APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 352 OF 2022
AND
IA NOS. 1189 OF 2022 & 1454 OF 2022

Dated: 2nd May, 2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Fatehgarh Bhadla Transmission Company Limited,
Through it Authorized Signatory
Adani Corporate House,
Shantigram, S G Highway,
Ahmedabad 382 421, Gujarat, India
Email:Praveen.tamak@adani.com… **….Appellant(s)**

AND

1. Central Electricity Regulatory Commission
Through its Secretary,
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001
Email: secy@cercind.gov.in
Phone: +91-11-23353503

2. Central transmission Utility
Formerly known as (Power Grid Corporation of India Limited)
Through its Chief General Manager
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3. Rajasthan Rajya Vidyut Prasaran Nigam Limited,
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Through its Nodal Officer
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4. Ajmer Vidyut Vitran Nigam Limited,
Through its Managing Director
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5. Jaipur Vidyut Vitran Nigam Limited,
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6. Jodhpur Vidyut Vitran Nigam Limited,
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Through its Managing Director,
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7. Himachal Pradesh State Electricity Board,
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Through its General Manager
Shimla-171004 (Himachal Pradesh)
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Phone: 0177-2801675

8. Punjab State Electricity Board,
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9. Haryana Power Purchase Centre,
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10. Power Development Department,
Government of Jammu & Kashmir,
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Through its Managing Director
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11. Uttar Pradesh Power Corporation Limited,
(Formerly Uttar Pradesh State Electricity Board),
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Through its Chairman
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12. Delhi Transco Limited,
Shakti Sadan, Kotla Road,
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13. BSES Yamuna Power Limited,
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Through its DGM
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14. BSES Rajdhani Power Limited,
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15. Tata Power Delhi Distribution Limited,
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16. Chandigarh Administration,
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Through its Chief Engineer
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17. Uttarakhand Power Corporation Limited,
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18. North Central Railway,
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19. New Delhi Municipal Council,
Palika Kendra, Sansad Marg,
New Delhi-110002
Through its Chairperson
Email:chairperson@ndmc.gov.in,
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20. Surya Urja Private Limited,
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22. Essel Saurya Urja Company of Rajasthan Limited,
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23. Power Grid Corporation of India Limited

Chairman and Managing Director
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Counsel for the Petitioner(s) : Mr. Sanjay Sen, Sr. Adv.
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Ms. Alchi Thapliyal

Counsel for the Respondent(s): Ms. Suparna Srivastava
Mr. Tushar Mathur for R-2

Mr. Anand K. Ganesan
Ms. Swpana Seshadri
Ms. Neha Garg for R-23

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. This appeal is preferred against the Order passed by the Central Electricity Regulatory Commission ("**CERC**" for short) in Petition No. 9/TT/2021 dated 11.06.2022. By` the said order, the CERC imposed, on the Appellant, the liability to pay transmission charges, to the Powergrid Corporation of India Limited ("**PGCIL"** for short), for the mismatch period. As elaborate submissions were made by

them in the I.A filed in this Appeal, Mr. Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, Ms. Suparna Srivastava, learned Counsel for the 2nd Respondent and Ms. Swapna Seshadri, learned Counsel for the 23rd Respondent, agreed, during the course of hearing on 05.01.2023, that, instead of adjudicating the IA, the main Appeal itself be decided on the basis of the submissions advanced by them.

I.A BRIEF BACKGROUND:

2. Implementation of the transmission assets, comprised in a transmission system scheme, is part of a co-ordinated transmission system plan undertaken by Respondent No.2 as the designated Central Transmission Utility (CTU) discharging its assigned functions under Section 38(2) of the Electricity Act, 2003 ("the Act" for short). The assets, which are to comprise in the said scheme, are finalized after discussions with the stakeholders and other entities in meetings, and the manner of its implementation must ensure that it matches with the commissioning of the generating stations(s) whose power is to be evacuated through the transmission system under the scheme.

3. The Act envisages two modes of implementation of a transmission system by a transmission licensee ie (1) the Regulated Tariff Mechanism (RTM) route and (2) the Tariff Based Competitive Bidding (TBCB) route. Under the RTM route, the ISTS transmission assets are implemented after obtaining Investment Approval from the licensee's Board of Directors and regulatory approval from the CERC. For the assets so implemented, the RTM licensee is entitled to receive regulated tariff as determined by the CERC under Section 62 of the Act in accordance with the principles enshrined under Section 61 thereof for determination of tariff, and the applicable Tariff Regulations framed in that behalf by the CERC. Under the Tariff Based Competitive Bidding (TBCB) route, the ISTS transmission assets are implemented by the successful bidder who is selected through a transparent process, of tariff based competitive bidding, undertaken by the Bid Process Coordinator under Section 63 of the Act as per the Government of India guidelines. For the assets so implemented, the TBCB licensee is entitled to receive the tariff discovered through the bidding process and adopted by the CERC. A transmission scheme may also be implemented through a combination of the above two routes and the decision/agreement, as regards segregation of transmission assets for their implementation through the

RTM route and the TBCB route, is taken in the meetings held for approving the said system.

4. A transmission licensee, implementing the ISTS transmission system under the RTM route, is required to file a Petition before the CERC for determination of tariff, for the transmission system implemented by it, as per the applicable Regulations framed for the said purpose. Ordinarily, the CERC approves the capital cost incurred by the said transmission licensee up to the date of its commissioning (its commercial operation date or COD), which the transmission licensee is entitled to recover through its tariff, along with return on equity. The transmission licensee, implementing the ISTS transmission system under the TBCB route, is required to file a Petition before the CERC for adoption of its discovered tariff. After examining whether the bidding process has been conducted in a transparent manner, and in accordance with the Guidelines framed by the Central Government, the CERC adopts the said discovered tariff.

5. As commissioning of the inter-connected transmission assets, implemented under the RTM route and TBCB route, is required to match inter-se, the said inter-connected transmission assets are required to be commissioned matching the commissioning of the generating station(s)

whose power is to be evacuated through use of the said system so that the commissioned generation capacity is not stranded. Likewise, the said generating station(s) are also required to be commissioned as per their assigned SCODs so that the transmission system, implemented for evacuating their generated power, is not stranded. The fact, however, remains that several instances of mismatch in commissioning of generating stations vis-à-vis their associated transmission system, as also commissioning of inter-linked transmission systems implemented partly through the RTM route and partly the TBCB route, have been found to occur, albeit for different reasons including claims of force majeure.

6. In the present case, the generation projects being set up in the Solar Power Park were initially scheduled to be commissioned by January, 2017, March, 2017 and July, 2017 respectively. Consequently, the evacuation systems were required to be put in place matching with the commissioning of the generation projects. In the 37th and 38th Meeting of the Standing Committee on Power System Planning of the Northern Region, held on 20.1.2016 and 30.5.2016, it was decided that the transmission scheme, for evacuation from the subject Solar Park, would be implemented as an Inter-State Transmission System, through a combined RTM and TBCB route. Regulatory

approval, for implementation of the transmission system, was granted to PGCIL vide Order of the CERC in Petition No.1/MP/2016 dated 31.3.2016.

7. In Petition No.3/MP/2017, filed by the Central Transmission Utility ("CTUIL" for short) seeking regulatory approval for undertaking development of a transmission system, meant for evacuation of power from the Solar Energy generators associated with the Solar Power Park to be developed at Fatehgarh district of Jaisalmer, Rajasthan, the CERC vide its Order dated 17.10.2017, while granting the said regulatory approval, held that, considering the fact that the scheduled commissioning of the Solar Power Projects was December, 2018, it was necessary to implement the transmission system to match the time schedule of generation from the Solar Power Projects, so that it does not get stranded for lack of an evacuation system. After regulatory approval was granted by the CERC, a competitive bidding process was undertaken by PFC Consulting Limited in accordance with the guidelines issued by the Central Government under Section 63 of the Act. In the said competitive bidding process, the Appellant emerged as the successful bidder to establish the transmission system for "Ultra Mega Solar Park in Fatehgarh", and to provide transmission services to the LTTC of the project. Since the bidding process was

undertaken, in terms of the guidelines under Section 63 of the Act, the transmission tariff / charges had been adopted by the CERC through the said bidding process.

8. PGCIL, also an 'inter-state transmission licensee', was developing its own transmission project under "*Transmission System for Solar Power Park at Bhadla*" in the Northern Region, the tariff for which was determined by the CERC, under Section 62 of the Act (a *non-bidding/ regulated tariff mechanism route*), in terms of the CERC (Terms and Conditions of Tariff) Regulations, 2019) ("**the 2019 Regulations**" for short). Both the projects, one of the Appellant and the other of PGCIL, were part of a larger inter-state transmission network operated by the PGCIL**.** Asset-6 of the transmission project of PGCIL [*comprising of two (2) Bays at Bhadla- 1 substation*] was to be connected to the transmission project of the Appellant. The Scheduled Commercial operation date ("SCOD" for short) of Asset-6 of PGCIL was 20.01.2019, and the SCOD of the Appellant was 30.09.2019.

9. The Appellant had also obtained a transmission licence from the CERC to implement the TBCB assets, subject, inter alia, to the following condition:"(j) the licensee shall remain bound by the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 ("the 2010 Regulations" for

short") as amended from time to time; (l) the licensee shall ensure execution of the project within the timeline specified in Schedule 3 of the TSA, and as per the Technical Standards and Grid Standards of CEA prescribed in Article 5.1.1 and Article 5.4 of the TSA and para 9 of the order; (m) the licensee shall, as far as practicable, coordinate with the licensee (including deemed licensee) executing the upstream or downstream transmission projects. It is evident, from the conditions stipulated in the said transmission license, that the Appellant was, among others, required to adhere to the timelines stipulated in the TSA, and to coordinate with the licensee executing the upstream or downstream transmission projects, (such as PGCIL), to ensure execution of the project in a matching timeline. It is not in dispute that the Appellant failed to adhere to the TSA timelines, and there was admittedly a delay on its part in commissioning its transmission asset.

10. PGCIL filed Petition No. 9/TT/2021 before the CERC seeking its approval, under Regulation 86 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, and for determination of transmission tariff for the 2019-24 period under the 2019 Regulations, in respect of the transmission assets under the "Transmission System for Solar Power Park at Bhadla" in the Northern

Region. Asset-6 related to 2 numbers 400 kV line bays at Bhadla (POWERGRID) Sub-station. Before the CERC, PGCIL had prayed, among others, to admit the capital cost as claimed in the Petition, and approve the Additional Capitalization incurred/projected to be incurred; approve the transmission tariff for the tariff block 2019-24 for the asset covered under the Petition; and approve the date of commercial operation of Asset-6 as 27.9.2019 as per clause 5(2) of the 2019 Regulations. Thereafter, the Appellant filed Petition No. 87/MP/2022 before the CERC seeking extension of SCOD, from 30.09.2019 to 31.07.2021, on account of *force majeure* events in terms of the Transmission Service Agreement dated 10.01.2018 ("TSA" for short) executed between them and the LTTC. This petition is said to be still pending adjudication before the CERC.

