NPCL has been procuring power for more than 3 (three) years.

**155.** Further, the Appellant questioned the transmission constraints faced by Respondent No.2/NPCL in tying up power under long term PPAs, as has been recorded in the aforesaid Order dated 31.07.2018 in Petition No.1325/2018, by highlighting that no such transmission constraints were faced by Respondent No.2/NPCL at the time of tying-up power with Respondent No.3/DIL. It is humbly submitted UPPTCL is under obligation to develop State Transmission Network in close coordination with the Discoms of the State. The absence of transmission capacity at specific points of time cannot be a ground for questioning the intent of Respondent No.2/NPCL for tying-up power under long term PPAs. Therefore, the contention of the Appellant in this regard is devoid of any merit and liable to be dismissed.

**156.** Pertinently, Respondent No. 2/NPCL has not even challenged the findings of the State Commission in its aforesaid Order dated 13.11.2017. Therefore, the interest of Respondent No. 3/DIL is not served today in any way by Respondent No.2/NPCL not tying-up additional power on long-term basis.

**157.** In fact, the aforesaid orders establish the various issues with power procurement still being faced by Respondent No.2/NPCL and thus the said orders continue to justify the procurement of power on long-term basis from a reliable source of power like the Project of Respondent No.3/DIL.

**158.** Over and above these facts, lack of any other feasible options, Respondent No.2/NPCL decided to enter into a long-term PPA with Respondent No.3/DIL which had a commissioned project with assured fuel supply and Long-term Access to Northern region. In this context, Respondent No.2/NPCL filed the PPA Approval Petition wherein it *inter-alia* provided the reasons for entering into the PPA with Respondent No.3/DIL while disclosing that Respondent No.3/DIL is one of the group companies of Respondent No.2/NPCL. The said reasons in brief were as follows:

- (i) Five (5) failed attempts in securing long-term power through competitive bidding under Section 63 of the Electricity Act and uncertainty/volatility in short-term power procurement;
- (ii) Respondent No.3/DIL was willing to supply 170 MW net Contracted capacity at an indicative fixed charge/capacity charge working out to Rs. 1.99 per kWh for the first year exclusive of taxes and other statutory charges on actual basis subject to prudence check by the State Commission with a commitment from the Respondent No. 3/DIL that the fixed charge will not undergo upward revision. The said indicative fixed charges were lower than most of the contemporary projects at that point;
- (iii) Delivery date of power would be immediately after PPA approval since Unit 2 of the Project of Respondent No.3/DIL already stood commissioned as on 02.08.2014;

- (iv) Supply of power would not commence at least a year from the initiation of the competitive bidding. Further, no successful bidder/project developer would be in a position to commence supply of power for at least a period of 18-24 months and the same would be inter-alia in contravention of directions issued by the State Commission vide Order dated 10.09.2014 to enter into a long-term power procurement arrangement within 6 (six) months;
- (v) Respondent No. 3/DIL had already obtained dedicated transmission corridor on long-term basis and long-term access for 150 MW from Unit 2 of the Project;
- (vi) The transaction was proposed to be conducted at arm's length; and
- (vii) The State Commission had complete power and authority to approve the PPA and determine the tariff under Section 62 of the Electricity Act as had already done by various state electricity regulatory commissions and even upheld by this Tribunal in Judgment dated 31.03.2010 in BSES Rajdhani Power Ltd. vs. DERC & Ors., 2010 ELR (APTEL) 0404 ("**BSES Judgment**").

**159.** Therefore, in view of the difficulties faced by Respondent No.2/NPCL in tying-up power on long-term basis and the benefits provided by Respondent No.3/DIL, the PPA dated 26.09.2014 entered between the Respondents was in the best interest of the consumers of Respondent No.2/NPCL, who were in desperate need of reliable long-term power in the shortest time possible. Keeping in mind the aforesaid benefits, Respondent No.2/NPCL had filed the PPA Approval Petition before the State Commission.

## **Procurement of power under Section 62 of the Electricity Act is permissible**

**160.** The State Commission, by way of its Rejection Order dated 27.01.2015 in the PPA Approval Petition rejected Respondent No.2/NPCL's proposal and held that only competitive bidding route was available to Respondent No.2/NPCL for long-term power purchase by erroneously relying upon the Guidelines issued by the Ministry of Power on 05.01.2011.

**161.** The Rejection Order dated 27.01.2015 was challenged by Respondent No.2/NPCL before this Tribunal by way of its Appeal No.88 of 2015 (NPCL vs. UPERC & Anr.,). This Tribunal vide its Remand Order dated 28.05.2015 was pleased to set aside the Rejection Order dated 27.01.2015 while holding that the State Commission's observation that for long-term purchase only competitive route is available appears to be in teeth of the clear finding of this Tribunal in the **BSES Judgment**. The Tribunal noted that while the State Commission may choose either route under Section 62 or Section 63 of the Electricity Act, the said discretion has to be based on rules of reason and justice. Further, this Tribunal remanded the matter to the State Commission inter alia directing the State Commission to deal with various contentions raised by Respondent No.2/NPCL regarding viability of entering into a PPA with Respondent No.3/DIL which were not dealt with by the State Commission.

**162.** Pertinently, the Hon'ble Supreme Court in its judgment dated 11.04.2017 in Civil Appeal Nos. 5399-5400 of 2016: Energy Watchdog vs. Central Electricity Regulatory Commission & Ors. ("Energy Watchdog Judgment") has also held that a distribution licensee may execute a PPA either under Section 62 or Section 63 of the Electricity Act. The relevant extract in this context is reproduced hereinbelow:

*“20. ... The reason why Section 62 alone has been put out of the way is that **determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding.** In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff...”*

*[Emphasis Supplied]*

### **Re. The State Commission has passed a reasoned order**

**163.** The contention of the Appellant that the State Commission has failed to pass a reasoned order with respect to procurement of power under Section 63 v/s Section 62 of the Electricity Act since no issue was framed in this respect is erroneous. It is evident from the Remand Order as well as other judgments highlighted hereinabove that the distribution licensee is free to procure power in terms of a PPA executed through the regulated route. The State Commission in Paragraph 1 of the PPA Approval Order has noted that this Tribunal vide the Remand Order has clarified that the State Commission is vested with the discretion to accord its approval to the PPA signed under Section 62 of the Electricity Act or to direct the distribution licensee to resort to the competitive bidding as per Clause 5.1 of the National Tariff Policy, 2006. Therefore, the State Commission in the PPA Approval Order applied its discretion, keeping in mind all facts brought on record by Respondent No.2/NPCL and pursuant to undertaking the requisite prudence check (detailed hereinbelow).

**164.** In view of the Remand Order passed by this Tribunal, the State Commission pursuant thereto vide its Orders dated 29.09.2015 and

15.01.2016 sought various details from Respondent No.2/NPCL which was provided by Respondent No.2/NPCL accordingly. Pertinently, Respondent No.2/NPCL had vide its PPA Approval Petition as well as the Submissions dated 26.10.2015, filed in response to the Order dated 29.09.2015 had in great detail provided the justification for entering into the PPA with Respondent No.3/DIL under Section 62 of the Electricity Act. Respondent No.2/NPCL while making the aforesaid submissions had also relied upon the BSES judgment as well as various instances where electricity regulatory commissions have allowed procurement of power under Section 62 of the Electricity Act in recent times. Therefore, the State Commission in terms of the findings of the Tribunal in the Remand Order as well as the submissions filed by Respondent No.2/NPCL had decided to allow the procurement of power from Unit 2 of the Project under Section 62 of the Electricity Act. The State Commission had vide its Orders dated 29.09.2015, 15.01.2016 and the PPA Approval Order dated 20.04.2016 undertook due prudence check and examined the various aspects of the proposed supply by Respondent No.3/DIL to Respondent No.2/NPCL under Section 62 of the Electricity Act *vis-à-vis* other projects under Section 63 of the Electricity Act. The State Commission had compared the levelized tariff of ₹ 4.79/kWh at UP periphery for supply of power offered under the PPA with the long-term Case-I bid tariffs under Section 63 of the Electricity Act adopted by the State Commission for procurement of power by UPPCL.

**165.** Even otherwise, there was no requirement in the present case for framing the issue of procurement of power under Section 62 *vis a vis* Section 63 of the Electricity Act, since the levelized tariff of Rs. 4.79/kWh at UP periphery was found to be competitive and aligned with the market reality by the State Commission. The State Commission accordingly passed a reasoned Order wherein it has categorically mentioned the



checks applied to verify the reasonability of the levelized tariff under the PPA for the proposed procurement of power from Unit 2 of the Project under Section 62 of the Electricity Act.

**166.** The Respondent No.2/NPCL had taken a conscious and prudent decision to enter into a long-term PPA for procurement of power at an indicative fixed charge which was highly competitive compared to other similar long-term PPAs entered into by distribution licensees. Therefore, the State Commission in the PPA Approval Order applied its discretion keeping in mind all facts brought on record by Respondent No.2/NPCL and pursuant to undertaking of requisite prudence check.

**167.** Regarding the averment of the Appellant that Respondent No.2/NPCL is bound to procure power only through competitive bidding in terms of the National Tariff Policy, it is reiterated that the said issue already stands decided in terms of the BSES Judgment and the Remand Order dated 28.05.2015. Further, the aforesaid position has also been recognized in the Energy Watchdog Judgment. This Tribunal in the BSES Judgment had dealt with the very same issue raised by the Appellant herein, i.e., whether power could be procured under Section 62 of the Electricity Act without complying with the competitive bidding process under Clause 5.1 of the National Tariff Policy, 2006 and held that the discretion to choose between either routes is with the State Commission. Further, this Tribunal while relying upon the BSES Judgment in the Remand Order had noted as under:

*“21. ...However, after referring to relevant judgments of the Supreme Court, this Tribunal held that the power under Section 62(1)(a) and Section 62(1)(b) conferred on the State Commission for determination of tariff through negotiated route cannot in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government/Executive and any rules or executive instructions or notifications which are contrary to any provisions of the tariff*



*statute shall be read down as ultra vires of the parent statute. This Tribunal rejected the contention that tariff determination under Section 62(1)(a) without adopting Competitive Bidding Process will render Clause 5.1 of the National Tariff Policy redundant as the distribution licensees in future will procure power from the generating companies through the negotiated route. This Tribunal observed that the said submission cannot be accepted as it is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. This Tribunal clarified that the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval to the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National Tariff Policy read with Section 63 of the Electricity Act.”*

[Emphasis Supplied]

**168.** The Clause 5.1 of the National Tariff Policy, 2006 has been recaptured in Clause 5.2 of the National Tariff Policy, 2016. As this Tribunal has already held in clear terms that power can be procured under both routes, i.e., regulated route under Section 62 or competitive bidding under Section 63, and that the National Tariff Policy, 2006 is not a bar on the aforesaid procurement, the same principle is also squarely applicable to National Tariff Policy, 2016.

**169.** Without prejudice to the aforesaid, it is submitted that it is an established principle of law that a subordinate legislation ought to be read harmoniously with the provisions of the parent Act. The National Tariff Policy, 2006 as well as the subsequent National Tariff Policy, 2016 have been framed in pursuance of Section 3 of the Electricity Act and are therefore sub-ordinate statutory policies which are required to be interpreted within the statutory parameters established by the parent statute, i.e., Electricity Act. In this context, reliance is placed on the judgment of Sales Tax Commissioner & Ors. Vs. B. G. Patel & Ors., (1995) 1 SCC 429. *Arguendo*, in the event the interpretation of the National Tariff Policy sought to be given by the Appellant is accepted then the same would

render the regulated route under Section 62 of the Electricity Act otiose, which cannot be the intention of the legislature. In terms of the judgment of the Hon'ble Supreme Court in *St. Johns Teachers Training Institute vs. Regional Director, National Council for Teacher Education & Anr.*, (2003) 3 SCC 321, it is established principle of law that delegated legislation cannot supplant the provisions of the enabling Act, but is required to supplement it.

**Re. Respondent No.2/NPCL has not challenged the validity of National Tariff Policy**

**170.** Contrary to what has been contended by the Appellant, it is not the case of Respondent No. 2/NPCL that the National Tariff Policy is in contravention of the provisions of Electricity Act and specifically, Section 62 of the Electricity Act. However, it is submitted that in terms of established regulatory and statutory scheme, the National Tariff Policy, being a delegated legislation, cannot be interpreted to override the statutory provisions of the Electricity Act. In any event, the National Tariff Policy, 2006 and the National Tariff Policy, 2016 being a policy, having been framed under Section 3 of the Electricity Act can merely be a guiding principle and not override statutory provisions.

**171.** In terms of Clause 5.1 of the National Tariff Policy, 2006 as well as Clause 5.2 of the National Tariff Policy, 2016, all future power procurement “should” be under the competitive bidding route except where regulators will need to resort to tariff determination based on norms. Therefore, the National Tariff Policy also recognizes that regulators such as the State Commission have the discretionary power to decide the cases where it needs to determine the tariff under Section 62 of the Electricity Act in case of future procurement of power also. Further, Clause 2.2 of the National Tariff Policy, 2016 clearly states that the “*Central Electricity Regulatory*

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*Commission (CERC) and State Electricity Regulatory Commissions (SERCs) shall be guided by the tariff policy in discharging their functions including framing the regulations".* Hence the reliance placed by the Appellant on the mandatory nature of the National Tariff Policy, 2016 in choosing the route of procurement of power is completely misplaced.

**172.** The present case of Respondent No.2/NPCL is an exceptional one—since despite multiple attempts, it had been unable to procure power under Section 63 of the Electricity Act, and any further delay in tying-up power on long-term basis would have caused grave prejudice to the consumers of Respondent No.2/NPCL, the State Commission applied its discretionary power to approve the present PPA under Section 62 of the Electricity Act.

**173.** The discretion of the State Commission to choose either of the routes provided under Section 62 or Section 63 of the Electricity Act cannot be ignored from the factual context. The State Commission as an independent regulator had taken into account the various unfruitful attempts of Respondent No.2/NPCL for procuring power through the competitive bidding route and allowed Respondent No.2/NPCL to procure power from Respondent No.3/DIL through a long-term PPA under Section 62 of the Electricity Act. It is submitted that the procurement of power under competitive bidding route cannot be a blanket mandate required to be followed irrespective of the market realities and the situation on hand. As stated in the Remand Order, the direction to procure power through competitive bidding route instead can only be made by the appropriate regulatory commission where the tariff under the regulated route under Section 62 is found to be more expensive than competitive bidding route, which was not the case here since Respondent No.2/NPCL had been unable to procure power even after 5 (five) attempts through competitive bidding in the first place.

**Re. National Tariff Policy cannot override the regulatory framework**

**174.** It is submitted that not just the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014 (“UPERC Generation Tariff Regulations 2014”), but also UPERC Generation Tariff Regulations 2019 have been framed only to provide for determination of tariff under Section 62 read with Section 86 of the Electricity Act in terms of Regulation 2(1) of the aforesaid Regulations. Therefore, the Appellant cannot seek to override such regulations and an entire regulatory structure framed by the State Commission on the basis of the National Tariff Policy framed under Section 3 of the Electricity Act. Reliance in this context is placed on the Tribunal’s Full Bench judgment dated 24.03.2020 (“Maruti Suzuki Judgment”) in Appeal No.103 of 2012: Maruti Suzuki India Limited vs. Haryana Electricity Regulatory Commission & Ors. (Paras 42 & 43) wherein it was held that *“if the Regulatory Commissions have to be independent and transparent bodies, they are expected to frame Regulations under Sections 178 & 181 independently”*. As explained hereinabove, the regulatory commissions can take guidance from National Electricity Policy or the National Tariff Policy, but are not bound by them. The Full Bench of this Tribunal further held that the National Tariff Policy and National Electricity Policy as mentioned in Sections 61, 79 & 86 are merely guiding factors and they do not control or limit the jurisdiction of the Appropriate Commission. The hierarchy between the regulations framed by the State Commission and policies such as the National Tariff Policy is settled in terms of the Hon’ble Supreme Court’s judgment in PTC India Limited vs. Ld. Central Electricity Regulatory Commission & Ors., (2010) 4 SCC 603 and the same has also been discussed in detail in the Maruti Suzuki Judgment (Para 41).

**175.** It is further submitted that the contention that the National Tariff Policy notified under Section 3 of the Electricity Act has the force of law, as averred by the Appellant, is completely erroneous. It is important to note that the context in which the Hon'ble Supreme Court had in the Energy Watchdog Judgment concluded that National Tariff Policy has the force of law. The Hon'ble Supreme Court in the Energy Watchdog Judgment was dealing with the question of 'Change in Law' events. The Electricity Act has no provision whatsoever which specifically deals with 'Change in Law' event claims. Hence, under such conditions, the principles of National Tariff Policy, i.e., a delegated legislation, are binding. However, on the question of discretionary power of regulators in choosing Section 62 or Section 63 of the Electricity Act, the provisions of the Electricity Act are well settled and in such matters, the provisions of a delegated legislation like National Tariff Policy cannot prevail over the principal statute, i.e., the Electricity Act. In this regard, reliance is placed on the Hon'ble Supreme Court's judgment in State of Madhya Pradesh vs. M/s G.S. Dall and Flour Mills, (1992) Supp (1) SCC 150 (Para 19), wherein the Hon'ble Supreme Court has held that Executive instructions can supplement a statute or cover areas to which the statute does not extend but they cannot run contrary to statutory provisions or whittle down their effect.

**176.** In view of the submissions hereinabove, therefore, Section 62 of the Electricity Act cannot be made nugatory or whittled down to only certain exclusionary cases.

**Re. Arm's Length Transaction between Respondent No.2/NPCL and Respondent No.3/DIL**

**177.** In order to question the propriety of the PPA entered into between the Respondent No.2/NPCL and Respondent No.3, Appellant has also raised

the issue of related party transaction. In this context, Appellant's allegation is that the Respondent No.2/NPCL and Respondent No.3/DIL, being sister concerns, have executed the PPA under Section 62 of the Act to the exclusion of other generators. In this regard, it may be noted that:-

- (i) CESC Limited holds stake in both Respondent No.2/NPCL as well as Respondent No.3/DIL. It is noteworthy that Greater Noida Industrial Development Authority ("**GNIDA**") owns 27.27% of equity shareholding in Respondent No. 2/NPCL; and
- (ii) the Chairman of GNIDA is also the Chairman of Respondent No. 2/NPCL. Further, Respondent No. 2/NPCL and Respondent No. 3/DIL have no common Board Members and GNIDA also nominates 2 (two) other Directors to the board of Respondent No. 2/NPCL.

**178.** The State Commission by way of Regulation 5.9 of the General Conditions of Distribution License Regulations, 2004 has permitted distribution licensees to enter into related party transactions, as long as the said transactions are at arms-length.

**179.** Further, Respondent No.2/NPCL has consistently disclosed before the State Commission as well as this Tribunal, that the parent company of Respondent No.3/DIL, i.e., CESC Ltd., also has a stake in Respondent No. 2/NPCL. The submission made by the State Commission in this regard was also duly noted by this Tribunal and recorded in the Remand Order (at Paragraph No.19) as under:-

*"19. Learned counsel for the State Commission supported the impugned order. Counsel submitted that Respondent No. 2 is an affiliate company of the Appellant and its bid was earlier rejected on that count. ...."*

**180.** In fact, this Tribunal had in the Remand Order dated 28.08.2015 passed in Appeal No. 88/2015, having noted the aforesaid position, had directed the State Commission to consider the NPCL Petition seeking approval of the PPA on merits.

**181.** It is submitted that procurement of power by a distribution licensee from a related party has previously been permitted by the Appropriate Commission under Section 62 of the Electricity Act, as in the following instances:

- (i) Order dated 19.07.2013 passed by the Maharashtra Electricity Regulatory Commission in Case No.76 of 2013 approving PPA between Reliance Infrastructure Limited- Mumbai Distribution and Vidarbha Industries Power Ltd., a wholly-owned subsidiary of Reliance Power Ltd.;
- (ii) Order dated 30.04.2009 passed by the Ld. Delhi Electricity Regulatory Commission in Petition No.60 of 2008 approving PPA between North Delhi Power Ltd., a joint-venture by Tata Power Company Ltd. and the Government of NCT of Delhi and Maithon Power Ltd., a joint venture of Tata Power Company Ltd. and Damodar Valley Corporation;
- (iii) Order dated 12.07.2013 passed by the Ld. Chhattisgarh State Electricity Regulatory Commission in Tariff Petition No.55 of 2012 approving the PPA between Jindal Power Limited and Jindal Steel & Power Limited.

**182.** Further, in most states in India, the State Distribution Company procures power from the State Generation Companies, both of which are usually under a common holding company created post-unbundling of the State Electricity Boards. Thus, Respondent No. 2/NPCL and Respondent



No. 3/DIL, being group companies, by entering into the PPA while maintaining an arm's length distance have acted within the four corners of the regulatory framework. It is submitted that the Electricity Act operates neutrally to ownership, i.e., it does not discriminate between public sector and private sector.

**183.** It is submitted that in any case, the relationship between the parties entering into a PPA does not have an impact on the tariff payable by the distribution licensee, as the same is independently determined by the Appropriate Commission under Section 62 of the Electricity Act and the corresponding Generation Tariff Regulations of the State for the PPAs executed on regulated basis such as the PPA between Respondent No. 2/NPCL and Respondent No. 3/DIL in the facts of the present case. Therefore, the allegation of collusion between Respondent No. 2/NPCL and Respondent No. 3/DIL made by the Appellant is unsubstantiated and without merit and ought not to be considered by this Tribunal.

**Re. The State Commission has carried out the prudence check.**

- **Prevailing circumstances at the time of PPA Approval**

**184.** It is submitted that the Appellant while questioning the prudence check carried out by the State Commission at the time of PPA Approval has failed to take note of the overall situation at the time of Respondent No.2/NPCL and Respondent No.3/DIL entering into the PPA. The following conditions existing at the time of the parties entering into the PPA are required to be taken into account:

**Re. Prevalent shortage of coal in or around 2010-15**

- (i) The shortage of coal and inability of power projects to procure coal was an industry reality from as early as 2010. In this



context, a Presidential Directive dated 04.04.2012 was issued *inter-alia* ratifying the Central Electricity Authority's decision that only 80% of ACQ for yet to be commissioned projects would be committed. In this context, Ministry of Coal had also issued its letter dated 17.02.2012 to Coal India Limited for execution of Fuel Supply Agreements with 80% ACQ as trigger level for disincentive. Furthermore, Ld. Central Electricity Regulatory Commission ("**CERC**") on 20.05.2013 also issued a statutory advice under Section 79(2) of the Electricity Act, *inter-alia* recognizing the shortage in availability of domestic coal and impact on tariff under the concluded PPAs. The coal supply commitment was further reduced by the Ministry of Power directive dated 31.07.2013 and the National Tariff Policy, 2016 to 65%, 67% and 75% in a phased manner. The aforesaid position was also acknowledged in the Energy Watchdog Judgment by the Hon'ble Supreme Court while recognizing the aforesaid directive(s) as Change in Law.

- (ii) The Hon'ble Supreme Court vide the Cancellation Judgment cancelled all coal blocks aggregating to more than 250 in number that were allotted by the Central Government through Screening Committee and Government dispensation routes by declaring them arbitrary and illegal acts on the part of the Government Authorities.

- **Prudence check carried out by the State Commission**

**185.** In the backdrop of the aforesaid scenario, the State Commission vide its Orders dated 29.09.2015 and 15.01.2016 in the PPA approval proceedings sought details of cost-effectiveness and details of fixed costs, increase in variable costs on account of fuel shortages, fuel price

escalation, etc., which demonstrates the exercise of due diligence by the State Commission and thus, the PPA Approval Order was not passed in a mechanical manner as wrongly implied by the Appellant.

