

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

**APPEALNO. 52 OF 2021  
& IA NO. 176 OF 2021**

**AND**

**APPEAL NO. 70 OF 2021  
& IA NO. 289 OF 2021**

**Dated: 02nd July 2021**

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member  
Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

**APPEALNO. 52 OF 2021  
& IA NO. 176 OF 2021**

**In the matter of:**

**SOLAR ENERGY CORPORATION OF INDIA LIMITED**

*[Through its Managing Director]*

First Floor, A-Wing, D-3,  
District Center - Saket,  
New Delhi-110 017

.... Appellant(s)

**VERSUS**

**1. DELHI ELECTRICITY REGULATORY COMMISSION**

*[Through its secretary]*

Viniyamak Bhawan, 'C' Block,  
Shivalik, Malviya Nagar  
New Delhi-110 017

**2. TATA POWER DELHI DISTRIBUTION LIMITED**

*[Through its Managing Director]*

NPDL House, Hudson Lines,  
Kingsway Camp  
New Delhi – 110 009

.... Respondents

Counsel for the Appellant(s):

**Mr. Tushar Mehta, Ld. Solicitor General of India**  
**Mr. M.G. Ramachandran, Sr. Adv.**  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardan  
Mr. Shubham Arya  
Ms. Tanya Sareen

Counsel for the Respondent(s): **Ms. Preeti Goel** for R-1

**Mr. S. Venkatesh**  
Mr. Siddharth Joshi for R-2

**APPEAL NO. 70 OF 2021**  
& IA NO. 289 OF 2021

**In the matter of:**

**SOLAR ENERGY CORPORATION OF INDIA LIMITED**

*[Through its Managing Director]*

First Floor, A-Wing, D-3,  
District Center - Saket,  
New Delhi-110 017

.... Appellant(s)

**VERSUS**

**1. PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**

*[Through its Secretary]*

Site No.3, Block-B, Sector-18-A  
Madhya Marg,  
Chandigarh,  
Punjab-160 018

**2. PUNJAB STATE POWER CORPORATION LIMITED**

*[Through its Managing Director]*

The Mall, PSEB Head Office,  
Baradari, Patiala  
Punjab-147 001

**3. ADANI GREEN ENERGY NINE LIMITED**

*[Through its Authorized Representative]*

Adani House, 56, Shrimali Society,  
Navrangpura Ahmedabad,  
Gujarat-380 009

**4. ADANI GREEN ENERGY SEVEN LIMITED**

*[Through its Authorized Representative]*

Adani House, 56, Shrimali Society,  
Navrangpura Ahmedabad,  
Gujarat-380 009

.... Respondents

Counsel for the Appellant(s):

**Mr. Tushar Mehta, Ld. Solicitor General of India**  
**Mr. M.G. Ramachandran, Sr. Adv.**  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal

Ms. Anushree Bardan  
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Ms. Tanya Sareen

Counsel for the Respondent(s): **Ms. Gargi Kumar** for R-1

**Mr. Anand K. Ganesan**  
Ms. Swapna Seshadri  
Mr. Amal Nair for R-2

**Mr. S. Venkatesh**  
Mr. Siddharth Joshi for R-3 & R-4

## **J U D G M E N T**

### **PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER**

1. The interference by the State Electricity Regulatory Commission (“SERC”) in the negotiated *trading margin* in the back-to-back power purchase agreement (“PPA”) between the electricity generating company (“generator”) and power trading licensee (“trader”), on one hand, and power supply agreement (“PSA”) between the trader and the distribution licensee (“Discom”), on the other, is questioned by the trader on grounds of jurisdiction and propriety. These appeals assailing orders of different SERCs have raised common questions of law that need to be addressed and, hence, have been heard and are being decided by this common judgment.

### ***THE APPELLANT***

2. The appellant in each matter is Solar Energy Corporation of India Limited (for short, “SECI” and also variously referred to hereinafter as “the appellant” or “the trader” or “the trading licensee”). It is a Government of India Enterprise and a company incorporated under the provisions of the Companies Act. It (SECI) is designated as the inter-State Trading Licensee, the Intermediary Nodal Agency for implementation of the

schemes of the Government of India for developing grid connected solar power capacity in the country including schemes for setting up of Inter-State Transmission System (ISTS) connected Solar/Wind/Wind-Solar Hybrid Power Projects. One of the main objectives of SECI is to assist Government of India and function as the implementing and facilitating arm of National Solar Mission (NSM) for development, promotion and commercialization of solar energy technology in the country. SECI has been granted the Inter-State Trading License under the Electricity Act, 2003 by the Central Electricity Regulatory Commission (for short, “CERC” or “the Central Commission”). It (SECI) has been entering into Power Purchase Agreements (“PPAs”) with the Solar (or Hybrid) Power Developers. The electricity procured by SECI under the PPAs is for onward sale on *back-to-back* basis to the buying utilities or distribution companies under the Power Sale Agreements (“PSAs”).

### THE RESPONDENTS

3. The respective SERCs have been impleaded as the first respondent – Delhi Electricity Regulatory Commission (“DERC”) in first captioned appeal and the Punjab State Electricity Regulatory Commission (“PSERC”) in the other, each being also commonly referred to hereinafter as “*the State Commission*”. The second respondent in each case is the Discom operating in the area allocated in respective States – Tata Power Delhi Distribution Limited (“TPDDL” or “the Delhi Discom”) in former appeal and Punjab State Power Corporation Limited (“PSPCL” or “the Punjab Discom”) in the latter appeal. In the second appeal (coming from Punjab), the *Hybrid Power Developers* – viz. Adani Green Energy Nine Limited and Adani Green Energy Seven Limited, each a project company of Adani Renewable Energy Park (Gujarat) Limited - have been added as the third and fourth

respondents respectively, they being the source of supply (wind-solar hybrid power).

### *THE ORDERS UNDER CHALLENGE*

4. The Order challenged in (first) appeal from Delhi was passed on 31.12.2020 by DERC in Petition (no.65 of 2019) filed by second respondent (“TPDDL”). Similarly, the order assailed in the (second) appeal from Punjab was passed on 01.02.2021 by PSERC in Petition (no.29 of 2020) filed by second respondent (“PSPCL”).

5. By Order dated 31.12.2020, DERC granted approval under Section 86 (1) (b) of Electricity Act, 2003, for procurement of 200 MW Solar Power by the Delhi Discom under the PSA with the appellant but ruled on the subject of *trading Margin* as under:

*“24. In view of the aforesaid discussions, a Trading Margin of 2 paise/kWh is allowed to SECI; and the PSA dated 26/06/2019 is approved subject to the condition that the applicable tariff shall be as approved by CERC with a trading margin of 2 paise/kWh. Consequently, the clauses of Article 1 of the PSA related to applicable Tariff shall be modified accordingly. It is also held that the Order dated 20/11/2019 of CERC has bearing in respect of Tariff for procurement of solar power for which the Petitioner TPDDL has entered into PSAs with SECI. Therefore, the Tariff as approved by CERC with a trading margin of 2 paise/kWh shall be applicable also to the PSAs approved by this Commission vide Orders dated 01/03/2019 in Petitions No. 24 of 2019 and 25 of 2019.*

*25. The Petition is disposed of accordingly with the direction to the Petitioner to submit duly signed copy of PSAs modified as indicated above to the Commission within a period of one month.”*

6. By order dated 01.02.2021, the PSERC granted approval under Section 86 (1) (b) of Electricity Act, 2003, for procurement of 500 MW Wind-Solar Hybrid Power by the Punjab Discom under the PSA with the appellant but ruled on the subject of *trading Margin* as under:

*“.....Therefore, the Commission after considering the Power Sale Agreement between SECI & PSPCL, Power Purchase Agreement between SECI & HPD, Trading Margin Regulations of CERC and the contentions put forth by SECI, feels that there is no reason to give trading margin higher than 2 paisa.*

*The Commission notes that the power procurement being hybrid in nature shall be helpful for PSPCL in fulfilling its Renewable Solar and Non-Solar Purchase Obligation. The Commission, therefore, approves the procurement of 500 MW Hybrid (Solar plus Wind) power from SECI at the tariff of Rs. 2.69/kWh with a trading margin of Rs. 0.02/kWh. Accordingly, the Commission directs PSPCL to execute the amended PSA with SECI at the approved tariff (including trading margin of Rs. 0.02/kWh) and submit a copy to the Commission within 15 days from the date of issuance of this Order.”*

7. The appellant is aggrieved by the above-mentioned two orders of the State Commissions, the bone of contention being the reduction of the *trading margin* from negotiated Rs.0.07/kWh to Rs.0.02/kWh.

### *THE BACKDROP*

8. The Electricity Act, 2003 brought about various reforms in the electricity sector and while delicensing generation of electricity, it promotes competition, in the overall interests of the consumers, regulates activities in the nature of transmission, trading and distribution. The regulatory and other functions, including adjudicatory, are assigned to Central Commission

and respective State Commissions, the crucial element for the former to come in being “*inter-State*” activity.

9. We are concerned here with the issue of *trading margin*. The expression “*electricity trader*” is defined by Section 2 (26) to mean “*a person who has been granted a licence to undertake trading in electricity under section 12*”. The word “*trading*” is defined by Section 2 (71) simply as “*purchase of electricity for resale thereof*” the expression “*trade*” to be “*construed accordingly*”. The provision contained in Section 12, *inter alia*, prohibits activity in the nature of trading in electricity except on the strength and subject to the conditions of a license for trading. Quite clearly, trading is an activity distinct from procurement simpliciter by the distributing licensee directly from the generating company.

10. The provision contained in Section 79, *inter alia*, provides thus:

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

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

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

.....  
(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

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

11. As observed earlier, even for purposes of tariff determination, as in case of trading margin, the Central Commission exercises jurisdiction in matters involving inter-State activity.

12. The functions of the SERCs include decision on the procurement of power by the distribution licensee and fixing of trading margin in intra-State transactions and, in this context, it is necessary to note the following part of Section 86 (1) of the Electricity Act, 2003:

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

*...*

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

*...*

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

*...”*

13. In exercise of the power conferred by Section 176 of Electricity Act, 2003, the Central Government had framed and notified Electricity Rules, 2005. Rule 8 of the said rules provides thus:

*“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (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.”*

14. On 11.01.2010, the Central Commission had issued Statement of Reasons for review of *Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2005* (hereinafter referred to as “Trading Margin Regulations 2005”), *inter alia*, stating as under:

*“1 The Central Electricity Regulatory Commission (CERC) is empowered under section 79 (i) (j) of the Electricity Act, 2003, to fix the trading margin in the inter-State trading of electricity if considered necessary. In exercise of these powers, the Commission had fixed the trading margin for the first time in January, 2006 through the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006. Due to dynamic changes in the power sector, notification of new regulations relating to issue of trading licence, emergence of Power exchanges, the issue of reviewing trading margin has been engaging the attention of the Commission for some time.*

.....

*1. Accordingly, the Commission evolved a proposal for revision of the trading margin in the form of draft regulations and through public notice dated 12.10.2009, invited suggestions and comments on the draft regulations on Fixation of Trading Margin for inter-State trading in electricity. The suggestions and comments have been received on the draft regulations from the stakeholders listed in the Annexure. The oral hearing was held on 2.12.2009.*

.....

*2. We have given our thoughtful consideration to the suggestions/ objections. Our views thereon are detailed in the subsequent paragraphs.*

.....

7. *The Commission is cognizant of the fact that the traders are providing different types of products by entering into contracts on long-term, medium-term and short-term basis. The risk profile of each of these contracts is different. Accordingly, the Commission is of the view that where traders enter into long term power purchase agreements of duration exceeding a year, the risks cannot be completely mitigated through a trading margin. Also, since the long term power procurement market is witnessing competitive forces at work, the Commission feels that the determination of an appropriate trading margin be best left to the market forces.*

(Emphasis Supplied)

15. On 14.01.2010, the *Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2010* (hereinafter referred to as “Trading Margin Regulations, 2010”) were notified by the Central Commission. The Trading Margin Regulations 2010, were applicable to the short term buy-short term sell contracts, namely contracts where duration of PPAs and PSAs is less than one year, for the inter-State trading in electricity undertaken by a licensee. The relevant extract of the Trading Margin Regulations reads thus:

*“The Central Electricity Regulatory Commission on being of the opinion that it is necessary to fix trading margin for inter-State trading in electricity, and in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, hereby makes the following regulations, namely: --*

.....

*2. Applicability: These regulations shall apply to the short term buy-short term sell contracts for the inter-State trading in electricity undertaken by a licensee.*

*3. Definitions and Interpretation: (1) In these regulations, unless the context or subject-matter, otherwise requires –*

.....  
(d) “Short Term Buy- Short Term Sell contract” means a contract where the duration of the power purchase agreement and power sale agreement is less than one year;

4. *Trading Margin: The licensee shall not charge trading margin exceeding seven (7.0) paise/kWh in case the sale price is exceeding Rupees three (3.0)/kWh and four (4.0) paise/kWh where the sale price is less than or equal to Rupees three (3.0)/kWh. This margin shall include all charges, except the charges for scheduled energy, open access and transmission losses. The trading margin shall be charged on the scheduled quantity of electricity.*

5. *Repeal and Savings: (1) Save as otherwise provided in these regulations, the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 shall stand repealed from the date of commencement of these regulations.”*

16. On 25.10.2013, the Ministry of New and Renewable Energy (MNRE), Government of India notified the *Jawaharlal Nehru National Mission, Phase-II, Guidelines for implementation of scheme for setting up of 750 MW Grid Connected Solar Power Projects under Batch-I (for short, “Guidelines dated 25.10.2013”)*. The said Guidelines, *inter alia*, read as under:

*“1.5 Definitions*

*“Trading Margin” shall mean the margin as fixed by MNRE under this scheme on sale of Solar power to State Utilities/Discoms/Other Bulk Consumers, subject to CERC applicable Regulations in this regard.*

...

*2.8 Implementation Arrangement*

*2.8.1...The solar power purchased by SECI shall be sold to to State Utilities/Discoms/Other Bulk Consumers at a fixed tariff of Rs.5.50/kWh ...for 25 years (including Trading Margin of SECI @ 5 Paisa/kWh).”*

17. Though the specifics would need mention a little later as part of factual narrative of the two cases, it may be noted here that, *inter alia*, pursuant to the above-mentioned Guidelines, revised subsequently, the appellant SECI issued certain public notices, each described as *Request for Selection* (for short, “RfS”), for selection of solar (or hybrid) power developers (for short, “SPD”) from whom renewable energy could be purchased for inter-State transactions of supply, defining the meaning and rate of *trading margin*. The RfSs so issued included those issued on 28.10.2013, 30.01.2018, 10.01.2019 and 08.03.2019, the details whereof would come up for notice in due course.