II.DETAILS OF THE IMPUGNED ORDER OF THE CERC DATED 11.06.2022:

11. In the impugned Order passed on 11.6.2022, in Petition No.9/TT/2021 filed by PGCIL, the CERC, while approving the transmission tariff for the transmission asset-6 under the "Transmission System for Solar Power Park at Bhadla in the Northern Region" being implemented by PGCIL, had directed that the transmission charges for transmission

assets being 2 nos. of line bays at Bhadla sub-station (Asset No.6) from 27.9.2019 to 29.7.2021 (the mismatch period) should be borne by the Appellant due to the delay on its part in implementing the inter-connected transmission asset i.e. the 765 kV Fatehgarh-Bhadla transmission line. This liability was imposed, on the appellant by the CERC in terms of Regulation 6(2) of the 2019 Regulations, and Regulation 13(12) of the 2020 Regulations, under which the liability for payment of transmission charges, for the period of mismatch in commissioning of the inter-linked transmission systems, has been fastened on the transmission licensee whose system has been commissioned subsequently, and beyond its scheduled commercial operation date (SCOD). In terms of the impugned Order, the 2nd Respondent raised an invoice dated 26.8.2022 for Rs.5,12,88,268/- upon the Appellant for the period September, 2019 to July, 2021 towards transmission charges for the mismatch period plus interest.

12. With respect to the subject matter of the present Appeal, the CERC, under the head “Sharing of Transmission Charges”, noted that PGCIL had prayed that the transmission charges for the 2019-24 period may be allowed to be recovered on monthly basis in accordance with Regulation 57 of the 2019 Regulations, and should be

shared by the beneficiaries and long-term customers as per the 2010 Regulations as amended from time to time; the appellant had submitted that there should not be any underlying consequence upon them, if the COD of Asset-6 was approved in accordance with Regulation 5(2) of the 2019 Regulations; TSA dated 10.1.2018 was executed between the Appellant and Adani Renewable Energy Park Rajasthan Limited (AREPRL), wherein the appellant, being the Transmission Service Provider (TSP), was required to provide transmission services to AREPRL as the Long-Term Transmission Customer (LTTC) and, as per Schedule 3 appended to the TSA, the completion target date as specified for all the elements of the transmission system was 30.9.2019; however, on account of various reasons in the nature of force majeure, the Appellant had achieved COD of the transmission system on 31.7.2021; as per Regulation 13(12) of the 2020 Regulations, in case of delay in execution of the transmission asset, the Yearly Transmission Charges (YTC) for the transmission system shall be paid by the inter-state transmission licensee till its transmission system achieves COD; the Appellant had submitted that it could not be made liable for payment of transmission charges in terms of Regulation 13(12) of the 2020 Regulations, on account of the following: (1) the reason for delay in achieving SCOD was on account of

reasons which were beyond their control, and as such there were *force majeure* events in terms of Article 11 of the TSA; the brief details of these events were as follows: (a) delay on account of re-routing of Fatehgarh-Bhadla line due to GIB Arc; (b) delay in grant of NOC by the Defence Department and the restrictions imposed under the said NOC; (c) delay on account of operation of first status-quo order passed by the Rajasthan High Court in the Writ Petitions filed by farmers in respect of land allocated to AREPRL to provide it to the appellant for the 400 kV Pooling Station; (d) delay in providing adequate land for the 400 kV and 220 kV Pooling Station, adjacent to the Solar Park of AREPRL, on account of the status quo order dated 8.9.2020 passed by the Rajasthan High Court; (e) delay in execution of the transmission system on account of the on-going COVID-19 pandemic; and (f) delay on account of intense sandstorm, which is a natural *force majeure* event.

13. The CERC noted the appellant's contention that the 2020 Regulations were silent on the treatment to be meted out in the event the delay, in achieving COD by an 'inter-State' transmission licensee, was on account of *force majeure,* while the associated transmission system by the other inter-state transmission licensee had already been executed; as per Article 11.7 of the TSA, the appellant

could not be fastened with any liability under the TSA in the event SCOD/COD was delayed on account of *force majeure* events; further, the transmission project was awarded pursuant to a bidding process conducted under Section 63 of the Act; once the said bid is conducted, the transmission project is awarded, and a TSA is executed, the same cannot result in imposition of any liability upon the transmission licensee, which is not contemplated in the TSA, nor provided in the RFP/RFQ; there is no provision or requirement under the TSA as well as RFP/RFQ for the prospective bidders to factor in any future costs associated with the delay in achieving SCOD/ COD, except imposition of liquidated damages as contemplated under Article 6.4 of the TSA; the same was mandated by the Ministry of Power guidelines that there should not be a levy of transmission charges upon a TBCB licensee based on delay in achieving SCOD/ COD other than liquidated damages to be imposed by the LTTCs; and this mandate of the MOP (that transmission charges cannot be imposed upon a TBCB licensee) is applicable irrespective of the fact that delay is occasioned on account of *force majeure*.

14. The CERC noted that the Appellant had further contended that the notification of the 2020 Regulations was a “change in law” event in terms of Article 12 of the TSA; the appellant

was not liable to bear any transmission charges, in terms of Regulation 13(12) of the 2020 Regulations, which specifically provided for payment of transmission charges by an inter-State transmission licensee, if COD of the transmission system of the associated transmission licensee is approved, as it is a “change in law” event in terms of Article 12 of the TSA; further, at the time of bidding for the transmission system, the 2010 Sharing Regulations were in force which did not contain a provision for payment of transmission charges by an ‘inter-state’ transmission licensee to another ‘inter-state’ transmission licensee in case of a mismatch of COD; and no transmission charges were required to be imposed by an ‘inter-State’ transmission licensee upon another ‘inter-State’ transmission licensee; however, the 2020 Regulations specifically provided for the transmission charges required to be paid by an ‘inter-State’ transmission licensee, if the COD of the transmission system of the associated ‘inter-State’ transmission licensee was approved; and, therefore, the notification of the 2020 Sharing Regulations was a “change in law” event.

15. Thereafter the CERC noted that, in response, PGCIL had submitted that the appellant had raised the issue of *force majeure* events encountered during execution of its line,

and was claiming that due to this it was entitled for extension of SCOD; PGCIL had submitted that the instant petition was for approval of their transmission tariff, and the appellant was trying to delay approval of tariff in the guise of the instant petition; for extension of time of SCOD, of the transmission assets being implemented by the appellant, it could approach the Commission through a separate petition; in the case of Asset-6, it had already been explained that it was ready for execution, but could not be declared under commercial operation due to the associated transmission line not being ready, and PGCIL was entitled to receive transmission charges from the COD of Asset-6 i.e. 27.9.2019; and with regard to sharing of transmission charges of Asset-6, the Commission, in the exercise of its statutory powers, may approve the sharing methodology of approved tariff as per the Sharing Regulations/relevant orders or agreements.

16. The CERC further noted that PGCIL had submitted that the deemed COD of the asset in the scope of the appellant was declared on 31.7.2021, they had no comments on the Appellant's prayer requesting the CERC to invoke its regulatory powers in order to ensure that no transmission charges were imposed upon them qua delay in achieving SCOD/ COD on account of occurrence of *force majeure*

events; and the appellant was seeking relief as per the TSA provisions entered into between the appellant and their LTTCs which did not pertain to the instant petition.

17. After considering the submissions of PGCIL and the Appellant, the CERC held that the associated transmission line, under the scope of the appellant, was not ready; the COD of 2 numbers of 400 kV line bays at Bhadla (PG) (Asset-6) had been approved as 27.9.2019 under the second proviso to Regulation 5(2) of the 2019 Regulations, as the associated transmission line i.e. 765 kV Fatehgarh-Bhadla Transmission Line under the scope of the appellant was not ready on 27.9.2019; the appellant had declared the deemed COD of Fatehgarh Pooling Station-Bhadla D/C line (initially to be operated at 400 kV) on 30.7.2021; therefore, the transmission charges of Asset-6 from 27.9.2019 to 29.7.2021 should be borne by the appellant; as on 30.7.2021 both the transmission line and the associated bays were ready, but generation under the control of AREPRL was not ready; therefore, from 30.7.2021 onwards, the transmission charges of Asset-6 should be borne by AREPRL till COD of the generation under the control of AREPRL; with effect from 1.11.2020, sharing of transmission charges for inter-State transmission systems was governed by the Central Electricity Regulatory

Commission (Sharing of Transmission Charges and Losses) Regulations, 2020 (the "2020 Regulations"); accordingly, the liability of the DICs, for arrears of transmission charges determined through this order, should be computed DIC-wise in accordance with the provisions of the respective Tariff Regulations and Sharing Regulations; and should be recovered from the concerned DICs through Bill 2 under Regulation 15(2)(b) of the 2020 Regulations. The Annual Fixed Charges (AFC) allowed, by the CERC in the Order under Appeal, in respect of the transmission Asset-6, for the 2019-24 tariff period, was as follows:

(₹ in lakh)

Asset-6					
Particulars	**2019-20 (Pro-rata 187 days)**	**2020-21**	**2021-22**	**2022-23**	**2023-24**
AFC	**87.74**	**243.76**	**291.28**	**314.26**	**321.31**

18. The CERC concluded stating that Annexure-I to the order formed part of the order. The table in the Annexure, with respect to Asset-6, reads thus:-

2019-24	Admitted Capital Cost as on COD	Projected ACE				Admitted Capital Cost as on 31.3.2024	Rate of Depreciation as per Regulations (in %)	Annual Depreciations as per Regulations				
Particulars		2019-20	2020-21	2021-22	2022-23			2019-20	2020-21	2021-22	2022-23	
Land – Freehold	13.03	0.00	0.00	0.00	0.00	13.03	0.00%	0.00	0.00	0.00	0.00	
Building Civil Works& Colony	14.48	41.36	35.10	17.55	8.77	117.26	3.34%	1.17	2.45	3.33	3.77	
Sub Station	390.44	526.79	439.81	209.64	111.92	1678.60	5.28%	34.52	60.04	77.19	85.68	
PLCC	58.63	12.79	10.85	5.43	2.71	90.42	6.33%	4.12	4.86	5.38	5.64	
IT Equipment (Including Software)	10.17	3.13	2.66	1.33	0.66	17.94	15.00%	1.76	2.19	2.49	2.64	
Total	486.75	584.07	488.42	233.95	124.06	1917.25		41.57	69.55	88.39	97.73	

Average Gross Block	778.79	1315.03	1676.22	1855.22	
Weighted Average Rate ofDepreciation (in %)	5.34%	5.29%	5.27 %	5.27%	

19. The above referred Order, now under Appeal before us, was passed in tariff Petition No. 9/TT/2021 filed by PGCIL seeking determination of transmission tariff / charges for its transmission project, including Asset-6, under Section 62 of the Act read with the 2019 Regulations. In this Petition, the Appellant was arrayed as Respondent No. 21. By the impugned Order the CERC, while determining the tariff of the PGCIL project including Asset-6, held that the transmission charges of Asset-6 should be borne exclusively by the Appellant from 27.09.2019 till 30.07.2021**,** i.e. the period of delay of the Appellant's project.