**186.** After receiving a commitment from Respondent No.3/DIL on Fixed Charges, Respondent No.2/NPCL submitted the following:

- (i) the unreliability of power from the power exchange and details of price fluctuation (volatility) for power traded on the short-term market for Financial Years 2013-14 and 2014-15;
- (ii) fixed charges for the duration of the PPA and a detailed break-up of the same; and
- (iii) a comparison of the capital cost of the Project with that of contemporary power plants as well as the Benchmark Capital Cost of the Ld. CERC

**187.** In the scenario where coal block allocation for some power projects have been cancelled, the projects with assured linkage coal would ensure better availability and reliability of long-term power as compared to projects which earlier had captive coal blocks which were subsequently cancelled. Under these factual situation, State Commission ensured that Respondent No.3/DIL had assured linkage coal.

**188.** Regarding variable charges, Respondent No. 2/NPCL had submitted the copy of the Letter of Assurance (“**LoA**”) issued to Respondent No. 3/DIL by SECL; and Calorific value and coal cost at railway Loading Point as per SECL notified prices. Further, Respondent No. 2/NPCL vide its submissions dated 19.02.2016 filed before the State Commission submitted that under the new bidding guidelines and in terms of Regulation 26 of the UPERC Generation Tariff Regulations, 2014 the generator can procure additional fuel through e-auction/imports to meet any shortfall in

coal supply and the cost of such fuel is passed on to the procurer subject to approval of the State Commission.

**189.** Therefore, it is clear that the State Commission has undertaken adequate prudence check at the time of passing the PPA Approval Order and judiciously applied its discretion while passing the Order dated 29.09.2015, 15.01.2016 and the PPA Approval Order, which are required to be read together. It is most humbly submitted that this Tribunal as an appellate body should not substitute its discretion in place of the State Commission's discretion unless the Appellant is able to establish any perversity or mala-fide in the exercise of discretion by the State Commission.

**Re. The prudence check carried out under the MYT Order**

**190.** Pertinently, the projected Capital Cost of Unit 2 of the Project was found to be lower than the benchmark capital cost issued by the Ld. CERC. The tariff offered by Respondent No. 3/DIL was thus in line with the regulatory norms and also aligned to the prevalent market conditions. Accordingly, the fixed charges based on such projected Capital Cost of Unit 2 of the Project of the Respondent No.3/DIL with a commitment from the Respondent No. 3/DIL that there will not be any upward revision of the same was found to be competitive.

**191.** Further, in response to the submissions made by the Appellant in the written submissions filed in Appeal No.185/2019, it is submitted that Regulation 19(6)(a) of the UPERC Generation Tariff Regulations 2014 provides for prudence check for capital cost of a thermal generating station at the time of tariff determination. In terms of the said Regulations, if the benchmark norms have already been specified by the Central Commission

and the capital cost of a thermal generating station is lower than the said benchmark capital cost, then the same may be allowed by the State Commission. Therefore, the State Commission during the PPA Approval proceedings had carried out the prudence check of Capital Cost of the Project in terms of Regulation 19(6)(a) of the UPERC Generation Tariff Regulations 2014, i.e., by comparing the Capital Cost of the Project as against the CERC benchmark Capital Cost vide its Orders dated 29.09.2015 and 15.01.2016 filed in the PPA Approval Petition. The project Capital Cost of Respondent No. 3/DIL was Rs. 4.57 Crores/MW (which was already commissioned at the time of Respondent No. 2/NPCL entering into the PPA with Respondent No.3/DIL) as against capital cost benchmark set out by the Ld. Central Commission, i.e., Rs. 4.71 Crores/MW.

**192.** The Appellant while questioning the tariff at which power is being supplied by Respondent No. 3/DIL to Respondent No. 2/NPCL has erroneously relied upon the following:

- (i) Competitive bidding tariff conducted by other licensees in the state of Uttar Pradesh;
- (ii) Medium-term bids received by Respondent No. 2/NPCL in the bid floated by it in 2018, wherein the landed tariff at which Respondent No. 3/DIL agreed to supply power was Rs. 4.55/kWh; and
- (iii) Supply by Respondent No. 3/DIL to Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**") at a tariff of Rs. 2.99/kWh.

**193.** The Appellant has at various points relied upon tariffs discovered under Section 63 of the Electricity Act without any uniformity for comparison to the tariff under the present PPA. The Appellant has relied

upon (a) tariff discovered at different times and in most cases after the execution and approval of the PPA; (b) tariff determined at different points of supply in the grid, i.e., tariff has been taken at generator ex-bus/NPCL periphery/UP periphery while comparing it with the tariff offered by Respondent No.3/DIL on levelized basis at UP Periphery; and (c) tariff discovered under short-term or medium-term biddings which were discovered on very different principles based on short-term requirements.

**194.** Pertinently, at the time of PPA Approval, Respondent No.2/NPCL vide its written submissions dated 26.10.2015 had provided a comparison of the levelized tariff offered by Respondent No.3/DIL at UP Periphery with the levelized UPPCL Case 1 bids discovered in 2012. Pertinently, the bids discovered in the UPPCL Case-1 2012 bidding wherein the supply was envisaged to commence from October 2016, were much higher than the levelized tariff offered by Respondent No.3/DIL under the PPA.

**195.** It was found that the average levelized tariff discovered during the process was Rs.5.55/kWh, i.e., Rs.0.76/kWh more expensive than the levelized tariff offered by Respondent No.3/DIL. The aforesaid position was also duly recorded in the Order dated 15.01.2016 passed by the State Commission in the PPA Approval proceedings. The summary of levelized tariff discovered in the said 2012 UPPCL bid is reproduced below:

List of Successful Bidders	Quantum (MW)	Levelized Tariff (₹/kWh) at UP Periphery
ACB India Ltd.(TRN Energy)	390	4.886
Lanco Babandh	424	5.074
RKM Power	350	5.088
KSK Mahanadi	1000	5.588
Moser Baer	361	5.730

**196.** Appellant has further erred in relying upon the bids discovered in the course of the long-term Design, Build, Finance, Own and Operate (“**DBFOO**”) competitive bidding conducted by UPPCL in 2016 to claim that power is available at a lower tariff from other generators. In this context, the first-year tariff at UP periphery referred to by the Appellant is provided as reproduced hereinbelow:

List of Bidders	Quantum (MW)	First year Tariff @ UP periphery (₹/kWh)
JITPL	200	3.939
Jindal Power	325	3.951
Balco	200	3.960
LANCO Amarkantak	1182	3.971
Adani	200	4.047
MB Power	374.15	4.095
NCC	200	4.407
Rattan India Power	750	4.487
SKS Power	255	4.527
RKM Powergen	350	4.635

**197.** It is submitted that the said bids are not comparable to the present case in view of the following:

- (i) the Government of Uttar Pradesh and UPPCL had cancelled the bids without execution of any PPAs and the same was also reported widely in newspapers;
- (ii) the bid results were opened on 08.08.2016, which was much after the PPA was entered into on 26.09.2014 and the date of approval of the PPA i.e., 20.04.2016;
- (iii) the rates referred by the Appellant as discovered in DBFOO long-term competitive bid conducted by UPPCL in 2016 were only the first-year tariff as quoted by the bidders at UP Periphery. Hence, it is incorrect to compare the first-year tariff of the bids quoted by the bidders in the DBFOO long-term bids

in 2016 with a levelized tariff stream for 25 (twenty-five) years and that too in different timeline;

- (iv) the levelized tariff under the present PPA at UP Periphery may only be compared to similarly placed PPAs, i.e., long-term PPAs that have resulted into flow of power during the same period from the generating company to the distribution licensee; and
- (v) Pertinently, the even the first-year tariff offered by Respondent No.3/DIL at UP periphery was Rs.4.16/kWh, which is well within the range of first year average tariff offered in the 2016 DBFOO long-term bids.

**198.** The Respondent No.2/NPCL reiterates that wrong comparisons by the Appellant with the first-year tariff of a cancelled DBFOO long-term bid of 2016 with a projected levelized tariff of 25 years, based on fuel prices prevailing on 26.10.2015 and estimated escalations thereafter, is misplaced and is liable to be rejected.

**199.** The Appellant has ignored the following crucial benefits under the present PPA, i.e., (a) reliability of the power which was being made readily available by Respondent No. 3/DIL while various attempts for competitive bidding had already failed; (b) the Project was already commissioned and Respondent No. 3/DIL had also secured a dedicated long-term access to Northern Region; (c) firm fuel supply linkage, whereas the entire power industry was and is still suffering from coal shortage; and (d) a levelized tariff which was much lower than the tariffs of the successful bidders in the Case-1 bidding conducted by UPPCL in December, 2012.

**200.** Further, the Appellant's reliance on the tariff of Rs. 4.55/kWh offered by Respondent No. 3/DIL from Unit-I of its Project to Respondent No.

2/NPCL at NPCL periphery under the e-tender process of medium-term power procurement floated by Respondent No. 2/NPCL is misplaced and erroneous. The aforesaid supply of power was only for a short period of 16 (sixteen) months and therefore, the same is not comparable with the levelized tariff of 25 (twenty-five) years indicated by Respondent No. 3/DIL at UP periphery for supply of power from Unit-2 of its Project. In this context, the summary of tariff discovered under the said medium-term bidding is reproduced hereunder:

List of Bidders	Quantum (MW)	Composite Tariff @ NPCL periphery (₹/kWh)
SKS Power Generation, Chhattisgarh	100	4.250
V.S Lignite, Rajasthan	63	4.310
Dhariwal Unit-1, Maharashtra	100	4.550
GMR Kamalanga, Odisha	70	4.660
Jindal India Thermal, Odisha	60	4.690
Mosaer Baer, Madhya Pradesh	100	5.490
Jindal India Thermal, Chhattisgarh	100	5.650
Jaypee Nigrie, Madhya Pradesh	100	5.930
Sembcorp Power, Andhra Pradesh	100	6.000
Shree Cement (CTU), Rajasthan	100	8.610
Shree Cement (STU), Rajasthan	50	11.314

**201.** Similarly, it is understood that the sale of short-term power by Respondent No. 3/DIL to Maharashtra State Discom (MSEDCL) at a tariff of Rs. 2.99/kWh at DIL generator bus was for even a shorter period, i.e., less than a month between the period of 07.05.2017 to 31.05.2017. In fact, in the case of short-term power supply to MSEDCL, the supply was from Unit1, which is connected to the State Transmission Utility (“**STU**”) of the Project and therefore the same cannot be compared to the tariff under the present PPA where supply of power is from the Project’s Unit2, which is



connected to the Central Transmission Utility (“**CTU**”). This tariff was not just for an extremely short-period but was also taken at the generator bus, as opposed to the levelized tariff at UP periphery under the PPA with which the Appellant has erroneously sought to draw a comparison.

**202.** Hence, the Appellant’s reliance and comparison of short-term tariff at Respondent No.3/DIL bus for supply of less than 1 (one) month or medium-term tariff for 16 (sixteen) months at NPCL connection point with the grid with that of a levelized tariff for 25 (twenty five) years at UP periphery, that too in different timelines, is grossly misplaced and incorrect. Further, it is reiterated that all the above tariffs referred to by the Appellant was at different points of time and at different points in grid, i.e., generator bus, UP periphery or NPCL Periphery.

**203.** Pertinently, Respondent No. 3/DIL is also supplying power to Tamil Nadu Generation and Distribution Company Limited (“**TANGEDCO**”) in terms of a PPA signed under Section 63 of the Electricity Act from the same Unit 2 of its Project. Respondent No. 2/NPCL understands that the power to TANGEDCO is being supplied based on the levelized tariff discovered at Rs.4.91/kWh. Therefore, Respondent No. 2/NPCL has been able to negotiate a highly competitive levelized tariff which is even lower than the levelized tariff discovered through competitive bidding for supply of power from the same unit by the same generator, i.e., Respondent No.3/DIL to another distribution licensee i.e., TANGEDCO. A summary of the tariff discovered during the TANGEDCO case-1 bidding although not part of the record, is provided hereinbelow:

List of Bidders	Quantum (MW)	Levelized Tariff@ State interface with CTU (₹/kWh)
DB Power	208	4.91
Jindal Power Ltd	400	4.91
Ind-Barath (Utkal)	500	4.91

BALCO	200	4.91
Dhariwal Infrastructure Limited	100	4.91
PTC-Adhunik	100	4.91
KSK Mahanadi	500	4.91
IL&FS	540	4.91
GMR Trading	150	4.91
Coastal Energen	548	4.91
OPG Generation	74	4.91

**204.** The contention of the Appellant that the power purchase cost from Respondent No. 3/DIL's Unit 2 is restricted at Rs. 4.79/kWh at UP periphery as approved vide the PPA Approval Order, is misconceived and legally untenable. The Appellant is again erroneously comparing levelized tariff of 25 years of Rs. 4.79/kWh at UP Periphery quoted by Respondent No.3/DIL with a provisional single year tariff number of Rs.5.54/kWh for FY 2019-20 and Rs. 6.18/kWh for the FY 2020-21 at NPCL Periphery. The aforesaid comparison is erroneous since:

- (i) the provisional tariff of Rs.5.54/kWh for FY 2019-20 and Rs. 6.18/kWh for FY 2020-21 are at NPCL Periphery which includes UP State losses and transmission charges;
- (ii) the component of capacity charges per unit, has been computed based on scheduled generation which were lower than the Normative Annual Plant Availability Factor ("NAPAF") of 85% in both the aforementioned years; and
- (iii) the provisional tariff for FY 2020-21 also includes component of additional coal.

**• Erroneous reliance on the Pilot Scheme Tender floated by PFC Consulting Limited in January 2020**

**205.** The Appellant vide its Application dated 03.07.2020 ("**Application**") has sought to place on record certain additional documents so as to

contend that pursuant to the bidding process conducted by PFC Consulting Limited (“**PFCCL**”) in January, 2020 for the procurement of 2500 MW of power for 3 (three) years under a Pilot Scheme, the tariff discovered was Rs. 3.26/kWh. It is respectfully submitted that the Appellant’s reliance on such documents is wholly misplaced inasmuch as the Appellant has attempted to compare the tariff determined under the PPA dated 26.09.2014 to the tariff discovered pursuant to the Tender issued by PFCCL on 01.01.2020 i.e., a tariff discovered 6 (six) years after the PPA dated 26.09.2014 was entered into between the Respondent No.2/NPCL and Respondent No.3/DIL.

**206.** Notably, PFCCL had issued 3 (three) Pilot Scheme Tenders for the procurement of 2500 MW of power on medium term basis in 3 (three) consecutive years i.e., 2018, 2019 and 2020 and the Appellant has conveniently and selectively chosen to only rely upon the Pilot Scheme Tender floated by PFCCL in January, 2020 since the tariff discovered therein was lower than the tariff discovered in the years 2018 and 2019. In this regard, the tariff discovered and the landed cost at UP periphery in all the 3 (three) Pilot Scheme Tenders floated by PFCCL for the procurement of 2500 MW of power on medium term basis is tabulated herein below:

<b>All figures in Rs./kWh</b>	<b>Pilot Scheme-I in May 2018</b>	<b>Pilot Scheme-II in March 2019 (Tender Cancelled)</b>	<b>Pilot Scheme-II in Jan 2020</b>
Discovered Tariff at CTU Interconnection Point ( <b>L1 Tariff</b> )	4.24	4.41	3.26
Landed Tariff at UP periphery	5.11	5.23	4.06
Landed Tariff at Respondent No.2/NPCL periphery	5.49	5.62	4.40

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*\*PTC trading margin = Rs.0.05/kWh for Pilot Scheme-I, PTC trading margin =Rs.0.0173/kWh for Pilot Scheme-II included in the above landed cost calculation.*

**207.** Therefore, it becomes evident that the Appellant has (a) presented an incomplete picture of the market by only relying on the Pilot Scheme Tender floated by PFCCL in the year 2020; and (b) erroneously compared medium-term tariff of one particular Pilot Scheme Tender while ignoring the higher tariffs discovered in similar Pilot Scheme Tenders in earlier years. It is further submitted that the Appellant is silent on the point of grid reference of tariff discovered in the said Tenders and is putting forth an entirely incorrect picture of the likely landed tariff at UP or the Respondent No.2/NPCL's periphery.

**Re. Tariff of Rs.4.79/kWh does not include UP State charges and losses**

**208.** It is submitted that Respondent No. 2/NPCL has nowhere claimed that the indicative levelized tariff of Rs. 4.79/kWh at UP Periphery was inclusive of UP State charges and losses ("**STU Charges and Losses**"). Such indicative levelized tariff of Rs. 4.79/kWh at UP Periphery implies that it consisted only of CTU Charges and Losses and as such, no STU Charges and Losses are included. It is therefore only the contention of the Appellant who is erroneously comparing tariffs at different points of time and at different points in grid, i.e., generator bus, UP periphery or NPCL Periphery.

**Re: Public Consultation Process through Public Hearing**

**209.** Prior to referring to the proceedings held before the State Commission during the PPA Approval, it is pertinent to note that the Appellant had also filed an Application seeking stay on the operation of the

Impugned order vide I.A. No.382 of 2017 (“**Stay Application**”) in the present matter. The Stay Application was dismissed by this Tribunal vide its Order dated 31.07.2017 by holding that any restriction on the supply of power by Respondent No.3/DIL to Respondent No.2/NPCL would lead to an acute shortage of power for supply to the consumers since the supply of power in terms of the PPA, forms about 60% of the average power requirement of Respondent No.2. This Tribunal in the said Order dated 31.07.2017 had in fact directed the State Commission to expeditiously look into the grievances of the consumers in the State, i.e., hold public hearing for the consumers during the tariff determination process. Therefore, this Tribunal itself had previously acknowledged the position that hearing will be provided to the Appellant(s) during the tariff determination process for supply of power from Unit 2 of the Project of Respondent No.3/DIL to the Respondent No. 2/NPCL.

**210.** In this regard, it is pertinent to mention that Respondent No.3/DIL had filed the MYT Petition No.1235/2017 before the State Commission for determination of the tariff in terms of UPERC Generation Tariff Regulations 2014, during adjudication of which due process of consultation under Part VII of the Electricity Act was followed. It is submitted that under the scheme of the Electricity Act, determination of tariff is carried out not by distribution licensee, (i.e. Respondent No. 2/NPCL in the facts of the present case) but by the State Commission, which is an independent regulatory authority as per law and within the prevalent regulatory framework. Further, in case of price fixation by an independent authority, consumers do not have an indiscriminate and unregulated right to hearing at every stage of proceedings but may only be granted such right as prescribed under the Electricity Act and the applicable Tariff Regulations.

**211.** It is submitted that the instances where providing hearing to the relevant stakeholder is mandatory, is explicitly provided under the Electricity Act. For instance, hearing is mandatory under the Electricity Act in the following cases:

- (i) In case of rejection of the relevant application under Sections 15(6) and 64(3) of the Electricity Act;
- (ii) In case of imposition of any penalty, compensation, punishment or monetary liability is imposed on any person under Section 57(2) and 126(3) of the Electricity Act; and
- (iii) During the hearing under Section 111 read with Section 127(3) of the Electricity Act by this Tribunal to the person affected.

However, no such provision for mandatory hearing to public during PPA approval has been provided under the Electricity Act.

**Re. Requirement of ensuring transparency during PPA Approval proceedings**

**212.** The only obligation on the State Commission in terms of Section 86(3) of the Electricity Act while approving PPA is to ensure transparency. It is submitted that the Appellants have misinterpreted the meaning of “transparency” required to be maintained by the State Commission in its functioning to contend that the State Commission is mandatorily required to hold a public hearing at the time of PPA approval. In the present matter, it is clear that the State Commission maintained transparency in passing of the Impugned Order and the same is demonstrable from the following instances:

- (i) The Schedule of Hearing for the final hearing held on 01.04.2016 in the present PPA Approval hearing was publicly available on the website of the State Commission.

- (ii) The Appellant No.1 was aware of the PPA executed between NPCL and DIL, as is clear from a perusal of Order dated 01.08.2016 passed by the State Commission in Petition No. 1077 of 2016 wherein the Appellant attended the Public Hearing dated 13.05.2016 and provided his comments and suggestions as well; and
- (iii) The State Commission vide its Orders dated 29.09.2015 and 15.01.2016 in the present PPA approval proceedings, sought details of cost-effectiveness and details of fixed costs, increase in variable costs on account of fuel shortages, fuel price escalation, etc., which demonstrates the exercise of due diligence by the State Commission and thus, the Impugned Order was not passed in mechanical manner as argued by the Appellants.

### **Re. Due hearing provided to the Appellant during tariff proceedings**

**213.** The PPA Approval Order of the State Commission is an order approving the PPA between Respondent No. 2/NPCL and Respondent No. 3/DIL. The Electricity Act read with the UPERC Generation Tariff Regulations grants a right to public hearing not for approval of PPA, but only at the stage of tariff determination. In this context, reliance is placed on Section 64(2) of the Electricity Act, which requires publication of the tariff application in an abridged form. Further, reliance is placed on Regulation 136 of the UPERC (Conduct of Business) Regulations, 2004 in terms of which the State Commission is required to invite objections/comments from public on the tariff application submitted to it. There is no similar provision for PPA approval process. Therefore, State Commissions are bound by neither the Electricity Act nor their own Regulations to hold any public hearing at the time of approval of PPA. The same is demonstrable from

various orders passed by State Electricity Regulatory Commissions across the country. To name some;

- (a) Order of the Ld. Haryana Electricity Regulatory Commission dated 13.11.2017 in Case No. HERC/PRO-24 of 2017; and
- (b) Order dated 26.12.2016 passed by Ld. Uttarakhand Electricity Regulatory Commission in the Application seeking approval of the Commission on the Draft Power Purchase Agreement between Uttarakhand Power Corporation Limited and M/s Greenko Budhil Hydro Power Pvt. Ltd.

**214.** The Appellant has been provided fair and complete opportunity to be heard in the tariff fixation process by the State Commission, preceding the passing of the MYT Order. The said opportunity has also been taken by Appellant No.1 by making both oral and written submissions at the time of Public hearing held prior to passing of the MYT Order.

**215.** In view of the foregoing, it is submitted that the Appellant's primary objection to the passing of the Impugned Order, i.e., high tariff being imposed without public consultation, has now been addressed by passing of the MYT Order by the State Commission. Pursuant to the MYT Order being passed by the State Commission, the Appellant is thus precluded from raising any objections to the provisional tariff approved by the State Commission in the Impugned Order, since the final tariff has been determined by the State Commission in the MYT Order.

**Re. Contention regarding approval of PPA prior to determination of tariff**

**216.** The Appellant's attempt to treat the PPA Approval Proceedings and the tariff approval proceedings as one and the same would in fact render



the presence of separate provisions for the aforesaid functions under Section 86(1)(b) and Section 62 of the Electricity Act, otiose.

**217.** The intent behind giving the right to be heard to public in the tariff proceedings is based on the reasoning that even if an indicative tariff is taken into consideration during the PPA Approval proceedings, the same is subject to the final approval during the tariff proceedings when the State Commission can take into account the views of public. Therefore, the Appellant's contention that approval of PPA is only after the tariff is certain and determined is erroneous. The aforesaid contention blurs the tariff determination process under Section 62 of the Electricity Act and PPA approval process under Section 86(1)(b) of the Electricity Act. While the approval of PPA does consider reasonability of the tariff, the same is only done on the basis of an indicative tariff which is subject to finalization during subsequent tariff proceedings.