18. On 03.08.2017, the Ministry of Power (“MoP”), Government of India notified the *Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects* (for short, “Guidelines dated 03.08.2017”), the following part being relevant for present discussion:

## “2. SCOPE OF THE GUIDELINES

...

*Explanation:*

.....

### c) ‘Intermediary Procurer’ & ‘End Procurer’:

i. *In some cases, an intermediary, between the distribution licensees and the generator (“Solar Power Generator”), may be required either to aggregate the solar power purchased from different Solar Power Generators and sell it to the distribution licensee, or to enhance the credit profile. In such cases, the “Procurer” would be a trader, buying power from the Solar Power Generators and selling the same to one or more distribution licensees, such distribution licensees shall be the “End Procurer” and the trader shall be “Intermediary Procurer” for the purpose of these Guidelines.*

ii. *The Intermediary Procurer shall enter into a PPA with the Solar Power Generator and also enter into a Power*

*Sale Agreement (PSA) with the End Procurer. The PSA shall contain the relevant provisions of the PPA on a back to back basis. The trading margin, as notified by the Appropriate Commission (or in the absence of such notification, as mutually decided between the Intermediary Procurer and the End Procurer), shall be payable by the End Procurer to the Intermediary Procurer.*

*iii. In such cases, as long as the Intermediary Procurer has followed these Guidelines for procurement of solar power, the End Procurer shall be deemed to have followed these Guidelines for procurement of solar power.”*

*(Emphasis Supplied)*

19. In terms of the above Guidelines, SECI had initiated Competitive Bid Process for selection of the Solar Power Developers (SPDs) to establish the solar power projects, generate and supply solar power to SECI to enable SECI to supply the same to the Buying Utilities / Distribution Companies to enable them to fulfill the Renewable Purchase Obligation (RPO) specified by the Appropriate State Commission.

20. On 25.05.2018, the Ministry of New and Renewable Energy (MNRE), Government of India notified the *Guidelines for transparent bidding process for Implementation of Scheme for setting up of 2500 MW ISTS- Connected Wind-Solar Hybrid Power Projects* (for short, the “Guidelines dated 25.05.2018”), the relevant part whereof provides as under:

*“3.2 Mechanism of Operation of the scheme*

*(ii) Sale of hybrid power: SECI shall sign Power Purchase Agreement (PPA) with hybrid project developers (HPDs) at bided tariff and also back to back PSA with buyers at a pooled price of the total capacity allotted. The duration of the PPA and PSA will be 25 years from Commercial Operation Date (COD) of the project. SECI will be entitled to charge trading margin as mutually agreed with buyer or as decided by the CERC for long-term power purchases whichever is less.*

*All the commercial transactions under the scheme for sale and purchase of hybrid power between project developers, SECI and Buying Entities will be governed by the PPA/PSA as the case maybe....”*

(Emphasis Supplied)

21. On 22.10.2019, the Ministry of New and Renewable Energy (MNRE), Government of India notified amendment to the Guidelines dated 03.08.2017, *inter alia*, clarifying the position of Trading Margin as under:

*“2.1.1 (c) ‘Intermediary Procurer’ & ‘End Procurer’*

*ii...*

*(b) The trading Margin of Rs. 0.07/kWh, shall be payable by the End Procurer to the intermediary Procurer.”*

22. On 02.01.2020, the Central Commission issued Statement of Reasons in the matter of *Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020* (for short, “Statement of Reasons dated 02.01.2020”), *inter alia*, stating as under:

*“5. Trading Margin (Regulation 8)*

*...*

*Analysis and Decision*

*...*

*5.1.4.3. Traders should provide an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller.*

*5.1.4.4. In the event that escrow arrangement or irrevocable, unconditional and revolving letter of credit is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge any trading margin exceeding two (2.0) paise/kWh.”*

23. On 02.01.2020, the Central Commission notified *Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020* (for short, "Trading License Regulations, 2020"), thereby repealing the Trading Margin Regulations, 2010, the Chapter-IV of the Trading License Regulations, 2020 dealing with Trading Margin, the relevant provisions thereof providing thus:

*"7. Applicability of Trading Margin:*

*Trading margin shall be applicable to the following transactions undertaken by the Trading Licensee:*

*...*

*(b) Transactions under long term contracts (where period of the contract of the Trading Licensee with either the seller or the buyer or both is more than one year);*

*(d) Transactions under Back to Back contracts, irrespective of duration of the contract;*

*8. Trading Margin:*

*(1) Trading Licensee shall comply with the trading margin as given below:*

*.....*

*(d) For transactions under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller:*

*Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.*

*.....*

*(f) For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in*

*favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.*

### *9. Obligations of the Trading Licensee*

.....  
*(10) The Trading Licensee shall make payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller. Such escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller shall be equivalent to:*

*(a) one point one (1.1) times the average monthly bill amount (estimated average of monthly billing amounts for three months or actual monthly billing amount for preceding three months as the case may be) with a validity of one year for long term contracts;*

*...”*

*(Emphasis Supplied)*

## *THE CASE FROM DELHI*

24. In context of appeal from Delhi, it is stated that pursuant to the Guidelines dated 25.10.2013, SECI had issued, on 28.10.2013, the Request for Selection Document (“RfS”) for 750 MW Grid Connected for Solar Photo Voltaic Projects under JNNSM Phase-II, Batch-I. The RfS Document dated 28.10.2013, inter-alia, reads as under:

### *SECTION 2*

*““Trading Margin” shall mean the margin on sale of solar power to State Utilities/Discoms/other Bulk Consumers as fixed by MNRE under this scheme, subject to CERC applicable Regulations in this regard;*

### *3.11 Power Purchase Agreement*

...



*iii) SECI shall issue letters to all the State Utilities/Discoms inviting “Expression of Interest” from willing State Utilities/Discoms, who would be purchasing the solar power under VGF scheme @ Rs.5.50/ kWh (including Trading Margin of SECI @ 5 paisa/kWh) and sign the Power Sale Agreement (PSA) with SECI.”*

25. The above move led to certain power projects being established to make available solar energy for sale through SECI by back-to-back arrangements in the nature of PPA and PSA. It is stated that on 28.03.2014, SECI had entered into PPA with Medha Energy Private Limited for the procurement of solar power for onward sale of power on back-to-back basis to TPDDL under the PSA dated 16.10.2014. The PPA dated 28.03.2014, *inter alia*, reads as under:

*“ARTICLE 1: DEFINITION AND INTERPRETATION*

*Trading Margin’ shall mean the margin on sale of Solar Power to Buying Utilities as fixed by MNRE under this scheme, subject to applicable CERC Regulations, in this regard”*

26. On 16.10.2014, the respondent TPDDL entered into the PSA with the appellant SECI for the procurement of 20 MW in terms of Guidelines dated 25.10.2013, it, *inter alia*, reading as under:

*“Trading Margin’ shall mean the margin as fixed by MNRE for SECI under this scheme on sale of Solar power to Buying Utilities, subject to CERC applicable regulations in this regard;”*

*“ARTICLE 5: APPLICABLE TARIFF*

*5.1.1. The Applicable Tariff for Solar Power shall be Rs.5.50/kWh including trading margin of Rs.0.05/kWh fixed for the entire term of this Agreement and the Buying Utility shall make the Tariff Payment to SECI as per the provisions of this agreement”*

27. On 30.01.2018, SECI issued the Request for Selection Document (“RfS”) for setting up of 2000 MW ISTS Solar Power Projects under Global Competitive Bidding in terms of the Guidelines dated 03.08.2017. The Rfs Document dated 30.01.2018, *inter alia*, read as under:

“ Section-IV

*Definitions of Terms*

1.47 “TRADING MARGIN” shall mean the margin on sale of solar power to State Utilities/ Discoms/ other Bulk Consumers under this RfS being charged by SECI and shall be @INR 0.07/kWh;”

28. On 06.09.2018, SECI entered into PSA with TPDDL for procurement of 100 MW solar power under the 2000 MW ISTS Solar scheme notified vide Rfs Document dated 30.01.2018. The PSA dated 06.09.2018, *inter alia*, read as under:

“ARTICLE 5: APPLICABLE TARIFF

5.1.1. From SCD and subject to the provision of the Article 6.7, the Buying Entity shall pay the Maximum Possible tariff of Rs.2.54/kWh plus trading margin of Rs. 0.07/kWh fixed up to commissioning of the cumulative capacity by SECI under the RfS.

5.1.2. Weighted average tariff as per Schedule-I plus trading margin trading margin of Rs. 0.07 per kWh (Rupees Seven Paise per kWh) shall be applicable upon Commissioning of the cumulative awarded capacity/accepted cumulative capacity by SECI under the RfS for balance term of this Agreement for the energy supplied as per provisions of this Agreement.

5.1.3. ....

5.1.4. As per the provisions of the PPA, the SPDs are permitted for full commissioning of the Project even prior to the SCD (as per the provisions of the RfS). In cases of early part-commissioning , till SCD, whichever is earlier, the Buying Entity shall purchase the generation till SCD, at 75% (seventy-five per cent) of the Tariff as per Article 5.1.1

*plus trading margin of Rs.0.07/kWh, (Rupees Seven Paise per kWh). However, in case the entire Project capacity is commissioned prior to SCD, the Buying Entity shall purchase at tariff as per Article 5.1.1.”*

(Emphasis Supplied)

29. On 06.12.2018, SECI entered into PPAs with Acme Phalodi Energy Private Limited and Acme Raisar Solar Energy Private Limited for the procurement of solar power for onward sale of power on back-to-back basis to TPDDL under the PSA dated 06.09.2018. By letter dated 16.07.2018, TPDDL sought the *in-principle* approval of DERC, *inter alia*, for procurement of 200 MW solar power from the 3000 MW ISTS solar power projects, stating thus:

*“Accordingly, Tata Power-DDL based on the aforementioned two scenarios, requests the Hon’ble Commission to grant “in principle” approval at the earliest for:*

*a) Procurement of 100 MW solar power from SECI under 2000MW ISTS solar project at a total tariff of Rs 2.64/KWH including SECI trading margin of 7 paise/KWH.*

*b) Procurement of 200 MW solar power from SECI under 3000MW ISTS solar project at a maximum ceiling rate of Rs 3/KWH including SECI trading margin of 7 paise/ KWH.*

*Based on the approval received we shall finalize the Power Purchase Agreements with SECI for the next 25 years.”*

(Emphasis Supplied)

30. On 14.08.2018, the DERC accorded in-principle approval for the procurement of 300 MW solar power by TPDDL from SECI.

31. On 10.01.2019, SECI issued the Request for Selection (RfS) document, along with Standard Power Purchase Agreement (“Standard

PPA”) and Standard Power Sale Agreement documents (“Standard PSA”), for selection of Solar Power Developers for development of cumulative capacity of 1200 MW Inter-State Transmission System (ISTS) connected Solar Power Projects (Tranche-III) under Global Competitive Bidding. The RfS document, *inter alia*, read as under:

**“SECTION-I**

**DEFINITION OF TERMS**

.....

*“Trading Margin” shall mean the margin on sale of solar power to State Utilities/ Discoms/ other Bulk Consumers under this RfS being charged by SECI and shall be @ INR 0.07/Kwh.*

.....

*4.0 Power procured by SECI from the above Projects has been provisioned to be sold to the different Buying Utilities of India. The details of Buying Utilities shall be intimated at a later date. SECI shall at its discretion be entitled to substitute any entity in other states only for selling the power procured from the selected Bidder. SECI shall be an intermediary nodal agency for procurement of power generated by the SPD and sale of such power to the Buying entity(ies) entirely on back to back basis based on due performance by the SPD as well as the Buying entity (ies).*

.....

*14.4 Back-to-back Power Sale Agreements (PSAs) in respect of all rights and obligation under the PPA between the SPD and SECI, will be executed by SECI with the Buying Entity for sale of solar power to buying entity, with the buying entity assuming all the obligations of SECI under the PPA. SECI’s obligation to SPD under the PPA shall also be on the back to back basis as provided in the PPA and the corresponding PSA.”*

(Emphasis Supplied)

32. In pursuance to the above competitive bid process, SECI proceeded to select the Solar Power Developers (“SPDs”) for establishing Solar Power Projects and for supplying Solar power to enable SECI to make available such power to the Buying Utilities/Distribution Companies.

33. On 01.03.2019, DERC passed two orders. By first of the said orders (in Petition no.24 of 2019 of TPDDL), approval was granted to the procurement of 20 MW solar power along with Trading Margin of Rs.0.05/kwh under the PSA dated 16.10.2014 executed between TPPDL and SECI for 25 years. By the second order of same date (01.03.2019), DERC allowed (in the Petition no.25 of 2019 of TPDDL) approval to the procurement of 100 MW solar power along with Trading Margin of Rs.0.07/kwh under the PSA dated 06.09.2018 executed between TPPDL and SECI for 25 years.

34. The appellant SECI, by letter dated 02.03.2019, sought consent from TPDDL for procurement of solar power under 1200 MW ISTS connected Solar Power Projects (Tranche-III) scheme, *inter alia*, stating:

*“Subject: Regarding consent for procurement of solar power under 1200 MW ISTS connected Scheme (Tranche-III)*

*...*

*With reference to the above, SECI concluded Tranche-VI E-RA on 25.02.2019 and according to the result total 1200MW project got selected against published RfS. With reference to the letter dated 07/08/2018, SECI is offering 200MW solar power out of your 200MW demand capacity from this phase.*

*From Schedule Commissioning Date (SCD) and subject to the provision of the PSA, the Buying Entity shall pay the fixed tariff of Rs. 2.61/kWh plus trading margin of Rs. 0.07/kWh fixed up to commissioning of the cumulative awarded capacity/accepted cumulative capacity by SECI under the RfS.*

...