III.RIVAL SUBMISSIONS:

20. Aggrieved by the aforesaid Order of the CERC dated 11.06.2022, the Appellant has preferred the present Appeal contending mainly (as shall be elaborated later in this Order) that the liability under the impugned Order has been wrongly imposed upon it by the CERC (1) without appreciating that the delay on its part in implementing the associated transmission line has been on account of force majeure events, adjudication whereof is pending before the CERC in Petition No.87/MP/2020 filed by the Appellant; (ii) the provisions of the 2019 Regulations and the 2020 Regulations, which are not applicable to the Appellant- being a transmission licensee implementing its transmission project under Section 63 of the Act, has been wrongly interpreted and applied; (iii) transmission charges can only be imposed upon a user of the inter-State transmission system (ISTS), and not upon an inter-State transmission licensee such as the Appellant; and (iv) the liability imposed upon it was outside the scope of the TSA dated 10.1.2018 executed by it with its long-term transmission customer (LTTC) and, except for imposition of liquidated damages as contemplated under the TSA, no additional liability can be imposed.

21. The case of CTUIL, on the other hand, is that, in the Petition filed before the CERC, PGCIL had claimed COD of one of its assets, being Asset-6, as 27.9.2019, and had submitted that, on the said date, the inter-connected transmission line, in the scope of the Appellant, had not yet been executed; it had been charged only on 30.7.2021 on the Appellant's transmission system achieving COD; considering the aforesaid the CERC, vide the impugned Order, had rightly imposed the liability of transmission charges, for the transmission asset, from 27.9.2019 to 29.7.2021 (the mismatch period), on the Appellant due to the delay on its part in implementing the associated transmission line i.e. 765 kV Fatehgarh-Bhadla transmission line; this liability was imposed on them in terms of Regulation 6(2) of 2019 Regulations, and Regulation 13(12) of the 2020 Regulations**,** under which the liability for payment of transmission charges, for the period of mismatch in commissioning the inter-linked transmission system, was required to be fastened on the transmission licensee whose system had been commissioned subsequently, and beyond its scheduled commercial operation date; and, in furtherance of the impugned Order, the CTUIL had raised the bill/invoice for Rs.5,12,88,268/- upon the Appellant.

22. It is the stated case of PGCIL that Asset-6 had been commissioned by them, to connect the 765 KV (operating at 400 KV) Fatehgarh-Bhadla line of the Appellant, which formed part of a larger transmission scheme known as "*Transmission System for Solar Power Park at Bhadla*" in the Northern Region"; they had obtained investment approval from their Board of Directors in the meeting held on 20.07.2016, pursuant to the letter of the Ministry of Power dated 04.08.2015 calling upon them to execute the transmission lines for evacuation of power from the upcoming solar generating parks including the Bhadla park; the transmission scheme was discussed in the 37th meeting of the Standing Committee, on Power System Planning in the Northern Region, held on 20.07.2016, and the 33rd TCC/37th NRPC meeting on Transmission for the Northern Region held on 21.03.2016/22.03.2016; in its capacity as the CTUIL, PGCIL had obtained Regulatory Approval of the CERC under Regulation 3 of the 2010 Regulations, and by way of the Order dated 31.03.2016 and the corrigendum order dated 13.06.2016 in Petition No. 1/MP/2016; as it is a transmission licensee, the tariff determination and recovery, with respect to PGCIL, is governed by the provisions of the Tariff Regulations notified by the CERC under Section 178 r/w Section 61 and 62 of the Act; the assets of PGCIL received tariff on a cost-plus basis, and their right to receive tariff had

been crystallized under the provisions of the 2019 Regulations which recognises a situation where the assets of one licensee may be ready while the inter-connecting system of the other licensee may not be ready; a licensee which comes in time is entitled to seek a declaration of deemed Commercial Operation Date under Regulation 5; Regulation 6 provides for treatment of mismatch in the date of commercial operation; as their assets were ready, and they were prevented from achieving Commercial Operation because of the default of either the interconnected transmission system of the other transmission licensee or generating station, PGCIL was entitled to seek a declaration of the deemed commercial operation date under the second proviso to Regulation 5(2); on the deemed COD being recognised by CERC, PGCIL is entitled to recover its tariff from the transmission licensee which has delayed the inter-connecting transmission assets; if any such delay had been caused by PGCIL, they would then have been asked to bear the transmission charges of the other licensee; the manner of determination of tariff of the Appellant and PGCIL, and the treatment of mismatch provided in Regulation 6 either between a generating company and a transmission licensee or between two inter-connected transmission licensees, cannot be made subject to the manner of determination of tariff under Section 62 and 63 of the Act or as to how either

of the parties is recovering its own tariff for their respective assets; and, as the transmission lines of PGCIL were ready by 26.07.2019, the Appellant was called upon to pay them a sum of Rs. 5,12,88,268/- for the mismatch period from 27.09.2019 to 30.07.2021, i.e. Rs. 4,35,67,934/- towards the principal, and Rs. 77,20,334/-.towards interest.

23. It is convenient to examine the elaborate rival submissions, both oral and written, put forth by Sri Sanjay Sen, learned Senior Counsel appearing on behalf of the Appellant, Mrs Suparna Srivastava, Learned Counsel appearing on behalf of CTUIL, and by Mrs. Swapna Seshadri, learned Counsel appearing on behalf of PGCIL, under different heads.

IV.DOES THE ORDER OF THE CENTRAL GOVT, UNDER SECTION 107 OF THE ACT, HAVE THE FORCE OF LAW AND IS IT BINDING ON THE CERC?

24. Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the Central Government, while issuing the Section 107 order on 15.01.2021, recognised the issues arising out of subsequent promulgation of Regulations after the bidding process was over, and had therefore issued certain directions; the Order passed under Section 107 is binding on the CERC; Section 63 of the Act shows that the bidding process, under which the Appellant

came, is completely governed by the Bidding Guidelines issued by the Central Government; as such, the aforesaid notification issued by the Central Government can also be considered as a 'clarification' of the Bidding Guidelines themselves, thereby having the force of law, and not merely a request to be implemented in future; the MOP notification/order dated 15.01.2021 clarifies the legal position regarding imposition of transmission charges, in excess of the levy of liquidated damages, through promulgation of Regulations after the bidding process is over; the MoP Notification dated 15.01.2021 is issued to safeguard/ encourage private participation, thereby encouraging competition in transmission infrastructure, by preventing levy of any uncontemplated charges, post finalisation of the bidding process and award of the project under Section 63 of Act; otherwise, private participation will be discouraged, which would be detrimental to public interest as transmission costs will go up based on less competition.

25. Learned Senior Counsel would submit that the Judgments of this Tribunal in **Steel City Furnace Association v. PSERC & Ors (Order in Appeal No. 189 of 2022, 369 of 2022 and 4 of 2021 – dated 31.10.2022)**, and in ***Kerala State Electricity Board v. KSERC & Ors. (Order in Appeal No. 5 of 2009 – dated 18.08.2010),*** are inapplicable as any direction issued under Section 107(2) of Act, in public

interest, *is binding*; and the findings rendered by the CERC, in Para 25 of its Order in Petition No. 116/TT/2017 dated 16.11.2022, is in the teeth of the Judgment passed by this Tribunal in Appeal No. No 17 of 2019, titled as ***NRSS XXXI (B) Transmission Ltd. v. CERC & Ors*.** (Para 8.24).

26. On the other hand, Mrs. Swapna Seshadri, Learned Counsel for PGCIL, would submit that the contention, that the Central Government issued binding directions under Section 107 of the Act, as there was a gap in the manner in which CERC dealt with cases of mismatch between Section 62 and Section 63 tariff regimes, is not tenable; as held by this Tribunal, in **Steel City Furnace Association v. PSERC & Ors (Order in Appeal No. 189 of 2022, 369 of 2022 and 4 of 2021 dated 31.10.2022**), and ***Kerala State Electricity Board v. KSERC & Ors. (Appeal No. 5 of 2009 dated 18.08.2010)***, the Regulatory Commissions are not bound by the directions issued by the Central/State Governments under Sections 107/108 of the Act; accepting this contention of the Appellant would set a dangerous precedent, since statutory regulations and functions of the Commissions will be controlled by directives under Sections 107/108 of the Act; the entire purpose of distancing the Government from the tariff fixation exercise, by framing the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003, will be rendered futile thereby; further, this contention of the

Appellant is mutually destructive to the pleas taken by it earlier for if, indeed, the 2019 Regulations are not applicable to the Appellant, there would be no need for the Central Government to issue the Section 107 directive at all.

27. Before examining the rival contentions under this head, it is useful to note the contents of the letter dated 15-01-2021.

A. Letter of the Ministry of Power, GOI dated 15th January, 2021:

28. The Ministry of Power, Government of India, while referring to the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020 ("Sharing Regulations") in its letter dated 15.01.2021, informed the CERC, among others, that, in its role as a nodal agency, CTU signs Long-Term Access Agreements (LTA) with the users (long term customers); the Ministry was actively considering amending the TBCB Guidelines to require the CTU to sign the Transmission Service Agreements (TSA) for development of the ISTS elements with the transmission licensees; the CTU also bills and collects ISTS charges from the users and disburses inter-state transmission charges to the transmission licensees after collection from DICs; as the nodal agency for the ISTS, the CTU acts as a bridge between the users and the transmission licensees; it co-

ordinates with the transmission licensees on the one hand and the users on the other; there is no direct relationship between the transmission licensees and the users (other than for ATS under TBCB route, which is also proposed to be changed in the revised Guidelines being issued by the Ministry under Section 63 of the Act); and this was also neither desirable nor possible since the ISTS is an inter-connected system, with many sub-systems and multiple transmission licensees, which are used by multiple users as a shared resource.

29. It is further stated in the said letter dated 15.01.2021 that, given that the ISTS is an inter-connected system with multiple licensees and users, it is important to recognize that the relationship of the licensees, as well as users of the ISTS, should be with the CTU for all purposes; the 2020 Sharing Regulations require that an ISTS licensee whose transmission system is delayed, rather than the CTU on behalf of the DICs, pays transmission charges to the licensee of an inter-connected transmission element / generation company whose deemed Commercial Operation Date (COD) is declared (Regulation 13(12)); similarly, Regulation 13(8) requires payment of the transmission charges of the Associated Transmission System by a transmission licensee to a generating company in case of delay in commissioning the Transmission System for the period from the COD of the

generating station to the COD of the ATS; conversely, on delay of COD by a generating station, the generating company concerned is required to pay the transmission charges of the ATS and the dedicated lines for the period from the COD of the ATS or the dedicated line, as the case may be, to the COD of the generating station (Regulation 13(5) and 13(9)); in all these cases, there is no contract or direct relationship between the defaulting party and the aggrieved; it is not proper to require a third entity, not party to a contract, to compensate either party to a contract; these clauses are also not proper for the following reasons: (i) the penalties are uncapped. This puts a lot of risk on the licensee and will lead to inflated bids, which will not be in public interest. (ii) the penalties, in case of regulation 13(12), are not linked to the project cost of the defaulting party; (iii) in case of TBCB projects, (a) the defaulting licensee is already required to pay liquidated damages as per the TSA; (b) the above-mentioned additional amount is not specified in the TSA. Requiring additional payments through Regulations is not in the spirit of Section 63 of the Act, according to which the Commission is required to adopt the tariff; (c) there is no provision in the TSA for payment by the generating company to the transmission licensee in case of delay of COD of the generating station. It is not proper to levy the same through Regulations after the TSA has been signed; (iv) it changes

the payer from the CTU (on behalf of the DICs) to the defaulting party.