**218.** The Appellant's attempt to treat the PPA Approval Proceedings and the tariff approval proceedings as one and the same would in fact render the presence of separate provisions for the aforesaid functions under Section 86(1)(b) and Section 62 of the Electricity Act, otiose. The State Commission at the time of tariff determination under Section 62 of the Electricity Act has to follow the detailed guiding principles framed under Section 61 of the Electricity Act and the procedure provided under Section 64 of the Electricity Act. Such guidelines/provisions are not available for Section 86(1)(b) of the Electricity Act. However, the State Commission as an independent regulatory authority undertook a detailed prudence check of various aspects, including the levelized tariff of Rs. 4.79/kWh at UP periphery offered by Respondent No. 3/DIL at the time of approval of the PPA. Therefore, the State Commission had duly scrutinised all the parameters required to be scrutinised by the appropriate commission in

terms of the judgment of Tata Power Company Ltd. vs. Reliance Energy Limited, (2009) 16 SCC 659 (Para 108) which has been referred to by the Appellant. The said judgment cannot in any way be read to mean that the preliminary scrutiny required to be carried out by the appropriate commission at the time of PPA approval can be equated with the tariff determination proceedings required to be undertaken by the commission separately.

**219.** In this context, it is pertinent to note that this Tribunal in its Judgment dated 11.10.2018 in Appeal No. 194 of 2016: Punjab State Power Corporation Limited vs. Everest Power Private Limited & Ors. had unambiguously observed that there cannot be a second opinion so far as the obligation of the commission to consider the aspect of price of power while considering the grant of approval is concerned. Therefore, it is well established that at the stage of approval of PPA, the state commissions are required to inter-alia examine only the cost of power purchase, reasonability of price and terms of the agreement. Therefore, it cannot be equated to final determination of tariff under Section 62 of the Electricity Act.

**Re. Public hearing at the time of PPA approval in other cases by the State Commission**

**220.** The Appellant has also relied upon the proceedings held in Petition No.830 of 2013 to contend that the State Commission as a matter of practice holds public hearing during PPA Approval proceedings, which it has not done in the present case. In the aforesaid proceedings, there had been an inordinate delay from the stage of project preparatory activities itself. Therefore, in Petition No. 830 of 2013 and batch, the State Commission was required to adjudicate upon various issues, including the issue of revised commercial operation date and change of location of the

project, for which the presence of public may have been necessary. In contrast, Unit 2 of the Project inter-alia had already achieved its commercial operation at the time of signing of the PPAs and also had an assured fuel source and long-term access to Northern Region. Further, the proposed levelized tariff for 25 (twenty five) years from Unit 2 of the Project was lower than case-1 levelized tariff adopted by State Commission for supply of long-term power to UPPCL. Further, Respondent No.3/DIL was willing to supply power on an undertaking with respect to the fixed costs which was based on an estimated Capital Cost lower than the CERC benchmark cost. Therefore, the premise for holding public hearing by the State Commission in Petition No.830 of 2013 was entirely different than the case of PPA approval for supply of long-term power from Respondent No.3/DIL to the Respondent No. 2/NPCL, wherein public hearing was not required.

**Re. Public hearing provided to the Appellant during retail tariff proceedings**

**221.** The consumer is primarily affected by the retail tariff orders passed for the distribution licensees. It will not be out of place to mention here that the Appellant had taken part in the retail tariff proceedings of the Respondent No.2/NPCL for FY 2016-17 held by the State Commission in Petition No. 1077 of 2016. Pertinently, even prior to passing of the MYT Order, the retail tariff payable by the consumers of Respondent No.2/NPCL for FY 2016-17 had been determined by the State Commission vide its Order dated 01.08.2016 ("**NPCL Tariff Order**") in Petition No.1077 of 2016 ("**NPCL Tariff Petition**"). By way of the said Tariff Order, the power purchase cost, and thereby the retail tariff of Respondent No. 2/NPCL, which includes the cost of power procurement from Respondent No.3/DIL, had been approved. Appellant had participated in the stakeholder

consultation process and attended the public hearing held on 13.05.2016 at Lucknow, which is after the issuance of the PPA Approval Order by the State Commission on 20.04.2016. In the above case, Appellant did not object to the sourcing of power from Respondent No.3/DIL but had only sought prudent scrutiny of the power purchase cost by the State Commission. Hence, the said Tariff Order, in terms of which tariff is being charged from consumers, has not been challenged and therefore has attained finality.

**Re. Hearing to the parties was duly provided in terms of the Remand Order**

**222.** The PPA Approval Order had been passed by the State Commission in terms of the Remand Order of this Tribunal, which are strictly complied with. This Tribunal had only directed the State Commission to consider the submissions made by Respondent No.2/NPCL and Respondent No.3/DIL on merits, which in fact was complied with by the State Commission during the PPA Approval proceedings pursuant to the Remand Order. There was thus no direction to give hearing to the public at large under the Remand Order. Judgments in the following cases are relevant: Meghalaya State Electricity Board vs. Meghalaya State Electricity Regulatory Commission & Anr., 2010 ELR (APTEL) 940 (Para 20). Further, this Tribunal in its Judgment dated 31.05.2011 in Appeal No.195 of 2011: Mumbai International Airport Pvt. Ltd. Chhatrapati Shivaji International Airport vs. Maharashtra Electricity Regulatory Commission and Reliance Infrastructure Limited. They highlight the law on scope of a remand order.

**Re. Issue of Public Hearing in Appeal No.185/2019**

**223.** The Appellant in Appeal No. 185/2019 has raised the issue of public hearing to a limited extent. While Appellant No. 1 had been provided adequate opportunity to be heard during the public hearing held on 30.10.2018 and filing of subsequent written submissions which have been recorded in the Order dated 05.02.2019 and addressed by the State Commission, it has been alleged that the State Commission has erroneously upheld the maintainability of the MYT Petition vide its Order dated 19.02.2018 filed by Respondent No. 3/DIL without any public hearing.

**224.** It is submitted that the doctrine of necessity and requirement of maintaining administrative efficiency mandates that the State Commission does not prolong the tariff determination process by holding public hearing at every stage of the process. Pertinently, the State Commission while passing the MYT Order had dealt with the issue of maintainability in detail and not just relied upon its Order dated 19.02.2018 and therefore Appellant No. 1's objection regarding maintainability of the MYT Petition have been adequately dealt with.

**Re. Jurisdiction of the State Commission to approve the PPA and determine Tariff.**

**225.** The State Commission has jurisdiction to pass the PPA Approval Order and the MYT Order as the generator, i.e., Respondent No.3/DIL had in consent with the distribution licensee, i.e., Respondent No.2/NPCL approached the State Commission seeking approval of the PPA. The power to approve PPAs is specifically vested with State Commissions under Section 86(1)(b) of the Electricity Act.

**226.** While Respondent No.3/DIL supplies power to the distribution licensees in the State of Tamil Nadu as well as the State of Uttar Pradesh from the Project, the jurisdiction of the State Commission is upheld through Section 64(5) of the Electricity Act. In this regard, reliance is placed on the Energy Watchdog Judgment wherein it has been held that:

“29.

...

*Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact, this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.”*

**227.** Accordingly, Respondent No.3/DIL and Respondent No.2/NPCL, which operates in the licensed area of Greater Noida, Uttar Pradesh had approached the State Commission, which has jurisdiction in respect of the licensee i.e. Respondent No.2/NPCL who intends to distribute and make payment for electricity. It is submitted that since the retail tariff and annual revenue requirement of Respondent No.2/NPCL are already being determined by the State Commission, which has a complete understanding of the impact of agreements being entered into by Respondent No.2/NPCL on its consumers, Respondent No.2/NPCL in consent with Respondent No.3/DIL had agreed to submit to the jurisdiction of the State Commission in terms of Section 64(5) of the Electricity Act.

**Re. Appellant’s erroneous reliance on judgments passed by this Tribunal**

**228.** The Appellant's reliance on this Tribunal's Judgment dated 07.04.2016 in Appeal No.100 of 2013: Uttar Haryana Bijli Vitran Nigam Ltd. vs. Central Electricity Regulatory Commission, which was also a subject-matter of appeal in the Energy Watchdog Judgment and Judgment dated 31.10.2018 in Appeal No.230 of 2017: KSK Mahanadi Power Company Limited vs. Andhra Pradesh Electricity Regulatory Commission ("KSK Judgment") is misplaced.

**229.** It is not at all in dispute that ordinarily the jurisdiction to adjudicate upon inter-state claims in a composite scheme vests with the Ld. CERC. However, Respondent No.2/NPCL and Respondent No.3/DIL have invoked the jurisdiction of the State Commission under the exception carved out in Section 64(5) of the Electricity Act and the said exception was never a point of contention in the KSK Judgment. In this context, reliance is placed on Paragraph 15 of the Judgment in **Pepsico India Holding (P) Ltd. vs. Grocery Market & Shops Board, (2016) 4 SCC 493**, wherein the words "one or more" have been interpreted to mean composite scheme to include various entries.

**Re. Appellant's reliance on Rule 8 of the Electricity Rules is misplaced**

**230.** Rule 8 of the Electricity Rules, 2005 would apply only if the Respondent No. 3/DIL and Respondent No. 2/NPCL had chosen to approach the Ld. CERC for determination of generation tariff. Even in the case of the TANGEDCO PPA, Respondent No. 2/NPCL understands that the Ld. CERC has not determined the generation tariff for supply of entire or any part of contracted capacity from Unit 2 of the Project to TANGEDCO. Hence, Rule 8 of Electricity Rules, 2005 is not applicable in case of Unit 2 of Respondent No.3/DIL.



### **Re. State Commission's decision on jurisdiction under the MYT Order**

**231.** The State Commission had in Paragraph 3.6.15 of the MYT Order in great detail provided the reasoning for upholding its jurisdiction. The State Commission had rightly noted that there is nothing in the language of Section 64(5) of the Electricity Act which suggests that it applies only in the case of sale by a generator of its whole capacity to the distribution licensee in a different State. The term 'supply' has been defined in the Electricity Act as 'sale of electricity to a licensee or consumer'. A harmonious reading of Section 64(5) of the Electricity Act in light of statutory definition of "supply" posits that Section 64(5) of the Electricity Act shall trigger in case of "any" and each inter-state sale of electricity by a generating company to a distribution licensee involving territories of two states.

**232.** There is no embargo in the Electricity Act and particularly under Section 79(1)(b) that a generating company cannot supply power to different procurers from the same generating unit under different routes (i.e., Section 62 or Section 63 of the Electricity Act), especially when such supplies are being made under separate independent PPAs. Under section 64(5) of the Electricity Act, the entities involved in generation and supply is to be ascertained qua each PPA. In case of Respondent No.3/DIL, power is being supplied under separate and independent PPAs to TANGEDCO (Section 63) and NPCL (Section 62). For purposes of ascertaining the application of Section 64(5) of the Act in case of Respondent No.3/DIL, the TANGEDCO PPA and NPCL PPA have to be considered independently, and both the PPAs involve only two states, and, hence, Section 64(5) of the Act is attracted.

**Re. Issue of notarisation of pleadings filed before the State Commission.**



**233.** The issue of notarisation of documents raised by Respondent No.2/NPCL has already been closed vide the Order dated 17.05.2017, when this Tribunal had allowed the Application for leave to file Appeal, i.e. I.A. No.550/2016 and therefore the said issue was not sought to be raised again by Respondent No.2/NPCL subsequently. Without prejudice to the aforesaid and for completion of facts, it is submitted that Respondent No.2/NCPL had objected to the grant of leave to file appeal to Appellant and also filed an Application vide I.A. No.727 of 2016, wherein it was brought to the attention of this Tribunal that the lease deed dated 10.10.2015 relied upon by Appellant to satisfy his locus to file the present Appeal had been improperly notarised by the Notary in question.

**234.** The issue of improper notarisation of the aforesaid lease deed had only come up since Appellant had failed to bring on record any documents initially to establish that he was residing in Greater Noida (supply area of Respondent No.2/NPCL), whereas there were various documents on record such as the RTI Application dated 15.06.2016 wherein Appellant's address was mentioned to be an apartment in Dalibagh, Lucknow.

**235.** It is pertinent to note that the issue of notarisation has been raised by the Appellant only by way of oral arguments, written submissions filed on 03.05.2017, and subsequently by way of only an Affidavit dated 04.07.2017 with neither any 'Prayer' to take the same on record nor with any application seeking leave to amend the present Appeal.

**236.** In any case, the Notary, Mr. Verma has admitted to having notarized the pleadings and supporting affidavits filed by Respondent No.2/NPCL and the said admission of Mr. Verma has been recorded by this Tribunal in its Order dated 27.03.2017. Thus, the only possible defect is regarding the

entries in the register of Mr. Verma, which is at best, an inadvertent and curable defect and thus neither render the proceedings before the State Commission nugatory nor render the Impugned Order null and void. The issue ought to be considered closed further to the Order dated 27.03.2017 issued by this Tribunal in the present matter.

**237.** It is settled law that procedural defects in pleadings are curable defects. Reliance in this context may be had to the Hon'ble Supreme Court's Judgment in Uday Shankar Triyar vs. Ram Kalewar Prasad Singh & Anr. (2006) 1 SCC 75 (Para 17); F.A. Sapa vs. Singora, (1991) 3 SCC 375 (at Page 403); and Alka Kasana vs. IIT, (2015) 222 DLT 473 (Para 23).

**238.** The Appellant has failed to distinguish between notarization of an instrument creating rights such as the Lease Agreement, which goes to the root of the authenticity of such instrument thereby creating substantial right to appeal as an "aggrieved person" and the notarization of pleadings, which is a procedural requirement. On the other hand, the present case concerns pleadings and supporting affidavits thereto which were admittedly notarized by Mr. Verma and only a corresponding entry was not made in his Register, which ought not to be considered a ground to render such Affidavits defective. In our humble submission, the laxity on the part of the Notary to make entry of the notarised documents in its register cannot be a ground to hold the Affidavits sworn before such notary by Respondent No. 2/NPCL as defective. In view of the unconditional apology tendered by the Notary before this Tribunal, Respondent No.2/NPCL had agreed to not press the issue of notarisation and in such a context, it may be appropriate for the Appellant to also not press the present issue.

**239.** It is humbly prayed that in view of the foregoing, this Tribunal may be pleased to dismiss the present Appeal and pass any other orders as it may deem fit in the facts and circumstances of the case.

### **Additional Written Submissions filed by Respondent No. 2.**

**240.** Respondent No.2/NPCL relies upon the submissions already made by it in the pleadings, the written note filed on 07.07.2020 and the consolidated written submissions filed on 29.07.2020 in the present matter before this Tribunal. The detailed contents of the aforesaid pleadings/submissions are not repeated herein for the sake of brevity.

**241.** The Appellant has inter-alia made the following allegations in the Additional Written Submissions:

- (a) Respondent No.2/NPCL has while justifying the tariff provided by Respondent No.3, Dhariwal Infrastructure Limited ("**Respondent No.3/DIL**") added the CTU and STU charges to the tariffs discovered in other bidding schemes, including the Pilot Scheme Tender of PFC Consulting Limited ("**PFCCL**"). However, Respondent No.2/NPCL has now taken the position that the STU charges are not included in the tariff of Rs.4.79/- and is not at the NPCL periphery, thereby misleading this Tribunal; and
- (b) Respondent No.2/NPCL has sought to mislead this Tribunal by stating that Respondent No.3/DIL has a firm fuel supply linkage as against the coal shortage situation in the market even though Respondent No.3/DIL has subsequently itself approached the State Commission for procurement of additional coal due to coal shortage.

## **Tariff Comparison including CTU and STU Charges**

**242.** The Appellant has erroneously submitted that Respondent No.2/NPCL has in any manner sought to mislead this Tribunal. It is submitted that Respondent No. 2/NPCL has nowhere claimed that the indicative levelized tariff of Rs. 4.79/kWh at UP Periphery was inclusive of UP State charges and losses (“**STU Charges and Losses**”). Such indicative levelized tariff of Rs. 4.79/kWh at UP Periphery implies that it consisted only of CTU Charges and Losses, and, as such, no STU Charges and Losses are included.

**243.** The only reason for Respondent No.2/NPCL to provide the comparison with tariff discovered under the Pilot Scheme of PFCCL at both, UP periphery and NPCL periphery was to in fact showcase the Appellant’s consistent attempt to mislead this Tribunal. The Appellant vide its Application dated 03.07.2020 (“**Application**”) had sought to place on record certain additional documents so as to contend that pursuant to the bidding process conducted by PFCCL in January, 2020 for the procurement of 2500 MW of power for 3 (three) years under a Pilot Scheme, the tariff discovered was Rs. 3.26/kWh without mentioning the grid point of reference at which this tariff was discovered under this medium-term tender and also ignoring the tariffs discovered under similar pilot procurement schemes earlier.

**244.** By way of the aforesaid comparison, Respondent No.2/NPCL had submitted that the Appellant has erroneously been comparing tariffs at different points of time and at different points in grid, i.e., generator bus, UP periphery or NPCL Periphery. The aforesaid clarification in the first place was required to respond to the allegation made by the Appellant that Respondent No.2/NPCL has submitted that the tariff quoted by Respondent No.3/DIL includes the CTU Charges and Losses. Respondent No.2/NPCL

while making the aforesaid comparison has provided the tariff under the PFCC bids both, at UP periphery (hence not including the STU Charges and Losses) and the NPCL periphery for the purpose of making a fair comparison. Respondent No.2/NPCL reiterates that the Appellant is erroneously comparing various tariff numbers at various points in the grid and that too in different timelines only to mislead.

### **Assured Fuel Linkage offered by Respondent No.3/DIL**

**245.** Respondent No.2/NPCL has outlined the prevalent coal shortage in or around 2010-15 that existed on account of various factors as was clear from the statutory directives issued by the Ministry of Power. Further, Respondent No.2/NPCL has referred to the Hon'ble Supreme Court's Judgment dated 25.08.2014 read with the decision dated 24.09.2014 passed in Writ Petition (Crl.) No. 120 of 2012 with Writ Petitions (C) Nos. 463, 515 of 2012 and 283 of 2013: Manohar Lal Sharma vs. Principal Secretary & Ors. ("**Cancellation Judgment**") due to which a large number of thermal power generators were facing uncertainty with respect to fuel requirement at the time of Respondent No.2/NPCL entering into the PPA with Respondent No.3/DIL.

**246.** In view of the aforesaid uncertainty, the State Commission had sought firm commitments from Respondent No.3/DIL. In this context, Respondent No.3/DIL had provided its commitment on fixed charges for the entire duration of the PPA. Respondent No.3/DIL also had assured coal linkage unlike various other power project developers at that time. Further, Respondent No.3/DIL had referred to Regulation 26 of the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014 ("**UPERC Generation Tariff Regulations 2014**") to submit that the generator can procure additional fuel through alternative sources such as e-

auction/imports, etc. to meet any shortfall in coal supply and the cost of such fuel is passed on to the procurer subject to approval of the State Commission. Therefore, the State Commission after satisfying itself of the reliability and cost-effectiveness of power being offered by Respondent No.3/DIL had approved the PPA entered between Respondent No.2/NPCL and Respondent No.3/DIL.

**247.** The Appellant has erroneously sought to compare the requirement of additional coal, for which Respondent No.3/DIL has in compliance of the direction of the State Commission vide PPA Approval Order dated 20.04.2016 and Multi-Year Tariff (“MYT Order”) dated 05.02.2019 subsequently approached the State Commission with the prevalent coal shortage situation existing at the time of Respondent No.2/NPCL entering into the PPA with Respondent No.3/DIL. The comparison drawn by Respondent No.2/NPCL in the Written Submissions dated 29.07.2020 when referring to the prevalent coal shortage in Paragraph 62 (i) to (iii) is in context of the thermal power project developers which had no linkage whatsoever and were thus relying solely on imported/e-auction coal or remaining stranded due to cancellation of the coal blocks. In fact, even today it is understood that Respondent No.3/DIL meets its coal requirement through long-term existing Fuel Supply Agreement with South Eastern Coal Fields (“SECL”) and procures additional coal in case of shortfall from SECL and through other market options, thus, had approached the State Commission for approval of such additional coal in terms of the earlier orders of the State Commission, including the PPA Approval Order and as per the applicable Generation Tariff Regulations.

**248.** The State Commission in its prudence had ensured that Respondent No.3/DIL has an assured fuel supply linkage for procurement of FSA grade coal and minimizing any scope of additional cost of fuel that may be

payable by Respondent No.2/NPCL and ultimately the consumers, by imposing the condition for procurement and use of additional coal only after the grant of permission by the State Commission.

**249.** The subsequent petitions filed by Respondent No.3/DIL is not the subject matter of the present dispute, by no stretch of imagination can the Appellant rely upon such petitions filed by Respondent No.3/DIL to equate the position of Respondent No.3/DIL with other thermal power generators suffering due to the shortage of coal.

**250.** With these submissions, Respondent No.2/NPCL prays that this Tribunal may be pleased to dismiss the present Appeal and pass any other orders as it may deem fit in the facts and circumstances of the case.

**251. Ms. Mandakini Ghosh, Learned Counsel for the Respondent No.3 (M/s. Dhariwal Infrastructure Limited) in Appeal No. 150 of 2017 has submitted the following Written Submissions for our consideration.**

**252.** Subsequent to operationalization of the Long-Term Access (“LTA”) by the Central Transmission Utility (“CTU”), Respondent No.3/DIL started supplying 34 MW of power from 18.11.2016 and after operationalization of LTA on 29.03.2017, the Respondent No.3/DIL is supplying the balance 136MW of power (i.e., 170 MW, the entire Contracted Capacity) which is to meet the base load of the Respondent No.2/NPCL. In this context, reference may be made to the Appellant No.1’s, (i.e., Shri Rama Shankar Awasthi’s) Application (i.e., I.A. No. 382 of 2017) along with the present Appeal seeking stay on the operation of the Impugned Order and for the grant of long-term open access to the Respondent No.2/NPCL and the Respondent No.3/DIL. The said Application was dismissed by this Tribunal vide its Order dated 31.07.2017.



**253.** For the sake of brevity, the Respondent No.3/DIL is not setting out the detailed factual matrix in the present Submissions as the same has been set out comprehensively in its Reply dated 08.09.2017 as well as its Written Note dated 02.06.2020 filed in the present Appeal. In view thereof, it is most respectfully submitted that the said Reply and Written Note be read as a part and parcel of the present Written Submissions.

**254.** The allegations made by the Appellant No.1 in the present Appeal, its Written Submissions and during the course of proceedings in the present Appeal are devoid of merits and ought to be rejected by this Tribunal. In this regard, the Respondent No.3/DIL respectfully submits that the present Written Submissions is limited to the following:

- (a) The PPA approved by the State Commission by way of the Impugned Order dated 20.04.2016 is at arms-length;
- (b) The State Commission has at the time of approval of PPA applied itself both to the facts and has also prudently verified the costs for the purposes of evaluation of PPA (It is clarified that tariff determination as per the applicable Tariff Regulations was done subsequently under a separate proceeding);
- (c) The Impugned Order dated 20.04.2016 does not suffer from violation of the principles of natural justice as has been alleged by the Appellant No.1;
- (d) The power supplied by the Respondent No.3/DIL is competitive and market-aligned and the Appellant No.1 is making an 'apple to orange' comparison by erroneously equating short/medium-term supply of power offered by Respondent No.3/DIL to the long term-supply of power by Respondent No.3/DIL from its

Unit 2 for a period of 25 (twenty five) years to the Respondent No.2/NPCL under the PPA dated 26.09.2014;and

- (e) The State Commission certainly has the jurisdiction under Section 64(5) of the Electricity Act, 2003 (“**Act**”) to approve the PPA and determine tariff for the supply of power by the Respondent No.3/DIL to the Respondent No.2/NPCL.