*It is requested to confirm your requirement with applicable tariff under this scheme by 10.03.2019 positively.”*

(Emphasis Supplied)

35. On 26.06.2019, SECI entered into a PSA with the TPDDL making a copy of the signed PPA to be entered into by the SECI with the SPD as a part of the PSA, the relevant clauses of PSA being as under:

*“C. SECI has been designated as a Nodal Agency for developing and facilitating the establishment of the Grid connected Solar Power capacity in India in terms of the above Policy of the Government of India;*

*D. In terms of the Guidelines, SECI had initiated a Tariff Based Competitive Bid Process for procurement of 1200 MW of the power generated from ISTS-connected Solar Power Projects on the terms and conditions contained in the Request for Selection (herein after referred to as ‘RfS’) issued by SECI vide RfS No SECI/C&P/SPD/ISTS-III/RfS/1200MW/01019 dated 10.01.2019 and subsequent amendment.*

*E. In terms of the Guidelines and more specifically Clause 2.1.1 (c)(ii), SECI is mandated to sign PPA with SPDs and back to back PSA agreements with buying utilities for resale the power;*

*F. SECI has [signed/will sign] Power Purchase Agreements (PPAs) with the Solar Power Developers (SPD) selected under the RfS mentioned herein below (hereinafter referred to as “SPDs”) for procurement of 1200 MW Solar Power or the total capacity of projects selected under the provisions of Request for Selection (RfS)(SECI/C&P/SPD/RfS/1200MW/01019 dated 10.01.2019 and subsequent amendment) based on the Guidelines, if it is less than 1200 MW, on a long term basis, as indicated at Schedule-1 and Schedule-2 respectively.*

G. Buying Utility has agreed to purchase 200 MW Solar power from the SECI under the above RfS and accordingly, SECI has agreed to sign Power Purchase Agreements (PPAs) with Solar Power developers (hereinafter referred to as “SPDs”) for procurement of 200 MW Solar Power on a long term basis, as indicated at Schedule-1 & 2. Copy of the PPA(s) shall be submitted to Buying Utility within thirty (30) days of the signing of the PPA(s) and such PPA(s) shall become integral part of this Agreement (SECI-Buying Utility PSA).

.....  
II. Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under Agreement shall be that within 6 months or from the date of approval of the Appropriate Commission whichever is earlier from the Effective Date. The Parties, shall within 6 months of the Effective Date, duly obtain the requisite regulatory approvals including but not limited to adoption of Tariff and the Trading Margin of 7 paisa/kWh payable to SECI and the contracted capacity as the case may be

....  
VI. Buying entity hereby acknowledges and accepts that SECI is an Intermediary to facilitate the promotion of Solar Power Projects and to purchase and re-sell the electricity to the distribution licensees to enable them to fulfill the Renewable Purchase Obligation. Therefore, the sale of electricity by SECI to Buying Entity under this Agreement shall be entirely on a back to back basis to the purchase of electricity by SECI from the SPDs under the SECI-SPD PPA, with the intent that there shall be no residual liability on the SECI towards the SPD which will not be fulfilled by the Buying Entity.

VII. Unless the context of this Agreement otherwise requires, the rights and obligations of Buying Entity under this agreement shall be available and enforceable entirely and effectively on a back to back basis to the rights and obligations of the SECI in the SECI-SPD PPA.

## Definitions

.....  
*Expiry Date: shall mean the date occurring twenty five (25) years from the Scheduled Commissioning Date subject to that the supply of power shall be limited for a period of 25 years from the Scheduled Commissioning Date unless extended by Parties as per this Agreement;*

**ARTICLE 1. APPLICABLE TARIFF**

*1.1.1 From SCD the Buying Utility shall pay the maximum possible fixed tariff of Rs.2.61/kWh plus trading margin of Rs.0.07/kWh fixed upto commissioning of the cumulative awarded capacity/accepted cumulative capacity by SECI unde the RfS.*

*1.1.2 Weightage Average Tariff as per schedule-2 plus trading margin of Rs. 0.07 per kWh (Rupees seven paisa per kWh) shall be applicable upon commissioning of the cumulative awarded capacity /accepted cumulative capacity by SECI under the RfS for balance term of this Agreement for the energy supplied as per provisions of this Agreement.*

.....  
*1.1.4 As per provisions of PPA, the SPDs are permitted for full commissioning as well as part commissioning of the Project even prior to the SCD (as per the provisions of the RfS). In cases of early part-commissioning, till SCD, whichever is earlier, the Buying Entity shall purchase the generation till SCD, at 75% (seventy-five per cent) of the Tariff as per Article 1.1.1 or 1.1.2 plus trading margin of Rs.0.07/kWh, (Rupees Seven Paisa per kWh). However, in case the entire Project capacity is commissioned prior to SCD, the Buying Entity shall purchase at tariff as per Article 1.1.1. or 1.1.2 as applicable.”*

(Emphasis Supplied)

36. On 15.07.2019, SECI filed Petition (no.204/AT/2019) before the Central Commission under Section 63 of the Electricity Act, 2003 for adoption of tariff for the 1200 MW (Tranche-III) Solar PV Projects connected to the Inter-State Transmission System (ISTS) and selected



through competitive bidding process as per the Guidelines dated 03.08.2017.

37. On 20.08.2019, SECI entered into PPA with SBSR Power Cleantech Eleven Private Limited for the procurement of solar power for onward sale of power on back-to-back basis to TPDDL under the PSA dated 26.06.2019. The relevant clauses of the said PPA may be quoted hereunder:

*“G. SPD acknowledges and accepts that SECI is only an Intermediary Company and is facilitating the purchase of sale of electricity generated from the Solar PV Projects and therefore, cannot assume independently, any obligation, financial or otherwise, either to the SPD or to Discom(s), except on a back to back basis, namely, that whatever obligation is enforced by the Discom(s) under the PSA against SECI, SPD(s) shall be bound to fulfil the obligation on a back to back basis towards SECI and similarly, whatever rights that SPD(s) may claim under this Agreement against SECI, shall be subject to due enforcement of the corresponding rights on a back to back basis by SECI against Discom(s), without an independent obligation on the part of SECI;*

.....

*I. The SPD has fulfilled the terms of the bidding and the terms of the Letter of Award for signing this Power Purchase Agreement as a definitive agreement for establishing the Solar Power Project of 300 MW at Village: Hapasar, Tehsil: Bikaner, District: Bikaner, Rajasthan for generation and sale of electricity by the SPD to SECI to enable SECI to make available such solar power to the Buying Utility (ies), as SECI may consider appropriate, under a Power Sale Agreement and on a back-to-back basis to the Power Purchase Agreement to be entered into with the SPD;*

*J. SECI has signed the Power Sale Agreement with the Buying Utility(ies) of States in India.*

## ARTICLE 9: APPLICABLE TARIFF

9.1 The SPD shall be entitled to receive the Tariff of Rs. 2.61/kWh, fixed for the entire term of this Agreement, with effect from the SCD, for the power sold by the Buyer to the Buying Entity for the scheduled energy as reflected in the REA. In case of early part-commissioning, till SPD subject to the consent for such purchase by the Buying Utility, SECI may purchase the generation @ 75% (seventy-five per cent) of the PPA tariff. However, in case the entire Project capacity is commissioned prior to SCD, SECI may purchase energy supplied till SCD at Rs. 2.61/kWh. In both the case of early part or full commissioning of the Project, the Applicable Tariff for the commissioned Project shall be Rs. 2.61/kWh from and including the SCD.

...”

38. On 19.09.2019, in furtherance of the in-principle approval accorded by DERC on 14.08.2018, TPDDL filed Petition (no.65 of 2019) under Section 86 (1) (b) read with Section 86 (1) (e) of the Electricity Act, 2003 for approval of PSA dated 26.06.2019, *inter alia* pleading:

“10. It is respectfully submitted that the solar tariff discovered through the competitive bidding route are market aligned tariffs. The bidding undertaken by SECI has been initiated pursuant to the 2017 Guidelines issued by Government of India and squarely falls within the ambit of Section 63 of the Electricity Act, 2003. Since process adopted by SECI is in line with the Guidelines issued by the Government of India and this Hon’ble Commission has to now merely approve the Power Sale Agreement executed between the Petitioner and SECI with the competitively discovered tariff of INR 2.61/ kWh plus its trading margin of INR 0.07/kWh (Rupee Seven Paise per kWh) as the power procurement cost of the Petitioner for 200 MW Solar Power...”

(Emphasis Supplied)

39. On 20.11.2019, the Central Commission passed order in Petition (no.204/AT/2019) of SECI, adopting the tariff discovered in the competitive bidding process of ISTS Tranche-III Solar scheme under Section 63 of the Electricity Act, 2003.

40. By order dated 20.02.2020 of DERC, on application (I.A. No.01/2020) filed by TPDDL SECI was impleaded as a party to the Petition No.65 of 2019 then pending before the State Commission.

41. On 28.02.2020, the Central Commission passed order in Petition No.187/AT/2019 and I.A No.86 of 2019, adopting the tariff discovered in the competitive bidding process of 2000 MW ISTS Tranche-I Solar scheme under Section 63 of the Electricity Act, 2003.

42. On 27.02.2020, SECI filed Affidavit of its authorized representative in Petition No.65 of 2020 placing on record the order dated 20.11.2019 of the Central Commission in Petition No.204/AT/2019, *inter alia*, stating:

*“5. I say that the adoption of tariff and all matters relating to terms and conditions of tariff and other associated matters are within jurisdiction and regulatory control of the Central Commission under Section 79 of the Electricity Act 2003.*

*6. I say that the above-mentioned Petition filed by the Petitioner is to be considered only to the extent of procurement of power by the Petitioner in terms of Section 86 (1) (b) of the Electricity Act, 2003 read with rule 8 of the Electricity Rules 2005.*

*7. I say that the Hon'ble Commission may be pleased to approve the procurement of power by the Petitioner for the quantum of 200 MW on the tariff terms and provisions of the PSA.”*

43. The TPPDL filed on 26.05.2020, affidavit of its authorized representative in response to affidavit dated 27.02.2020 of SECI before DERC, *inter alia*, stating thus:

*“8. In view of the above, it is humbly submitted that since the entire process of procurement of renewable power has been initiated with SECI in terms of the Business Plan Regulations, 2017 and specific directions of this Hon’ble Commission dated 14.08.2018, this Hon’ble Commission be pleased to approve the Power Purchase Agreement dated 26.06.2019 executed between the Petitioner herein and SECI for procurement of power (200 MW) from SBSR at Rs.2.61/kWh and a trading margin payable to SECI at the rate of Rs.0.07/kWh.”*

44. On 27.08.2020, Central Commission reserved order in Petition No.160/AT/2019 and I.A. No.81 of 2019 filed for adoption of tariff discovered in the competitive bidding process of 750 MW JNNSM Phase-II, Batch-I scheme under Section 63 of the Electricity Act, 2003. The DERC by daily order dated 17.09.2020 reserved the order in Petition No.65 of 2020.

45. On 18.09.2020, SECI filed affidavit in Petition No.65 of 2020 before DERC setting out reasons for being entitled to trading margin of Rs.0.07/kWh in terms of the Guidelines, RfS Document, PSA, order dated 20.11.2019 of the Central Commission in Petition No.204/AT/2020, Regulations of the Central Commission, decisions of this tribunal and other State Commissions approving trading margin of Rs.0.07/kWh etc. On 08.10.2020, another affidavit was filed by SECI in Petition No.65 of 2020 before DERC submitting further documents in regard to aspect of trading margin including copy of the NSM Guidelines dated 14.03.2016 of the Government of India, amendment dated 22.10.2019 to the Guidelines dated 03.08.2017 of the Government of India, decisions of this tribunal and orders of various State Commissions approving trading margin of Rs.0.07/kWh.

46. On 31.12.2020, DERC passed the Order impugned in the first captioned appeal, granting approval for procurement of 200 MW Solar

Power under the PSA dated 26.06.2019 but reducing the trading Margin from Rs.0.07/kWh to Rs.0.02/kWh.

47. The order is assailed only to the extent it reduces the trading margin as settled by the parties in the contract mutually agreed.

### *THE CASE FROM PUNJAB*

48. On 25.05.2018, the Ministry of New and Renewable Energy (MNRE), Government of India notified the *Guidelines for transparent bidding process for Implementation of Scheme for setting up of 2500 MW ISTS- Connected Wind-Solar Hybrid Power Projects* (for short, the “Guidelines dated 25.05.2018”), the relevant part whereof provides as under:

*“3.2 Mechanism of Operation of the scheme*

*(ii) Sale of hybrid power: SECI shall sign Power Purchase Agreement (PPA) with hybrid project developers (HPDs) at bided tariff and also back to back PSA with buyers at a pooled price of the total capacity allotted. The duration of the PPA and PSA will be 25 years from Commercial Operation Date (COD) of the project. SECI will be entitled to charge trading margin as mutually agreed with buyer or as decided by the CERC for long-term power purchases whichever is less.*

*All the commercial transactions under the scheme for sale and purchase of hybrid power between project developers, SECI and Buying Entities will be governed by the PPA/PSA as the case maybe....”*

(Emphasis Supplied)

49. In terms of the *Guidelines for transparent bidding process for Implementation of Scheme for setting up of 2500 MW ISTS- Connected Wind-Solar Hybrid Power Projects* (for short, the “Guidelines dated 25.05.2018”), quoted earlier, the appellant SECI is authorized to enter into

PPAs with hybrid project developers (HPDs) at bided tariff and also back to back PSA with buyers at a pooled price of the total capacity allotted, on long-term basis for 25 years from Commercial Operation Date (COD) of the project and *“be entitled to charge trading margin as mutually agreed with buyer or as decided by the CERC for long-term power purchases whichever is less”*. SECI initiated a Competitive Bid Process for selection of the Wind-Solar Hybrid Power Developers to establish the Wind-Solar Hybrid power projects, generate and supply hybrid power to SECI to enable SECI to supply the same to the Buying Utilities or Distribution Companies to enable them to fulfil the Renewable Purchase Obligation (RPO) specified by the Appropriate State Commission.