30. The letter dated 15.01.2021 goes on to state that the Sharing Regulations do not recognize events of force majeure which may delay COD of a transmission element or a generating station; moreover, clause (1) (c) of Regulation 13 of the Sharing Regulations exempts transmission charges for power generated from solar and wind power for a period of twenty five years from generating stations whose capacity is declared to be under commercial operation on or before 3l.12.2022 which date has been extended by the Ministry; moreover, there may be delay in COD of a solar or wind power generating station due to an event of force majeure or due to delay in commissioning of the associated transmission system; and the Sharing Regulations thus need to be amended to provide for these.

31. It is also stated, in the said letter dated 15.01.2021, that in most cases a power producer (generating plants) or power procurer (distribution companies) will be connecting to the existing network without any requirement of upgradation of the network; in such a case, the only cost to be incurred is the cost of connecting to the network and this cost is to be met by the entity connecting to the system whether it is a producer of power (generator) or procurer of power (DISCOM); in such a case, if the producer of power does not

begin to inject power into the system on the scheduled date or the DISCOM does not begin drawing the power on the scheduled date, it is not causing any loss to the system; however, the delays on both the sides should attract penalties (reasonable) so that grid discipline is maintained (i) where the addition of a generating unit or the increase in consumption by a DISCOM entails the strengthening of the transmission system at any particular point then, more often than not, the strengthening will not be only for one generator/ DISCOM but will provide for a larger capacity addition to be used by many generators or consumers down the line; the entire burden of strengthening, which will serve many producers/procurer in the future, cannot be levied on one producer/ procurer; (ii) the penalties for the failure of the Generator or procurer or Transmission entity to adhere to the committed timelines need to be equitable; therefore, if it is proposed that where a transmission entity completes the construction of the line, but the upstream (generation or other transmission segment) or downstream (Distribution or downstream segment of transmission) is not ready, the defaulting entities pay the full transmission charges, then a similar penalty will need to be levied on the transmission entity and if it fails to adhere to the time line it will need to pay the cost of power not despatched; this construct is impractical as is puts an unacceptable burden of risk on the

constituents; the system must provide for penalties for delays, but seeking to compensate any party for the losses will not be feasible; (iii) where the determination has been made of the existence of force majeure, in accordance with the provisions of the contract governing the setting up of power plants, it should not be re-opened again in a litigation before the CERC.

32. The letter dated 15.01.2021 concludes holding that, in view of the above, the Central Government in public interest, under Section 107 of the Electricity Act, 2003 was issuing directions to the Central Electricity Regulatory Commission to amend the Sharing Regulations to provide for the following: (i) On COD of an element of ISTS, its Transmission Charges be included for determination of transmission charges of DICs in accordance with Regulations 5 to 8 of the Sharing Regulations, independent of the readiness of associated generation or upstream or downstream transmission elements; (ii) no additional penalties, through Sharing Regulations, to be levied for delay in COD of an element of ISTS in the Regulations; delay automatically causes losses to the transmission licensees in the form of delay in realization of revenues, increased finance cost, etc; moreover, in case of TBCB projects, the penalties for default are already provided in the form of liquidated damages which are linked to the project tariff in TSA; so, there are sufficient

disincentives to the transmission licensees for delay in COD; the penalties recovered from the ISTS licensees for delay in commissioning shall be shared with the DICs; (ii) no additional penalties, through Sharing Regulations, to be levied for delay in COD of an element of ISTS in the Regulations; delay automatically causes losses to the transmission licensees in the form of delay in realization of revenues, increased finance cost, etc; moreover, in case of TBCB projects, the penalties for default are already provided in the form of liquidated damages which are linked to the project tariff in TSA; so, there are sufficient disincentives to the transmission licensees for delay in COD; the penalties recovered from the ISTS licensees for delay in commissioning shall be shared with the DICs; (iv) where a Renewable Energy generation capacity, which is eligible for ISTS waiver in terms of the extant orders, is granted extension in COD by the competent authority, the commencement and the period of the LTA shall also get extended accordingly, and it will be deemed that the period of ISTS waiver is extended by the said period; and (v) events of force majeure may be defined and provision included enabling the CTU to extend the COD of a generating station and the LTA start date for reasons of force majeure.

33. The sum and substance of the letter dated 15.01.2021 is that there is no direct relationship between the transmission

licensees and the users; the relationship of the licensees, as well as users of the ISTS, should be with the CTU; as there is no contract or direct relationship between the defaulting party and the aggrieved, it is not proper to require a third entity, not a party to a contract, to compensate either party to a contract; the clauses in the 2020 Regulations are not proper as the penalties are uncapped which would lead to inflated bids; in the case of TBCB projects, the defaulting licensee is already required to pay liquidated damages as per the TSA, and the additional amount is not specified therein; requiring additional payments through Regulations is not in the spirit of Section 63 of the Act; such a levy changes the payer from the CTU (on behalf of the DICs) to the defaulting party; the Sharing Regulations do not recognize events of force majeure; the entire burden of strengthening, which will serve many producers/procurer in the future, should not be levied on one producer/procurer; and the Central Government in public interest, under Section 107 of the Electricity Act, 2003, was therefore issuing directions to the CERC to amend the 2020 Sharing Regulations.

34. As the aforesaid directions were issued under Section 107 of the Act, it is necessary to examine its scope.

B.**SECTION 107 OF THE ACT: ITS SCOPE:**

35. Section 107 of the Electricity Act relates to directions by the Central Government, and under sub-section (1) thereof, in the discharge of its functions, the Central Commission shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing. Section 107(2) provides that, if any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.

36. Section 108 of the Electricity Act relates to directions by the State Government, and under sub-section (1) thereof, in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Section 108(2) stipulates that, if any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final. Section 108 of the Electricity Act is in pari-materia with Section 107 of the Act, except that Section 108 relates to 'Direction by the State Government' to the 'State Commission', and Section 107 relates to 'Direction by the Central Government' to the 'Central Commission'. While the Central Commission is required to be guided by such directions in the matters of

public interest, the directions of the Central Government, under Section 107 of the Act, are not binding on them.

C.JUDGMENTS UNDER THIS HEAD:

37. In **APTRANSCO vs Sai Renewable Energy Pvt. Ltd: (2011) 11 SCC 34,** the Supreme Court held that the State Commission was not bound by any policy directions issued by the Government under the Act, if such directions hampered the statutory functions of the Commission; all policy directions shall be issued by the State Govt consistent with the objects sought to be achieved by this Act and, accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers; the State Govt. was further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and to duly take into account the recommendations of the Regulatory Commission on all such matters; the scheme of the provisions was to grant supremacy to the Regulatory Commission; the State was not expected to take any policy decision or

planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions; fixation of tariff was the function of the Regulatory Commission; and the State Govt. had a minimum role in that regard.

38. In **Kerala State Electricity Board v. Kerala State Electricity Regulatory Commission (Order in Appeal No. 05 of 2009 dated 18.08.2010),** this Tribunal held that it is settled law, as laid down by this Tribunal as well as the Supreme Court, that all the policy directions are not binding on the State Commission, since the State Government cannot curtail the powers of the State Commission in the matter of determination of tariff; and the State Commission was perfectly in its right to disregard the directive, through a letter by the Government, on rates of depreciation as applicable for determination of ARR and ERC

39. In ***SIEL Limited Vs. Punjab State Commission*** **(**Order in Appeal No. 4, etc. of 2005 dated 26.05.2006), this Tribunal held that the State Commission had the powers to determine the tariff; the orders passed by it, under Section 61 and 62 of the Act relating to tariff, will bind the State Governments; the Commission is an independent statutory body and its directions, in terms of the Act, are binding on the State Electricity Board whose *de jure* owner is the State; the Appropriate Commission, while determining tariff, is required

to be guided by the parameters enshrined therein; one of the factors, on the basis of which tariff is to be determined, is the consumer interest; sub-clause (d) of Section 61 requires the Commission to safeguard the interest of the consumers and ensure that the recovery of the cost of electricity is effected in a reasonable manner; there was nothing in Sections 61 and 62 of the Electricity Act to show that orders relating to tariff will not bind the State Government; the Commission is an independent statutory body; the Commission is not powerless to issue orders and directions relating to matters having a bearing on and nexus with the determination and fixation of tariff; its directions are binding on all persons and authorities, including the State Government; and the State Commission is perfectly in its right to disregard the directive, through a letter by the Government, on rates of depreciation as applicable for determination of ARR and ERC.

40. In **Polyplex Corporation vs Uttarakhand Electricity Regulatory Commission (Order in Appeal no. 41,42 and 43 of 2010 dated 31.01.2011)**, this Tribunal held that the State Commission was an independent statutory body; therefore, the policy directions issued by the State Government were not binding on the State Commission, as those directions could not curtail the power of the State Commission in the matter of

determination of tariff; the State Government may have given any such policy direction in order to cater to the popular demand made by the public, but while determining tariff the State Commission may take those directions or suggestions for consideration, but it is for the State Commission which has a statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances; and it was purely discretionary on the part of the State Commission on acceptability of the directions issued by the state government in the matter of determination of tariff.

41. In **Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Regulatory Commission & Anr. (Order in Appeal No. 92 of 2013 & IA No. 151 of 2013 dated 21.01.2014),** this Tribunal was called upon to consider whether the directions issued under Section 108 were binding on the State Commission. Relying on the judgment of the Supreme Court in **APTRANSCO vs Sai Renewable Energy Pvt. Ltd:(2011)11SCC 34,** and the judgment of this Tribunal, in **Polyplex (Order in Appeal No. 41,42 and 43 of 2010 dated 31.01.2011),** this Tribunal held that the following inferences could be made: (1) the Commissions are independent

statutory authorities and are not bound by any policy or direction which hamper its statutory functions; (2) the term ‘shall be guided’ is not mandatory, and its character would depend upon a case to case basis; the State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government, but the same are not mandatory; and the State Commission being an independent statutory authority is not bound by any policy directions which hampers its statutory functions.