**255.** Prior to commissioning of both the Units of the Respondent No.3/DIL’s Project, i.e., Unit 1 on 11.02.2014 and Unit 2 on 02.08.2014, the Respondent No.3/DIL had executed a long-term PPA dated 27.11.2013 with Tamil Nadu Generation and Distribution Corporation Limited (“TANGEDCO”) through a competitive bidding process under Section 63 of the Act (“TANGEDCO PPA”). The said PPA with TANGEDCO is for the supply of 100 MW from Unit 2 of the Respondent No.3/DIL’s Project at a levelized tariff of Rs. 4.91/kWh. Further, under the said PPA, the Respondent No.3/DIL in addition to the quoted tariff is entitled to the following:

- (a) Central Electricity Regulatory Commission (“CERC”) escalation on the escalable components of tariff;
- (b) pass-through on account of ‘Change in Law’ events; and
- (c) pass-through on account of shortfall in the coal supplied by Coal India Limited (“CIL”) [in terms of the policy directive dated 31.07.2013 issued by the Ministry of Power (“MoP”) read with Paragraphs 56-68 of the judgment of the Hon’ble Supreme Court of India dated 11.04.2017 in Energy Watchdog vs. CERC & Ors., (2017) 14 SCC 80 (“Energy Watchdog Judgment”)].

**256.** Notably, since the Respondent No.3/DIL's Project had already been commissioned and the Respondent No.3/DIL had received a Letter of Assurance ("LoA") from South Eastern Coalfield Limited ("SECL") dated 20.08.2008 and 06.06.2009 for the supply of coal, the Respondent No.3/DIL was in a position to supply power to the Respondent No.2/NPCL.

**257.** Subsequently, the Respondent No.3/DIL and the Respondent No.2/NPCL entered into the PPA dated 26.09.2014 for the supply of 170 MW net contracted capacity, subject to the approval of the State Commission. Pursuant thereto, the Respondent No.2/NPCL on 29.09.2014, filed a Petition before the State Commission seeking approval of the PPA executed with Respondent No.3/DIL. However, the State Commission by its Order dated 27.01.2015 rejected the Petition/PPA ("PPA Rejection Order"). In the said order, the State Commission directed the Respondent No.2/NPCL to undertake the purchase of power through a competitive bidding route, as envisaged under Section 63 of the Act.

**258.** Since the Respondent No.2/NPCL had earlier failed in its several attempts to obtain power through competitive bidding under Section 63 of the Act, the Respondent No.2/NPCL filed an Appeal before this Tribunal, (i.e., Appeal No. 88 of 2015) challenging the PPA Rejection Order dated 27.01.2015. This Tribunal, vide its Judgment dated 28.05.2015 ("Remand Judgment") in Appeal No. 88 of 2015 was pleased to set aside the PPA Rejection Order dated 27.01.2015 and remand the matter back to the State Commission for fresh reconsideration. Further, this Tribunal, also took note of the failed attempts by the Respondent No.2/NPCL to procure power through competitive bidding.

**259.** Thereafter, at the instance of the Respondent No. 2/NPCL, the State Commission reinstated the PPA Approval Petition and in terms of the

Remand Judgment of this Tribunal examined (a) whether the Respondent No.2/NPCL could execute a PPA with the Respondent No.3/DIL for the purchase of power under Section 62 of the Act; and (b) the terms of such PPA for the supply of power to the Respondent No.2/NPCL. In this context, during the hearings between 29.09.2015 to 04.11.2015 before the State Commission, the Respondent No.3/DIL gave various calculations/computations to the Respondent No.2/NPCL, which were also subsequently filed before the State Commission. In the Submissions dated 26.10.2015, 20.11.2015 and 19.02.2016 that were filed by the Respondent No.2/NPCL before the State Commission, the Respondent No.3/DIL had confirmed the following:

- a) that the Respondent No.3/DIL is willing to supply power at an indicative levelized ex-bus fixed charges/capacity charges for 25 (twenty-five) years working out to Rs. 1.93/kWh (exclusive of taxes and statutory charges on actual basis) and there would be no upward revision of the project cost;
- b) the indicative levelized tariff at UP periphery for 25 (twenty-five) years for the purposes of comparison with other generating stations supplying power under Case-1 competitive bidding to the State of Uttar Pradesh would be Rs. 4.79/kWh, based on the cost of coal and transportation as on that date; and
- c) going forward the Respondent No.3/DIL would be entitled to receive the benefit of the CERC Coal Escalation Index and reimbursement for purchase of alternate coal on account of shortfall in the supply by SECL.

**260.** It was clarified as in those days (and even now), CIL companies are not supplying the entire quantum of coal that was agreed to under the

LoA/Fuel Supply Agreements (“FSAs”). As a result, the generators had to procure coal from alternate sources. This fact is undisputed and recognized in various orders passed by the State Commission, this Tribunal as well as the Hon’ble Supreme Court. The Central Electricity Authority (“CEA”) and MoP also in various documents/communications have recognized the issues that had arisen on account of shortages in coal supply and the consequent burden on the generators. In this context, specific reference may be made to the policy directive dated 31.07.2013 issued by the MoP which has also been referred to in the Energy Watchdog judgment. The Hon’ble Supreme Court has held that such policy directive having been issued under statutory provisions has the force of law.

**261.** The State Commission by its Orders dated 29.09.2015, 15.01.2016 and the Impugned Order dated 20.04.2016 examined the cost competitiveness of the transaction and approved the supply of power by the Respondent No.3/DIL to the Respondent No.2/NPCL including the conditions of tariff. It is submitted that the levelized tariff of Rs. 4.79/kWh at UP periphery for 25 (twenty-five) years was taken as a benchmark for the purpose of initial review of cost of power with cost of other generating stations supplying power under Case-1 competitive bidding to the State of Uttar Pradesh. The said benchmarking was subject to a determination of tariff as per the applicable Tariff Regulations. The proceedings before the State Commission in the PPA Approval Petition No. 971 of 2014 culminating into the Impugned Order dated 20.04.2016, which is the subject matter of the present Appeal is only on the issue of approval of PPA and the initial benchmarking of the conditions of tariff. The tariff was subsequently determined through an established regulatory process culminating into the Order dated 05.02.2019 in the Multi Year Tariff Petition No. 1235 of 2017 (“MYT Order”) against

which Appeal No. 185 of 2019 has been filed by the Appellant No.1 before this Tribunal.

- **The PPA has been executed between the Respondent No.2/NPCL and Respondent No.3/DIL at arm's length**

**262.** The Appellant No.1 has sought to create prejudice against the Respondent No.3/DIL in the present Appeal by contending that since the PPA dated 26.09.2014 has been executed between related parties, i.e., Respondent No.2/NPCL and Respondent No.3/DIL, the State Commission has erred in dispensing with the requirement of competitive bidding process. At the outset, it is noteworthy that the disclosure that the parent company of Respondent No.3, i.e., CESC Ltd. also has a stake in the Respondent No.2/NPCL has been made at multiple stages, including before this Tribunal which has been noted in Paragraph 19 of the Remand Judgment dated 28.05.2015 issued by this Tribunal.

**263.** The parent shareholder of the Respondent No.3/DIL i.e., CESC Limited is the majority shareholder of the Respondent No.2/NPCL. However, it is to be noted that 27% of the equity shareholding of the Respondent No.2/NPCL is owned and controlled by the Noida/Greater Noida Authority. Further the Chairman, Greater Noida Authority is the Ex-Officio Chairman of the Respondent No.2/NPCL. The Board of Directors of the 2 (two) companies are separate and as such, their transactions are at arms-length.

**A(i) Disclosure of the fact that the Respondent No.3/DIL and the Respondent No.2/NPCL are related parties.**

**264.** The fact that the parties to the PPA, i.e., Respondent No.2/NPCL and Respondent No.3/DIL are related has always been disclosed and an arm's length in conducting the business has always been maintained. The same

is seen from the following extract from the PPA Approval Petition filed by the Respondent No.2/NPCL:

*“23.It is pertinent to note that CESC Limited holds stakes in both the Petitioner Company as well as DIL; however it is submitted that the transaction is proposed to be conducted at arm’s length and is subject to the final approval of this Hon’ble Commission. The Petitioner Company proposes to enter into the Power Purchase Agreement in bona fide belief that the same is in the best interests of the licensed business as well as consumers....”*

(Emphasis Supplied)

**265.** Further, the fact that the parties to the PPA, i.e. Respondent No.2/NPCL and Respondent No.3/DIL are related was also disclosed before this Tribunal in Appeal No.88 of 2015 where the State Commission while defending its PPA Rejection Order dated 27.01.2015 had *inter alia* raised the contention that Respondent No.2/NPCL and Respondent No.3/DIL are group companies. The said submission made by the State Commission was duly noted by this Tribunal and recorded in Paragraph 19 of the Remand Judgment dated 28.05.2015 as set out above.

**A(ii) Regulation 5.9 of the Distribution License Regulations permits distribution licensees to enter into related party transactions**

**266.** In this regard, it is also noteworthy that the State Commission, by way of its General Conditions of Distribution License Regulations, 2004 has permitted Distribution Licensees to enter into related party transactions, as long as the said transactions are at arms-length. The relevant excerpts from the said Regulations are set forth herein below ease of reference:

***“5.9 The Distribution Licensee may engage any of the Subsidiaries or Holding Company or a Subsidiary of such Holding Company of the Distribution Licensee to provide any goods or services to the Licensee in connection with the Licensed Business, subject to the following conditions:***

***(a) That the transaction will be on an arms-length basis and at a value that is fair and reasonable in the circumstances;***



...”

(Emphasis Supplied)

**267.** In view of the foregoing, it is submitted that since the tariff is determined by the State Commission through a transparent process under Section 62 or Section 63 of the Act, the allegation of having common shareholders becomes irrelevant and baseless. The Appropriate Commission determines tariff on the basis of certain settled regulatory parameters, or the guidelines framed by the Central Government. The parties do not negotiate and fix tariff. Further, in most of the States, the Distribution Licensees and the State generating companies are owned and controlled by the State Governments and the Appropriate Commission determines tariff for those generators also. Notably, the Act does not apply differently for the government-owned companies and the private companies. Even the private sector companies, for instance, Tata Power and now Adani Power own generating stations and are also Distribution Licensees in specified licensed areas.

**268.** A generating company has been held to be free to enter into an agreement, particularly a long-term agreement with the Distribution Licensee subject to approval and regulation by the Appropriate Commission. If the terms and conditions relating to quantity, price, mode of supply and the need of the Distributing Licensee *vis-a-vis* the consumer, keeping in view its long-term need are found to be reasonable, approval may be granted by the Appropriate Commission.

**The Impugned Order has been issued by the State Commission after duly applying itself to the facts and prudently verifying the costs, which in any event was subject to determination of tariff at a later stage**

**269.** The Appellant No.1 has erroneously contended that the State Commission has not carried out prudence check at the time of passing of the Impugned Order dated 20.04.2016 approving the PPA entered into between the Respondent No.3/DIL and the Respondent No.2/NPCL. In this context, it is humbly submitted that pursuant to the Remand Judgment dated 28.05.2015 of this Tribunal, the State Commission had by way of its Order dated 29.09.2015 sought various details and data from the Respondent No.2/NPCL. The relevant excerpts from the State Commission's Order dated 29.09.2015 are set forth herein below for the ease of reference:

***“2. The Commission desired to know that whether the cost of electricity from this project is competitive with the available cost of power from other sources and with the power available from exchange. NPCL was also asked that how would NPCL ensure that the commitments made by the concerned generator would be adhered to and whether they have made any such condition in their agreement to the effect that if the commitments are not fulfilled, the impact thereof will not be passed on to the consumers. The Commission further enquired about the FSA and 100 percent coal linkage of the generator.***

***2. NPCL was directed to submit detailed reply on above along with supporting documents”***

(Emphasis Supplied)

**270.** Notably, in response to the directions of the State Commission in the aforesaid Order dated 29.09.2015, the Respondent No.2/NPCL had filed its Written Submissions on 26.10.2015 wherein the Respondent No.2/NPCL *interalia* provided the background of its (a) earlier 5 (five) attempts to procure power under competitive bidding; and (b) its requirement to procure power from a firm source, where the generating station has been commissioned and has coal linkage. In the said Written Submissions, the Respondent No.2/NPCL had provided the following details:

- a) The unreliability of power from the power exchange and details of fluctuation (volatility) for power traded on the short-term market for Financial Years 2013-14 and 2014-15;
- b) Summary of tariff proposal submitted by the Respondent No.3/DIL where the fixed charges for 25 (twenty-five) years along with first year variable charges and all the other relevant assumptions were provided;
- c) The procurement of power by Uttar Pradesh Power Corporation Limited (“UPPCL”) in 2012 under Case-1 competitive bidding, where the weighted average levelized tariff was Rs. 5.55/kWh (which is higher by Rs. 0.76/kWh compared to the levelized tariff of DIL). This procurement of power was approved by the State Commission;
- d) Details of PPAs executed under Section 62 of the Act by UPPCL at fixed costs higher than the fixed costs proposed by the Respondent No.3/DIL;
- e) Comparative of capital costs of power plants across India commissioned between 2014 and 2015
- f) Apart from the above comparative data, the Respondent No.2/NPCL also submitted for consideration for the State Commission the monthly report of the status of thermal projects in the country, April 2015 prepared by the CEA
- g) CERC’s Order dated 04.06.2012 in the matter of benchmark coal capital cost of thermal power stations
- h) Report on short-term power market in India by CERC; and

- i) Maharashtra Electricity Regulatory Commission's Order dated 09.03.2015 in Case No. 115 of 2014 in the Petition by Vidarbha Industries Limited for determination of the final cost and tariff

**271.** Thereafter, the State Commission conducted a further hearing on 04.11.2015 and sought certain clarifications, which were responded to by the Respondent No.2/NPCL by way of its Written Submissions dated 20.11.2015. Subsequently, the State Commission issued an Order dated 15.01.2016 considering all the submissions that were made till that point of time. In the said Order dated 15.01.2016, the State Commission inter alia held as follows:

*"12.From the above discussions, it is evident that although NPCL has submitted a commitment on fixed charges for 25 years but has not submitted firm view on variable cost for the term of the PPA as promised by them during the hearing. The undertaking submitted by the generator is only for the period till fuel supply agreement is executed. In view of the fact that whole case of NPCL is based on the levelized tariff of Rs. 4.79/kwh (for the period of 25 years), it becomes necessary to firm up the fixed as well as the variable part of the tariff. The table showing fixed charges for 25 years and confirmation that there would be no upward revision in the project cost ensures sanctity of fixed charge. Similarly the component of variable charge also require to be as per the commitment of levelized tariff of Rs. 4.79/kwh for the period of 25 years except for the variation due to CERC escalation rates, over and above the escalation rates taken in calculation of levelized tariff of Rs. 4.79/kwh, which would be additionally allowed in variable charge. Such limitation on variable charge would mean that for the whole term of PPA if there ever is any short supply from SECL and the Seller has to procure fuel from alternative sources then he would bear the additional cost, if any, over the prevailing SECL price plus CERC escalation. In this manner, the consumer may be ensured to get power at a cheaper rate through this PPA as promised by the parties.*

*13.It has also been observed by the Commission that many clauses in the draft PPA have been deleted and new insertions have been made. As any deviation is required to be approved by the Commission, it is desired that all such deviations/ insertions should be put up before the Commission in tabular form giving reasons for deletions/insertions."*

**272.** Pursuant thereto, in compliance with the State Commission's Order dated 15.01.2016 in the PPA Approval Petition and after having

discussions with the Respondent No.3/DIL, the Respondent No.2/NPCL filed its Written Submissions dated 19.02.2016, confirming the following position:

- a. Fuel related risks are not under the control of any generator and it would be impossible to predict the fuel prices/the quantum of shortfall or the quality of the fuel supplied for a period of 25 (twenty-five) years;
- b. The inability of the earlier competitive bidding framework to provide an adequate mechanism for sharing the risk on account of fuel has led to filing of cases and also non-availability of power under the PPA;
- c. Due to this reason, the Government of India modified the Bidding Guidelines dated 19.01.2005 sometime on 22.07.2010 to ensure that the developer/suppliers are not exposed to fuel related risks. Under the amended/revised Competitive Bidding Guidelines, the generator can purchase additional fuel through e-auction/imports to meet shortfall in coal supply and the cost of such additional fuel is passed on to the procurer; and
- d. The State Commission also recognized this and has allowed fuel escalation cost as a pass-through in its Generation Tariff Regulations namely UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014-19.

**273.** In view of the above, it becomes evident that pursuant to the Remand Judgment dated 28.05.2015 issued by this Tribunal, the terms and conditions of the PPA were delved into by the State Commission. Further, the capital cost of the Respondent No.3/DIL was duly compared with the benchmark set by the CERC as well as the capital cost of similarly placed

generators with operational PPAs in the State of Uttar Pradesh. Being satisfied of the tariff indicated by the Respondent No.3/DIL being competitive as well as the capital costs being fixed and frozen, the State Commission had approved the PPA vide the Impugned Order dated 20.04.2016. Thus, the State Commission, while approving the PPA, has acted in accordance with the regulatory practice of prudence check. In the said Impugned Order, the State Commission took judicial notice of the submissions made by the Respondent No.2/NPCL which becomes evident from a perusal of the following excerpts from the Impugned Order:

*“NPCL has submitted that since their Power Plant is already complete and commissioned hence there is no risk of increase in Capital Cost post approval of the PPA. In this sense, this is a significant advantage compared to tariffs from other MoU projects. NPCL has added that fuel related risks are not under their control therefore commitment on variable charges for a period of 25 years will be unsustainable. Inadequate mechanism for risk sharing has negative impact on competitive bidding framework which Government of India has in the past tried to rectify. As per the new provision, in case of shortfall in fuel supply, additional procurement may be done with the approval of the procurer and concerned SERCs. UPERC’s Regulation has also recognized this issue. Regard such procurements, NPCL has submitted as follows:*

*‘Additionally, the parties also commit that, in case of any shortfall in the quantity of coal supply from the domestic linkage from CIL, DIL would procure additional fuel, either from e-auction or through a transparent competitive bidding process (for imported coal), in line with the UPERC Tariff Regulations, DIL also commits to seek prior approval from NPCL and the Commission in this regard. The proposed mechanism for additional fuel supply is transparent at arm’s length and is balanced from a risk perspective. Necessary changes in this regard will be promptly made in the PPA after grant of approval by the Hon’ble Commission.’*

...

8. *In view of above, the Commission allows that in case of any shortfall in the quantity of coal supply from the domestic linkage from SECL, DIL and NPCL in consent may approach to the Commission for prior approval of procurement of fuel from alternative sources. However, it would be ensured by DIL that coal available under FSA would first be utilized for supply of 187 MW of NPCL.*

5. *The Commission also approves the deviations in the submitted PPA as annexed.”*

**274.** In view of the foregoing, all the above-mentioned submissions made by the Respondent No.2/NPCL and the Respondent No.3/DIL as well as the data put on record have been duly recorded and dealt with by the State Commission before passing the Impugned Order. Thus, the State Commission has demonstrably approved the PPA only after conducting due prudence check so as to safeguard the interest of the consumers to the extent possible, contrary to the unsubstantiated allegations of the Appellant No.1.

**275.** Further, the Appellant No.1 has erroneously contended that the submission with regard to shortage of coal to justify the reliability of the power procurement from the Respondent No.3/DIL is erroneous since (a) even the Respondent No.3/DIL had submitted that it cannot commit to fixed Energy Charges as the availability and price of coal are beyond the control of a generator; and (b) the State Commission had given the Respondent No.3/DIL the liberty to claim the costs for the procurement of additional coal. In this regard, it is noteworthy that:

- (a) the supply of coal under the linkage from CIL was restricted to <80% under the New Coal Distribution Policy, 2013 (“NCDP”) which had already been promulgated. In view of such restriction imposed upon by the Coal Companies for all projects in the country having linkage coal, the use of additional coal for supply of power up to the Contracted Capacity to the Respondent No.2/NPCL was inevitable. This problem of shortage of coal in projects based on linkage coal was recognised in the National Tariff Policy, 2016 and by various Regulatory Commissions, this Tribunal and the Hon’ble Supreme Court. In view of the above, a mechanism was put into place to compensate the generators having coal linkage



towards the procurement and use of coal from alternative sources due to shortfall in supply of such linkage coal; and

- (b) the coal assured through coal linkage (even with some shortage and incremental cost thereto) was a better proposition than the generating companies whose coal blocks were cancelled and had no assured supply of coal.

**276.** So far as competitive bidding process is concerned, it is submitted that initiation of competitive bidding and or even successful completion of the competitive bidding does not guarantee for supply of cheap and competitively priced power. The present times are seen/filled with examples of litigation involving re-opening of PPAs executed pursuant to a competitive bidding process and generators seeking higher tariff. Therefore, it is possible that the tariff indicated by the bidders may be unsustainable leading to subsequent claims of compensatory tariff which in turn would create uncertainty and potential hikes in retail tariff. In any case, the fact that the generating station has been commissioned (and the capital cost was more or less frozen) and that there was a fuel linkage from CIL are factors that provided security of both cost and supply, which also weighed in favour of approval of PPA. This aspect was particularly important for the reason that Essar Power (Jharkhand) Limited after having executed a PPA on 09.05.2012 with the Respondent No.2/NPCL under Section 63 of the Act (through a competitive bidding process) was unable to supply power and as such the said PPA was terminated, leading to disputes between the parties that had to be resolved by the State Commission. Reference is made to the Orders dated 30.05.2014 and 27.01.2015 passed by the State Commission in Petition No.903 of 2013 and Petition No. 971 of 2014 respectively

## **The Impugned Order does not suffer from violations of the Principle of Natural Justice as has been alleged**

**277.** It is submitted that the Appellant No.1 has erroneously raised the issue of lack of public hearing before the approval of the PPA and thereby, contended that the State Commission has violated the principle of natural justice while issuing the Impugned Order dated 20.04.2016 approving the PPA. In this regard, the Respondent No.3/DIL adopts the detailed submissions made by the Respondent No.2/NPCL during the course of hearing before this Tribunal and only makes the following additional submissions.

**278.** In terms of the Act read with the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014 (**Generation Tariff Regulations, 2014**), a public notice is mandatory when tariff is being determined by the Appropriate Commission in proceedings under Section 62 read with Section 64 of the Act. Such public notice is not mandatory for the approval of PPA by the Appropriate Commission under the provisions of Act read with Generation Tariff Regulations, 2014. The requirement of public consultation process including publication of public notice in dailies such as Hindustan Times, Indian Express and Hindustan (Hindi Daily), at the stage of tariff determination has duly been complied with by the State Commission at the time of passing of the MYT Order dated 05.02.2019.

**279.** Further, the Appellant No.1 had participated in the proceedings related to determination of retail tariff for supply of power to Respondent No.2/NPCL, which also included the supply of power from Respondent No.3/DIL, which becomes evident from a perusal of the Orders issued by the State Commission for determination of retail tariff of Respondent No.2

(where the cost of power procurement from Respondent No.3/DIL was also determined).

**280.** The Appellant No.1 had participated in the stakeholder consultation process including attending the public hearing held at Lucknow on 13.05.2016, 22.09.2017 and 17.12.2018, in Petition No. 1077 of 2016, Petition Nos.1145 & 1146 of 2017 and Petition No.1349 of 2018 respectively. However, the Appellant No.1 had neither objected to the sourcing of power from the Respondent No.3/DIL in any of the aforesaid hearings nor challenged any of the said Orders. The aforesaid position becomes clear from a perusal of the Tariff Orders dated 01.08.201, 30.11.2017 and 22.01.2019 passed in Petition No. 1077 of 2016, Petition Nos.1145 & 1146 of 2017 and Petition No.1349 of 2018 respectively. Further, the State Commission had also held a public hearing on 30.10.2018 in relation to the tariff determination of the power supplied by the Respondent/DIL, wherein the Appellant No.1 had submitted his objections both orally and in writing *inter alia* on the issue of jurisdiction of the State Commission.