50. On 08.03.2019, SECI issued the Request for Selection (RfS) Document along with Standard Power Purchase Agreement (“Standard PPA”) and Power Sale Agreement (“Standard PSA”) document, for selection of Hybrid Power Developers for development of cumulative capacity of 1200 MW Inter-State Transmission System connected Wind-Solar Hybrid Power Projects (Tranche-II). The Rfs Document dated 08.03.2019, *inter alia*, reads as under:

### “Section-2

#### *Definitions*

*“Trading Margin” means the trading margin as mutually agreed between Buying Entities and the SECI or as decided by CERC for long-term power purchase, whichever is less;”*

51. In pursuance to the abovesaid competitive bid process, SECI proceeded to select the Hybrid Power Developers for establishing Hybrid Power Projects and for supplying Hybrid power to enable SECI to make available such power to the Buying Utilities/Distribution Companies. On

28.08.2019, the meeting of Long Term Power Purchase Committee of respondent Discom (PSPCL) was held in respect of proposal for procurement of Power under Tranche-II Hybrid scheme of SECI and the minutes, *inter alia*, noted on the subject of the applicable trading margin as under:

*“.... The tariff recovered after Reverse Auctioning in this scheme is Rs.2.69 per kWh (excluding Trading Margin). SECI Trading margin is Rs.0.07 per kWh.....*

*After deliberation and discussions, it was decided by the committee to recommend the purchase of 500 MW (400 MW Solar + 100 MW Wind) of Hybrid Power at the rate of Rs.2.69/kWh plus 7 paisa/kWh trading margin, from SECI, which is likely to be available w.e.f 2021-2022, which shall also help to cover the shortage of RE power during the year 2021-2022 and onwards.”*

52. On 03.01.2020, PSPCL entered into the PSA with SECI for the procurement of 500 MW Wind-Solar Hybrid Power under the ISTS Wind-Solar Hybrid scheme (Tranche-II) notified vide RfS Document dated 08.03.2019, the PSA, *inter alia*, reading as under:

*“II. Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that within 6 months from the Effective Date, the Buying Entity shall duly obtain the order of the respective State Electricity Regulatory Commission adopting the Tariff and the trading margin of 7 paisa/kWh to SECI and approving the procurement of the contracted capacity on the terms and conditions contained in this Agreement entered into between SECI and Buying Entity read with the terms and conditions contained in the PPA to be entered into between SECI and the HPD.”*

*“Article 1. APPLICABLE TARIFF*

1.1.1. From COD, the tariff for Hybrid Power of individual projects shall be the tariff determined from the reverse auction process conducted by SECI as per the RfS i.e. Rs. 2.69/kWh plus trading margin of Rs. 0.07 per kWh (Seven Paisa/kWh) fixed for entire term of this Agreement.

1.1.2. Until the commissioning of the cumulative awarded capacity/cumulative capacity commissioned as accepted by SECI under the RfS, the applicable tariff payable by Buying Entity shall be the Tariff of the individual projects as determined from the reverse auction process plus the trading margin as per Article 1.1.1.

Subsequently, the applicable tariff payable by Buying Entity shall be the pooled tariff arrived as per schedule 2 of this agreement of the Commissioned project capacity of all the projects accepted by SECI, till the end of the term of the Agreement. The Buying Entity shall make the Tariff Payments to the Buyer as per the provisions of this Agreement.

1.1.3. As per provisions of PPA, the HPDs are permitted for full commissioning as well as part commissioning of the Project even prior to the SCD. However, early commissioning shall be allowed only in the case where the DISCOM agrees to purchase power from the project at the tariff as per the PPA rate plus trading margin of Rs. 0.07/kWh, (Seven Paisa per kWh).

1.1.4. Any excess generation over and above energy specified in Article 2.9, may be purchased at the tariff as mentioned in Article 1.1.1 provided the Buying Entity consents for purchase of such excess generation, with Trading Margin of Rs. 0.07/kWh (Seven Paisa per kWh). In case of any excess generation indicated by the HPD under the PPA, SECI shall intimate the Buying Utility regarding the proposed quantum of excess generation, at least 1 month prior to the scheduled excess generation proposed. The Buying Utility shall be required to grant its consent/refusal for the proposed excess generation within 15 days from the receipt of the above intimation from SECI (through email). In case the consent/refusal as sought by SECI for the same is not issued by the Buying Utility within the above stipulated timelines, it shall be deemed that the



*Buying Entity has granted its consent for purchase of such excess generation as per the terms of this Agreement.*

...”

53. On 21.01.2020, SECI entered into the PPAs with the *Hybrid Power Developers* – third respondent Adani Green Energy Nine Limited and fourth respondent Adani Green Energy Seven Limited, each a project company of Adani Renewable Energy Park (Gujarat) Limited - for the procurement of wind-solar hybrid power from their power projects of 300 MW each capacity in the State of Rajasthan at tariff of Rs.2.69/kWh for onward sale on back-to-back basis to Buying Utilities/Distribution Companies including PSPCL under the PSA dated 03.01.2020:

54. On 19.02.2020, SECI filed Petition (no.307/AT/2020) before the Central Commission under Section 63 of the Electricity Act, 2003 for adoption of tariff for the 600 MW (Tranche-II) Wind-Solar Hybrid Power Projects connected to the Inter-State Transmission System (ISTS) and selected through competitive bidding process as per the Guidelines dated 25.05.2018. PSPCL was impleaded as (third) respondent in the said Petition, besides another buying entity - India Power Corporation Limited (IPCL) – in the fray as the fourth respondent, the appellant (SECI), *inter alia* pleading that “(i)n addition, there will be the trading margin of Rs.0.07/kWh (as mutually agreed between the parties) to be recovered from the Buying Utilities/Distribution Licensees in terms of the PSAs with the Buying Utilities/Distribution Licensees being Respondent No.3 and Respondent No.4 herein”. The Central Commission passed order on 21.05.2020, in said Petition (no.307/AT/2020) filed by SECI, adopting the tariff discovered in the competitive bidding process for the 600 MW (Tranche-II) Wind-Solar Hybrid Power Projects connected to the ISTS under Section 63 of the Electricity Act, 2003. The following part of the said order dated 21.05.2020 is relevant:

*“27. The Petitioner, in its prayer, has further submitted that in addition to the tariff, there will be the trading margin of Rs. 0.07/kWh (as mutually agreed between the parties) to be recovered from the Buying Utilities/Distribution Licensees in terms of the PSAs with the Buying Utilities/Distribution Licensees. In this regard, Regulation 8(1)(d) of the Trading Licence Regulations dealing with trading margin provides as under:*

*“8 (1) (d) For the transaction under long-term contracts, the trading margin shall be as mutually decided between the Trading licensee and the seller.”*

*The above provision gives choice to the contracting parties to mutually agree on Trading Margin for long-term transaction*

*28. Proviso to Regulation 8(1)(d) of the Trading Licence Regulations provides as under:*

.....

*29. In addition, Regulation 8(1)(f) of the Trading Licence Regulations provides as under:*

.....

*30. Thus, the Petitioner, SECI shall also be governed by the provisions of Regulation 8(1)(d), the proviso to Regulation 8(1)(d) and provisions of Regulation 8(1)(f) of the Trading Licence Regulations.”*

(Emphasis Supplied)

55. The PSA dated 03.01.2020 between SECI and PSPCL was amended first on 10.06.2020 by Supplemental Agreement (Amendment 1) and then on 10.08.2020 by Supplemental Agreement (Amendment 2), the parties having agreed to a revised period of nine months from the effective date of

the PSA (earlier 6 months from the effective date of the PSA) for fulfilling the condition precedent of obtaining the order of the State Commission approving the procurement of contracted capacity on the terms and conditions contained in the PSA including tariff and trading margin of Rs.0.07/kWh.

56. Prior to the second amendment, the existing *Clause II* of the Power Sale Agreement dated 03.01.2020 read as under:

*“Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this agreement shall be that within 6 months from the Effective Date, the Buying Entity shall duly obtain the order of the respective State Electricity Regulatory Commission adopting the Tariff and the trading margin of 7 paisa/kWh to SECI and approving the procurement of contracted capacity on the terms and conditions contained this agreement entered into between SECI and Buying Entity read with the terms and conditions contained in the PPA to be entered into between SECI and the HPD.”*

(emphasis supplied)

57. Post amendment, the above clause stood substituted by the following:

*“Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this agreement shall be that within 9 months from the Effective Date, the Buying Entity shall duly obtain the order of the respective State Electricity Regulatory Commission adopting the Tariff and the trading margin of 7 paisa/kWh to SECI and approving the procurement of contacted capacity on the terms and conditions contained this agreement entered into between SECI and Buying Entity read with the terms and conditions contained in the PPA to be entered into between SECI and the HPD.”*

(emphasis supplied)

58. On 17.09.2020, PSPCL filed Petition (no.29 of 2020) under Section 86 (1) (b) of the Electricity Act, 2003 before PSERC for approval of procurement of 500 MW Wind-Solar Hybrid Power under the PSA dated 03.01.2020 entered into with SECI. PSPCL, *inter alia*, prayed for approval of tariff and trading margin of Rs.0.02/kWh payable to SECI. SECI, at the relevant time, was not made a party to the said Petition filed before the State Commission. On coming to know of the filing of the Petition by PSPCL, SECI addressed a communication on 19.10.2020 to PSPCL on the subject of prayer for approval of trading margin at Rs.0.02/kWh, *inter alia*, stating thus:

*“With reference to e-mail cited in Sl. No. 2 above, Punjab State Power Corporation Ltd. (PSPCL) has filed a Petition for approval of terms and conditions of signed PSA cited in Sl. No.1. It has been observed that PSPCL has unilaterally decided for approval of Trading Margin at Rs. 0.02/kWh and SECI files its objections on the same*

*...  
It is being submitted that SECI is opening Letter of Credit in favour of Developer before commissioning of the project as per terms and conditions of the RfS, PPA and PSA without even waiting for opening of LC by Buying Utilities. Therefore, under clause 8(d) of Hon’ble CERC notification dated 02.01.2020, Trading Margin shall be decided mutually between the parties signing the PSA and mutually decided Trading Margin for aforesaid PSA is Rs. 0.07/kWh.*

*...  
Moreover, regarding Trading Margin as stated in draft Supplemental Agreement for Amendment No. 3 of said PSA, SECI submits that any condition post signing of PSA cannot be altered unilaterally and suggests PSPCL to accept the conditions as per signed PSA. However, in recital II from 09 months to 12 months is under*

*examination of SECI management subject to no objection from HPD.*

*In view of above, SECI submits that PSPCL may suitably amend its petition before Hon'ble PSERC and pray for mutually agreed Trading Margin of Rs.0.07/kWh and other terms and conditions of signed PSA. Also, approval of PSA may be expedited as same may effect schedule of commissioning of projects.*

*(emphasis supplied)*

59. On 21.10.2020, the Petition (no.29 of 2020) of PSPCL was listed for admission before the PSERC and the Commission recorded as under:

*“PSPCL has filed the present petition under Section 86(1)(b) of the Electricity Act 2003, seeking approval of procurement of 500MW Wind-Solar Hybrid Power from the Solar Energy Corporation India Limited (SECI) on long term basis as per the Power Sale Agreement dated 03.01.2020 executed between SECI and Punjab State Power Corporation Limited (PSPCL). Prayer made by PSPCL in the petition is as follows:*

*1) Approve the procurement of the contracted capacity on the terms and conditions contained in the PSAs dated 03/01/2020 and Amendment No.1 in PSA dated 10.06.2020 entered into between the SECI and PSPCL read with the terms and conditions contained in the PPAs entered into between SECI and 1) M/s Adani Green Energy Nine Limited. 2) M/s Adani Green Energy Seven Limited.*

*2) Approve the tariff and the trading margin of 2 paise/kWh to SECI.*

*The petition was taken up for hearing on admission on 07.10.2020 and the Ld. Counsel appearing on the behalf of PSPCL has been heard at length. It is observed that PSA dated 03.01.2020 executed between SECI and PSPCL provides for trading margin of 7 paise/kWh whereas PSPCL is seeking approval of 2 paise/ kWh which is in*

conflict with the mutually agreed terms and conditions between the parties. The period for obtaining regulatory approval has also expired on 02.07.2020.

Further, it is pertinent to mention that another petition no. 23 of 2019 was filed by PSPCL before the Commission similarly seeking approval of (1) procurement of 300 MW solar power and 200 MW wind power from NTPC Ltd. on long term basis through PSA and (2) respective tariffs and trading margin of 7 paise/kWh to NTPC. In the said petition, PSPCL has filed a copy of the review petition filed by it before the CERC praying for fixing of trading margin at 1 paisa / kWh. Therefore, pleadings in the present petition with regard to fixing of trading margin need to be reconciled with the prayer made by PSPCL before CERC in the said review petition

Considering the above, the Commission is of the view that it will not be appropriate to admit the petition at this stage. The parties may agree on the trading margin, reconcile/amend the PSA and then approach the Commission, accordingly.”