42. This Tribunal then summarised its findings as under: **(i)** the State Commission in discharge of its functions under the Electricity Act, 2003 has to be guided by the directions of the State Government u/s 108 of the 2003 Act, but the same are not mandatory and binding. The State Commission being an independent statutory authority is not bound by any policy directions which hampers its statutory functions. (ii) the State Commission has to be guided by the directions of the State Government u/s 108 of the Act only in the discharge of the functions assigned to it under the 2003 Act. Such directions have to be implemented only under the functions and powers assigned to the State Commission under the 2003 Act.

43. **In Steel City Furnace Association v. Punjab State Electricity Regulatory Commission & ors. (Order in APPEAL No. 189 of 2022, 369 of 2022 and 4 of 2021 dated 31.10.2022),** it was contended that the Commission was bound by the order issued by the State Government '*in public interest*' in exercise of the powers vested in it by Section 108 of the Electricity Act. In this context, this Tribunal observed that they could not subscribe to the view that the directions of the State Government, under Section 108 of the Electricity Act, would bind the State Commission; that was not the mandate of the statute; the law only said that the State Commission '*shall be guided*' by such directions as may be issued by the State Government in matters of public interest'; the provision contained in Section 108 could be contrasted with Section 11 of the Electricity Act, 2003 wherein an appropriate government is vested with the power '*in extraordinary circumstances*' to specify that the generating companies shall operate and maintain their generating stations '*in accordance with the directions*' of the government; the expression "*extraordinary circumstances"* was defined by the explanation to mean such circumstances as may arise out of threat to the security of the State, public order or a natural calamity or "*such other circumstances arising in the public interest"*; given the language employed in Section 11, there could be no debate that the generating companies

were *bound* to act '*in accordance with*' the directions of the government issued to deal with the situation arising out of such extraordinary circumstances, the caution being – as provided by sub-section (2) – for such measures also to be adopted as would "*offset the adverse financial impact of the directions"* for the generating companies; and in contrast, Section 108 of the Electricity Act only expected the State Commission to *"be guided by*" the directions of the State Government.

44. For the CERC to be guided by the directions issued under Section 107(1) of the Act, such directions should have been issued by the Central Govt, in writing, on a policy matter involving public interest. Firstly, not every direction issued by the Central Govt would fall within the ambit of Section 107(1). The directions in writing must relate to a matter of policy. Again not all matters of policy, but only those policy directives which involve public interest fall within the ambit of the said provision. Further Section 107(1) only requires the CERC, in the discharge of its functions, to be guided by such directives. The meaning of the words "guided by" is to be "assisted by in reaching a conclusion". The directives of the Central Govt, under Section 107(1), can only be of assistance to the CERC in taking a decision and, while the CERC should take such directives into consideration while discharging its functions, it is not bound by such guidance.

45. That apart, the guidance provided by the directives of the Central Govt is confined to the functions which the CERC is required to discharge. PART X of the Act relates to the Constitution, powers and functions of the Central Commission, and Section 79 thereunder relates to the functions of the Central Commission. Under sub-section(1) thereof, the Central Commission is required to discharge the functions namely those in clauses (a) to (k) thereunder. While Section 79(2) relates to matters on which the Central Commission is required to advise the Central Govt, Section 79(3) requires the Central Commission to ensure transparency while exercising its powers and discharging its functions. Besides being guided by the directives of the Central Govt under Section 107(1), the CERC is also required, in terms of Section 79(4), to be guided by the National Electricity Policy, the National Electricity Plan and the tariff policy published under Section 3(2) of the Act.

46. Unlike Section 79 under PART X of the Act which relates to the functions of the CERC, Section 178, under PART XVIII of the Act, relates to the powers of the Central Commission to make regulations. Under Section 178(1), the Central Commission may, by notification, make regulations, consistent with the Act and the Rules, generally to carry out the provisions of the Act. Section 178(2) provides that, in particular and without prejudice to the generality of the power

contained in sub-section (1), such regulations may provide for any of the matters enumerated in clause (a) to (ze) thereunder. Section 178(2)(ze) relates to any other matter which is to be, or may be, specified by regulations. Section 2(62) defines “specified” to mean specified by regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act.

47. Section 2(46) defines “notification” to mean notification published in the Official Gazette, and the expression “notify” shall be construed accordingly. The only fetters placed by Section 178(1), on the CERC exercising its powers to make regulations, are (1) they should generally be made to carry out the provisions of the Act; (2) they must be consistent with the Act and the Rules; and (3) they must be notified in the Official Gazette. The power to make regulations under Section 178(1) is not subject to any other restrictions, much less to the directives under Section 107(1). As the directives of the Central Govt, under Section 107(1), serve only as a guide to the CERC in the discharge of its functions, the guidance is applicable only when the CERC discharges its functions under Section 79, and not while exercising its powers to make regulations under Section 178 of the Act. The directives, in the letter of the Ministry of Power dated 15.01.2021, for the CERC to suitably amend the 2020

sharing regulations, thus falls well beyond the scope of Section 107(1) of the Act.

48. Since Sri Sanjay Sen, Learned Senior Counsel, had contended that the CERC had not even considered the letter dated 15.01.2021, we had suggested that the matter could be remanded on this score. He, however, stated that no useful purpose would be achieved in doing so, as the CERC had already taken a view in this regard in another case. What the Learned Senior Counsel was, evidently, referring to was the Order of the CERC, in **Power Grid Corporation of India Limited v. Ajmer Vidyut Vitran Nigam Limited and ors (Order in Petition No. 116/TT/2017 dated 16.11.2022),** holding that Section 108 of the Act was on an equivalent footing with Section 107 of the Act with only one difference that Section 108 deals with 'Direction by the State Government' to the 'State Commission' while Section 107 deals with 'Direction by the Central Government' to the 'Central Commission'; except this, there was no variation in the language applied in both the Sections; they were of the view that the directions given by the Central Government under Section 107 of the Act were not binding in nature; however, the Central Commission shall be guided by such directions in the matters of public interest; the Commission's Regulations do not provide that, where there is no contractual relationship, the Commission cannot impose

transmission charges for a transmission system, merely because the upstream or downstream system was not constructed at the time of execution of the transmission system; and the approach of the Commission in the cases of mismatch was consistent that the defaulting upstream/downstream entity was liable for payment of charges on whose account the associated asset was stranded.

49. Section 63 of the Act merely requires the Commission to adopt the tariff, if such tariff is determined through a transparent process of bidding in accordance with the guidelines issued by the Central Govt, and nothing more. The tariff to be determined for the Appellant's transmission assets is not in issue in the present case. On the other hand, the dispute relates to imposition of transmission charges for the mismatch period on the Appellant, in Section 62 proceedings determining the tariff for the transmission assets of PGCIL. While it is true that the bidding process, under which the Appellant came, is governed by the Bidding Guidelines issued by the Central Government in terms of Section 63 of the Act, neither can such guidelines nor the notification issued under Section 107 of the Act, be elevated to the status of a subordinate legislation having the force of law as, unlike the latter, the former does not have statutory sanction. The objects for which the Section 107 proceedings were

issued matter little, as the directions issued therein, calling upon the CERC to amend the Regulations made by it earlier, cannot be given effect to as Section 107 of the Act does not confer any such power on the Government.

50. In Para 25 of the impugned Order, all that the CERC has held that Asset-6 had been put under commercial operation long after its SCOD. As the submission, urged on behalf of the Appellant, is that the findings recorded therein are contrary to the order of this Tribunal in **NRSS XXXI (B) Transmission Ltd,** it is useful to take note of the contents of the said judgement.

51. In **NRSS XXXI (B) Transmission Ltd. Vs. Central Electricity Regulatory Commission and Ors: (Order in APPEAL NO. 17 OF 2019 dated 14.09.2020), t**he Appellant could not complete the Project on the Scheduled Date. As per the granted transmission license dated 25.08.2014, the Project completion period was 28 months from its effective date. The Commercial Operation Date (COD) of the 400 kV D/C Kurukshetra–Malerkotla Transmission Line was declared on 18.01.2017 with a delay of 128 days. The Deemed Commercial Operation Date of 400 kV D/C Malerkotla–Amritsar Transmission Line was declared on 27.03.2017 with a delay of 196 days. On 09.12.2016, PGCIL filed a petition before the CERC alleging that the delay was mainly due to matching the bays with the upcoming TBCB line. The

issue of delay in commissioning of the transmission line by the Appellant was pending by way of a separate petition, in which they had detailed force majeure reasons explaining the time and cost overruns. On 30.11.2017 the CERC passed an Order holding the Appellant liable for payment of IDC and IEDC for their delay in commissioning the assets. By way of the Impugned Order, the Appellant was mulcted with IDC and IEDC costs without adjudicating and giving any finding on the reasons given by the Appellant for the said delay. Aggrieved by the Impugned Order passed by the CERC on the above aspect, the Appellant preferred an Appeal before this Tribunal. Among the questions, which arose for consideration in the Appeal, was whether, in the facts and circumstances of the case, the CERC was right in placing the liability of payment of IDC and IDEC on the Appellant?**.** Before the CERC the Appellant had specifically raised the issue of delay in the commissioning of the Appellant's assets being due to force majeure events, and subsequent to the filing of the above appeal by the Appellant, the Petition filed by the Appellant was decided by the CERC concluding that the delay on the part of the Appellant in commissioning the associated assets of the Appellant was due to Force Majeure events, beyond the control of the Appellant.

52. This Tribunal noted that, as a matter of fact, the assets/bays of PGCIL could not be put to use on account of delay in

implementation of the transmission lines being constructed by the Appellant; the CERC had decided COD of the bays of PGCIL as per Regulation 4 (3) (ii) of the Tariff Regulations, 2014, and had directed that the IDC and IEDC of the assets of Respondents No 2, from their respective dates of commercial operation till the commissioning of the Appellant's transmission system, shall be billed to the Appellant; it was held by the CERC that, as the bays could not be put into regular service without the commissioning of the associated transmission line, COD of Asset I and Asset II, i.e. the bays of PGCIL, shall be considered from the date of COD of the associated line being implemented by the Appellant; it was the submission of the Respondents that the consistent position adopted by the CERC and upheld by this Tribunal was that, in the event of mismatch in the commissioning of the inter-linked transmission systems, the transmission licensee (or its long-term customers) whose assets are not yet ready, and because of which the already commissioned assets of the other transmission licensee have not been put in regular service, is liable to pay the transmission charges till commissioning of the inter-linked downstream/upstream transmission system; the principles laid down for such cases by the CERC, and upheld by this Tribunal in the context of mis-match in commissioning of transmission systems by different licensees, were (i) The

LTTCs/beneficiaries are liable to pay transmission charges only when the Transmission System is being used or put to use, (ii) in the absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014, the CERC, through exercise of its regulatory powers, has prescribed the aforesaid principles for sharing of transmission charges of the Transmission System; (iii) the statutory basis for the decision by the CERC to assign liability for payment of transmission charges in such matters is based on the Supreme Court's judgement wherein the Apex Court has held that decision-making Authority of the Commission under Section 79 (1) of the Act is not dependent upon making of regulations under Section 178 of the Act, and if any regulations are framed by the CERC under Section 178 of the Act, then the decision of the CERC has to be in accordance with the said regulations; the bays of PGCIL could not be put into regular service without the commissioning of associated transmission line of the Appellant; therefore, the Commission decided that the COD of the bays constructed by PGCIL shall be considered from the date of COD of the associated line; and, subsequently, the Commission granted relief to the Appellant by allowing delay in grant of forest clearance as an event of force majeure, and allowed extension of COD of the Appellant's transmission system till the actual COD.