**281.** The Appellant No.1 being a consumer if at all may have a direct grievance against determination of retail tariff of Respondent No.2, but it has chosen not to challenge the same. The said Tariff Orders of the Respondent No.2 have attained finality, wherein cost of power procurement *inter-alia* for sourcing of power from the Respondent No.3/DIL has also been decided and remains unchallenged. Therefore, the Appellant No.1 cannot at such a belated stage and pursuant to having participated in the public hearing, bring up the issue of lack of public consultation and/or hearing at the time of passing of the Impugned Order. It is clarified that as regards the proceedings for determination of tariff is concerned, a public hearing was duly conducted by the State Commission on 30.10.2018 and the Appellant

No.1 had participated and filed its objections/submissions in the said proceedings. As stated hereinabove, the MYT Order dated 05.02.2019 issued in MYT Petition No. 1235 of 2017 is a subject matter of Appeal No. 185 of 2019 filed by the Appellant No.1 before this Tribunal

**282.** The Impugned Order was passed pursuant to the Remand Judgment of this Tribunal dated 28.05.2015 in Appeal No.88 of 2015. The proceedings were only limited to the approval of PPA for which there is no requirement of public hearing. It is reiterated that under the Act, public notice is a requirement for determination of tariff under Section 64 of the Act. In this regard, reference may be made to Section 64(2) of the Act which requires publication of the tariff application in an abridged form. It is reiterated that in the proceedings for tariff determination, the procedure envisaged under the Act as well as the Generation Tariff Regulations, 2014 has been entirely followed by the State Commission.

### **The Tariff determined by the State Commission is Competitive and Market Aligned**

**283.** The Appellant No.1 has *inter alia* contended that the power supplied by the Respondent No.3/DIL to the Respondent No.2/NPCL is uncompetitive.

**284.** At the outset, it is submitted that both the aforesaid tariff for the short-term supply to MSEDCL and for the medium-term supply to the Respondent No.2/NPCL were discovered pursuant to a competitive bidding process under Section 63 of Act and subsequent to signing and approval of the PPA and thus, have no relevance in the present matter.

**285.** Further, the Appellant No.1 is making an ‘apple to orange’ comparison by erroneously equating short/medium-term supply of power offered by the Respondent No.3/DIL to the long term-supply of power by the Respondent No.3/DIL from Unit 2 of its Project for a period of 25 (twenty-five) years under PPA dated 26.09.2014.

**286.** Firstly, the sale of short-term power by the Respondent No.3/DIL from Unit 1 of its Project to MSEDCL at a tariff of Rs. 2.99/kWh at the generator bus was for less than a month between the period of 07.05.2017 to 31.05.2017. The dynamics and economics impacting discovery of tariff in short-term/medium-term market and long-term market is entirely different. They are as under:

<b>Factors affecting Long-term price discovery</b>	<b>Factors affecting Short-term/Medium-term price discovery</b>
<ul style="list-style-type: none"> <li>- To meet the base load demand of a Distribution Licensee</li> <li>- Period of contract is long typically more than 7 (seven) years upto 25 (twenty-five) years for long-term contract</li> <li>- Procurement is decided based on future demand growth.</li> <li>- Firmly contracted capacity from generator (Availability of power for Discom is firm)</li> <li>- Long-term and assured fuel (coal) supply arrangements allowed to the generators.</li> <li>- Price of power is firm with only allowed variations as per applicable regulations.</li> </ul>	<ul style="list-style-type: none"> <li>- To meet the seasonal and diurnal variations of demand of a Distribution Licensee</li> <li>- Period of contract is short and typically upto 1-5 (one-five) years for medium term and few days to maximum 1 (one) year for short-term.</li> <li>- Procurement is decided based on present demand-supply condition and urgency.</li> <li>- Uncontracted surplus capacity from generator (Availability of power in the market for Discom is uncertain due to various factors such as sudden change in weather condition, forced outage etc.)</li> <li>- Coal is sourced from domestic open market/e-auctions/imports etc. depending on the availability and economic feasibility at that point of time.</li> <li>- Price is uncertain and depends on demand-supply condition of grid, market forces, season, availability of coal, etc.</li> </ul>

<b>Factors affecting Long-term price discovery</b>	<b>Factors affecting Short-term/Medium-term price discovery</b>
<ul style="list-style-type: none"> <li>- Assured transmission corridor under long-term open access.</li> </ul>	<ul style="list-style-type: none"> <li>- No firm transmission corridor for short-term power, hence, higher chances of curtailment in case of network constraints.</li> </ul>

**287.** Secondly, Unit 1 of the Project is connected to the transmission network of State Transmission Utility (“STU”) and Unit 2 is connected to the transmission network of CTU which implies that configuration and connectivity of these two Units are different and mutually exclusive. Notably, the short-term power supply to MSEDCL was from Unit 1, which is connected to the STU and therefore, the tariff for supply under this short-term contract cannot be compared to the levelized tariff for 25 (twenty-five) years under the present PPA where supply of power is from Unit 2, which is connected to the CTU.

**288.** Thirdly, the delivery point under this short-term contract for supply of power from Unit 1 of the Project was at the generator bus, as opposed to the delivery point at UP periphery under the present long-term PPA for supply of power from Unit 2. Therefore, the Appellant No.1 is erroneously attempting to draw a comparison between two different tariffs for the power supplied by the Respondent No.3/DIL from Unit 1 and Unit 2 of the Project and which are completely different in terms of the period of supply and delivery points.

**289.** Further, it is submitted that since there is no long-term PPA for Unit 1 of the Project, the short-term supply of power from Unit 1 to MSEDCL was only an attempt of the Respondent No.3/DIL to operate the idle Unit 1 of the Project, overriding all commercial considerations and quoting just enough tariff to recover its fuel cost. Further, unlike long-term and medium-term contracts, short-term tariff is a single-part tariff with a minimum offtake clause and therefore, only a margin over the fuel cost is allowed.

**290.** This Tribunal in its Order dated 31.07.2017 in I.A. No. 382 of 2017 recorded the above submission, by way of which the Appellant No.1's Application for Stay was rejected by this Tribunal. The relevant extracts from the Order dated 31.07.2017 issued by this Tribunal are set forth herein below for the ease of reference:

*"5.We have also heard Mr. Sen, learned Senior Advocate appearing for M/s Dhariwal, Respondent No.3. Counsel submitted that in this case there is no breach of principles of natural justice. The consumers are not affected by the source of power. They are affected only by tariff of power. They can avail of the opportunity to be heard during public hearing, which will be conducted at the time of determination of generation tariff of M/s Dhariwal. Counsel further urged that the Appellants cannot draw any mileage from the fact that M/s Dhariwal has put in a 9 bid for supply of power from its Unit – I of the Project to the distribution licensee in the State of Maharashtra. Unit- I of M/s Dhariwal was lying idle for the last three years. Counsel submitted that it was therefore considered appropriate to check the readiness of Unit – I by operating the unit for a short period of about three months by supplying power to distribution licensee in the State of Maharashtra overriding commercial interest. No use can be made by the Appellants of this circumstance. Other submissions of Mr. Sen are similar to the submissions of Mr. Vaidyanathan and hence we need not repeat them."*

**291.** In addition to the above, the Appellant No.1 has once again erroneously placed reliance on the tariff of Rs. 4.55/kWh that was offered by the Respondent No.3/DIL to the Respondent No.2/NPCL at its periphery for medium-term supply under the e-tender process floated by the Respondent No.2/NPCL in the year 2018. The medium-term supply of power was for a short period of 16 (sixteen) months, and therefore, the same is not comparable with the levelized tariff of 25 (twenty-five) years for supply of power from Unit 2 of the Project to the Respondent No.2/NPCL. Further, the tariff offered by the Respondent No.3/DIL was comparable to that offered by 10 (ten) other bidders who participated in the medium-term bid process. A summary of the tariff discovered under the said medium-term bidding is reproduced hereunder:



List of Bidders	Quantum (MW)	Composite Tariff @ NPCL periphery (₹/kWh)
SKS Power Generation, Chhattisgarh	100	4.250
V.S Lignite, Rajasthan	63	4.310
Dhariwal Unit-1, Maharashtra	100	4.550
GMR Kamalanga, Odisha	70	4.660
Jindal India Thermal, Odisha	60	4.690
Mosaer Baer, Madhya Pradesh	100	5.490
Jindal India Thermal, Chhattisgarh	100	5.650
Jaypee Nigrie, Madhya Pradesh	100	5.930
Sembcorp Power, Andhra Pradesh	100	6.000
Shree Cement (CTU), Rajasthan	100	8.610
Shree Cement (STU), Rajasthan	50	11.314

**292.** In view of the above, it is humbly submitted that the Appellant No.1 is erroneously comparing the tariff at which the Respondent No.3/DIL is supplying power at short/medium-term basis to the tariff at which the Respondent No.3/DIL is supplying power on a long-term basis to the Respondent No.2/NPCL from Unit 2 of its Project for a period of 25 (twenty-five) years under the PPA dated 26.09.2014.

### **THE STATE COMMISSION HAS THE JURISDICTION UNDER SECTION 64(5) OF THE ACT TO APPROVE THE PPA**

**293.** Then coming to the argument of lack of jurisdiction of the State Commission under Section 64(5) of the Act to approve the PPA entered into between the Respondent No.2/NPCL and the Respondent No.3/DIL, at the outset, it is necessary to make a distinction between proceedings for (a) approval of PPA; and (b) determination of tariff. The State Commission exercises jurisdiction for the approval of PPA under Section 86(1)(b) of the Act. It is humbly submitted that the jurisdiction for the approval of a PPA is

only available with the State Commission and there is no such provision in relation to such approval under Section 79 of the Act, which vests jurisdiction with the CERC. The present matter only relates to the approval of PPA, which surely could not have been done by the CERC under Section 79 of the Act. Hence, the submissions qua jurisdiction is completely misplaced and without merits in context of the present Appeal.

**294.** Further, it is submitted that the State Commission has the jurisdiction to pass the Impugned Order approving the PPA as the generator, i.e., the Respondent No.3/DIL and the Distribution Licensee, i.e., Respondent No.2/NPCL have approached the State Commission under Section 62 read with Section 86(1)(b) of the Act. Under Section 64(5) of the Act, the parties with mutual consent can approach the State Commission for determination of tariff when the generation and sale is under a “composite scheme” and the jurisdiction (for such tariff determination) generally vests with the CERC.

**295.** The Respondent No.3/DIL craves leave of this Tribunal to place reliance upon its detailed submissions on the issue of jurisdiction of the State Commission under Section 64(5) of the Act which has been dealt with by the Respondent No.3/DIL in Appeal No. 185 of 2019 before this Tribunal.

**296.** In view of the foregoing, they sought for dismissal of the appeal in 150 of 2017.

**297. Ms. Mandakini Ghosh, Learned Counsel for the Respondent No. 3 (M/s. Dhariwal Infrastructure Limited) in Appeal No. 185 of 2019 has submitted the following Written Submissions:**

**298.** Notably, the captioned Appeal has been filed by the Appellant for *inter alia* setting aside the Multi Year Tariff Order dated 05.02.2019 (“Impugned Order”/ “MYT Order”) passed by the Respondent No.1 i.e., Uttar Pradesh Electricity Regulatory Commission (“State Commission”) in Petition No.1235 of 2017 (“MYT Petition”), wherein the State Commission has fixed the Multi Year Tariff (“MYT”) for the supply of 170 MW net Contracted Capacity (gross Contracted Capacity of 187 MW) from the Respondent No.3/DIL’s Project to the Respondent No.2, i.e., Noida Power Company Limited (“NPCL”) for FY 2016-17 to FY 2018-19 under the Power Purchase Agreement dated 26.09.2014 (“PPA”).

**299.** The State Commission had in Petition No.971 of 2014 (“PPA Approval Petition”) approved the PPA dated 26.09.2014 executed between the Respondent No.2/NPCL and the Respondent No.3/DIL vide its Order dated 20.04.2016 (“PPA Approval Order”). The said PPA Approval Order has also been challenged by the Appellant herein along with another consumer vide Appeal No.150 of 2017: Rama Shankar Awasthi & Anr. Vs. UPERC & Ors. (“PPA Approval Appeal”). The Respondent No.3/DIL has made submissions and also filed separate Written Submissions thereto.

**300.** The allegations made by the Appellant in the present Appeal are devoid of merits. Appellant’s contentions in brief are as under:

- a) The State Commission does not have the jurisdiction to determine tariff in the present facts and it is the Ld. Central Electricity Regulatory Commission (“Ld. Central Commission”) which has the jurisdiction to determine tariff for the supply of power by the Respondent No.3/DIL to the Respondent No.2/NPCL in terms of Section 79(1)(b) of the Electricity Act, 2003 (“Act”);

- b) The Order dated 19.02.2018 was passed by the State Commission in the MYT Petition at the interim stage without public hearing and thus, the issue of maintainability was open for the consumers;
- c) The tariff under Section 62 of the Act has been determined by the State Commission without the prudence check of the capital cost claimed by the Respondent No.3/DIL; and
- d) The State Commission has erred in keeping tariff issues open by way of directing the Respondent No.3/DIL to file its Petitions pertaining to its 'Change in Law' claims and procurement of additional coal separately as is done in Case-1 procurement.

**301.** Respondent No.3/DIL submits in detail as under:

**The State Commission has the jurisdiction under Section 64(5) of the Act to determine the tariff in the present case.**

At the outset, it is relevant to note that the Respondent No.3/DIL is supplying power on a long-term basis from Unit 2 of its Project located in the State of Maharashtra in the following manner:

- (a) MW of gross Contracted Capacity (170 MW net Contracted Capacity) on long-term basis to the Respondent No.2/NPCL. Further, State Commission had vide the PPA Approval Order dated 20.04.2016 read with its Order dated 15.01.2016, approved the PPA for the aforesaid supply to the Respondent No.2/NPCL. As aforesaid, the said PPA Approval Order dated 20.04.2016 has been separately challenged by the Appellant in

Appeal No. 150 of 2017. The present Appeal is only in relation to sale of power to the Respondent No.2/NPCL; and

- (b) 100 MW power from its Project to TANGEDCO in terms of the PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013("TANGEDCO PPA") executed pursuant to the Case-1 competitive bidding conducted by TANGEDCO.

**302.** In terms of Section 64(5) of the Act, the Respondent No.3/DIL had in consent with the Respondent No.2/NPCL approached the State Commission for determination of its tariff. The relevant excerpts from Section 64 of the Act are set forth herein below:

*"Section 64. (Procedure for tariff order): --- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

...

*(5) Notwithstanding anything contained in Part X, the tariff for any inter State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor."*

(Emphasis Supplied)

**303.** The Section 64(5) of the Act is an exception to the jurisdiction of the Ld. Central Commission under Section 79 of the Act, by way of which the parties can approach the State Commission for the determination of tariff for a generating company supplying power to the Distribution Licensee within the territorial jurisdiction of such State Commission. Accordingly, the Respondent No.3/DIL and the Respondent No.2/NPCL had concurred and jointly submitted themselves to the jurisdiction of the State Commission for the determination of tariff in context of the supply of 187 MW of power by the Respondent No.3/DIL to the Respondent No.2/NPCL.

## **Jurisdiction of the State Commission under Section 64(5) and the findings of the Supreme Court in the Energy Watchdog Judgment**

**304.** The issue of ‘composite scheme’ as well as the jurisdiction of the Ld. Central Commission under Section 79(1)(b) of the Act and the jurisdiction of the State Commission(s) to determine tariff under Section 64(5) of the Act, came up before the Hon’ble Supreme Court in the Energy Watchdog Judgment. In this context, it is relevant to set out the relevant excerpts from the Energy Watchdog Judgment issued by the Hon’ble Supreme Court:

*“29. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”*

(Emphasis Supplied)

**305.** The Hon’ble Supreme Court, while interpreting the term ‘composite scheme’ under Section 79(1)(b) of the Act in the Energy Watchdog Judgment, has held that the Ld. Central Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff is either determined under Section 62 or adopted under Section 63 of the Act. However, the Hon’ble Supreme Court in view of the specific carve-out in

Section 64(5) of the Act was pleased to clarify (in Paragraph 29) that the said provision will “*only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity*”

**306.** Admittedly, in the present case, the Respondent No.3/DIL supplies power to the Respondent No.2/NPCL, which is located in the State of Uttar Pradesh, under the PPA under Section 62 of the Act. Further, the Respondent No.3/DIL supplies power under the TANGEDCO PPA to the Distribution Licensee (TANGEDCO) in the State of Tamil Nadu (under Section 63 of the Act). The Project of the Respondent No.3/DIL is located in the State of Maharashtra. Hence, undoubtedly, the present generation and supply of power from the Project of the Respondent No.3/DIL falls within the meaning and scope of the words ‘composite scheme’ under Section 79(1)(b) of the Act, as explained by the Hon’ble Supreme Court. However, in the present case, the jurisdiction of the State Commission is also available in view of Section 64(5) of the Act (which creates a special carve-out), although the Ld. Central Commission has jurisdiction under Section 79(1)(b) of the Act. The Respondent No.3/DIL in consent with the Distribution Licensee, i.e., the Respondent No.2/NPCL has rightfully approached the State Commission for determination of tariff under Section 62 of Act *inter alia* vide the MYT Petition. Therefore, in view of Section 64(5) of the Act, the State Commission has the jurisdiction to pass the MYT Order.

**307.** Since the definition of composite scheme has to be understood in the context of Section 79(1)(b) of the Act. Section 64(5) of the Act can thus only come into effect when supply of electricity is in more than two States.



In this context, reliance is placed on Paragraph 15 of the Judgment in *Pepsico India Holding (P) Ltd. vs. Grocery Market & Shops Board*, (2016) 4 SCC 493, wherein the words “one or more” have been interpreted to mean composite scheme to include various entries.

### **APPELLANT’S MISPLACED RELIANCE ON THIS TRIBUNAL’S JUDGMENTS – IT DOES NOT APPLY TO THE PRESENT FACTS**

**308.** The Appellant has erroneously relied upon the Judgment dated 07.04.2016 passed by this Tribunal in Appeal No.100 of 2013: *Uttar Haryana Bijli Vitran Nigam Limited vs. Central Electricity Regulatory Commission* (“APTEL Judgment”) (which was also a subject-matter of Appeal in the *Energy Watchdog Judgment*) as well as the *Energy Watchdog Judgment*, to submit that even sale to a single State would be within the jurisdiction of the Ld. Central Commission, provided that the generator is in a different State and the procurer is in a different State.

**309.** The judgment in *Energy Watchdog* matter be read in a holistic manner. The Appellant while relying on the *Energy Watchdog* judgment has failed and neglected to quote paragraph 29, which is the relevant paragraph in the present case. It has been expressly noted in the *Energy Watchdog Judgment* that Section 64(5) of the Act only comes into effect when there is a composite scheme in effect. Therefore, in context of Section 64(5) of the Act, the Hon’ble Supreme Court has noted that Section 64(5) of the Act is an exception to the general rule of vesting jurisdiction to the Central Commission when generation and sale of power is under a ‘composite scheme’.

**310.** *KSK Mahanadi Power Company Limited vs. Andhra Pradesh Electricity Regulatory Commission* (“KSK Judgment”) is misplaced as this Tribunal was not dealing with the issue of jurisdiction of a State

Commission under Section 64(5) of the Act. However, the Respondent No.3/DIL and the Respondent No.2/NPCL, with mutual consent, invoked the jurisdiction of the State Commission under the exception carved out in Section 64(5) of the Act but the said exception was never a point of contention in the KSK Judgment.

**Reasoning of the State Commission in its Order dated 19.02.2018 for upholding its jurisdiction.**

**311.** Further, the State Commission had vide its Order dated 19.02.2018 passed in the MYT Petition, provided its reasoning for upholding its jurisdiction in terms of Section 64(5) of the Act. The relevant portions of the said Order are set forth herein below for the ease of reference:

*"5. The Petitioner has clarified that Section 64(5) of the Electricity Act 2005 clearly mentions that "Section 64. (Procedure for tariff order) (5) Notwithstanding anything contained in Part X, the tariff for any inter-State Supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.*

*6. The petitioner has highlighted the Hon'ble Supreme Court judgment dated 11.4.2017 in the matter of Energy Watchdog Vs Central Electricity Regulatory Commission and others (Civil Appeal no.5399-5400 of 2016) which says that Section 64 (5) can only apply if the jurisdiction otherwise being with the Central Commission alone, by application of parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of licensee who intends to distribute and make payment for electricity.*

*7. The Petitioner has also submitted that the composite scheme comes into picture since the generation and distribution licensees are situated in different States, thereby triggering the jurisdiction of the Central Commission under Section 79(1)(b) of the Electricity Act 2003 with the exception of Section 64(5) of the Act which provides that parties can approach the State Commission for determination of tariff for a generating company to the distribution licensee with the territorial jurisdiction of such State Commission, therefore Section 64(5) of the Act has an overriding effect on Section 79 of the Act as it starts with non-obstante clause, "Notwithstanding anything contained in Part X.." and Part X of the Act includes Section 79 which deals with the functions of the Central*

*Commission. Appellate Tribunal for Electricity in its judgment dated 4.11.2011 in Appeal no.15 of 2011: Lanco Power Limited vs. Haryana Electricity Regulatory Commission and Others has held that the State Regulatory Commission of the place where the electricity has been consumed is the appropriate Commission to exercise jurisdiction under Section 64(5) of the Electricity Act. In other cases cited by the Petitioner different State Commissions on the basis of Section 64(5) of the Electricity Act have affirmed the jurisdiction of the State Commissions to determine the tariff by the State Commission of the State in which the distribution licensee is located.*

*8. On the basis of written submissions made by the Petitioner and after going through the contents of 64(5) of the Act and the position narrated by the Hon'ble Supreme Court the Commission holds that it has the jurisdiction to determine the tariff under the aforesaid petition."*

**312.** Therefore, the State Commission has upheld its jurisdiction under Section 64(5) of the Act after taking into consideration the facts of the above appeal.

### **Misplaced reliance on Petition No. 327/MP/2018 filed by the Respondent No.3/DIL before Central Commission**

**313.** The Appellant has erroneously relied on Petition No.327/MP/2018: DIL vs. TANGEDCO filed by the Respondent No.3 before the Ld. Central Commission to allege that the Respondent No.3/DIL is indulging in forum shopping. Notably, the Appellant was allowed to participate as an Objector in the proceedings before the Ld. Central Commission, which relates to sale of power by the Respondent No.3/DIL in the State of Tamil Nadu.