(Emphasis Supplied)

60. It is stated that on 28.10.2020, SECI sent a letter to PSPCL, in pursuance of the above-quoted order dated 21.10.2020, setting out detailed reasoning for non-applicability of ceiling of Rs.0.02/kWh in terms of Trading License Regulations, 2020 as relied upon by PSPCL, asking PSPCL to amend their Petition filed before PSERC to the extent of prayer for approval of trading margin at Rs.0.07/kWh as mutually agreed to in the PSA, the letter, *inter alia*, stating as under:

*“...It has been observed that PSPCL has unilaterally decided for approval of Trading Margin at Rs. 0.02/kWh which is contrary to signed terms and conditions of the PSA and SECI has already filed its objection on the same vide letter cited in Sl. No. 3 above.*

*SECI has studied the petition filed by PSPCL with Hon'ble PSERC having petition no. 29 of 2020, wherein PSPCL is misquoting the provisions of Trading Margin Regulation 2020 viz. Article 8(1)(d) and Article 8(1)(f) by hiding the relevant portion of the provision as follows (underlined):*

*“For transactions under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller:*

*...*

*As per above provision Trading Margin of Rs. 0.02/kWh is applicable in case SECI fails to provide PSM to its developers of the corresponding PSA. It is pertinent to mention here that SECI do not wait for opening of LC from its DISCOMs to extend the same to its developers, in turn, prior to commissioning of projects, LC are being provided to all developers, in turn, prior to commissioning of projects, LC are being provided to all the developers. Also, it is being brought to your knowledge, LC requirement from PSPCL as on date is around Rs. 115 Crores, whereas, PSPCL has opened LC of around Rs. 20.48 Crores (that too four times revolving). Therefore, PSPCL claim for approval of Trading Margin of Rs. 0.02/kWh do not fit in case of SECI.*

*Further, it may be noted that tariff discovered through competitive bidding in SECI schemes is quite low because of timely payment to Developers, various risks (such as payment default risk, late payment risk, contract dishonor risk, inflation risk) off- taking capability of SECI and robust payment security mechanism.*

*SECI's Trading Margin of Rs. 0.07/kwh has already been approved from various SERCs such as Hon'ble Haryana Electricity Regulatory Commission (HERC) in case No. HERC/PRO – 19 of 2018 vide order dated 03.05.2018, Hon'ble Uttar Pradesh Electricity Regulatory Commission (UPERC) in Petition No. 1505/2019 vide order dated 09.12.2019, Hon'ble Rajasthan Electricity Regulatory Commission (RERC) in Petition No. RERC -1594/19 vide order dated 08.01.2020 and Hon'ble Tamil Nadu Electricity Regulatory Commission (TNERC) in M.P. No. 8 of 2020 and P.P.A.P. No.1 of 2020 vide order dated 09.06.2020.*

*The orders passed by these commissions are placed at Annexure – A, B, C and D respectively.*

*Also, Hon'ble Appellate Tribunal in its order dated 27.02.2020 passed in Appeal Nos. 368,369,370,371,372 and 373 of 2019 in the matter of Ayana Ananthapuramu Solar Private Limited -v- Andhra Pradesh Electricity Regulatory Commission & Ors, while considering the issue of Trading Margin in context of PSA executed between SECI and Andhra Pradesh DISCOMs has approved the Trading Margin for SECI as Rs. 0.07/kWh. A copy of the order dated 27.02.2020 passed by Hon'ble Appellate Tribunal in Appeal Nos. 368,369,370,371,372 and 373 of 2019 is attached at Annexure – E. The relevant clause in the order may referred as below:*

*....*  
*Recently, Hon'ble Joint Electricity Regulatory Commission (JERC) in its order dated 06.10.2020 passed in Petition No. 14/2019 has also approved the Trading Margin of Rs. 0.07/kWh in the 40 MW PSA signed between SECI and Electricity Department, Chandigarh and copy of the same is attached as Annexure-F for ready reference.*

*It may be noted that PSPCL's unilateral decision on Trading Margin of Rs. 0.02/kWh keeping aside mutual consent of the same at Rs. 0.07/kWh while signing of PSA may bring sense of insecurity in the renewable energy sector and may put impact in commissioning of the projects as looking at the current scenario, various developers are facing constraints in getting sanctioned loans.*

*In view of above, SECI requests PSPCL may suitably amend its petition before Hon'ble PSERC and pray for mutually agreed Trading Margin of Rs. 0.07/kWh and other terms and conditions of signed PSA. Also, approval of PSA may be expedited for smooth commissioning of the projects."*

*(emphasis supplied)*

61. On 13.11.2020, the PSA dated 03.01.2020 (including subsequent amendments) was further amended by the Supplemental Agreement (Amendment 3) entered into between SECI and PSPCL, the parties having



agreed to a revised period of thirteen months from the effective date of the PSA (earlier nine months from the effective date of the PSA) for fulfilling the condition precedent of obtaining the order of the State Commission approving the procurement of contracted capacity on the terms and conditions contained in the PSA including tariff and trading margin of Rs.0.07/kWh, the Amendment 3 to the PSA, *inter alia*, substituting Clause-// with the following:

*“Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this agreement shall be that within 13 months from the Effective Date, the Buying Entity shall duly obtain the order of the respective State Electricity Regulatory Commission adopting the Tariff and the trading margin of 7 paisa/kWh to SECI and approving the procurement of contacted capacity on the terms and conditions contained this agreement entered into between SECI and Buying Entity read with the terms and conditions contained in the PPA to be entered into between SECI and the HPD.”*

(emphasis supplied)

62. On 17.11.2020, PSPCL filed an additional affidavit of its authorized representative (vide I.A. No.09 of 2020) before PSERC, *inter alia*, stating thus:

*“5. The tariff in the present case is Rs.2.69 per unit which is very competitive. Even after taking the trading margin of Rs.0.07 per unit, the landed cost of power at Punjab is only at Rs.2.76 per unit, which is also very competitive.*

...

*16. As stated above, in case the CERC Regulations on capping is applicable, the trading margin would be capped at Rs.0.02 per unit. In case the Regulations are adjudicated to be as not applicable, the trading margin would be Rs.0.07 per unit.*

17. I say that in any event, even if the trading margin is Rs. 0.07 per unit, the power in the present case is in the interest of PSPCL and the consumers in the State of Punjab as the power is available to the State at the aggregate tariff of Rs. 2.76/- per unit. The said power purchase cost of Rs. 2.76/- per unit is competitive in comparison to the variable cost of power being procured from IPPs. The said tariff is also competitive in comparison to the other renewable power that is being procured by PSPCL.

18. I say that the requirement of power was considered by PSPCL and approved after considering the full trading margin of Rs. 0.07 per unit and the power was found reasonable in an overall manner as the total cost was very competitive.

19. In regard to the observation of Hon'ble commission in the order dated 21.10.2020 for amendment in the prayer, I say that the prayer of Rs. 0.02 per unit was in relation to the applicability of the Regulations as mentioned herein above.

20. The prayer of the Petitioner can be only in relation to the approval of the power purchase and the applicable trading margin. The Petitioner cannot seek the approval of the trading margin at a lower tariff unilaterally, de hors the agreement between the parties and the applicable Regulations. It is this context that the Petitioner has sought approval of the trading margin at Rs. 0.02 per unit in case the capping in the Regulations is held to be applicable, and in case the capping in the Regulations is not held to be applicable the trading margin of Rs. 0.07 per unit to be approved by Hon'ble Commission as the same is mutually agreed between the parties in the PSA.

21. It is pertinent to mention that the power in question is cost effective and competitive. It is further stated that other states, such as the State Regulators for the State of Haryana, Chhattisgarh have approved the purchase of power from SECI even with a trading margin of Rs. 0.07 per unit vide orders dated 27/02/2019 and 24/04/2020. Copies of the said orders have been annexed herewith and marked as Annexure B (Colly).

22. In terms of the above, I say that the procurement of this power is in the interest of PSPCL and the Hon'ble commission may approve the same. In the submission of PSPCL, the trading margin regulations of CERC apply,

irrespective of the agreement between the parties. However, in any event, the approval by PSPCL to purchase this power was after considering the full trading margin of Rs. 0.07 per unit, which was also found very competitive considering the nature of the power and the tariff at which it is available for the period of 25 years.”

(emphasis supplied)

63. Pursuant to the directions of the PSERC, SECI filed its reply on 17.12.2020, in Petition no.29 of 2020, before the State Commission explaining at length the justification of its claim for trading margin of Rs.0.07/kWh in terms of the Guidelines, RfS Document, PSA, order dated 21.05.2020 of the Central Commission in Petition No.307/AT/2020, Trading License Regulation 2020 of the Central Commission, decisions of this tribunal and other State Commissions approving trading margin of Rs.0.07/kWh etc. On 28.12.2020, PSPCL filed Rejoinder to the reply of SECI, *inter alia*, stating thus:

“5. On the issue of jurisdiction, it is not denied that under Section 79 of the Electricity Act 2003 it is the Hon’ble CERC which has been bestowed with the power to determine the tariff for the inter-state transmission of electricity and as such there is no lis between the parties regarding quantum of tariff determined by the Hon’ble CERC.

18. It is submitted that the tariff in the present case is Rs.2.69/- per unit which is very competitive and would be in the interest of the consumers, particularly when the power will go on to fulfil the Renewable Purchase Obligation of PSPCL. Even after taking the trading margin of Rs.0.07 per unit the landed cost of power at Punjab is only Rs.2.76 per unit, which is also very competitive...”

(emphasis supplied)

64. On 01.02.2021, the PSERC passed the Order impugned in the second captioned appeal granting approval for procurement of 500 MW

Wind-Solar Hybrid Power under the PSA dated 03.01.2020 but reducing the trading Margin from Rs.0.07/kWh to Rs.0.02/kWh.

65. The second-captioned appeal challenges the impugned order to the extent it directs reduction in the trading margin of the appellant SECI.

### *ARGUMENTS – COUNTER-ARGUMENTS*

66. The appellant assails the impugned orders of DERC and PSERC reducing the trading margin to Rs 0.02/KWh submitting that the same are patently erroneous and liable to be set aside. It is argued that the transactions involved in the matter are *inter-State* operations and so the State Commission has no jurisdiction to deal with the trading margin of SECI, an *inter-State* trading licensee granted under section 79 (1)(e) of the Electricity Act, 2003. The jurisdiction to deal with the applicable trading margin of SECI is exclusively of the Central Commission under Section 79(1)(j) of the Electricity Act and not of the State Commission under section 86(1)(j) of the Electricity Act which is circumscribed and limited by Rule 8 of the Electricity Rules, 2005.

67. In context of Delhi case, the appellant contends that TPDDL had duly accepted and mutually agreed the trading margin of Rs 0.07/kWh by the PPAs and PSA which are long term arrangements consistent with Regulation 7 of the Trading License Regulations 2020, the State Commission having erred in taking into consideration the trading margin capping applicable for short-term transactions of Rs.0.04/kWh when tariff is less than Rs.3/kWh as specified in Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2010.

68. In context of Punjab case, it has been similarly submitted that the respondent PSPCL had duly proceeded on the basis of trading margin being Rs 0.07/kWh it having been mutually agreed by the PPAs and

PSA which are long term arrangements consistent with the governing regulations i.e. Regulation 7 of the Trading License Regulations 2020. The argument is that the tariff applicable to PSPCL is Rs.2.69 per kWh plus trading margin of Rs.0.07/kWh aggregating to Rs.2.76/kWh which is concededly competitive, economical and beneficial for PSPCL, an aspect which has not been disputed either by PSPCL or by the State Commission, the Central Commission having duly adopted the discovered tariff which could not have been disturbed.

69. The appeals are contested by respondents, particularly the two State Commissions and the distribution licensee. It has been argued that the State Commission has wide jurisdiction u/s. 86(1)(a) & (b) of the Electricity Act to regulate power procurement including by PSAs, and the impugned order does not exceed the limitation placed by Rule 8, Electricity Rules. It is submitted that Section 86(1)(b) vests in the State Commission the jurisdiction to regulate the Electricity purchase including the price. Reliance is placed on the ruling in *V.S Rice Mills vs State of A.P* (AIR 1964 SC 1781) whereby the Supreme Court had observed that the word “regulate“ is wide enough to confer power on the respondent to regulate either by increasing the rate or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. It is argued that the State Commission being the regulatory authority is empowered to interpret and apply the Regulations framed by the Central Commission keeping in mind the interest of the consumers and at the same time to provide recovery of the cost of electricity in a reasonable manner.

70. It is contended by the respondents that only the Regulations can determine trading margin *inter alia* for long-term and back-to-back

contracts, and mutually agreed trading margin cannot be contrary to the Regulations, the freedom to mutually agree on the trading margin being not unlimited but subject to the ceiling under the Regulations. The regulatory jurisdiction or approvals required under the statute or RPO Regulations for long-term power procurement have an important regulatory and public interest purpose, and not merely a formal exercise. It is argued that the State Commission had found that the mutually agreed trading margin attracted the ceiling u/Regulations 8(1)(d)-(f), as the PSM failed to comport with Regulation 9(10) being neither (a) unconditional, nor (b) of the prescribed amount. This, according to respondents, is not a case of a court rewriting a contract, because the PSA was a conditional agreement, subject to the approval of the Commission, the *in-principle* approval creating no estoppel qua the trading margin. It is argued that the impugned has no conflict with CERC order or Regulations.

71. Similarly, the PSERC defends its order which is impugned in the second captioned appeal arguing that it is a reasoned order, not based on presumptions or conjectures, but founded on material facts and submissions, in due exercise of its jurisdiction under Section 86(1)(b) of Electricity Act, duly keeping in mind its duty under Section 61(d) to safeguard the consumer interest and at the same time ensuring that the cost of electricity is recovered by the intermediate procurer in a reasonable manner.

72. The PSERC has also argued that on the issue of quantum of trading margin, the Central Commission has held that that while under Regulation 8(1)(d) of the Central Electricity Regulatory Commission (Procedure, Terms and Condition for grant of Trading License and other related matters) Regulation 2020, the trading margin can be mutually agreed, the trading margin as payable shall also be governed by the

proviso to Regulation 8(1)(d) and the provisions of 8(1)(f) of the Trading Licence Regulation, 2020. It is the contention of the respondent that the Central Commission has not adopted the trading margin of 7.0 paise/kWh per se as claimed by the appellant but has only made it clear that the appellant would be governed by the Trading Licence Regulations, 2020 particularly Regulation 8(1)(d) and Regulation 8(1)(f) which caps the trading margin. Conceding that it is CERC which has been entrusted with the duty of deciding trading margin, such decision of CERC having an overriding effect on any other guidelines issued, it is argued that CERC has already held that for long term power purchase the trading margin should be mutually agreed between the parties which, as per the respondents, requires approval of the State Commission under section 86(1)(b) of the Electricity Act,2003 keeping in mind the consumers' interest. The submission essentially is that having regard to the decision of CERC, the trading margin for long term transactions may be mutually agreed between the parties but subject to it being approved by the concerned SERC.

73. It is further argued that CERC's Regulations do not cover the exigency of a Discom providing a back-to-back arrangement of a letter of credit with the trader. In the submission of PSERC, the obligation to maintain the payment security mechanism i.e. maintaining the Letter of Credit by SECI for the Hybrid Power Developer is subject to opening of Letter of Credit by PSPCL and thereby there is no independent obligation of SECI. SECI is only opening a revolving letter of credit in favour of the HPD whereas PSPCL is providing a letter of credit, payment security fund as well as giving State Govt. guarantee to SECI. It is argued that the risk of SECI is totally covered by the three types of securities being rendered by PSPCL. Thus, the entire transaction is based on back-to-back contracts, provisions of Regulation 8(1)(f) are

attracted and thereby in absence of independent Letter of Credit by the appellant in favour of HPD, the trading margin is to be capped at Rs 2.0 paise/kWh.