53. In examining the question whether liability of IDC and IEDC of the assets of Respondent No 2 could be imposed on the Appellant when the Commission had condoned the delay in commissioning of its transmission assets on account of force majeure event, and had allowed extension of COD of its transmission system within the terms of the TSA dated 02.01.2014, this Tribunal held that, admittedly, the Appellant had implemented the project under TBCB route as per the TSA dated 02.01.2014; the Appellant was entitled to extension of the commercial operation date under Article 11 of the TSA (force majeure), if the project implementation was affected due to force majeure event(s); once the Commission allows extension of COD of the transmission elements/system under the terms of the TSA, it revokes all the tacit or explicit agreements made by the parties or system planning authorities regarding scheduled commercial operation dates of transmission elements; the Scheduled Commercial Operation date is accordingly shifted to actual COD; thus, the decision of the CERC to impose liability of IDC and IEDC of PGCIL bays on the Appellant, for the delay in commissioning of the transmission system, was completely contradictory to the relief granted to the Appellant under the provisions of force majeure of the contract by way of extension of COD; imposing liability of IDC and IEDC on the Appellant defeats the objective of introducing the

provision of force majeure in the TSA i.e. to save the Appellant from the consequences of anything over which it has no control; when the relief is available under the force majeure provisions of the contract, the Commission ought not to have penalised the Appellant for the same act outside the contract, particularly when there is no such provision in the sharing regulations which the Appellant could have made itself aware of before bidding for the project; the Commission, in the impugned order and order dated 29.03.2019, had decided that, even if the COD of the transmission licensee has been extended on account of Force Majeure event, the licensee has to pay transmission charges for upstream/downstream assets for the period of delay; therefore, the bidder had to mandatorily consider this scenario while submitting the bid; they failed to understand the rationale behind this, as to how a transmission licensee can submit a reasonable bid when it is not aware of the liability pertaining to anticipated duration of such delay and the cost of the upstream/down-stream assets before submitting the bid; the same is equally applicable for the delay in achievement of COD on account of force majeure events by the projects implemented/being implemented through Regulated Tariff Mechanism (RTM); and the infrastructure projects, involving huge investments, must not be party to such regulatory uncertainties, that too without

remedy; admittedly, the CERC does not issue the directions for sharing of transmission charges in such cases as per the Sharing Regulations framed under Section 178 of the Act, but by exercising regulatory power under Section 79 of the Act; therefore, such transmission charges, in the absence of a contract, are more in the nature of 'damages' for delay in commissioning of assets and cannot be qualified as sharing of transmission charges; however, breach of contract is a pre-condition to claim 'damages' under Section 73 and Section 74 of the Indian Contract Act, 1872; it was undisputed that there exists no contract between the licensees implementing the inter-linked transmission systems in such cases; and, therefore, it was not prudent on the part of the CERC to impose such liability on the transmission licensees without their entering into a contract.

54. In **NRSS XXXI (B) Transmission Ltd,** this Tribunal was of the view that imposition of transmission charges was in the nature of levy of 'damages' for delay in commissioning of assets; breach of contract was a pre-condition to claim 'damages' under Section 73 and Section 74 of the Indian Contract Act, 1872; and, as there existed no contract between the licensees implementing the inter-linked transmission systems in such cases, it was not prudent on the part of the CERC to impose such liability on the transmission licensees without their entering into a contract.

The order imposing transmission charges was interfered with as the CERC had, in the absence of any Regulations framed under Section 178 of the Act for sharing of transmission charges in such cases, issued such directions in the exercise of its regulatory power under Section 79 of the Act.

55. In the present case, however, imposition of transmission charges on the Appellant was in terms of the 2019 and 2020 Regulations made by the CERC in the exercise of its regulation making power under Section 178 of the Act. A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation. As Regulations make an inroad into even existing contracts, on the making of Regulations, even existing power purchase agreements (PPA) should be modified and aligned with the said Regulations. All contracts, coming into existence after making of the Regulations, should also factor in the Regulations. Regulatory intervention, into existing contracts across the board, can only be done by making Regulations under Section 178 of the Act. (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).**

D.REGULATIONS ARE STATUTORY IN CHARACTER AND HAVE THE FORCE OF LAW:

56. It is a common legislative practice that the Legislature may choose to lay down only the general policy and leave to its delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the statute by framing rules/regulations which are in the nature of subordinate legislation. **(*Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27)**. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations, made by reason of the specific power conferred by the statutes, establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The power to legislate by statutory instruments, in the form of rules and regulations, is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened, and the needs of the modern day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. A delegated legislation should be read in the context of the primary statute under which it is made. **(*NOVVA ADS v. Deptt. of Municipal Admn. and Water Supply*, (2008) 8**

SCC 42; *St. Johns Teachers Training Institute* v. *National Council for Teacher Education*: (2003) 3 SCC 321). Rules and Regulations made under a statute must be treated, for all purposes of construction or obligations, exactly as if they were in that Act and are to the same effect as if they were contained in the Act. **(State of U.P. v. Babu Ram Upadhyaya: AIR 1961 SC 751; *Peerless General Finance and Investment Co. Ltd. v. RBI*, (1992) 2 SCC 343)**. Regulations are incorporated and become part of the Act itself. They must be governed by the same principles as the statute itself. The statutory presumption that the legislature inserted every part thereof for a purpose, and the legislative intention should be given effect to, would be applicable to the Regulations. (***Peerless General Finance and Investment Co. Ltd. v. RBI*, (1992) 2 SCC 343)**. Rule or Regulation making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class. They affect the rights of individuals in the abstract and are applied in a further proceeding before the legal position of any particular individual will be definitely affected. (**Bernard Schwartz in Administrative Law, p. 144 (1976); Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223**). A regulation, made under Section 178 of the Act, is in the nature of subordinate legislation. Applying the test of "general

application", a regulation stands on a higher pedestal vis-à-vis an order (decision) of the Commission, in the sense that an order has to be in conformity with the Regulation. (**PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603**).

57. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act, and it is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. Courts do not examine the merits or demerits of such a policy because its scrutiny is limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute. **(*Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27).** As power delegated by statute is limited by its terms and subordinate to its objects, the delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. **(*Shri Sitaram Sugar Co. Ltd. v. Union of India*, (1990) 3 SCC 223).** So long as the body entrusted with

the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, Courts neither concern themselves with the wisdom or efficaciousness of such rules or regulations nor would they interfere unless the particular provision suffers from any legal infirmity. **(*Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27).**

58. Both the 2019 and the 2020 Regulations, made by the CERC in the exercise of the powers conferred on it under Section 178 of the Act, must be treated, for all purposes of construction or obligations, exactly as if they were in the Electricity Act and are to the same effect as if they were contained in the said Act. These Regulations are statutory in character, constitute law, and are binding on all the regulated entities including the appellant herein (as well as the CERC and even this Tribunal). Consequently, even in the absence of a contract between them and PGCIL, the Appellant would nonetheless be governed by these 2019 and 2020 statutory regulations. Reliance placed on behalf of the Appellant, on **NRSS XXXI (B) Transmission Ltd**, is therefore misplaced.

59. Viewed from any angle, we are satisfied that the directives in the letter dated 15.01.2021 do not bind the CERC, and it could not have been directed to amend the regulations. The

power to declare subordinate legislation ultra vires, lies only with the Supreme Court and the High Courts exercising the power of judicial review, and is not within the province of the Central Govt or even this Tribunal. In any event, as the 2019 and the 2020 Regulations continue to remain in force, it is unnecessary for us to consider whether, even if it were to be amended, the amended provision would have any application to the present case.

60. For the aforesaid reasons the contentions, urged on behalf of the appellant under this head, necessitate rejection.

V.DOES THE SCHEME OF THE ELECTRICITY ACT NOT PERMIT IMPOSITION OF TRANSMISSION CHARGES ON THE APPELLANT?

61. Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that one 'inter-state' transmission licensee (i.e. PGCIL) cannot be permitted to impose "transmission charges" upon another 'inter-state' transmission licensee (i.e the Appellant), as the same is not provided under Sections 38 and 40 of the Act (charging provisions); levy of "transmission charges" is strictly governed by the provisions of the Parent Statute (EA 2003); from a perusal of Sections 2(47), 38(2)(d) & 40(c) of the Act, the following scheme emerges qua levy of transmission charges: (a) as per Section 2(47) of the Act, '*open access*' is

a non-discriminatory provision for the use of transmission lines by a licensee or consumer or a person engaged in generation, in accordance with the regulations specified by the Appropriate Commission; (b) as per Regulation 12 of the CERC Connectivity Regulations, 2009 ("the 2009 Regulations" for short), for grant of open access, there has to be a formal application containing certain details; (c) as per Regulation 2(1)(l) and 2(1)(n) of the said Regulations, Long-Term Access/ Open Access or Medium-Term Open Access means the right to use the inter-state transmission system; the Regulations contemplate grant of open access qua the inter-state transmission system; admittedly, there is neither any application filed by the Appellant for availing open access in the inter-state transmission system or in the system of PGCIL, nor has the Appellant been granted open access either by CTUIL or PGCIL; as per Sections 38(2)(d) and 40(c) of the Act, transmission charges can be levied only for providing 'open access' and for no other purpose; this means that "transmission charges" are to be paid only by open access customers (i*.e.,* those customers who have been granted open access); apart from generating companies and consumers, only distribution licensees and trading licensees, who have ownership over electrons, can engage in sale or supply thereof; under Section 41 (3rd Proviso) transmission licensees are barred from trading in

electricity; in view of the aforesaid, the Parent Statute does not contemplate imposition of “transmission charges” by PGCIL upon the Appellant as they are neither an open access customer of PGCIL nor of the inter-state transmission system; rather, both the Appellant and PGCIL, are inter-state transmission licensees, and open access providers, and not availers (i.e., both receive payment of transmission charges, not pay/ bear the same); charging statutes or provisions (including Sections 38(2)(b) & 40(c) of the Act) should be strictly construed; and there cannot be any new levy envisaged either by way of any inherent or regulatory powers, or by way of any delegated legislation (as has been done in the present case).

62. On the other hand, Mrs. Swapna Seshadri, Learned Counsel for PGCIL, would submit that Section 38 of the Act merely provides for the functions of the CTUIL which include planning, coordination and development of the ISTS; it is not made clear by the appellant as to how the tariff determination and recovery Regulations contain anything contrary to Section 38; there is also a lack of conceptual clarity on the part of the Appellant in assuming that it has been asked to pay charges towards open access such as Long Term Access Charges, Medium Term Open Access Charges or Short Term Open Access Charges; the Appellant has only been asked to pay ‘transmission charges’ for Asset 6 for the

mismatch period 27.09.2019 to 30.07.2021; this has nothing to do with obtaining open access which entails payment of open access charges; and open access charges are distinct from transmission charges that go towards capital cost recovery.