**314.** It is quite surprising how the Objector, who is a resident of Lucknow and Noida, has any interest in a Petition filed by the Respondent No.3/DIL for claiming relief on account of 'Change in Law' events before the Ld. Central Commission with respect to the sale of 100 MW under the TANGEDCO PPA. The Appellant had sought to contend that even assuming that the State Commission would have jurisdiction under Section

64 (5) of the Act, it cannot be that the Respondent No.3/DIL at the same time also approaches the Ld. Central Commission instead of the corresponding State Commission, namely Tamil Nadu Electricity Regulatory Commission ("TNERC") with respect to supply of power to TANGEDCO. The Ld. Central Commission while refusing to stay the proceedings by its Order dated 01.07.2019, also noted the following:

*"28. The Commission observes that in the instant case, the generation and supply of power by the Petitioner involves three States i.e. Maharashtra where the plant is situated and Tamil Nadu and Uttar Pradesh where the power is supplied. Therefore, provisions of Section 64(5) of the Act requiring „involving the territories of two States“ are not attracted in this case and thus, the case falls squarely under Section 79 (1) (b) of the Act.*

*29. Further, TANGEDCO as well as Shri Awasthi have placed lot of emphasis on the fact that the supply to both TANGEDCO and NPCL are being made by the Petitioner from the same generating unit, namely, Unit-2 of its generating station. In our considered view, this fact has no relevance in deciding the question of maintainability with which the Commission is presently concerned. There is no embargo in the Act, particularly under Section 79(1) (b), that a generating company cannot supply power to different procurers from the same generating unit, especially when such supplies are being made under separate PPAs as in the present case.*

*30. Shri Awasthi has stated that the issue of jurisdiction is pending before the APTEL in Appeal No. 185 of 2019 filed by it, where the precise issue of whether the Petitioner can approach UPERC under Section 64(5) has been raised. Shri Awasthi has requested to adjourn the present proceedings till the disposal of the said appeal by APTEL.*

*31. Per contra, the Petitioner has submitted that above Appeal No. 185 of 2019 pending adjudication before the APTEL is in relation to the supply of 170 MW of power to NPCL under NPCL PPA wherein the tariff of such sale has been determined by UPERC under Section 62 of the Act. It has stated that Mr. Awasthi has challenged the jurisdiction of UPERC while the present Petition has been filed in terms of provisions of TANGEDCO PPA, there is no scope for stay/ adjournment of the present proceedings.*

*32. It is noted that the present Petition has been filed for claiming compensation towards certain change in law events in terms of Article 10.1.1 of the TANGEDCO PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 for supply of 100 MW contracted capacity to TANGEDCO from Unit-2 of the generating station. Since no Appeal is pending before APTEL against the supply of 100 MW of power to TANGEDCO under the TANGEDCO PPA, the contention of Shri Awasthi to adjourn the present Petition is not sustainable.*

*33. In light of above discussion, we hold that the present petition is maintainable before this Commission. We make it clear that this order is*

limited to determination of issue of the jurisdiction of this Commission and maintainability of the Petition before this Commission. We have not expressed any view on the merit of the issues raised in the Petition.”

(Emphasis Supplied)

**315.** Therefore, the Order dated 01.07.2019 has no impact on the present proceedings and the Ld. Central Commission had refrained from making any specific observations with respect to the NPCL PPA in view of the pendency of the present Appeal. It is submitted that the Respondent No.3/DIL itself had filed the Petition before the Ld. Central Commission, since the exclusion of Section 64(5) of the Act is only available for the PPA signed with the Respondent No.2/NPCL under Section 62 of the Act.

**316.** A Review Petition i.e., 15/RP/2020 was also filed by the Respondent No.3/DIL, wherein it *inter alia* sought review and clarification of the Order dated 01.07.2019 passed in Petition No.327/MP/2018 since the observations therein were being misinterpreted by the Appellant before various *fora*, including this Tribunal. The Ld. Central Commission disposed of the aforesaid Review Petition vide its Order dated 23.12.2019 (Paragraphs 12 & 14), *inter alia* holding that Paragraph 28 of the Order dated 01.07.2019 has to be read holistically with Paragraphs 25, 26 and 27 and the same was “*only for purpose of deciding the maintainability of the Petition before this Commission* (i.e. Ld. Central Commission)” and it is for the Respondent No.3/DIL to counter any alleged misuse of the Ld. Central Commission’s Order before the appropriate *fora*. Therefore, the Ld. Central Commission was of the view that since Section 64(5) of the Act is not applicable in the case of supply of power from Unit 2 of the Project to TANGEDCO in terms of Section 63 of the Act under the TANGEDCO PPA (contrary to the contention of the Appellant herein), it had the jurisdiction to adjudicate upon the dispute between TANGEDCO and DIL. The Ld. Central Commission refrained from commenting on the jurisdiction of the

State Commission in the case of NPCL PPA since the Order dated 01.07.2019 had only been passed in the context of the TANGEDCO PPA.

**317.** It is noteworthy that the reliefs sought on account of 'Change in Law' events under the TANGEDCO PPA, including the claims due to shortage of supply of coal before the Ld. Central Commission, and the reliefs sought on account of 'Change in Law' events and 'Additional Coal' before the State Commission, do not overlap and are distinctly demarcated by way of respective coal allocation under the FSA dated 08.03.2016 read with the Addendum No.1 dated 30.06.2016 for the respective contracted capacities with TANGEDCO and the Respondent No.2/NPCL and limited to the contracted capacities under the respective PPAs. As such, the outcome of the above Petitions before the respective Regulatory Commissions (i.e., Ld. Central Commission and State Commission) are mutually exclusive and do not have any impact on tariff for supply of power from Unit 2 to TANGEDCO or to the Respondent No.2/NPCL under the respective PPAs.

### **Misplaced reliance on Rule 8 of the Electricity Rules, 2005**

**318.** Further, the reliance placed by the Appellant on Rule 8 of the Electricity Rules, 2005 is misconceived as the said provision would apply only if the Respondent No. 3/DIL and Respondent No. 2/NPCL had chosen to approach the Ld. Central Commission for the determination of generation tariff. The basic premise/criteria of qualifying of power sale portfolio of the Respondent No.3/DIL's Unit 2 under Rule 8 of Electricity Rules, 2005 is not fulfilled in the present case and thus, there is no question of re-determination of tariff by the State Commission. In the present case (i.e. for the NPCL PPA), it may be noted that Ld. Central Commission has not determined the generation tariff under Section 79(1)(b) read with Section 62 of the Act for supply of entire or any part of



contracted capacity from Unit 2 to the long-term beneficiaries of the Respondent No.3/DIL, which are the Respondent No.2/NPCL & TANGEDCO.

**319.** In view of the foregoing, it is submitted that the averment of the Appellant that the State Commission lacked the jurisdiction to pass the MYT Order is misconceived, contrary to the express provisions of Act and settled position of law as held by the Hon'ble Supreme Court in the Energy Watchdog judgment.

**There is no statutory requirement of issuance of a public notice before adjudicating upon the question of jurisdiction**

**320.** The Appellant has erroneously contended that the State Commission has merely upheld its jurisdiction in the MYT Order by relying on the Interim Order dated 19.02.2018 issued by it in the MYT Petition. The Appellant has further contended that the State Commission has erred in adjudicating upon the question of jurisdiction on its own before issuance of public notice and inviting comments and suggestions, thereby not providing an opportunity to the stakeholders to make submissions on the maintainability of the MYT Petition.

**The Appellant's submission on jurisdiction was duly taken into account before the issuance of the Impugned Order dated 05.02.2019**

**321.** The State Commission in the MYT Order has while noting that it has already taken a view on the issue of jurisdiction in its Order dated 19.02.2018 also provided its reasoning for upholding its jurisdiction in terms of Section 64(5) of the Act in Paragraph 3.6.15 of the MYT Order. Therefore, the Appellant has erroneously contended that the State Commission has upheld its jurisdiction merely by relying upon its interim



order. The Appellant was provided complete opportunity to make its submissions *interalia* on the issue of jurisdiction and the said submissions have also been recorded in the MYT Order. The MYT Order deals with the submissions on maintainability made by the Appellant in the MYT Petition. Therefore, the State Commission has in fact passed the final order *interalia* on the issue of jurisdiction by taking into consideration the submissions made by the Appellant.

**322.** The State Commission has rightly noted that there is nothing in the language of Section 64(5) of the Act which suggests that it applies only in the case of sale by a generator of its whole capacity to the Distribution Licensee in a different State. The term “supply” has been defined in the Act as ‘sale of electricity to a licensee or consumer’. A harmonious reading of Section 64(5) of the Act in light of statutory definition of “supply” posits that Section 64(5) of the Act shall trigger in case of “any” and each inter-state sale of electricity by a generating company to a Distribution Licensee involving territories of two States. Therefore, it is factually incorrect for the Appellant to now allege that the State Commission has upheld its jurisdiction by merely relying upon the Order dated 19.02.2018.

**323.** There is no embargo in the Act and particularly under section 79(1)(b) that a generating company cannot supply power to different procurers from the same generating unit under different routes (i.e., Section 62 or Section 63 of the Act), especially when such supplies are being made under separate independent PPAs. Under section 64(5) of the Act, the entities involved in generation and supply is to be ascertained qua each PPA. In case of the Respondent No.3/DIL, power is being supplied under separate and independent PPAs to TANGEDCO (under Section 63) and the Respondent No.2/NPCL (under Section 62). For the purposes of ascertaining the application of section 64(5) in case of the Respondent

No.3/DIL, the supply of power under the TANEGDCO PPA and the NPCL PPA have to be considered independently, and both the supplies under the respective PPAs involve only two States. Once the scheme of generation and sale of power is held to be composite under Sec 79 1(b) of the Act, the carve-out under section 64(5) of the Act can be exercised provided there is an agreement between the parties to approach the State Commission where the Distribution Licensee resides.

**324.** In any event, the State Commission could not have proceeded with the MYT Petition without determining its jurisdiction first. The State Commission could have only exercised its power to issue public notice and hold a public hearing pursuant to ascertaining whether or not, it has the jurisdiction to proceed with the MYT Petition in the first place. Pursuant to the State Commission satisfying itself that it indeed has the jurisdiction to proceed with the MYT Petition, the State Commission could have finally decided in its MYT Order that it in fact cannot determine the tariff for supply of power by the Respondent No.3/DIL to the Respondent No.2/NPCL if there was any merit in the submissions made by the Appellant then.

**There is no statutory requirement for the State Commission to hold a public hearing before deciding the question of its jurisdiction**

**325.** There is no statutory or regulatory provision for the State Commission to hold a public hearing before taking a preliminary view on its own jurisdiction at the admission stage. It is pertinent to note that in terms of Section 64(2) of the Act, the only requirement for public consultation is the publication of the tariff application in an abridged form *as may be specified* by the Appropriate Commission and therefore, the State Commission has been provided the discretion to decide the requirements of the publication of the tariff application and there is no bar on the State

Commission to direct publication of public notice prior to adjudicating upon the maintainability of the tariff application in the first place. Tariff determination has to be done in a time-bound manner and the State Commission is not expected to prolong the tariff determination process by holding public hearing at every stage of the process. It is submitted that considering the time limit of 180 (one hundred and eighty) days from the date of receipt of the tariff application provided under Section 64(3) for passing of the tariff order, the State Commission cannot be expected to hold a public hearing even before it has adjudicated upon its own jurisdiction at the interim stage, especially when the same is subject to its final Orders.

**The Impugned Order has been passed by the State commission after duly conducting prudence check**

**326.** The Regulation 19 of the Generation Tariff Regulations, 2014 provides that subject to prudence check by the State Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff for new and existing projects. Further, the methodology to be followed for such prudence check has been provided under Regulation 19(6) of the Generation Tariff Regulations 2014, which is reproduced hereunder for the ease of reference:

“19 ...

- (6) *Prudence Check of Capital Expenditure: The following principles shall be adopted for prudence check of capital cost of the existing or new projects:*
  - (c) *In case of the thermal generating station, prudence check of capital cost may be carried out taking into consideration the benchmark norms specified/to be specified by the Central Electricity Regulatory Commission from time to time:*
  - (b) *Provided that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the capital expenditure, financing plan, interest during construction, incidental*

*expenditure during construction for its reasonableness, use of efficient technology, cost over-run and time over-run, competitive bidding for procurement and such other matters as may be considered appropriate by the Commission for determination of tariff:*

- (d) *Provided further that in cases where benchmark norms have been specified, the generating company shall submit the reasons for exceeding the capital cost from benchmark norms to the satisfaction of the Commission for allowing cost above benchmark norms.*
- (e) *The Commission may issue new guidelines or adopt the guidelines prescribed by the Central Electricity Regulatory Commission for vetting of capital cost of projects by an independent agency or an expert and in that event the capital cost as vetted by such agency or expert may be considered by the Commission while determining the tariff for the generating station.*
- (f) *The Commission may issue new guidelines or adopt the guidelines prescribed by the Central Electricity Regulatory Commission for scrutiny and approval of commissioning schedule of the projects which shall be considered for prudence check.*
- (g) *Where the power purchase agreement entered into between the generating company and the beneficiaries provides for ceiling of actual capital expenditure, the Commission shall take into consideration such ceiling for determination of tariff for prudence check of capital cost."*

(Emphasis Supplied)

**327.** Therefore, in terms of the Regulation 19(6)(a) of the Generation Tariff Regulations 2014 prudence check for the capital cost of a thermal generating station may be carried out taking into consideration the benchmark norms specified/to be specified by the Ld. Central Commission from time to time. Notably, in the facts of the present case, State Commission has carried out the prudence check for the capital cost of the Project in terms of Regulation 19(6)(a) of the Generation Tariff Regulations 2014, i.e., by comparing the capital cost of the Project as against the Ld. Central Commission's benchmarks and the same can be seen from the Orders passed in Petition No.971 of 2014 at the time of approval of the NPCL PPA. The project cost of the Respondent No.3/DIL was Rs.4.57 Crore/MW (which was already commissioned at the time of DIL entering into the PPA with NPCL) as against the capital cost benchmark set out by the Ld. Central Commission, i.e., Rs. 4.71 Crore/MW. Notably, one of the

reasons for the Respondent No.2/NPCL to accept the Respondent No.3/DIL's supply proposal was that the Project had already been commissioned and the fixed costs were thus known and frozen.

**328.** The contention of the Appellant regarding prudence check having not been carried out by the State Commission including the demand for appointment of an independent agency are misplaced. Such alternate process of prudence check by way of appointment of independent agency is necessary when the capital cost of the new or existing project is more than the benchmark capital cost set by the Ld. Central Commission or the State Commission, as the case may be. The aforesaid position is also clear from a perusal of Regulation 37(4) of the Generation Tariff Regulations, 2014, wherein for hydro-power projects, unlike Regulation 19(6)(a), there is no provision for taking into consideration benchmark that may have already been set by the Ld. Central Commission and the capital cost is required to be vetted by such agency or expert as may be considered by the State Commission.

**329.** In the present case, since the project cost of the Respondent No.3/DIL, i.e. Rs. 4.57 Crore/MW was lower than the benchmark capital cost of Rs. 4.71 Crore/MW already set by the Ld. Central Commission, the State Commission had followed the process as set out under the Generation Tariff Regulations, 2014 and thus, was not required to revisit the details of the capital cost or set-up a prudence check committee as alleged by the Appellant.

**330.** In view of the above, it is evident that the State Commission had carried out due prudence check (in terms envisaged under the Generation Tariff Regulations, 2014) of the capital cost of the Project of the Respondent No.3/DIL and determined tariff vide the MYT Order for the supply of power

from the Respondent No.3/DIL's Project to the Respondent No.2/NPCL while considering various aspects as elaborated below.

**331.** The Appellant has failed to demonstrate in any manner that any provision of the Generation Tariff Regulations 2014 has been violated. The Appellant has only made bald allegations regarding lack of prudence check by the State Commission without substantiating the same. Also, the Appellant has failed to disclose the aforesaid entire material that was considered by the State Commission for approving the capital cost of the Respondent No.3/DIL.

**332.** It is submitted that in any event, in terms of the Proviso to Regulation 19(2) of Generation Tariff Regulations 2014, for all projects wherein the tariff has been determined under Section 62 of the Act, the agreed ceiling capital cost between the generating company and the beneficiary shall be brought to the State Commission for approval and the approved cost shall be a part of the PPA. The actual capital cost, if it is equal to the approved ceiling capital cost, shall form the basis for prudence check and determination of tariff by the State Commission. If the actual cost is lower, then the lower cost would be taken and if it is higher, then the additional cost would first be verified and agreed between the generating company and the beneficiary then shall be taken up by the State Commission for consideration and approval. Since in the case of the Respondent No.3/DIL, the capital cost of the Project upto Cut-off Date, i.e., 31.03.2017, determined under the MYT Order was lower than the agreed ceiling capital cost, i.e., Rs.1941 Crore, the same was required to be *ipso-facto* accepted. As has been highlighted in Paragraphs 3.6.18 and 4.2.3 of the MYT Order, since the capital cost of the Project Rs.1903 Crore upto the Cut-off date, i.e., 31.03.2017 submitted at the time of the MYT Order being passed was less than the estimated ceiling capital cost of Rs.1941 Crore, which was

approved considering various aspects as mentioned above at the time of PPA Approval, the capital cost of the Project upto the Cut-off Date of Rs.1903 Crore was prudently approved by the State Commission.

**333.** Further, the Appellant's contention that the State Commission has erred in noting that the claim of Additional Capitalization shall be considered at the stage of truing-up, is erroneous and premature. In this regard, it is to be noted that Regulation 24(3) of Generation Tariff Regulations 2014 stipulates that the Additional Capitalization projected to be incurred during the Tariff Period may be admitted by the State Commission for determination of tariff. It is submitted that the capital cost of the Project including the proposed Additional Capitalization was within the earlier estimated ceiling capital cost of Rs. 1941 Crore. This was mainly on account of the deferred works related to Ash Handling System etc. and final settlement of Balance of Plant ("BoP") Package under the Original Scope of Work. This is also in compliance with Regulation 22(2) of the Generation Tariff Regulations 2014.

**334.** It is submitted that the State Commission having decided to take up the claim of Additional Capitalization within the estimated ceiling capital cost of Rs.1941 Crore subject to the applicable regulations, during truing-up, there cannot be any challenge by the Appellant to such findings, especially at this stage. It is further submitted that the approved PPA provisions as well as the Generation Tariff Regulations, 2014 of the State Commission shall continue to remain applicable through-out the term of the PPA including on account of inter alia any 'Change in Law' (or uncontrollable) events which may affect the components of levelized tariff.

**The State Commission has undertaken a greater scrutiny in the present case by directing for separate petitions to be filed by the Respondent No.3/DIL.**



**335.** It is noteworthy that the Respondent No.3/DIL in the MYT Petition had also sought relief pertaining to the procurement of additional coal and other uncontrollable costs (on account of 'Change in Law' events) which affected the Energy Charges in terms of Regulation 26 of the Generation Tariff Regulations 2014 and the approved PPA with the Respondent No.2/NPCL.

**336.** The State Commission in order to enable scrutiny of the matter in greater detail directed filing of separate Petitions. As coal is the principal component of variable charges to be determined for the supply of power by a generating company to the Distribution Licensee, the State Commission had in its prudence and discretion decided to scrutinize such claims in greater detail through separate proceedings to protect the interest of the consumers.

**337.** In view of the directions issued by the State Commission vide its Orders dated 26.03.2018, 02.05.2018 and the MYT Order dated 05.02.2019, the Respondent No.3/DIL had filed a separate Petition, i.e., Petition No.1440/2019 on 29.03.2019 for claiming relief on account of various 'Change in Law' events as per Article 13.1.1 of the PPA read with the applicable Tariff Regulations. Further, as mentioned hereinabove, the Respondent No.3/DIL had also filed Petitions for procurement of additional coal on account of shortfall of FSA Grade Coal in FY 2017-2018, FY 2018-2019 and FY 2019-2020 vide Petition Nos.1319/2018, 1318/2018 and Petition No.1438/2019 respectively in compliance with the directions issued by the State Commission.

**338.** After having (a) undertaken a thorough prudence check and detailed analysis on the claims made by the Respondent No.3/DIL; and (b) taking into account the submissions made by the Appellant as well as the

Respondent No.2/NPCL, the State Commission has issued its Order dated 19.03.2020 in Petition Nos.1319/2018 and 1318/2018, Order dated 06.05.2020 in Petition No.1438/2019 and its Order dated 29.05.2020 in Petition No. 1440/2019. Pertinently, while allowing certain claims of the Respondent No.3/DIL, the State Commission has tested such claims on the touchstone of regulatory parameters as well as auditor's certificates and other details which were submitted in support of expenditure incurred by the Respondent No.3/DIL.

**339.** Therefore, the contention of the Appellant that the State Commission has erred in leaving the issue of tariff open ended to the prejudice of the consumers is highly erroneous. In this regard, it is submitted that it is in fact the Respondent No.3/DIL who has been adversely affected on account of filing separate Petitions before the State Commission on account of the higher degree of scrutiny and prudence check undertaken by the State Commission in the interest of the consumers.

**340.** It is noteworthy that the Respondent No.3/DIL had during the PPA Approval proceedings categorically submitted that the fuel risks are not under the control of any generator and a PPA for 25 (twenty-five) years cannot envisage all the changes/variations which the fuel market may witness in the coming years. In this context, the Respondent No.3/DIL had also referred to Regulations 17(4) and 26 of the Generation Tariff Regulations, 2014 to establish that the regulatory framework of the State Commission also allows such claims.

**341.** It is clarified that *inter-se* PPA cannot give any benefit which is beyond the terms of the regulation. The filing of separate Petitions by the Respondent No.3/DIL, which has been done in accordance with the directions of the State Commission, cannot be held against the Respondent

No.3/DIL as there is no bar on a claim under 'Change in Law' events being allowed in terms of tariff determination under Section 62 of the Act, subject to the terms of the applicable regulations. Further, the Respondent No.3/DIL's claim under 'Change in Law' events stem from the terms of the PPA, wherein the affected party is allowed to claim compensation on account of 'Change in Law' events under Article 13 of the PPA. Therefore, it is denied that the State Commission has treated the claim of the Respondent No.3/DIL akin to a Case-1 bidding project

**342.** With these submissions Respondent No. 3 sought for dismissal of the present Appeal filed by the Appellant challenging the Impugned Order dated 05.02.2019.

**343.** We have heard learned counsel appearing for the Appellants and for the Respondents at considerable length of time, we have carefully gone through their written submissions/additional written note/arguments and also taken note of the relevant material placed on record during the proceedings. Perused the judgments relied upon by the parties. The issues raised in both the Appeals are common and hence, we proceed to adjudicate both the Appeals by this common judgement. On the basis of the pleadings and submissions available, the following issues emerge in the instant Appeals for our consideration:-

**Issue No. 1:** Whether the Impugned Order has been passed in the violation of Principles of Natural Justice on the ground that Public Hearing not held ?

**Issue No. 2:** Whether the State Commission is justified in approving the procurement process under Section 62 of the Act from a related party

**instead of procurement through competitive bidding under Section 63 of the Act?**

**Issue No. 3: Whether the Impugned Order has been passed by the State Commission in a mechanical manner without applying prudence check and requisite analysis?**

**Issue No. 4: Whether the State Commission has jurisdiction to approve the PPA and Tariff in an Inter-State Project?**

### **Our Findings and Analysis**

**344.** So far as arguments pertaining to notarisation of certain documents, it is seen at the time of leave to appeal, it was considered at great length. Mr. Verma, Notary had informed that by inadvertence notings were not made in the Register. We are of the opinion in the light of the statement of Mr. Verma, Notary, even if there is lacuna of not maintaining the Register by Notary is accepted, at the most it amounts to irregularity and not illegality. Therefore, it would not go to the root of the matter. Further it is noted that in the first round of proceedings on earlier occasion, parties mutually consented not to press this issue. Hence, we are not adjudicating the same on merits.

### **Issue No. 1**

**345.** Learned Counsel for the Appellant Mr. Anand K. Ganesan outrightly submitted that the Impugned Order has been passed in violation of the principles of natural justice and behind the back of the consumers – the only affected parties. He further submitted that as the entire power purchase cost would be a pass through to the consumers, the only affected

party and party being prejudiced are the consumers. The consumers have had no say and the impugned order has been passed behind their back. There was no notice issued to any consumer representative or any public notice issued. This is contrary to the requirement and also the practice followed by the Commission while approving the PPAs for other generators including the State generators.

**346.** Learned Counsel further submitted that the contention of the Respondents that the Electricity Act does not provide for any hearing in such cases is misconceived. Firstly, the approval of the PPA is done only after the tariff is certain and determined because the approval has to necessarily consider the reasonability of the tariff. However, in the present case the approval of the PPA has been made first, which itself is erroneous. Further, the approval of the PPA affects the consumers of the Respondent No. 2 for the next 25 years as a lower generation tariff automatically results in lower tariff to the consumers.