74. The respondent PSPCL adopts the above line of submissions adding that the Central Commission has not adopted the trading margin of 7.0 paise/ kWh *per se* as claimed by the Appellant, but has only clarified that the appellant would be governed by the Trading License Regulations and in particular Regulation 8(1)(d) and Regulation 8(1)(f) which caps the trading margin. It contends that the objective of the Trading License Regulations, 2020 (notified by the Central Commission after execution of the PPA and PSA) is to limit the trading margin to a trading licensee that does not assume any risk and does not provide any payment security mechanism to the generator, the purpose being that while a higher trading margin can be agreed to by the parties where the trading licensee has certain risks for which it is entitled to a higher consideration as may be agreed to, but if the trading licensee does not by itself provide a payment security mechanism to the generator, the trading licensee is not entitled to a margin more than 2.0 paise/ kWh. It is argued that the consideration payable in the form of trading margin to a trading licensee such as the appellant depends upon the risks assumed, and it is for this specific purpose that the Trading License Regulations capped the trading margin considering the risks of payment security mechanism assumed. It is submitted that in the present case, the trading margin cannot exceed 2.0 paise/ kWh as provided for in the Trading License Regulations as has been held by the SERC.

75. It would be appropriate to deal with general grounds common to both appeals at this stage, followed by the contentions specific to the facts and circumstances of each separately.



## VIEWS ON CORE ISSUES

76. It is stated that SECI by virtue of its operations, is exposed to various risks such as payment default, late payment, breach of contract, inflation etc. The Trading Margin, Rs.0.07/kWh applicable in the present cases, is to mitigate the risk being borne by SECI. It is because of the payment security mechanism provided by SECI that the tariff discovered under SECI schemes are significantly lower than those under tenders done by distribution companies themselves and this benefit is passed onto Buying Entities.

77. We would rather examine the correctness or otherwise of the impugned view taken by the two State Commissions in light of statutory provisions and the regulatory regime than by commercial considerations of the *inter-State trading licensee*.

### *On Jurisdiction*

78. As noted earlier, the trading of an *Inter-State Trading Licensee* is governed by Section 79(1)(e) and Section 79(1)(j) of the Electricity Act, 2003 and the Central Commission exercises regulatory jurisdiction in such respect. It is not in dispute that the appellant SECI has been granted Inter-State Trading License by the Central Commission for undertaking trading in entire territory of India in terms of section 79(1)(e) read with Section 14 and Section 15 of the Electricity Act, 2003. The contractual arrangements in each case clearly bring out that the Power Developers establishing Power Projects in another State (e.g. Rajasthan) have agreed to commit Solar (or hybrid) Power generated by them for sale and consumption in the State of Delhi and Punjab respectively. The PPAs and PSAs involved in the two matters represent

composite schemes for generation and sale in more than one State and, thus, the matters of tariff will be governed by Section 79 (1) (b) of the Electricity Act, 2003.

79. In above context, the decision of Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission & Ors.* (2017) 14 SCC 80 binds all concerned, the following observations being germane:

*“24. 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 clauses (c), (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 clauses (a), (b) and (d), and “intra-State” in 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.*

.....

26. *Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”*

(Emphasis Supplied)

80. Both State Commissions (DERC and PSERC) do not dispute the above legal position of the jurisdiction of the Central Commission. The former (DERC) has, *inter alia*, held by the impugned order as under:

*“9. The terms and conditions of the PSA have been analysed and it is observed that the tariff is discovered through competitive bidding and are composite in nature, therefore, the tariff approved/adopted by CERC would be applicable in the instant PSA.....”*

81. Similarly, the PSERC, by the impugned order has observed thus:

*“The Commission observes that as per Section 86 (1) (b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005, the Commission is not to redetermine the tariff determined by CERC for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act...”*

82. The provision contained in Section 86(1)(b) of the Electricity Act, 2003 and Rule 8 of the Electricity Rules, 2005 have been noted by us earlier. The exercise of powers by the State Commission thereunder is primarily to decide on whether the quantum of power should be purchased by the distribution licensees and the price at which such procurement be permitted. The *trading margin* is not part of the price

mentioned in clause (b) of Section 86(1), it being covered by separate provision – clause (j) of Section 86(1) for *intra-State* by the State Commission and clause (j) of Section 79(1) for *inter-State* by the Central Commission. At any rate, the determination of trading margin in inter-State transaction is by the Central Commission, there being no authority in State Commission to redetermine the same later.

83. It is not correct on the part of respondents to argue that scrutiny by the State Commission into the price under Section 86(1)(b) would include the revisit of the trading margin determined under Section 79 by the Central Commission in case of inter-State transaction. That approach would render the jurisdiction of the Central Commission nugatory or subservient to that of the State Commission. Reliance on *V.S Rice Mills vs State of A.P* (supra) is misplaced. The general comments on power to “*regulate*” have to be understood in light of Electricity Act, a later enactment. The power and jurisdiction of the State Commission under Section 86(1)(b) concerns source, quantum and price (tariff) of procurement by the distribution licensee. In inter-State transaction it is bound to follow the regulatory regime or determination of trading margin by the Central Commission and cannot sit in judgment over its propriety. To hold otherwise would be permitting it to make inroad into the jurisdiction assigned to the Central Commission which will not be lawful.

84. From the above, it emerges that both orders disturbing the trading margin fixed by the regulatory framework put in position by the Central Commission have been passed by the State Commissions without authority in law. The impugned orders cannot be allowed to stand for this very reason alone. For comprehensive scrutiny, however, we proceed to examine other contentions as well.

## *Misconstruing of Regulations on Trading Margin*

85. The relevant parts of the Trading Margin Regulations 2010 of the Central Commission (repealed by Trading License Regulations, 2020) have been quoted earlier. The applicability clause itself declared upfront that the said regulations were to govern “*short term buy-short term sell contracts for the inter-State trading in electricity undertaken by a licensee*” which meant “*a contract where the duration of the power purchase agreement and power sale agreement is less than one year*”. There is no fixation of trading margin in case of long-term transaction.

86. The State Commission (DERC), however, held by the impugned order as under:

*“16. The aforesaid Regulations were replaced by notification dated 11/01/2010 whereby the limit for trading margin was revised as 7 paise/kWh for Tariff more than Rs. 3.00/kWh and trading margin of 4 paise/kWh for tariff less than Rs.4.00/kWh. It is a point to be noted that the new Regulations were made applicable only in respect of short term power purchase and there was no provision for long term power procurement.*

...

*18. From above discussions and Regulatory provisions framed by CERC, it is observed that there was no provision for Trading Margin in case of long term transactions. Further, for short term transactions, there is a capping on Trading Margin @ 4 paise/kWh and 7 paise/kWh in case sale price is less than or equal to Rs. 3.00/kWh and sale price is more than Rs.3.00/kWh respectively.”*

(emphasis supplied)

87. The error lies in glossing over the guidance in the Regulations whereby the trading margin in long-term purchases is left for mutual negotiation and agreement by the parties rather than being subjected to

a cap as in short-term purchases. Clearly, the State Commissions have committed a patent error in applying the Regulation of short-term trading to long-term purchases when there is otherwise a specific provision in the Trading Licensee Regulations namely Regulation 8(1)(d) providing not for any such specific rate of trading margin but leaving it to the parties to mutually agree.

88. As noted earlier, the Trading Margin Regulations 2010 framed by the Central Commission were replaced by Trading License Regulations, 2020. The relevant parts have been quoted. To recapitulate, by Regulation 7, the subject of “*trading margin*” is controlled vis-à-vis “*transactions undertaken by the Trading Licensee*” that include “*Transactions under long term contracts (where period of the contract of the Trading Licensee with either the seller or the buyer or both is more than one year)*” and “*Transactions under Back to Back contracts, irrespective of duration of the contract*”. Regulation 8 in no uncertain terms declares that “*(f)or transactions under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller*” but this being subject to the proviso stating that “*in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh*”. The same provision also provides that for transactions under Back-to-Back contracts, “*where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh*”. At the same time by clause (10) of Regulation 9, it is stipulated that “*(t)he Trading Licensee shall make*

*payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller...”.*

89. In terms of the above, the trading margin for the long-term PSA is to be mutually agreed to between the parties as per the opening part of Regulation 8 (1) (d) of the Trading License Regulations, 2020. The proviso to regulation 8(1) (d) and regulation 8(1)(f) prescribing the ceiling of Rs.0.02/kWh applies only in the event of failure of the trading licensee to provide the Letter of Credit or Escrow arrangement in favour of the Power Developer (seller of power) and not otherwise. In this context, it is also appropriate to refer to the Statement of Reasons dated 02.01.2020, already quoted earlier, explaining in particular context of Regulation 8 on the subject of *trading margin* forming part of Trading License Regulations 2020 that the trader is expected to “*provide an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller*” and that it is “*(i)n the event that escrow arrangement or irrevocable, unconditional and revolving letter of credit is not provided*” that it shall not be entitled to “*charge any trading margin exceeding two (2.0) paise/kWh*”. Simply put, the Proviso to Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading License Regulations, 2020 are not applicable so long as the trader (here, the appellant SECI) has maintained either an escrow arrangement or an irrevocable, unconditional and revolving letter of credit. It may be added that the proviso to regulation 8(1)(d) and Regulation 8(1)(f) of Trading License is applicable only when the time for giving Letter of Credit occurs and SECI does not open the letter of credit under the PPA in favour of Solar Power Developer if there is appropriate provision made in the PPA in terms of regulations. This provision is premised on the existence of default on the

part of the Trader to dis-incentivize the non-payment of the amount becoming due to the generator. The regulations do not state that trading margin will be Rs.0.02/kWh even when the trader opens a Letter of credit under the PPA and the procurer opens a letter of Credit under the PSA, the contracts having been executed on back-to-back basis.

90. The approach of the State Commissions in the two impugned orders itself is erroneous and based on premature unfounded assumptions. We shall examine the relevant facts in this context when we come to scrutiny of each case separately in due course.

#### *Freedom of contract*

91. It is trite that regard is required to be had to the sanctity of the terms and provisions of the Power Purchase Agreement/Power Sale Agreement executed between the parties, it being impermissible for the Courts or adjudicating authorities (and that includes the regulatory authority in present context) to create or write or rewrite contracts between the parties. [see *Alopi Parshad and Sons Ltd. V. Union of India*, (1960) 2 SCR 793; *Naihati Jute Mills Ltd. V. Khyalirm Jagannath*, (1968) 1 SCR 821; AIR 1968 SC 522; *Shin Satellite Public Co. Ltd. V. Jain Studios Ltd.* (2006) 2 SCC 628; *Food Corpn. of India v. Chandu Construction*, (2007) 4 SCC 697; *Rajasthan State Industrial Development & Investment Corpn v. Diamond & Gem Development Corpn. Ltd*, (2013) 5 SCC 470; *Gujarat Urja Vikas Nigam Limited v. Emco Limited and Another* (2016) 11 SCC 182; *Gujarat Urja Vikas Nigam Limited v. ACME Solar Technologies (Gujarat Pvt) Ltd and Ors*, (2017) 11 SCC 801; *Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Co. (India) P. Ltd*, (2017) 16 SCC 498; *Shree Ambica*



*Medical Stores v. Surat People's Cooperative Bank Limited* 2020 SCC OnLine SC 92].

92. As the earlier discussion has clearly brought out, on and for the subject of *trading margin* in long-term *back-to-back* contractual arrangements for inter-State supply/sale of electricity between the generating company, an intermediary and the procuring distribution licensee (at the end-of-the-chain) of the kind in issue in these appeals, the regulatory frame-work put in position, *inter alia*, by the Central Commission vests in the parties the freedom of contract allowing them to *mutually agree*. In our considered view, the said freedom has been tinkered by the State Commissions by the impugned view, it being an impermissible attempt to rewrite the contracts which have the approval of the appropriate (Central) Commission and (but for the stipulation on *trading margin*) even of the State Commissions.

93. Noticeably, the DERC has observed in the impugned order as under:

*“20. From above mentioned CERC Trading Margin Regulations, 2020, it is observed that there is a capping for Trading Margin of 2 paise/kWh even on long term transactions, in case, where escrow arrangement or irrevocable letter of credit is not provided by the Trading Licensee. However, the said Regulations do not specify the Trading Margin/Capping of Trading Margin for long term transactions in case escrow arrangement or irrevocable letter of credit is provided by the Trading Licensee.”*

94. The decision of the Central Commission rendered on 20.11.2019 in the matter of *Solar Energy Corporation of India Limited v. Ministry of New and Renewable Energy & Others* (Petition no.204/AT/2019) adopting the tariff in terms of Section 63 of the Electricity Act, 2003 under the ISTS Tranche-III Solar scheme (also applicable here) had

dealt with the issue of *trading margin*. The views articulated therein, with which we agree, may be quoted with advantage here:

*“29. The Petitioner has prayed to adopt the trading margin of Rs. 0.07/kWh. It is observed that Section 79(1)(j) of the Act requires the Commission “to fix the trading margin in the inter-State trading of electricity, if considered necessary”. Accordingly, the Commission, being of the opinion that it was necessary to fix trading margin for inter-State trading in electricity, exercised the powers conferred under Section 178 of the Act and conceived Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010 (hereinafter referred to as “Trading Margin Regulations”), applicable to the short-term-buy-short-term sell contracts for the inter-State trading in electricity undertaken by a licensee. The Regulations provide for the ceiling of the trading margin in short-term-buy-short-term-sell contracts for the inter-State trading. Trading Margin Regulations do not provide for any trading margin for long term transactions and, therefore, it is upto the contracting parties to mutually agree on trading margin, if any, in such cases. In any case, the Commission does not fix trading margin on case to case basis. The spirit of the Act read with the Trading Margin Regulations gives freedom and choice to the contracting parties to mutually agree on Trading Margin for any kind of trading transaction, subject to the ceiling Trading Margin, whenever applicable. Accordingly, the Commission cannot fix or adopt any Trading Margin for long-term transactions under the provisions of the present Trading Margin Regulations. In view of the above, the prayer of the Petitioner to adopt the Trading Margin is decided accordingly.”*

(Emphasis supplied)

95. Another decision of the Central Commission is relevant and, since we endorse the view taken therein for present factual-matrix, we may quote the same as well with approval. In the matter of *Solar Energy Corporation of India Limited v. Ministry of New and Renewable Energy and Others* (Petition no.552/AT/2021), by order dated 19.03.2021, while dealing with the applicability of Trading License Regulations, 2020, after

taking note, *inter alia*, of similar terms of the PSA and Regulation 8(1)(d) & (f) of the *Trading License Regulations*, CERC has observed as under:

“32. The above two provisions are exceptions to the main provision as regards trading margin. *Distribution licensee has agreed to a trading margin of Rs.0.07/kWh as agreed in the PSA, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. Therefore, in case of failure by SECI to provide escrow arrangement or irrevocable, unconditional and revolving letter of credit to the solar generators, trading margin shall be limited to Rs.0.02/kWh as specified in Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading Licence Regulations.*”

(Emphasis Supplied)

96. The impugned directions as to reduction of the trading margin, thus, is an illegal inroad into the domain reserved for the parties and consequently liable to be interfered with.