63. In considering the submissions, urged on behalf of the Appellant under this head, it is useful to take note of the provisions they have relied upon, and other provisions to the extent relevant.

A.RELEVANT PROVISIONS:

64. Section 2 **(**47) of the Act defines “open access” to mean the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. Section 10 of the Electricity Act relates to the duties of Generating Companies and, under sub-section (3) thereof, every generating company shall (a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority; and (b) Co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.

65. Section 38(2) of the Electricity Act stipulates that the functions of the Central Transmission Utility shall be (a) to

undertake transmission of electricity through inter-State transmission system; (b) To discharge all functions of planning and co-ordination relating to inter-State transmission system with –(i) State Transmission Utilities; (ii) Central Government; (iii) State Governments; (iv) generating companies; (v) Regional Power Committees; (vi) Authority; (vii) licensees; (viii) any other person notified by the Central Government in this behalf; (c) To ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres; (d) to provide non-discriminatory open access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission.

66. Section 40 relates to the duties of transmission licensees, and thereunder it shall be the duty of a transmission licensee—(*a*) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be; (*b*) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may

be; (*c*) to provide non-discriminatory open access to its transmission system for use by—(*i*) any licensee or generating company on payment of the transmission charges or (*ii*) any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42 on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.

67. Section 41 relates to other business of transmission licensee, and stipulates that the transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilisation of its assets. Under the first proviso thereto, a proportion of the revenues derived from such business shall, as may be specified by the appropriate commission, be utilised for reducing its charges for transmission and wheeling. The third proviso stipulates that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity.

68. Regulation 2(1) (i) of the CERC (Grant of connectivity, long term access and medium term open access in inter-state Transmission related matters) Regulations, 2009 (the “2009 Regulations” for short} defines ‘Grid Code’ to mean the Grid Code specified by the Commission under clause (h) of sub-section (1) of Section 79 of the Act. Regulation 2(1)(l) of the 2009 Regulations defines ‘Long-Term Access’ to mean the

right to use the inter-state transmission system for a period exceeding 12 years but not exceeding 25 years. Regulation 2(1)(n) defines 'Medium-Term Open Access' to mean the right to use the inter-state Transmission system for a period exceeding 3 months but not exceeding 3 years, and Regulation 2(1)(s) defines **'Short-Term Open Access'** to have the meaning ascribed thereto in the Central Electricity Regulatory Commission (Open Access in inter-state transmission) Regulations, 2008.

69. Regulation 3 relates to the scope of the Regulations and provides that these regulations shall apply to the grant of connectivity, long-term access and medium-term open access, in respect of inter-State transmission system. Under the first proviso thereto, a generating station, seeking connectivity to the inter-State transmission system, cannot apply for long-term access or medium-term open access without applying for connectivity. The second proviso enables a person to apply for connectivity and long-term access or medium-term open access simultaneously. Regulation 4 stipulates that the nodal agency, for grant of connectivity, long-term access and medium-term open access to the inter-State transmission system, shall be the Central Transmission Utility.

70. Chapter 3 of the 2009 Regulations relates to "Connectivity", and Regulation 8 thereunder deals with "Grant of

Connectivity". Regulation 8 (3) provides that, while granting connectivity, the nodal agency shall specify the name of the sub station or pooling station or switchyard where connectivity is to be granted. The applicant or inter-State Transmission Licensee, as the case may be, shall sign a connection agreement with the Central Transmission Utility or inter-State Transmission licensee owning the sub-station or pooling station or switchyard or the transmission line as identified by the nodal agency where connectivity is being granted. Under the proviso thereto, in case connectivity of a generating station is granted to the inter-State transmission system of an inter-State Transmission Licensee other than the Central Transmission Utility, a tri-partite agreement as provided in the Central Electricity Authority (Technical Standards for Connectivity to the Grid) Regulations, 2007 shall be signed between the applicant, the Central Transmission Utility and such inter-State Transmission Licensee. Regulation 8(5) stipulates that the grant of connectivity shall not entitle an applicant to interchange any power with the grid unless it obtains long-term access, medium-term open access or short-term open access.

71. Chapter 4 of the 2009 Regulations relates to "Long-Term And Medium-Term Open Access", and Regulation 9 thereunder deals with the criteria for granting long-term

access or medium-term open access. Regulation 9 (1) provides that, before awarding long-term access, the Central Transmission Utility shall have due regard to the augmentation of inter-State transmission system proposed under the plans made by the Central Electricity Authority. In terms of Regulation 9(2), medium-term open access shall be granted if the resultant power flow can be accommodated in the existing transmission system or the transmission system under execution. Under the first proviso thereto, no augmentation shall be carried out to the transmission system for the sole purpose of granting medium-term open access. Chapter 5 deals with “Long-Term Access”. Regulation 12 thereunder deals with the “Application for long-term access and under sub-regulation (1) thereof, the application for grant of long-term access shall contain details such as the name of the entity or entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured along with the quantum of power and such other details as may be laid down by the Central Transmission Utility in the detailed procedure. Regulation 12 (2) provides that the applicant shall submit any other information sought by the nodal agency, including the basis for assessment of power to be inter-changed using the Inter-State Transmission System and power to be transmitted to or from various

entities or regions to enable the nodal agency to plan the inter-State transmission system in a holistic manner. Regulation 15 deals with Execution of Long-term Access Agreements.

72. Chapter 7 deals with “Conditions Of Long-Term Access And Medium-Term Open Access”. Regulation 26 thereunder deals with “Transmission Charges” and provides that the transmission charges, for use of the inter-State Transmission system, shall be recovered from the long-term customers and the medium-term customers in accordance with the terms and conditions of tariff specified by the Commission from time to time.

73. While the functions of the CTU, under Section 38(2)(d), is to provide non-discriminatory open access to its transmission system for use on payment of the transmission charges, the duty of a transmission licensee, under Section 40(*c*), is to provide non-discriminatory open access for its transmission system to be used on payment of transmission charges. All that Regulation 12(1) of the 2009 Regulations requires is for the applicant, seeking long term open access, to furnish details of the name of the entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured along with the quantum of power. These provisions show that, on payment of transmission charges and on fulfilment of the stipulated

conditions, the Transmission licensee is obligated to provide open access.

74. The first proviso to Section 41 makes it clear that transmission charges are the amounts paid to the transmission licensee. While transmission charges are no doubt paid by those to whom open access is granted, that does not mean that the obligation to pay transmission charges is confined only to those seeking or being granted open access, and none else. Transmission charges for open access are distinct from transmission charges imposed on a transmission licensee, towards capital cost recovery of the transmission asset of another transmission licensee, for the delay on the part of the former in commissioning its transmission asset.

75. Section 62(1)(b) of the Act requires the Appropriate Commission to determine the tariff in accordance with the provisions of the Act for transmission of Electricity. Under the said provision, the CERC approves the capital cost, incurred by the transmission licensee with respect to the subject project, up to the date of its commissioning (its commercial operation date or COD), which the transmission licensee is entitled to recover through its tariff, along with return on equity. PGCIL had filed tariff Petition No. 9/TT/2021 before the CERC, invoking its jurisdiction under Section 62(1)(b), seeking determination of transmission tariff

/ charges for its transmission project, including Asset-6, under Section 62 of the Act read with the 2019 Regulations. Its yearly transmission tariff was determined by the CERC for the five year block period 2019 to 2024. The liability for payment of transmission charges could have been fastened upon the beneficiaries/consumers only after they start receiving power through the commissioned inter-connected transmission assets. The delay on the Appellant's part in commissioning its transmission asset had left the transmission asset of PGCIL stranded resulting in no power being transmitted to the consumers. As PGCIL could not be denied yearly transmission charges after their transmission asset had been commissioned, and as consumers could not be called upon to pay such charges as they had not been supplied power, the Appellant was fastened with the liability to pay transmission charges to PGCIL for the mismatch period ie from 27.09.2019 when the transmission asset of PGCIL was deemed to have been commissioned, till 30.07.2021 when the transmission asset of the Appellant was actually commissioned, i.e. the period of delay in commissioning the Appellant's transmission asset.

76. Section 61 of the Act relates to tariff regulations, and thereunder the Appropriate Commission shall, subject to the provisions of the Act, specify the terms and conditions for the determination of tariff, and in doing so to be guided by

clauses (a) to (i) thereunder. Clause (d) of Section 61 requires the Commission to be guided by the requirement of safeguarding consumers interest and, at the same time, ensure recovery of the cost of electricity in a reasonable manner. Regulation 6(2) of the 2019 Regulations and Regulation 13(2) of the 2020 Regulations seek to achieve this object. Thereby, PGCIL has been permitted to avoid suffering losses on its transmission asset being commissioned, and to recover the yearly transmission charges from the Appellant which had delayed commissioning of its transmission asset. Since the beneficiaries/consumers would receive electricity only after the Appellant's transmission asset is commissioned and ARPRL commissions its generating asset and evacuates power, the aforesaid Regulations safeguard their interests also, in not fastening liability on them for the Appellant's delay in commissioning its transmission asset.

77. As noted hereinabove, the provisions of the Act, on which reliance has been placed on behalf of the Appellant, do not disable recovery of transmission charges (ie towards capital cost recovery) , from the appellant by PGCIL for the mismatch period. We may, therefore, not be justified in holding that imposition of such transmission charges on the Appellant, in terms of the 2019 and 2020 Regulations, is contrary to the provisions of the Act. Even otherwise, as shall

be detailed hereinafter, the question whether these Regulations contravene the Act, and if so its consequences, are matters for examination in judicial review proceedings, and not in an appeal under Section 111 of the Act.

VI. EVEN IF THE REGULATIONS APPEAR TO PROVIDE SOMETHING WHICH IS NOT CONTEMPLATED UNDER THE PARENT STATUTE, CAN THIS TRIBUNAL IGNORE THE SAME?

78. Sri Sanjay Sen, Learned Senior Counsel, would submit that one route is as per Section 62 (non-bidding route/ regulated tariff mechanism), while the other route is as per Section 63 (bidding route); since liquidated damages for delay in commissioning is already covered under the bidding guidelines, no further regulatory powers are available for a Commission qua a Section 63 process to impose additional burden on account of delay in commissioning (***Energy Watchdog vs. CERC, (2017) 14 SCC 80 (Para 19 & 20)***]; the Bidding Guidelines cover the issue and cap the liability; the Bidding Guidelines were issued along with the model RfP, the model RfQ and the model TSA; the said documents only contemplate levy of 'liquidated damages' in the event of any delay in construction of a transmission project awarded through competitive bidding; thus, in the present case, the

Appellant was never aware of any liability, other than liquidated damages, based on any delay in constructing the transmission project for which bid was conducted; as such, the Appellant could not factor-in any risk/ cost allocation towards any future liability of any alleged transmission charges being imposed based upon delay in constructing the project; and the aforesaid bidding scheme contemplated under Section 63 of the Act is required to be considered while adjudicating this case.