**347.** Learned counsel for the Appellant vehemently submitted that unless in exceptional cases, the mandate to follow the principles of natural justice, hear opposite views and take a considered view is essential. In this regard, learned counsel placed reliance on the following judgements :

- a) Canara Bank v Debasis Das, (2003) 4 SCC 557, para 19 to 22
- b) Darshan Lal Nagpal v. Government of NCT of Delhi, (2012) 2 SCC 327, para 30 to 33; and
- c) Nav Bharat Ferro Alloys Ltd v. A.P. Electricity Regulatory Commission, Appeal No. 173 of 2005 dated 02/03/2006, para 6 to 11.

**348.** Learned counsel pointed out that it is for this reason also that all stakeholders including consumers are invited for representation when the

tariff of generating companies is involved. Even in Section 63 PPAs, where tariff claims are involved, consumers are heard. Learned counsel in this context referred the Energy Watchdog case. Learned counsel for the Appellant categorically refuted the contentions made by the learned counsel for the Respondent that Right to public hearing not available during the PPA approval proceedings under law. He submitted that Firstly, the Respondents have not relied upon any provision under law to show that the public hearing is barred or that no right is available to the consumers during PPA Approval. In fact, it is settled position of law that principles of natural justice and right to be heard is an inherent feature of the judicial process. He further submitted that while the Respondents have failed to place on record any provision excludes the right of the consumers to be heard, the Appellant has placed on record orders of the State Commission itself, where consumers have been heard during PPA approval process.

**349.** Regarding contentions raised by the Respondents that the Appellant did not raise any objection during determination of retail supply tariff of NPCL for FY 2016-17 held by State Commission in Petition No. 1077 of 2016, learned counsel for the Appellant contended that firstly, in the retail supply tariff orders, the entire approved power purchases are an automatic pass through. The retail supply tariff orders providing for the pass through of the power from Respondent No. 3 is also based on the impugned order only. This is also provided for in the National Tariff Policy and various decisions of the Tribunal, wherein it is held that approved power purchases cannot be postponed or restricted from recovery in the retail supply tariff.

**350. Per contra,** learned counsel appearing for the Respondent Nos. 1, 2 & 3 have submitted that on the issue of public hearing, it is important to

note the observation of this Tribunal in the remand order dated 28/05/2015 of which relevant extract is reproduced hereunder:-

*24. Reasons introduce clarity and also give assurance to the litigants that their case is considered. In the circumstances, we are of the opinion that this matter needs to be remitted to the State Commission so that submissions of the parties can be considered afresh. While remitting the case, we would like to make it clear that we have not expressed any opinion on the merits of the case of the parties. Nothing said by us in this judgment should be treated as expression of our opinion on the merits of the case of the parties. The State Commission will apply its mind to all contentions raised by the parties independently and in accordance with law and arrive at its conclusions.*

*25. In the result, the impugned order is set aside. **The matter is remanded to the State Commission for fresh consideration of all the submissions of the parties, independently and in accordance with law.** All contentions raised by the parties are kept open. The appeal is disposed of in the aforestated terms."*

**351.** Learned counsel submitted that in the remand order it has been specifically mentioned by this Tribunal that the submissions of the parties are to be considered afresh and not that the public hearing needs to be undertaken as done in the tariff matters under the Regulations. It is the contentions of the Respondents that a consumer cannot claim to have a grievance with respect to the source of power from where its distribution licensee seeks to procure electricity. The Consumers' concern, at the highest, can only be with respect to the price at which power is being supplied to them and no prejudice is caused to the consumer and none of its valuable rights are affected with the tying up of procurement with a particular generator.

**352.** Learned counsel for the Respondents submitted in unison that the tariff determination under Section 62 (1) (a) read with Section 64 (5) of the Electricity Act is a comprehensive process which involves public consultation so as to ensure all interested persons can raise their objections. The UPERC (Conduct of Business) Regulations, 2004 provides



for public consultation before the tariff is finalized. Relevant part of the UPERC Regulations is extracted below:

*“136. The licensee or the generating company shall publish within three (3) days of submission of its application, a notice in at least two (2) daily newspapers widely circulated in the area of generation or supply, outlining the proposed tariff and calling for objections from the interested persons and the State Government.”*

**353.** Also, the State Commission vide Order dated 26.03.2018 has observed as follows:

*“ ....*

*The Commission clarified that the Commission would like to determine the tariff as per its earlier orders but the extra cost on account of procurement of additional coal and change in law shall be dealt with separately as is done in case-1 procurement. The Commission also clarified that the tariff stream submitted by the Petitioner need to be scrutinized in the Commission and deficiency notes if any shall be communicated to the Petitioner to which the Petitioner will have to reply at the earliest. After this process is completed the matter will be heard again and the Commission will take a call on the admittance of the tariff petition.”*

**354.** Learned counsel for the Respondent vehemently submitted that thus, prior to determination of the tariff all stakeholders, including the Appellant, will have sufficient opportunity to raise their concerns and objections. In fact, the State Commission appreciates and acknowledges that consumers play an important role in the determination of tariff. Further, the State Commission is statutorily bound to take into account all the submissions of the consumers during a tariff determination exercise and it would never give a go-by to the statutory scheme and extant regulations. Accordingly, the apprehension of the Appellant that it has been unable to voice its objections to the approval of PPA is misconceived as it has ample opportunity to present its concerns before the State Commission at the appropriate stage.

**355.** Learned counsel for the Respondents submitted that the instances where providing hearing to the relevant stakeholder is mandatory, is explicitly provided under the Electricity Act. For instance, hearing is mandatory in the following cases:

- (a) In case of rejection of the relevant application under Sections 15(6) and 64(3) of the Electricity Act;
- (b) In case of imposition of any penalty, compensation, punishment or monetary liability is imposed on any person under Section 57(2) and 126(3) of the Electricity Act; and
- (c) During the hearing under Section 111 read with Section 127(3) of the Electricity Act by this Tribunal to the person affected.

**356.** However, no such provision for mandatory hearing to public during PPA approval has been provided under the Electricity Act. Learned counsel for the Respondent further contended that the only obligation on the State Commission in terms of Section 86(3) of the Act while approving PPA is to ensure transparency. In fact, the Appellants have misinterpreted the meaning of “transparency” required to be maintained by the State Commission in its functioning to contend that the State Commission is mandatorily required to hold a public hearing at the time of PPA approval. While referring to the factual matrix of the present case, it is clear that the State Commission maintained transparency in passing of the Impugned Order and the same is demonstrable from the following instances:

- (a) The Schedule of Hearing for the final hearing held on 01.04.2016 in the present PPA Approval hearing was publicly available on the website of the State Commission.
- (b) The Appellant No.1 was aware of the PPA executed between NPCL and DIL, as is clear from a perusal of **Order dated**

**01.08.2016 passed by the State Commission in Petition No. 1077 of 2016 wherein the Appellant attended the Public Hearing dated 13.05.2016 and provided his comments and suggestions as well; and**

- (c) The State Commission vide its Orders dated 29.09.2015 and 15.01.2016 in the present PPA approval proceedings, sought details of cost-effectiveness and details of fixed costs, increase in variable costs on account of fuel shortages, fuel price escalation, etc., which demonstrates the exercise of due diligence by the State Commission and thus, the Impugned Order was not passed in mechanical manner as implied by the Appellants.

**357.** Learned counsel advancing their arguments further submitted that the Appellant has now been provided fair and complete opportunity to be heard in the tariff fixation process by the State Commission, preceding the passing of the MYT Order. The said opportunity has also been availed by Appellant No.1 by making both oral and written submissions at the time of Public Hearing held prior to passing of the MYT Order.

**358.** Learned counsel for the Respondents further submitted that besides participating in the proceedings related to determination of retail tariff for supply of power to Respondent No.2/NPCL, the Appellant No.1 had participated in the stakeholder consultation process including attending the public hearing held at Lucknow on 13.05.2016, 22.09.2017 and 17.12.2018, in Petition No. 1077 of 2016, Petition Nos.1145 & 1146 of 2017 and Petition No.1349 of 2018 respectively. However, the Appellant No.1 had neither objected to the sourcing of power from the Respondent No.3/DIL in any of the aforesaid hearings nor challenged any of the said Orders.

**359.** Further, the State Commission had also held a public hearing on 30.10.2018 in relation to the tariff determination of the power supplied by the Respondent/DIL, wherein the Appellant No.1 had submitted his objections both orally and in writing *inter alia* on the issue of jurisdiction of the State Commission.

**360.** Stating the above facts learned counsel for the Respondent reiterated that the Impugned Order has been passed in strict adherence of the relevant regulations and law and the question of violation of principles of natural justice in no way, arises.

### **Our findings.**

**361.** We have carefully considered the rival submissions of the learned counsel for the Appellant and the learned counsel for the Respondents and also taken note of the judgements relied upon by them. It is the main contention of the Appellant that the Impugned Order has been passed without hearing the consumers who are the only affected party, and in other words the Order is passed behind the back of consumers.

**362.** Learned counsel for the Appellant has repeatedly submitted that the power procurement is tied up for 25 years on long term basis, through a negotiated route and tariff to be determined under Section 62 therefore the proper notice needs to be issued to at least one consumer representative or to the public which has been the regular practice all along while approving the PPA for other generators including the State generator. Hence, in the present case, the PPA has been approved in complete violation of principles of natural justice. Further, learned counsel for the Appellant submits that in the present case the approval of PPA has been made first without determination of the generation tariff which in turn affect

the consumers of the Second Respondent for next 25 years. In support of the contentions learned counsel for the Appellant has placed reliance on a number of judgements of the Apex Court and the same are perused.

**363.** On the other hand, learned counsel for the Respondents have vehemently submitted that the main order has been passed after the remand order dated 28.05.2015 by this Tribunal which inter alia specifies that the submissions of the parties ought to be considered afresh and nowhere it envisaged that the public hearing needs to be undertaken as done normally in the tariff matter under the Regulations. They further contend that the consumers cannot claim grievance with respect to the source of power from where his distribution licensee will procure electricity and at the most, consumer's concern can only be with respect to the price at which they will get supply of electricity. Moreover, while determining the retail tariff for supply of power to the consumers public notices are invariably issued and objections are invited from the stakeholders before passing the MYT Order.

**364.** We have taken note of the regulations notified by the State Commission specially Regulation 136 which reads as under:

*"136. The licensee or the generating company shall publish within three (3) days of submission of its application, a notice in at least two (2) daily newspapers widely circulated in the area of generation or supply, outlining the proposed tariff and calling for objections from the interested persons and the State Government."*

**365.** We have gone through various provisions under Electricity Act and note that certain matters were providing hearing as mandatory i.e. have been explicitly provided. However, no such provision for mandatory hearing to public during PPA approval has been provided under any of the provision of the Electricity Act. The only obligation on the State

Commission in terms of Section 86(3) of the Act while approving PPA is to ensure transparency. Admittedly, the PPA Approval Order of the State Commission is an order approving the PPA between Respondent No. 2/NPCL and Respondent No. 3/DIL. The Electricity Act read with UPERC Generation Tariff Regulations grants a right to public hearing not for approval of PPA, but only at the stage of tariff determination. While specific provisions are there for public hearing / publication of the tariff, apparently there is no similar provision for PPA approval process. The same has been demonstrated while similar orders passed by SERCs across the country.

**366.** From the various records placed before us, we note that the first Appellant has participated in the proceedings relating to determination of tariff for supply of power to second Respondent /NPCL which also included the supply of power from the third Respondent /DIL .Besides the first Appellant participating in the stakeholder consultation process includes attending the various public hearings held at Lucknow on several dates in Petition No. 1077 of 2016, Petition Nos.1145 & 1146 of 2017 and Petition No.1349 of 2018.However, the first Appellant had neither objected to the sourcing of power from the third Respondent/DIL in any of the aforesaid hearings nor challenged any of the said Orders. Further, the State Commission had also held a public hearing on 30.10.2018 in relation to the tariff determination of the power supplied by the Respondent/DIL, wherein the first Appellant had submitted his objections both orally and in writing *inter alia* on the issue of jurisdiction of the State Commission.

**367.** It is thus evident that the first Appellant being a consumer if at all may have a direct grievance against the determination of retail tariff of second Respondent but it has chosen not to challenge the same. The said tariff order of second respondent has attained finality wherein cost of power procurement inter-alia for sourcing the power from the third Respondent

/DIL has also been decided and remains unchallenged. In such a scenario, the Appellant No. 1 cannot at this belated stage having participated in the public hearing, bring up the issue of lack of public consultation and/or hearing at the time of passing of the Impugned Order. Further, the Impugned Order was passed pursuant to the judgement of the Tribunal Appeal No. 88 of 2015 and the proceedings were only limited to the approval of PPA for which there is no requirement of public hearing either under the Act or under the State Regulations.

**368.** In view of the above facts we opine that a public notice is a must requirement for determination of tariff under Section 64 of the Act and in this regard under Section 64 (2) Publication of tariff application is required in an abridged form. We further notice that tariff determination procedure envisaged under the Act and the relevant Regulations of the State Commission have been duly followed. Therefore, we conclude that there has been no violation of principles of natural justice as alleged by the Appellant. Thus, our intervention on this issue is not warranted.

## **Issue No. 2**

**369.** Learned counsel for the Appellant submitted that there is no justification for procurement of electricity by the Second Respondent from its sister concern at much higher rate when the competitive bidding process might have provided tariff at much lower rate. Learned counsel contends that the recent competitive bidding process conducted by the other licensees in Uttar Pradesh itself discovered tariffs lesser than Rs. 4 per unit. Besides, there were multiple generators who offered to supply at tariff less than Rs. 4 per unit. He further submitted that the difference in the tariff on this count itself would work out to savings of 20% on the power purchase cost of the Respondent No. 2, which would yield direct benefits to



the consumers in the State. Learned counsel for the Appellant vehemently submitted that even assuming a competitive bidding process under Section 63 was not to be followed, the State Commission could have at the least invited other offers to supply electricity at a cost cheaper than what was indicated by the Respondent No. 3/DIL. Learned counsel contended that the contention of the Respondents that multiple bidding processes failed in the past is evidently false and the same is only to justify the procurement of power by the second Respondent from its own group company.

**370.** Regarding the contentions raised by the Respondents that “5 attempts to procure power through bidding process has been recorded by the State Commission in its Tariff Order dated 19.10.2012, and also by this Tribunal in the Remand Order dated 28.05.2015, learned counsel pointed out that the Respondents have not produced any document on record showing the bids received or the results of the 5 failed attempts. The Respondents have sought to place reliance on an observation by the State Commission in the aforesaid Tariff Order whereby the State Commission has observed that NPCL has been trying to procure power through bidding from 2008-09.

**371.** In fact, the last bidding process was successful and there were 6 bidders who had participated. The tariff was discovered, which was much lower than in the present case, the tariff was adopted and the PPA was also executed. Learned counsel pointed out that in the said bidding process undertaken by the second Respondent, DIL/third Respondent did not participate in the bid at all. However, the contract/PPA got terminated in exercise of the contractual rights which is always possible for any contract, whether under bidding or otherwise to be terminated. This therefore does not mean that the bidding process was unsuccessful.

**372.** Learned counsel for the Appellant further submitted that it is the justification of the Respondent that L2 bidders had not yet commissioned its project whereas the plant of the third Respondent /DIL stood commissioned and was in operation. Hence there were no uncertainties in the procurement of power as well as the cost of the power plant/supply of power. Learned counsel for the Appellant also contended that in view of these facts, the second Respondent has no intention of undertaking a bidding process for procurement of power, but only sought to benefit its own sister concern at a very high tariff. The same is also evident from various orders of the State Commission such as dated 27.01.2015, 31.07.2018 and dated 13.11.2017.

**373.** Learned counsel for the Appellant advancing his arguments further submitted that interestingly, the Respondent No. 3/DIL had offered to supply power at much lower tariff. There is no reason why the supply to second Respondent which is a sister concern should be about Rs. 5 per unit. In the present case, the tariff of Rs. 4.79/- itself is exorbitant, which does not even include STU charges and losses for both Maharashtra and Uttar Pradesh. The entire burden of power purchase is being passed on to the consumers, the second Respondent has successfully avoided scrutiny on merits for one year on the grounds of deed not being notarized. It is now seeking to avoid the very same issue for its affidavits and pleadings and is seeking to continue the power procurement burdening the consumers at large. Further, the second Respondent has also sought to justify the tariff of its sister concern by relying on the fact that it had a firm fuel supply linkage as against the coal shortage situation in the market for other developers. In fact, it is an admitted position that not only did DIL refuse to commit to fixed energy charges, but also the State Commission

has given liberty to DIL to come back for approval for procurement of additional coal in case of shortage.

**374.** Learned counsel for the Appellant further submitted that State Commission has erred in not following the National Tariff Policy which mandates that the procurement of thermal power by the distribution licensees has to be only through a bidding process under Section 63 of the Electricity Act. The National Tariff Policy notified under Section 3 has the force of law and is required to be followed by the State Commission. The previous decision of this Tribunal holding that National Tariff Policy is merely a policy and is not binding is now overruled by the judgement in the Energy Watchdog case.

**375. Per contra,** learned counsel for the Respondents submitted that in view of the failed attempts of NPCL to procure power from long term basis through competitive bidding, it sought to enter into a PPA through the bilateral negotiated route under the provisions of Section 62 with Respondent No. 3/DIL as the tariff offered was competitive and DIL was prepared to supply power without any delay as its plant was commissioned and ready to deliver. In fact, this Tribunal in Appeal no. 88 of 2015, while passing the remand order dated 28/05/2015 has also expressly noted that Respondent No. 3 is an affiliate company of Respondent No. 2 and the bid of the Respondent No. 3 was earlier rejected by the State Commission on that count. The conscious of the above fact this Tribunal in the remand order directed the state commission to examine the PPA entered into between the Respondent Nos. 2 and 3 on merits and further directed the commission to consider that in past 5 attempts by Respondent No. 2 to procure power through Competitive Bidding Process has failed.

**376.** Hence, in the facts of the present case wherein by the Remand Order this Tribunal directed the State Commission to address the contentions of the NPCL that it had made repeated attempts to procure power through competitive bidding which were unsuccessful.

**377.** Learned counsel for the Respondents further submitted that vide various proceedings the State Commission had directed second Respondent to make arrangements for procurement of power on long term basis as it ensures availability of power at optimum rates for consumers in future. However, as power could not be procured through competitive bidding, NPCL executed the PPA with DIL as DIL was in a position to supply power immediately. Given the fact that it was essential that NPCL have a long term power procurement arrangement in place as procuring power from short term sources would eventually lead to high tariffs and be detrimental to consumer interests, the State Commission, after examining the case from all aspects approved the PPA between two sister concerns. Needless to mention that in doing so the State Commission has safeguarded the interests of both NPCL as well as consumers which are the objective of the Electricity Act.

**378.** Learned counsel for the Respondents further contended that the decision to procure power under Section 62 of the Electricity Act was on account of exceptional circumstances in the present case as the Five Failed Attempts to Procure Power Through Competitive Bidding from FY 2008-09 onwards.

**379.** In response to the various contentions of the learned counsel for the Appellant, learned counsel for the Respondents have rendered categorical explanations such as NPCL could not have approached Athena Power, 55,000MW power being tied up through competitive bidding till FY 2015-16,

Availability of 30,000 MW of surplus power, NPCL's alleged intention to never procure power through competitive bidding, etc. Learned counsel for the Respondent further submitted that the procurement of power under Section 62 of the Electricity Act is permissible. In fact, this Tribunal vide its Remand Order dated 28.05.2015 set aside the Rejection Order dated 27.01.2015 passed by the State Commission while holding that the State Commission's observation that for long-term purchase only competitive route is available appears to be in teeth of the clear finding of this Tribunal in the BSES Judgment.

**380.** Pertinently, the Hon'ble Supreme Court in its judgment dated 11.04.2017 in *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.* ("Energy Watchdog Judgment") has also held that a distribution licensee may execute a PPA either under Section 62 or Section 63 of the Electricity Act. The relevant para in this context is reproduced hereinbelow:

*"20. ... The reason why Section 62 alone has been put out of the way is that **determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding.** In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff..."*

*[Emphasis Supplied]*

**381.** Learned counsel for the Respondents contended that the Respondent No.2/NPCL has not challenged the validity of National Tariff Policy, however, the Tariff Policy cannot override the regulatory framework. In this context learned counsel for the Respondent placed reliance on this

Tribunal's Full Bench Judgement in *Maruti Suzuki case* (Appeal No. 103 of 2012), wherein it was held that "*if the Regulatory Commissions have to be independent and transparent bodies, they are expected to frame Regulations under Sections 178 & 181 independently*". The Regulatory Commission can take guidance from the National Electricity Policy or National Tariff Policy but are not bound by them. Hierarchy between the Regulations framed by the Commission and also such as National Tariff Policy is settled in terms of the Apex Court Judgement in *PTC India Limited vs. Ld. Central Electricity Regulatory Commission & Ors.*, (2010) 4 SCC 603 and the same has also been discussed in detail in the *Maruti Suzuki Judgment*.

**382.** Learned counsel for the Respondents further submitted that on the question of discretionary power of regulators in choosing Section 62 or Section 63 of the Electricity Act, the provisions of the Electricity Act are well settled, and in such matters, the provisions of a delegated legislation like National Tariff Policy cannot prevail over the principal statute, i.e., the Electricity Act. In this regard, reliance is placed on the Hon'ble Supreme Court's judgment in *State of Madhya Pradesh vs. M/s G.S. Dall and Flour Mills*, (1992) Supp (1) SCC 150 (Para 19). Learned counsel reiterated that Section 62 of the Electricity Act cannot be made nugatory or whittled down to only certain exclusionary cases in the light of above submissions.

### **Our Findings**

**383.** We have gone through the rival submissions of the Appellant and the Respondent and also has taken a note of various decisions of this Tribunal and the Hon'ble Supreme Court. It is not in dispute that the National Tariff Policy provides for the procurement of power by the Distribution licensee through a bidding process under section 63 of the Electricity Act. However,

the Act in no way prohibits in entirety that power cannot be procured under Section 62 of the Act. In the facts and circumstances of the case, it is crystal clear that second Respondent/NPCL made several attempts to procure power on long term basis through competitive bidding but due to the one or the other reason the same was not successful. In such a situation, second Respondent had no option but to enter into a PPA through the bilateral negotiated route under the provisions of Section 62 with the Respondent NO. 3/DIL as the tariff was competitive and DIL was prepared to supply power immediately as its plant was already in operation.