#### *SUMMING UP*

97. In view of above discussion, we are of the considered opinion that the nature of the transactions involved in these matters being inter-state operations, and not intra-state or within the State operations, the State Commission has no jurisdiction to deal with the *trading margin* of the interstate trading licensee (SECI) acting in terms of such trading License granted by the Central Commission under section 79 (1)(e) read with section 14 of the Electricity Act, 2003 and under the applicable Regulations notified by the Central Commission in exercise of powers under section 178 of the Act. Indisputably, the grant of such trading license to SECI is not by the State Commission under section 86(1)(d) of the Act, such inter-state trading Licensee of the Central Commission not

required to obtain the intra-state trading license from the State Commission to undertake even intra-state trading in terms of Rule 9 of the Electricity Rules 2005. In this view of the matter, the jurisdiction to deal with the applicable trading margin of SECI is of the Central Commission under Section 79(1)(j) of the Electricity Act and not of the State Commission under section 86(1)(j) of the Electricity Act, the jurisdiction being exercised by the State Commission under section 86(1)(b) of the Electricity Act, in cases where the regulatory jurisdiction of the transaction is vested in the Central Commission, being circumscribed and limited as provided under Rule 8 of the Electricity Rules, 2005. The relevant regulatory framework established by the Central Commission vests autonomy unto the parties to take a decision by mutual agreement on the issue of trading margin for such long-term contracts of inter-State supply, there being no role envisaged in law on this subject for the State Commission. Any interference by the State Commission on this issue in such scenario under the cover of jurisdiction under Section 86(1)(b) is improper, unauthorized and illegal. The proviso to regulation 8(1)(d) and Regulation 8(1)(f) of Trading License Regulations comes into play only in the event of default in compliance with payment security mechanism on the part of the trading licensee and not otherwise not the least before the time such compliance has become due.

### *TAKING VIEW ON SPECIFIC CASES*

98. Bearing in mind the above noted conclusions on the prime questions of law, we now proceed to decide issues specific to the two appeals.

*Appeal no. 52 of 2021 (the case from Delhi)*

99. It is appropriate to quote the following clauses from the PPA dated 20.08.2019 in the case from Delhi:

*10.4 Payment Security Mechanism  
Letter of Credit (LC):*

*10.4.1 Subject to opening and maintenance of Letter of Credit by the Buying Entities (as per terms of SECI-Buying Entity PSA) in favour of the Buyer, the SECI shall provide to the SPD, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable letter of credit ("Letter of Credit"), opened and maintained which may be drawn upon by the SPD in accordance with this Article.*

*10.4.2 Subject to Article 10.4.1, not later than one (1) Month before the start of supply, SECI through a scheduled bank open a Letter of Credit in favour of the SPD, to be made operative from a date prior to the Due Date of its first Monthly Bill under this Agreement. The Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:*

- i) for the first contract year, equal to the estimated average monthly billing;*
- ii) for each subsequent Contract Year, equal to the average of the monthly billing of the previous Contract Year.*

.....  
*10.4.4 Provided further that if at any time, such Letter of Credit amount falls short of the amount specified in Article 10.4.2 due to any reason whatsoever, SECI shall restore such shortfall within fifteen (15) days.*

.....  
*10.4.6 SECI shall ensure that the Letter of Credit shall be renewed not later than its expiry*

*10.4.7 All costs relating to opening, maintenance of the letter of credit shall be borne by the SECI/SPD.*

*10.4.8 If SECI fails to pay undisputed Monthly bill or Supplementary Bill or part thereof within and including the due date, then, subject to Article 10.4.6 and 10.5.2, the SPD may draw upon the letter of credit and accordingly the bank shall pay without any reference or instructions from SECI, an amount equal to such monthly bill or part thereof, in accordance with Article 10.4.3 above, by presenting to the scheduled bank issuing the Letter of Credit, the following documents:*

- i) a copy of the monthly bill or supplementary bill which has remained unpaid to SPD and;*
- ii) a certificate from the SPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date;”*

100. It is clear that as per Article 10.4 of the PPA quoted above, SECI is required to open, not later than one (1) month before the start of supply of power, a Letter of Credit through a scheduled bank in favour of the Solar Power Developer, to be made operative from a date prior to the due date of the first monthly bill under the PPA. As is clear from the factual narration, the PPA and PSA in question are back-to-back arrangements. There is no allegation made that the appellant conducted itself in such manner as to be in breach of contractual obligation under above-quoted clause of the PPA from Delhi.

101. It is not in dispute in context of case from Delhi that the PPA and the PSA were entered into in pursuance to Tariff Based Competitive Bidding Process under Section 63 of the Electricity Act, 2003. The Competitive Bidding was undertaken in terms of the *Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects* notified by Ministry of Power, Government of India on 03.08.2017, as amended from time to time (for

short, “the Guidelines dated 03.08.2017”) and the *Request for Selection* (‘RfS’) Document issued by SECI on 10.01.2019 along with Standard PPA and PSA in terms of the Guidelines for setting up of 1200 MW ISTS-connected Solar Power Projects (Tranche-III).

102. As noted earlier, clause 2.1.1 c) ii of the Guidelines dated 03.08.2017 deals with *trading margin* and, *inter alia*, provided for the same to be “*mutually decided between the Intermediary Procurer and the End Procuree*” in the scenario wherein Intermediary Procurer enters into a PPA with the Solar Power Generator and PSA with the End Procuree, the PSA containing the relevant provisions of the PPA on a back-to-back basis. The Amendment dated 22.10.2019 to the Guidelines notified on 03.08.2017, clarified Rs.0.07/kwh as the applicable *trading margin* payable to Intermediary Trading Licensee. As also noted earlier, the definition of *Trading Margin* under Section-I of the RfS Document dated 08.03.2019 issued by SECI, itself declared that it “*shall mean the margin on sale of solar power to State Utilities/ Discoms/ other Bulk Consumers under this RfS being charged by SECI and shall be @ INR 0.07/Kwh*”.

103. As is clear from the Recital II and Article 1 of the PSA dated 26.06.2019 (quoted earlier), it provides for the applicable Trading Margin of Rs.0.07/kWh. The procurer respondent TPDDL had sought by letter dated 16.07.2018 the *in-principle* approval of DERC, *inter alia*, for procurement of 200 MW solar power from the 3000 MW ISTS solar power projects, the agreed terms unequivocally being inclusive of “*SECI trading margin of 7 paise/ KWh*”. It was in response to such request that the *in-principle* approval for the procurement of 300 MW solar power by TPDDL from SECI was granted by DERC the letter dated 14.08.2018. It is in the wake of grant of such *in-principle* approval by DERC that the procurer TPDDL filed Petition no.65 of 2019 before the State

Commission under Section 86 (1) (b) of the Electricity Act 2003 for approval of power procurement under the PSA dated 26.06.2019 along-with Trading Margin of Rs.0.07/kWh. The pleadings in the said petition, as quoted earlier, show that TPDDL was agreeable because the terms were based on *“competitively discovered tariff of INR 2.61/ kWh plus its trading margin of INR 0.07/kWh (Rupee Seven Paisa per kWh) as the power procurement cost of the Petitioner for 200 MW Solar Power...”*.

104. Interestingly, the Delhi State Commission had earlier taken a view which is in sharp contrast to the view taken by the impugned order, the latter sounding a discordant note. By order dated 01.03.2019 in Petitions (nos.24-25 of 2019) relating to same distribution company, TPDDL, the procurement of power under the PSA with trading margin of Rs.0.05 per kWh/ Rs.0.07 per kWh as agreed to between the parties under the PSA had been approved.

105. The order dated 01.03.2019 passed by DERC in the first said petition reads as under:

*“5. The terms and conditions of PSA dated 16.10.2014 between SECI and the Petitioner have been examined keeping in view the submissions made by the Petitioner that the present PSA is intended to meet the Renewable Purchase Obligation of the applicant and the fact that the Tariff in the instant petition has to be adopted by CERC and not this Commission. In view of the aforesaid, Article 5 of the terms and conditions of the PSA related to the applicable Tariff have to modified as under:*

*5.1.1 The maximum tariff for the Solar power shall be the Maximum possible fixed tariff as adopted by the concerned Regulatory Commission (CERC) plus trading margin of Rs.0.05/kWh fixed for the entire term of this agreement and the buying utility shall make payment to SECI as per the provisions of this Agreement.*



*6. In view of the foregoing discussions, the PSA dated 16.10.2014 between SECI and the Petitioner is hereby approved subject to the modifications as indicated in para 5 above...”*

106. Similarly, the order of DERC in second abovesaid petition was on the following lines:

*“6. The terms and conditions of PSA dated 06.09.2018 between SECI and the Petitioner have been examined in light of the fact that the Tariff in the instant petition has to be adopted by CERC and not this Commission. Therefore, Article 5 of the terms and conditions of the PSA related to the applicable Tariff have to modified as under:*

*5.1.1. From SCD and subject to the provisions of the Article 6.7, the Buying Entity shall pay Maximum possible fixed tariff as adopted by the concerned Regulatory Commission (CERC) plus trading margin of Rs.0.07/kWh fixed upto commissioning of the cumulative awarded capacity/ accepted cumulative capacity by SECI under RfS.*

*5.1.2 Weighted average tariff as approved by CERC plus trading margin of Rs.0.07/kWh fixed shall be applicable upon commissioning of the cumulative awarded capacity/ accepted cumulative capacity by SECI under RfS for the balance term of this Agreement for the energy supplied as per provisions of this agreement.”*

*7. In view of the foregoing discussions, the PSA dated 17.07.2018 between SECI and the Petitioner is hereby approved subject to the modifications as indicated in para 5 above...”*

107. It is vivid that in the said matters, the DERC honored and accepted the trading margin mutually agreed upon by the parties in terms of the liberty given in such transactions by the regulations. A different approach in the case at hand only strengthens the argument of the impugned view being arbitrary.

108. In the matter of *Ayana Ananthapuramu Solar Private Limited v. Andhra Pradesh Electricity Regulatory Commission & Ors.* (Appeal No.368 of 2019), this tribunal by judgment dated 27.02.2020 had held thus:

*“70. It is also seen from the reply of AP Discoms that APERC (Intra-State Electricity Trading) Regulations of 2005 have not provided any trading margin for long term transactions. The Judgment of CERC dated 20.11.2019 above, actually says that trading margin regulation gives freedom and choice to the contracting parties to mutually agree on trading margin for any kind of trading transaction, subject to the ceiling whenever applicable. There are no trading margin regulations of the State of Andhra Pradesh Regulatory Commission for long term transactions. Therefore, the only reliance that can be placed is on the mutually agreed upon terms which are spelt out as rights and obligations of the parties under PSA. Therefore, in the light of the PSA indicating Rs.0.07 as trading margin and in the absence of any Regulations that are applicable to the case on hand, we are of the opinion that trading margin of 7 paise per kWh has to be paid. The PSA between AP Discoms and NTPC/SECI is the final binding document which speaks about tariff and also trading margin on the transaction of sale of power to AP Discoms.”*

(Emphasis Supplied)

109. We agree with the appellant that DERC has failed to appreciate the decision dated 27.02.2020 of this tribunal in the matter of *Ayana Ananthapuramu Solar Private Limited* (supra) wrongly treating it as not applicable. The factual matrix was similar, if not identical. The parties had a mutual agreement on the subject of trading margin, it not being prohibited by the law or regulations.

110. It is submitted that DERC has made a departure from its earlier dispensation by orders dated 01.03.2019 (quoted above) without justification. It is not correct to contend that it is only in absence of

applicable regulations governing the long-term contracts that it was held that the trading margin would be as per the terms of the contract mutually agreed. The fact that law gives autonomy to the parties on this subject cannot be ignored. At any rate, in the present matters the CERC Regulations do give the parties the discretion to mutually agree and this has been endorsed by the Central Commission by referring to the appropriate regulations in its order.

111. From the above, it is clear that the Guidelines, various other documents and instruments clearly establish that TPDDL had duly proceeded on the basis of trading margin being Rs 0.07/kWh. The respondent TPDDL had mutually agreed with SECI on the applicability of trading margin at Rs.0.07 per kWh and the PPAs and PSA which are long term arrangements have been concluded on the said basis consistent with the governing regulations. The tariff applicable to TPDDL is Rs.2.61/kWh plus trading margin of Rs.0.07/kWh aggregating to Rs.2.68/kWh which has been concededly settled because it is highly competitive, economical and beneficial for TPDDL to purchase, this aspect having not been disputed either by TPDDL or by the State Commission. The Central Commission has duly adopted the discovered tariff. The State Commission has erred by taking into consideration the trading margin capping applicable for short-term transactions of Rs.0.04/kWh when tariff is less than Rs.3/kWh as specified in *Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2010* for approving trading margin of Rs.0.02/kWh under the PSA dated 26.06.2019. The approach of the State Commission has been arbitrary and, therefore, unacceptable. The TPDDL had neither opposed nor suggested anything contrary to the trading margin of Rs 0.07/ kWh. As observed earlier, the proviso to regulation 8(1)(d) and Regulation 8(1)(f) of Trading License Regulations cannot be applied

save in the event of default in compliance with payment security mechanism on the part of the trading licensee, not the least prematurely. The decision of DERC to modify the mutually agreed term of *trading margin* which, in turn, is in accord with the Regulations is not only without jurisdiction but also against the applicable regulatory framework.

112. We, thus, hold and conclude in the case from Delhi that a binding mutual agreement exists between the trader and the procurer with regard to applicability of Trading Margin of Rs.0.07/kWh, it being consistent with the Regulation 8 (1) (d) of the Trading License Regulations, 2020, Clause 2.1.1 c) ii (b) of the Guidelines, the definition of Trading Margin in the RfS Document and proviso to Regulation 8 (1) (d) and Regulation 8 (1) (f) of the Trading License Regulations, 2020. There is no justification for the DERC to reduce it without jurisdiction or authority in law.

113. The impugned order of DERC to the extent it reduces the trading margin is liable to be set aside. Ordered accordingly.

*Appeal no. 70 of 2021 (the case from Punjab)*

114. The back-to-back contractual arrangement put in position by the hybrid power producers (the third and fourth respondents), the trader (the appellant) and the end-procurer (the second respondent) through the PSA and PPA is not in dispute. It is admitted fact that the contractual arrangement has been that the electricity (hybrid power) generated by the Power Projects established by the generating companies in another State (Rajasthan) would be allocated for sale and consumption in the State of Punjab (PSPCL) and State of West Bengal (India Power Corporation Limited). In this factual matrix, there can be no denial of the fact that it is a case of inter-State supply/purchase of electricity, a

transaction wherein the subject of *trading margin* is governed by Section 79 of Electricity Act within the domain of the Central Commission.

115. It is necessary to quote the following clauses from the PPA with PSPCL in the case from Punjab:

*Article 10. BILLING AND PAYMENT*

.....

*10.4 Payment Security Mechanism*

*Letter of Credit (LC)*

*10.4.1 Subject to the opening and maintenance of Letter Of Credit by the Buying Entities (as per terms of Buyer-Buying Entity PSA) in favour of the Buyer, the Buyer shall provide to the HPD, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable letter of credit ("Letter Of Credit"), opened and maintained which may be drawn upon by the HPD in accordance with this Article.*

*10.4.2 Subject to article 10.4.1, not later than one (1) month before the start of supply, Buyer through a scheduled bank open a Letter Of Credit in favour of the HPD, to be made operative from a date prior to the due date of its first Monthly bill under this Agreement. The Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:*

- iii) for the first contract year (post COD), equal to the estimated average monthly billing;*
- iv) for each subsequent Contract Year, equal to the average of the monthly billing of the previous Contract Year.*

*10.4.3 .....*

*10.4.4 Provided further that if at any time, such letter of credit amount falls short of the amount specified in Article 10.4.2 due to any reason whatsoever, buyer shall restore such shortfall within fifteen (15) days.*

10.4.5 .....

10.4.6 *Buyer shall ensure that the letter of credit shall be renewed not later than its expiry.*

10.4.7 *All costs relating to opening, maintenance of the letter of credit shall be borne by the buyer.*

10.4.8 *If the buyer fails to pay a monthly bill or part thereof within and including the due date, then, subject to Article 10.4.6 and 10.5.2, the HPD may draw upon the letter of credit and accordingly the bank shall pay without any reference or instructions from buyer , an amount equal to such monthly bill or part thereof, in accordance with Article 10.4.3 above, by presenting to the scheduled bank issuing the Letter of Credit, the following documents:*

- i) *a copy of the monthly bill or supplementary bill which has remained unpaid to HPD and;*
- ii) *a certificate from the HPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the agreement and has remained unpaid beyond the due date;”*

116. It is clear that Article 10.4 of the PPA that SECI is required to open, not later than one (1) month before the start of supply of power, a Letter of Credit through a scheduled bank in favour of the Hybrid Power Developer, to be made operative from a date prior to the due date of the first monthly bill under the PPA. The proviso to regulation 8(1)(d) and Regulation 8(1)(f) of Trading License is applicable only if and when the time for giving Letter of Credit lapses and the intermediary trader (SECI) does not open the letter of credit under the PPA in favour of Hybrid Power Developer as per the terms and conditions contained in Article 10.4 of the PPA. This provision is premised on the occurrence of default on the part of SECI/Trader, the objective being to dis-incentivize the non-payment of the amount becoming due to the generator. The regulations do not state that trading margin will be Rs.0.02/kWh even

when SECI opens a Letter of credit under the PPA and PSPCL opens a letter of Credit under the PSA, the contracts having been executed on back-to-back basis.

117. While capturing the background facts, we have extracted earlier relevant parts of the communications addressed on 19.10.2020 and 28.10.2020 by the appellant SECI to PSPCL, *inter alia*, taking exception to the unilateral move of the procurer to plead and press for lower trading margin against the mutually agreed terms and the other relevant material including the Regulations, RfS, PPA and PSA and clarifying the position of SECI with regard to the opening of the Letter of Credit in favour of the developers “*without even waiting for opening of LC by Buying Utilities*”, in the context of the then pending petition from which the impugned order has arisen. By letter dated 28.10.2020, it was expressly highlighted by SECI that under the relevant Regulations the *trading margin* for long term contracts is to be “*decided mutually between the Trading Licensee and the seller*”, bringing out that the regulation had been *misquoted* by PSPCL in its petition before the Commission. Pertinent to add that by order dated 21.10.2020 (quoted earlier), PSERC *inter alia* noted that the position taken in the petition filed by PSPCL was “*is in conflict with the mutually agreed terms and conditions between the parties*” and called upon the parties to “*agree on the trading margin, reconcile/amend the PSA and then approach the Commission, accordingly*”, this view reaffirming the case of the appellant that the issue of *trading margin* in this scenario was a matter to be decided by the parties on their own by consensus.

118. In the factual narrative, we have already noted that the appellant SECI had filed, on 19.02.2020, Petition (no.307/AT/2020) under Section 63 of the Electricity Act, 2003 before the Central Commission for adoption of tariff for the 600 MW (Tranche-II) Wind-Solar Hybrid Power

Projects connected to ISTS, the respondent PSPCL having been impleaded as third respondent therein. The petition was allowed by the CERC by order dated 21.05.2020 which has also been quoted. Suffice it to recall that the Central Commission accepted that “*choice to the contracting parties to mutually agree on Trading Margin for long-term transaction*” is available in context of “*transaction under long-term contracts*” in terms of “*Regulation 8(1)(d) of the Trading Licence Regulations*”. As already concluded earlier, for purposes of inter-State transactions of supply/sale/procurement of electricity, it is the Central Commission whose writ (under Section 79 of Electricity Act) prevails, it being beyond the domain of the State Commission under Section 86. The impugned order falls foul of the binding ruling on the subject of *trading margin* in the contractual arrangement between the parties herein and, thus, cannot be upheld.

119. It is the case of the appellant that in other similarly placed PSAs entered into by SECI with PSPCL under other schemes involving certain other generating companies - ReNew Power Ventures Private Limited and Adani Green Energy (MP) Limited both under Tranche-II of ISTS Wind Schemes besides Green infra Wind Energy Limited under Tranche-III of ISTS Wind Schemes - the respondent PSPCL has chosen to accept the mutually agreed terms on *trading margin* without demur, SECI having been regular in opening and maintaining independent, irrevocable, unconditional and revolving Letter of Credits in favour of the Power Developers, not assigning the letter of credit opened by PSPCL.

120. Be that as it may, we cannot ignore that the impugned order suffers from the vice of perversity the State Commission having glossed over documents and instruments which were available for consideration. It cannot be overlooked that the PPAs and the PSA have been entered into in pursuance of the Tariff Based Competitive Bidding Process under



Section 63 of the Electricity Act, 2003. It is not disputed that the Competitive Bidding was undertaken in accord with Guidelines for transparent bidding process for Implementation of Scheme for setting up of 2500 MW ISTS-connected Wind-Solar Hybrid Power Projects notified by Ministry of New and Renewable Energy, Government of India on 25.05.2018 (“the MNRE Guidelines”) and the Request for Selection Document for setting up of 1200 MW ISTS-connected Wind-Solar Hybrid Power Projects (Tranche-II) issued by SECI on 08.03.2019 (“RfS”) along with Standard PPA and PSA in terms of the Guidelines. The relevant parts of both have been quoted earlier. To recapitulate, we note here that in terms of the MNRE Guidelines for sale of hybrid power “SECI will be entitled to charge trading margin as mutually agreed with buyer or as decided by the CERC for long-term power purchases whichever is less” and under the RfS the expression *trading margin* was expressly define to mean “as mutually agreed between Buying Entities and the SECI or as decided by CERC for long-term power purchase, whichever is less”.

121. The State Commission (PSERC) has unfairly ignored Recital II and Article 1 of the PSA dated 03.01.2020 providing for “*the trading margin of 7 paisa/kWh to SECI*” as the applicable Trading Margin of Rs.0.07/kWh, also sidestepping the fact that the said agreed term was retained even in the amendments (no. 2 and 3) to PSA dated 03.01.2020 carried out on 10.08.2020 and 13.11.2020, the last such amendment being after the filing of Petition No.29 of 2020 before the State Commission on 07.10.2020.

122. It is surprising that the PSERC has also ignored that the procurer (PSPCL) had reconciled to the obligation and justification for the agreed terms of tariff and trading margin, during pendency of the petition before the Commission, due to deliberations between the parties which had

been encouraged by the Commission itself to resolve the dispute, it having found it difficult to entertain the petition on account of difference (as noted in order dated 21.10.2020). The view taken in the final impugned order is out of sync with the said earlier approach. The impression gained is that the Commission is engaging itself in whimsical or capricious decision-making process, which does not reflect well on the credibility of a statutory authority.

123. As noted earlier, an additional affidavit of the authorized representative of PSPCL was filed on 17.11.2020 before the PSERC stating that even with Trading Margin of Rs.0.07/kWh, the power will be in the interest of PSPCL – to quote again, “*very competitive considering the nature of the power and the tariff at which it is available for the period of 25 years*”. It is also apt to recall that in the rejoinder dated 28.12.2020 (quoted earlier) filed by PSPCL to the reply of SECI (in Petition No.29 of 2020) before the State Commission, PSPCL had, *inter alia*, taken the position that “*under Section 79 of the Electricity Act 2003 it is the Hon’ble CERC which has been bestowed with the power to determine the tariff for the inter-state transmission of electricity and as such there is no lis between the parties regarding quantum of tariff determined by the Hon’ble CERC*” and further that “*the tariff in the present case is Rs.2.69/- per unit which is very competitive and would be in the interest of the consumers ... (e)ven after taking the trading margin of Rs.0.07 per unit the landed cost of power at Punjab is only Rs.2.76 per unit, which is also very competitive...*”.

124. We have already referred to the decision of this tribunal by order dated 27.02.2020 in the matter of *Ayana Ananthapuramu Solar Private Limited* (supra). As in the case from Delhi (first captioned appeal), PSERC has also failed to apply the said ruling to the case at hand from Punjab, impermissibly so, the factual matrix being identical.

125. We find that various documents and instruments clearly establish that PSPCL had duly proceeded on the basis of trading margin being Rs 0.07/kWh and, therefore, cannot be allowed to change its stand in the present proceedings. The respondent PSPCL had mutually agreed with SECI on the applicability of trading margin at Rs.0.07 per kWh and the PPAs and PSA which are long term arrangements and have been concluded on the said basis consistent with the governing regulations being Regulation 7 of the Trading License Regulations 2020. The tariff applicable to PSPCL is Rs.2.69 per kWh plus trading margin of Rs.0.07/kWh aggregating to Rs.2.76/kWh which has been accepted by the end-procurer to be highly competitive, economical and beneficial for it (PSPCL) to purchase, this aspect crucial for consideration at the stage of Section 86(1)(b) scrutiny having not been disputed either by PSPCL or by the State Commission. The Central Commission has duly adopted the discovered tariff by referring to the relevant regulations which decision binds one and all. As in the case from Delhi, even in the matter at hand the attempt to invoke proviso to regulation 8(1)(d) and Regulation 8(1)(f) of Trading License Regulations prematurely is improper since there is no default yet made in compliance with payment security mechanism on the part of the trading licensee.

126. We, thus, hold and conclude that PSERC has fallen in grave error by disturbing the agreed terms settled by the contracting parties on the subject of *trading margin*. PSPCL has duly accepted the Trading Margin of Rs.0.07/kWh when it entered into the PSA dated 03.02.2020 and subsequent amendments. This has brought into existence a mutual agreement with regard to applicability of Trading Margin of Rs.0.07/kWh, it being binding since it is consistent with Clause 3.2 of the applicable Guidelines, Regulation 8 (1) (d) of the Trading License Regulations, 2020, the decision dated 21.05.2020 of the Central Commission in

Petition No.307/AT/2020 whereby it was ruled that Regulation 8 (1) (d) of the Trading License Regulations, 2020 provision “*gives choice to the contracting parties to mutually agree on Trading Margin for long-term transaction*”, the RfS document defining that Trading Margin “*means the trading margin as mutually agreed between Buying Entities and the SECI or as decided by CERC for long-term power purchase, whichever is less*” and the proviso to Regulation 8 (1) (d) and Regulation 8 (1) (f) of the Trading License Regulations, 2020.

127. The impugned order of PSERC to the extent it reduces the trading margin is also liable to be set aside. We order accordingly.

### CONCLUSION

128. For the foregoing reasons, both appeals succeed.

129. We allow the first captioned appeal (Appeal no. 52 of 2021) and set aside and vacate the order dated 31.12.2020 passed by DERC in Petition (no.65 of 2019) filed by second respondent (“TPDDL”) to the extent thereby the trading margin of 7 paise/ kWh agreed by the parties was reduced. For removal of doubts, it is made clear that the said agreed stipulation as to the trading margin shall bind the back-to-back contractual arrangement between the parties entered upon by the subject PPA/PSAs and that subject to this modification the approval granted by the State Commission by the impugned order under Section 86(1)(b) of Electricity Act shall prevail and regulate the conduct of the parties hereinafter.

130. We allow the second captioned appeal (Appeal no. 70 of 2021) and set aside and vacate the order dated 01.02.2021 passed by PSERC in Petition (no.29 of 2020) filed by second respondent (“PSPCL”) to the extent thereby to the extent thereby the trading margin of 7 paise/ kWh

agreed by the parties was reduced. For removal of doubts, it is made clear that the said agreed stipulation as to the trading margin shall bind the back-to-back contractual arrangement between the parties entered upon by the subject PPA/PSAs and that subject to this modification the approval granted by the State Commission by the impugned order under Section 86(1)(b) of Electricity Act shall prevail and regulate the conduct of the parties hereinafter.

131. The appeals are disposed of in above terms. The pending applications are rendered infructuous and are disposed of accordingly.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING  
ON THIS 02<sup>nd</sup> DAY OF JULY, 2021.**

**(Justice R.K. Gauba)  
Judicial Member**

**(Ravindra Kumar Verma)  
Technical Member**