**384.** This Tribunal in its Remand Order dated 28.05.2015 also expressly noted the fact leading to the proposal for procurement of power through negotiated route under Section 62. The relevant para of the said Remand Order of this Tribunal is reproduced hereunder:

***23. The State Commission will have to address the Appellant's contention that it had made five attempts to procure power through Competitive Bidding Process, but that did not result in an effective arrangement for getting the necessary quantum of power required on long term basis; that the last attempt made by the Appellant which resulted in the signing of the PPA did not result in the commencement of supply of power from 30.4.2014 as envisaged by PPA; that need of the Appellant is to have long term arrangement forthwith instead of speculating purchase for the supply at a later date through Competitive Bidding Process and that the State Commission itself had repeatedly impressed upon the procurement of power on the long term basis forthwith instead of procurement of power on short term basis. The State Commission has also not taken into account the Appellant's contention that Respondent No.2 is willing to supply the required capacity at an indicative fixed charges/capacity charges working out to Rs.1.99 per kWh exclusive of reimbursement of income tax, CTU, SLDC charges for transmission of power from the generating station which will be on an actual basis and the project cost and other tariff elements leading to the above capacity charges which shall be further subject to prudence check by the State Commission under Section 62 of the Electricity Act. While leaning in favour of Competitive Bidding route under Section 63 of the Electricity Act and rejecting the negotiated route under Section 62 thereof, the State Commission should have examined the PPA entered into between the Appellant and Respondent No.2. The State Commission has not done so. Its reasoning is solely based on interpretation of MoP Guidelines. It has held that after 5.1.2011 for long term power purchase***



*only competitive route is available. We have already noted the Appellant's contention that the State Commission's interpretation of MoP Guidelines is totally incorrect and illegal. Submissions of the Appellant in this regard have not been taken into consideration by the State Commission...*

**(Emphasis supplied)**

**385.** In the case on hand, the State Commission vide its various proceedings directed second Respondent/NPCL to make arrangement of procurement of power on long term basis as it ensures availability of power at optimum price for consumers in future. Based on the Remand Orders, the State Commission evaluated all aspects associated with the procurement of power and approved the power purchase agreement considering all aspects to safeguard the interest of the consumers.

**386.** The Respondents have brought in their submissions as under:

**32. Notably, PFCCL had issued 3 (three) Pilot Scheme Tenders for the procurement of 2500 MW of power on medium term basis in 3 (three) consecutive years i.e., 2018, 2019 and 2020 and the Appellant has conveniently and selectively chosen to only rely upon the Pilot Scheme Tender floated by PFCCL in January, 2020 since the tariff discovered therein was lower than the tariff discovered in the years 2018 and 2019. In this regard, the tariff discovered and the landed cost at UP periphery in all the 3 (three) Pilot Scheme Tenders floated by PFCCL for the procurement of 2500 MW of power on medium term basis is tabulated herein below:**

<b>All figures in Rs./kWh</b>	<b>Pilot Scheme-I in May 2018</b>	<b>Pilot Scheme-II in March 2019 (Tender Cancelled)</b>	<b>Pilot Scheme-II in Jan 2020</b>
<i>Discovered Tariff at CTU Interconnection Point (L1 Tariff)</i>	4.24	4.41	3.26
<i>Landed Tariff at UP periphery</i>	5.11	5.23	4.06
<i>Landed Tariff at Respondent No.2/NPCL periphery</i>	5.49	5.62	4.40

*\*PTC trading margin = Rs.0.05/kWh for Pilot Scheme-I, PTC trading margin =Rs.0.0173/kWh for Pilot Scheme-II included in the above landed cost calculation.*

**387.** It is pertinent to note from the above that any competitive bidding if not reacted to its logical conclusion leading to signing of PPAs for supply of power cannot be taken for reference in evaluating the merits of other contract as being attempted by the Appellant in the instant case. Neither, the bid process in State of UP nor by PSC could see the light of the same on account of one or the other reason. The same collectively cannot be any basis for comparison of tariff finalized in other process either under Section 62 or Section 63. It is desirable that to have more transparency in procurement of power, the rates are decided through bidding process as per the National Tariff Policy. However, the Section 62 process cannot be negated totally under which the Commission exercised their regulatory power to apply prudence check for the ultimate benefit of the end consumers.

**388.** The Act clearly provides for generation, transmission and distribution to be conducted on commercial principles and the same are guided under the overall regulation of the State Commissions. Therefore, we do not find any embargo in procurement of power from a related company by the Distribution Licensee as in the present case for which various provision in PPA are examined by the State Commission and PPA is subsequently approved by Commission. In view of these facts, we are inclined to agree with the findings of the State of Commission in the Impugned Order on this account.

### **Issues No. 3**

**389.** Learned counsel for the Appellant submitted that the determination of tariff under Section 62 has been done by the State Commission without any prudence check of capital cost and without applying any of the norms and parameters, as required under the UPERC (Terms and Conditions of

Generation Tariff) Regulation, 2014. In fact, in the present case, the State Commission has approved the PPA between NPCL and DIL on the basis of a commitment given by DIL that since the generating station is already established there would be a firm cost of power and any variation above that would be absorbed by the generators.

**390.** Learned counsel further submitted the State Commission in terms of the Regulations has to work out other parameters such as Capital Cost, Debt-Equity Ratio etc., which exercise also has admittedly not been done in the present case. The State Commission has merely noted the ceiling tariff of Rs. 4.79 per unit as approved was based on the estimated capital cost of Rs. 1941 Crores. Further, the submission of DIL was that the capital expenditure was revised to 1927.65 Crores which it intended to capitalize by FY 2018-19. The actual expenditure as on cut-off date was Rs. 1903 Crores.

**391.** Learned counsel for the Appellant vehemently submitted that the approach adopted by the State Commission seems to be that since the actual capital cost of Rs. 1903 Crores as claimed by DIL is less than Rs. 1941 Crores based on which the ceiling tariff of Rs. 4.79 per unit was approved, the same may be approved. Learned counsel alleged that the actual capital cost incurred by the Appellant would not be subject to scrutiny by the State Commission merely because it is less than as approved for a ceiling tariff. As regards to the process of tariff determination, which admittedly has to be done in terms of the UPERC Tariff Regulations 2014, the only response by DIL has been that in terms of the Regulations, there cannot be an exercise to find out cost of each and every component of the plant. For the purpose reliance has been placed on Regulation 19(6).

**392.** Learned counsel pointed out that the Regulation 19(6) only provides for prudence check of capital cost and apart from the this, none of components of tariff have been decided in terms of the Regulations such as interest on loan, depreciation, ROE, O&M expenses, interest on working capital, etc.

**393.** Learned counsel for the Appellant further submitted that the State Commission while purportedly determining tariff under Section 62, has held vide order dated 26.03.2018 that claims relating to Change in law and extra cost on account of procurement of additional coal would be dealt separately, as done in Case-1 procurement. It implies that the tariff has been left open and the same would be dealt separately.

**394.** Learned counsel for the Appellant pointed out that the approval of the PPA, was based on a firm commitment of tariff, and the only exception was with respect to procurement of additional coal in case of shortage, for which DIL would have to take prior approval from the State Commission. This being the case, the State Commission ought to have rejected any claim in respect of change in law, which was contrary to the commitment given by DIL.

**395.** Learned counsel further contended that it is not understandable as to how can there be change in law in relation to variable charges in a petition under Section 62 of the Electricity Act. When the tariff is being determined on a cost-plus basis, the question of change in law does not arise separately. The costs and expenses as on the date of the tariff being determined have to be taken into account, subject to the ceiling cost as determined in the order approving the power purchase. Stating the above facts, and circumstances learned counsel for the Appellant submitted that the Impugned Order is liable to be set aside.

**396. Per contra**, learned counsel for the Respondents submitted that the Petition No. 971 of 2014 was filed by Respondent No. 2 /NPCL for Approval of PPA between NPCL and DIL seeking *inter alia* for the following reliefs:-

*“(a) Accord the Approval for purchase of power of 187 MW at generation bus from CTU connected Unit-2 -1X x300 MW thermal power station of M/s Dhariwal infrastructure Ltd in Chandrapur, Maharashtra for a period of 15 years;*

*(b) Approve the draft power purchase agreement as annexed at annexure A;*

*(c) Pass such other or further orders as this Hon’ble Commission may deem fit and proper in the facts and circumstances of the case”*

**397.** Learned counsel for the Respondent further submitted that the State Commission initially vide its order dated 27/01/2015 rejected the prayer of the second Respondent on the ground that for long-term power purchase, competitive route under Section 63 of the Act is available and therefore directed the Respondent No. 2 to take concrete steps for long-term power purchase agreement through bidding route. However, being aggrieved with the above said order dated 27/01/2015, the Respondent No. 2/NPCL filed an appeal bearing Appeal number 88 of 2015 before this Tribunal *inter alia* on the ground that approval of procurement of power through negotiated agreement is not in any manner affected by the guidelines issued by the Ministry of power on competitive bidding process.

**398.** This Tribunal vide its Remand Order dated 28.05.2015 set aside the Rejection Order dated 27.01.2015 passed by the State Commission and remanded the matter back to the Commission for fresh consideration of all the submissions of the parties. After the Remand Order, the State Commission commenced hearing in the matter during 11.08.2015 to 23.09.2015 wherein the State Commission thoroughly examined NPCL’s

proposal to procure long-term power from DIL through bilateral negotiated route at a tariff to be determined under Section 62 of the Act.

**399.** Learned counsel for the Respondent contended that for the purpose of evaluating and ascertaining the reasonableness of tariff, the State Commission put several specific queries to the parties and directed them to demonstrate the comparative advantages of the proposed transactions. The Order dated 29.09.2015 passed by State Commission is extracted below:

*“Learned Counsel Sri Shanti Bhushan, Sr. Advocate made submissions on behalf of NPCL.*

*The Commission desired to know that whether the cost of electricity from this project is competitive with the available cost of power from other sources and with the power available from exchange. NPCL was also asked that how would NPCL ensure that the commitments made by the concerned generator would be adhered to and whether they have made any such condition in their agreement to the effect that if the commitments are not fulfilled, the impact thereof will not be passed on to the consumers. The Commission further enquired about the FSA and 100 percent coal linkage of the generator.*

*NPCL was directed to submit detailed reply on above along with supporting documents.*

*4. The next hearing shall be on 4.11.2015 at 11:30 Hrs.”*

*(Emphasis Supplied)*

**400.** Learned counsel for the Respondents further submitted that in response to the query of the Commission made in the order dated 29/09/15, NPCL submitted that the first year fixed charge is at Rs. 2.14/kwh and the term of PPA as 25 years. The levelized tariff was indicated to be calculated as Rs. 4.79/kwh. Second Respondent/NPCL has also submitted that this levelized tariff is lower than the discovered levelized tariff of Rs. 5.73/kwh – Rs. 4.886/kwh under Case -1 bidding as adopted by the Commission vide order dated 24.06.2014 in Petition No. 911 of 2013. Besides Respondent No. 2 had also stated that the capital cost of Rs. 6.47 Cr./MW for DIL is lower than quite number of contemporary power plants

like Anupur TPS (2 x 600 MW) – Rs.6.67 Cr/MW, Bongaingaon TPS (3 x 250 MW) Rs. 6.85 Cr./MW, Chandrapur TPS (2 x 500 MW) MSPGCL Rs. 6.50/MW) etc. NPCL has also mentioned that its capital cost also compares favourable with CERC's benchmark capital cost.

**401.** Learned counsel for Respondent further contended that for future certainty and clarity and to protect consumers from increasing costs of power in the PPA approved under Section 62, the State Commission directed NPCL to file submissions and relevant material with respect to the variable part of the tariff as per the levelized tariff of Rs. 4.79 / kWh for the period of 25 years. Therefore, it is manifestly clear that the State Commission conducted a thorough and exhaustive process to protect consumer interests and ensured that there were no lacunae which could be abused / misused by the parties. Further, the State Commission has fully complied with the statutory mechanism and directions in the Remand Order and any allegation by the Appellant that the Impugned Order has been passed in a cursory manner without conducting a comparative cost analysis, is devoid of any merit and contrary to the material on record. It is accordingly concluded that the State Commission has acted in accordance with law and discharged its statutory obligations in a bonafide manner while acting in compliance to the Remand Order passed by this Tribunal. Learned counsel further submitted that the contention of the Appellant that the impugned order is passed in a mechanical manner and without any prudence check or reasoning is entirely erroneous and liable to be rejected.

### **Our Findings**

**402.** We have carefully gone through the submissions made by the learned counsel for the Appellant and the learned counsel for the Respondents and also taken note of Regulations notified by the UPERC for



determination of generation tariff. Pertinently, the capital cost of unit 2 of the DIL's project was found to be lower than the benchmark capital cost issued by the CERC and the tariff offered by Respondent No. 3/DIL was thus in line with the regulatory norms and also aligned to the prevalent market conditions. We also note that fixed charges based on such projected Capital Cost of Unit 2 of the Project of the Respondent No.3/DIL with a commitment from the Respondent No. 3/DIL that there will not be any upward revision of the same and was found to be competitive. We have gone through the Regulation 19(6)(a) of the UPERC Generation Tariff Regulation, 2014 which provides prudence check for capital cost of a thermal generating station at the time of tariff determination. In terms of the said regulations if the bench mark norms have already been specified by the Central Commission and the capital cost of thermal generating station is lower than the said bench mark of capital cost then the same may be allowed by the State Commission. Keeping this in view, the State Commission during the PPA Approval proceedings had carried out the prudence check of Capital Cost of the Project in terms of Regulation 19(6)(a) of the UPERC Generation Tariff Regulations 2014, i.e., by comparing the Capital Cost of the Project as against the CERC benchmark Capital Cost vide its Orders dated 29.09.2015 and 15.01.2016 filed in the PPA Approval Petition.

**403.** We note that the project Capital Cost of Respondent No. 3/DIL was Rs. 4.57 Crores/MW which was already commissioned at the time of NPCL entering into the PPA with Respondent No.3/DIL as against capital cost benchmark set out by the Central Commission, i.e., Rs. 4.71 Crores/MW. Therefore, the submission of the learned counsel for the Appellant with respect to lack of prudence check even during the tariff determination is beyond comprehension.

**404.** From the records placed before us it is noticed that there are other several crucial benefits stipulated under the present PPA i.e. (a) reliability of the power which was being made readily available by DIL while various attempts for competitive bidding had already failed; (b) the Project was already commissioned and DIL had also secured a dedicated long-term access to Northern Region; (c) firm fuel supply linkage, whereas the entire power industry was and is still suffering from coal shortage; and (d) a levelized tariff which was much lower than the tariffs of the successful bidders in the Case-1 bidding conducted by UPPCL in December, 2012.

**405.** In view of the above facts, it is opined that the Impugned Order has been passed by the State Commission after duly applying its judicious mind to the facts and prudently verifying the cost which in any event was subject to determination of tariff at a later stage. Therefore, the same cannot be termed as being passed in a mechanical manner without considering the regulations and applying the requisite prudence check on capital cost etc. Accordingly, we do not find any infirmity or ambiguity in the Impugned Order pertaining to this issue and intervention of this Tribunal is not warranted.

#### **Issue No. 4**

**406.** Learned counsel for the Appellant submitted that the State Commission has exceeded its jurisdiction in approving the PPA and tariff in the present case due to the fact that the power project is situated in the State of Maharashtra and supplying power to Uttar Pradesh as well as State of Tamil Nadu. He further submitted that thus, there is supply to two or more states and the same squarely falls within the provisions of Section 79(i)(b) of the Electricity Act and is within the exclusive jurisdiction of the Central Commission for regulating the tariff.

**407.** Learned Counsel pointed out that DIL/Respondent No. 3 has already invoked the jurisdiction of the Central Commission in so far as the inter-state supply to Tamil Nadu is concerned. In view of this when the Central Commission has already exercised jurisdiction in the petition of the Respondent No. 3, it is not legally permissible for the Respondent No. 3 to invoke the jurisdiction of the Uttar Pradesh State Commission in so far as the Respondent No. 2 is concerned.

**408.** Learned counsel further contended that the jurisdiction under Section 79(1)(b) assumes importance as many aspects require common parameters to be applied, such as Station Heat Rate, Auxiliary Consumption, the parameters for coal consumption, the nature of taxes to be considered for Change in Law etc. He submitted that the reliance on Section 64(5) of the Electricity Act by the Respondents is also misconceived. Firstly, the Energy Watchdog case itself after considering Section 64(5) and thereafter the Hon'ble Supreme Court upheld the jurisdiction of the Central Commission. Further, Section 64(5) can itself possibly apply only when there are only two States involved, namely, generator in one State and the Procurer of the entire capacity in another State. Therefore, in the present case, there being two procuring States hence, there cannot be possibly more than one Regulatory Commission involved in such a situation.

**409.** Learned counsel for the Appellant argued that the approval of PPA under Section 86(1)(b) cannot precede the determination of tariff. One of the primary parameters to be considered for approval of the PPA itself is the reasonability of the tariff. Therefore, it is not possible for the approval to be made in advance and thereafter the tariff to be determined by the State Commission. Learned counsel also pointed out that the precise situation is

also governed by Rule 8 of the Electricity Rules, 2005 which provides as under:

***“8. Tariffs of generating companies under Section 79.-The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.***

**410.** Learned counsel therefore contends that in view of the above facts, the State Commission has no jurisdiction to approve the PPA and tariff for the projects of Respondent No. 3 and the Central Commission has the exclusive jurisdiction in this regard.

**411. Per contra,** learned counsel for the Respondents outrightly oppose the arguments of the Appellant. Learned counsel further submits that the State Commission has jurisdiction to pass the PPA Approval Order and the MYT Order as the generator (Respondent No.3) had in consent with the distribution licensee (Respondent No.2) approached the State Commission for granting necessary approval under Section 86(1)(b) of the Electricity Act. Learned counsel for the Respondents further submitted that while Respondent No.3/DIL supplies power to the distribution licensees in the State of Tamil Nadu as well as the State of Uttar Pradesh from the Project, the jurisdiction of the State Commission is valid through Section 64(5) of the Electricity Act. In this regard, reliance has been placed on the Energy Watchdog Judgment wherein it has been held that:

“29.

...

*Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where*

*tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact, this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.*

**412.** Learned counsel for the Respondents vehemently submitted that the Appellant's reliance on the Tribunal's Judgment dated 07.04.2016 in Appeal No.100 of 2013 in the case of Uttar Haryana Bijli Vitran Nigam Ltd. vs. Central Electricity Regulatory Commission, which was also a subject-matter of appeal in the Energy Watchdog Judgment and Judgment dated 31.10.2018 in Appeal No.230 of 2017 in the case of KSK Mahanadi Power Company Limited vs. Andhra Pradesh Electricity Regulatory Commission is misplaced.

**413.** Learned counsel for the Respondents further points out that ordinarily the jurisdiction to adjudicate upon inter-state claims in a composite scheme though vests with the CERC, however, Respondent No.2 and Respondent No.3 have invoked the jurisdiction of the State Commission under the exception carved out in Section 64(5) of the Electricity Act. The said exception was never a point of contention in the KSK Judgment. Learned counsel for the Respondents placed reliance on the Judgment in Pepsico India Holding (P) Ltd. vs. Grocery Market & Shops Board, (2016) 4 SCC 493, wherein the words "one or more" have been interpreted to mean composite scheme to include various entities.

**414.** Learned counsel for the Respondents contended that the contentions of the Appellant regarding the State Commission lacking the jurisdiction to pass the PPA Approval Order is therefore contrary to the settled position of

law. Therefore, reliance placed by the Appellant on Rule 8 of the Electricity Rules, 2005 is misconceived as the said provision would apply only if the Respondent No. 3/DIL and Respondent No. 2/NPCL had chosen to approach the CERC for determination of generation tariff. Even in the case of the TANGEDCO PPA, it is understood that the CERC has not determined the generation tariff for supply of entire or any part of contracted capacity from Unit 2 of the Project to TANGEDCO. Hence, Rule 8 of Electricity Rules, 2005 is not applicable in case of Unit 2 of Respondent No.3/DIL.

**415.** Learned counsel for the Respondent further submitted that the State Commission had in Paragraph 3.6.15 of the MYT Order in great detail penned the reasoning for upholding its jurisdiction. The State Commission had rightly noted that there is nothing in the language of Section 64(5) of the Act which suggests that it applies only in the case of sale by a generator of its whole capacity to the distribution licensee in a different State. In fact, a harmonious reading of Section 64(5) of the Electricity Act in light of statutory definition of “supply” points out that Section 64(5) of the Electricity Act shall trigger in case of “any” and each inter-state sale of electricity by a generating company to a distribution licensee involving territories of two states.

**416.** Further, under Section 64 (5) of the Electricity Act, the entities involved in generation and supply is to be ascertained qua each PPA. In case of Respondent No.3/DIL, power is being supplied under separate and independent PPAs to NPCL and TANGEDCO. Both the PPAs have to be considered independently and both the PPAs involved only two States and hence Section 64 (5) of the Act is attracted.

## **Our Findings**

**417.** We have carefully considered the rival submissions of both the parties relating to the jurisdiction of the State Commission to determine the tariff and to approve the PPA in the present case under Section 64 (5) of the Electricity Act. It is not in dispute that Respondent No. 3/DIL is supplying power on a long term basis from its Unit No. 2 of the project located in the State of Maharashtra to Respondent No. 2/NPCL (Section 62) and TANGEDCO (Section 63).

**418.** The State Commission vide its PPA Approval Order dated 20.04.2016 read with its Order dated 15.01.2016, approved the PPA for the aforesaid supply to the Respondent No.2/NPCL. Similarly, the PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 was executed pursuant to the Case-1 competitive bidding conducted by TANGEDCO. It is clear that both the PPAs are distinct and independent. Before proceeding further, let us take note of the provisions under Section 64 of the Act of which relevant extract is reproduced hereunder:

*“Section 64. (Procedure for tariff order): --- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

*...*

*(5) Notwithstanding anything contained in Part X, the tariff for any inter State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefore.”*

(Emphasis Supplied)

**419.** It is crystal clear that Section 64 (5) of the Act is an exception to the jurisdiction of the Central Commission under Section 79 of the Act, under which the parties by consent can approach the State Commission for the determination of tariff for the generating company supplying power to the



distribution licensee within the territorial jurisdiction of such State Commission. Accordingly, Respondent No. 3 and Respondent No. 2 has concurred and jointly submitted themselves to the jurisdiction of the State Commission for the determination of tariff in context of the supply of 187 MW of power by the Respondent No.3/DIL to the Respondent No.2/NPCL.

**420.** We also note that the issue of ‘composite scheme’ as well as the jurisdiction of the Central Commission under Section 79(1)(b) of the Act and the jurisdiction of the State Commission(s) to determine tariff under Section 64(5) of the Act, came up before the Hon’ble Supreme Court in the Energy Watchdog case. In this context, it is relevant to set out the relevant excerpts from the Energy Watchdog Judgment passed by the Hon’ble Supreme Court is as under:

*“29. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”*

(Emphasis Supplied)

**421.** The Hon’ble Supreme Court, while interpreting the term ‘composite scheme’ under Section 79(1)(b) of the Act in the Energy Watchdog Judgment, has held that the Ld. Central Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff is either

determined under Section 62 or adopted under Section 63 of the Act. However, the Hon'ble Supreme Court in view of the specific carve-out in Section 64(5) of the Act was pleased to clarify (in Paragraph 29) that the said provision will *"only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity"*.

**422.** A similar matter came up before us for adjudication under Section 64 (5) and Section 79(i)(b) of the Act in Appeal No. 327 of 2018 and Batch in the case of M.P. Power Management Company Ltd. Vs. MPERC and Ors. This Tribunal in its judgement dated 19.08.2020 has held that in such cases the State Commission has to determine tariff and approve the PPA under Section 64 (5) of the Act.

**423.** We also hold that the said judgement of this Tribunal having its basis on the interpretation of Hon'ble Supreme Court in Energy Watch Dog case, squarely applies to the present case on hand. In view of this, we opine that the State Commission has the jurisdiction and there is no perversity in the decision of the State Commission in its Order. Hence, our intervention on this issue is not required.

### **ORDER**

For the foregoing reasons stated supra, we are of the considered view that the issues raised in the present appeal Nos. 150 of 2017 and 185 of 2019 are devoid of merits and hence Appeals are dismissed. The Impugned Orders dated 20.04.2016 and dated 05.02.2019 passed by the Uttar Pradesh Electricity Regulatory Commission are hereby upheld.

**424.** Needless to mention that the pending IAs, if any, shall stand disposed of. No order as to costs.

**425.** Pronounced in the Virtual Court on this the **6<sup>th</sup> day of August 2021.**

**(Ravindra Kumar Verma)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

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