79. On the other hand Mrs. Swapna Seshadri, Learned Counsel for PGCIL, would submit that the judgement of the Supreme Court, in ***Energy Watchdog v. CERC & Ors*****. (2017) 14 SCC 80**, supports the case of PGCIL that the source of power, whether under Section 62 or Section 63, can be traced back to Section 79.

80. The construction of Section 63, on its being read with the other provisions of the Electricity Act, fell for consideration in the appeals in **Energy Watchdog v. CERC, (2017) 14 SCC 80,** and the Supreme Court held that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62; unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” the tariff already determined under Section 63; such “adoption” is only if such tariff has been determined through a transparent process of

bidding, and this transparent process of bidding must be in accordance with the guidelines issued by the Central Government; the appropriate Commission does not act as a mere post office under Section 63; it must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government; Guidelines have been issued under this Section, and have been amended from time to time; Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4; the regulatory powers of the Central Commission, in so far as tariff is concerned, are specifically mentioned in Section 79(1); this regulatory power is a general one; when the Commission adopts the tariff under Section 63, it does not function dehors its general regulatory power under Section 79(1)(*b*); for one thing, such regulation takes place under the Central Government's guidelines; for another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, it cannot be said that the Commission's power to “regulate” tariff is completely done away with; considering the fact that the non obstante clause restricts itself to Section 62, there is no good reason to put Section 79 out of the way altogether; the reason why Section 62

alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts the tariff that is already determined by a transparent process of bidding; in either case, the general regulatory power of the Commission under Section 79(1)(*b*) is the source of the power to regulate, which includes the power to determine or adopt tariff; in fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff, whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(*d*); Section 79(1)(*b*) is a wider source of power to "regulate" tariff; in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(*b*), only in accordance with those guidelines; and it is only in a situation where there are no guidelines framed at all, or where the guidelines do not deal with a given situation, that the Commission's general regulatory powers under Section 79(1)(*b*) can then be used.

81. If the situation is covered by the guidelines issued by the Central Government under Section 63, the law declared in **Energy Watchdog** would bind the CERC to those guidelines and they would be obligated to exercise the regulatory functions under Section 79 of the Act only in accordance with those guidelines. However, in the present case, what has been determined by the Section 63 process, is the tariff to which the Appellant is entitled to. No guidelines of the Central Govt which stipulate that, notwithstanding their failure to commission their transmission asset even after the transmission asset of PGCIL has been commissioned, they are not liable to compensate the other transmission licensee for the loss they have sustained, has been brought to our notice. As the law declared in **Energy Watchdog** is also that in a situation where the guidelines do not deal with a given situation, the CERC can use its general regulatory powers under Section 79, the CERC was not disabled from exercising even its regulatory powers under Section 79 in this regard.

82. Unlike in **Energy Watchdog,** the liability imposed on the Appellant is in terms of the 2019 Regulations framed by the CERC under Section 178 of the Act, and not in the exercise of its regulatory power under Section 79 of the Act. In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by

the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions). **(PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).** Reliance placed on behalf of the Appellant, on the judgement in **Energy Watchdog,** is therefore of no avail.

83. As noted hereinabove, the Appellant had obtained a transmission licence from the CERC to implement the TBCB assets subject, inter alia, to certain condition including (l) the licensee shall ensure execution of the project within the timeline specified in Schedule 3 of the TSA; (m) the licensee shall, as far as practicable, coordinate with the licensee (including deemed licensee) executing the upstream or downstream transmission projects and the Central Electricity Authority for ensuring execution of the project in a matching timeline. It is evident, from the conditions stipulated in the said transmission license, that the Appellant was, among others, required to adhere to the timelines stipulated in the TSA, and to coordinate with the licensee executing the upstream or downstream transmission projects, (such as PGCIL), to ensure execution of the project in a matching timeline. It is not in dispute that the Appellant failed to adhere to the TSA timelines, or to execute the project in a

matching timeline with PGCIL, and there was admittedly a delay on its part in commissioning its transmission asset.

84. The model Transmission Supply Agreement, which provided for levy of 'liquidated damages' in the event of any delay in construction of a transmission project awarded through competitive bidding, is the Agreement which the Transmission Service Provider was required to enter with its Long Term Transmission Customer. The Appellant (TSP) entered into such an agreement with Adani Renewable Energy Park Rajasthan Ltd. (AREPRL)(LTTC). The TSA, as shall be detailed later in this Order, also provides for the period within which the transmission asset of the Appellant was required to be commissioned, and it is not in dispute that the Appellant has not adhered to the stipulated time schedule.

85. In the Petition filed by them before the CERC, among others against AREPRL, the Appellant has claimed extension of COD on account of force majeure events which relief, if granted, would enable them to avoid payment of liquidated damages, if any, claimed by AREPRL. The liability of the Appellant to pay transmission charges to PGCIL is not in terms of any contract, but in terms of the Regulations which were framed later. Imposition of such liability on the Appellant, in the present case, is by law.

86. The Appellant was well aware of its obligations, both in terms of the Transmission license and the Transmission Service Agreement, to adhere to the time stipulated for commissioning its transmission asset, and to ensure that it is commissioned matching the timelines of the upstream or downstream transmission asset. The Appellant could not have been unaware that any delay on its part in adhering to the SCOD would result in the other commissioned transmission asset being stranded, and such a transmission licensee being forced to suffer loss as a result.

87. It is difficult, therefore, to accept that, despite being aware of its obligations to adhere to the time schedule and that delay on its part would result in the other transmission licensee suffering losses, the Appellant had not factored in the possibility of their having to compensate the other transmission licensee for the losses it suffered as a result of the former's delay in achieving COD.

88. In any event, inability of the Appellant to factor-in risk/ cost allocation, towards future liability of transmission charges being imposed for the delay in commissioning its transmission asset, when they submitted their bid, does not enable them to avoid the liability imposed on them by law (Both the 2019 and 2020 Regulations are subordinate legislation having the force of law).

A.CAN THIS TRIBUNAL IGNORE STATUTORY REGULATIONS WHILE EXERCISING ITS APPELLATE JURISDICTION UNDER SECTION 111?

89. Sri Sanjay Sen, Learned Senior Counsel, would submit that, based upon the scheme of the Parent Statute qua imposition of transmission charges, if there are any Regulations which seek to impose 'transmission charges' upon an inter-state transmission licensee (such as the Appellant) who does not avail open access either in the inter-state transmission system maintained by CTUIL or inter-state system developed by PGCIL, then this Tribunal has adequate powers to ignore both the said 2019 and 2020 Regulations; the Supreme Court, in ***Bharathidasan University & Anr., vs. All India Council for technical Education & Ors., (2001) 8 SCC 676*****,** has held that Tribunals can ignore regulations if they are found to provide something which is beyond the scope of the Parent Legislation; this Tribunal, in ***Damodar Valley Corporation vs. CERC & Ors.*** **(Order in Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007 dated 23.11.2007),** proceeded to ignore regulations when it was found to be contrary to an existing Statute; this judgment was also upheld by the Supreme Court in ***Bhaskar Shrachi Alloys Limited vs. Damodar Valley Corporation & Ors.,*** reported in ***(2018) 8 SCC 281*****)**; accordingly, the 2019 and 2020 Regulations, to the extent they contemplate levy of 'transmission charges'

upon an inter-state transmission licensee (such as the Appellant) who does not avail open access (Regulations 5(2) & 6(2) of the 2019 Regulations and 13(12) of the 2020 Regulations), should be ignored.

90. Mrs Swapna Seshadri, Learned Counsel, would submit that, in ***Damodar Valley Corporation v. CERC & Ors.*** **(Appeal No. 271, 272, 273, 275 of 2006 and 8 of 2007)**, this Tribunal had ignored the provisions of the Tariff Regulations framed by the CERC in view of the 5th proviso to Section 14 of the Electricity Act which continued the provisions of the DVC Act, 1948 in so far as they were not inconsistent with the Electricity Act. However, the 2019 Regulations are not contrary to any provision of the Electricity Act to enable the Appellant to claim that the Regulations should be ignored; and the judgement of the Supreme Court, in ***Bharathidasan University & Anr. v. AICTE & Ors.*** **(2001) 8 SCC 676**, is also not applicable since the 2019 Regulations, which were notified after due public consultation, are not contrary to any provisions of the Electricity Act or any other law.

91. As held hereinabove, the contention that the 2019 and 2020 Regulations fall foul of the Electricity Act does not merit acceptance. Even otherwise, this Tribunal lacks jurisdiction to examine the vires of these Regulations, as that would amount to exercise of the power of Judicial review. The Electricity Act, 2003 does not confer the power of judicial

review, of the validity of the regulations made by the CERC under Section 178 of the Act, on the Appellate Tribunal for Electricity. Such Regulations are made under the authority of delegated legislation, they are in the nature of subordinate legislation, and have general application. Consequently its validity can be tested only in judicial review proceedings before Courts, and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act, more so as the word “order” in Section 111 of the 2003 Act does not include Regulations made under Section 178 of the Act. Section 121 of the 2003 Act, and the words “orders”, “instructions” or “directions” used therein, do not also confer the power of judicial review on the Appellate Tribunal for Electricity. No appeal to the Appellate Tribunal shall lie on the validity of a Regulation made under Section 178. **(PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).** The power to interpret the 2019 and 2020 Regulations does not extend to examining its vires, and the power to strike down subordinate legislation on the ground that it runs contrary to the Parent Act, under which it was made, can be exercised only in judicial review proceedings.

92. The submission urged on behalf of the Appellant, however, is that they are not calling upon this Tribunal to strike down the 2019 and 2020 Regulations, but only to ignore it as, according to them, it is contrary to the 2003 Act. Reliance is

placed in support of this submission, on ***Bharathidasan University & Anr., vs. All India Council for technical Education & Ors., (2001) 8 SCC 676*****;** ***Damodar Valley Corporation vs. CERC & Ors.*** **(Order in Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007 dated 23.11.2007);** and ***Bhaskar Shrachi Alloys Limited vs. Damodar Valley Corporation & Ors: (2018) 8 SCC 281.***

93. This Tribunal is a creature of the 2003 Act, and derives its powers from the express provisions of the said Act. The powers, which have not been expressly given thereby, cannot be exercised by it. **(Rajeev Hitendra Pathak Vs. Achyut Kashinath (2011) 9 SCC 541)**. Tribunals function as courts within the limits of its jurisdiction, and its powers are limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. **(Union of India and Anr. V. Paras Laminated (P) Ltd: AIR 1991 SC 696).** Challenge to the provisions of the particular Act (or the Rules and Regulations made thereunder) as ultra vires cannot be brought before Tribunals constituted under an Act. (**Dhulabhai v. State of Madhya Pradesh [1968] 22 STC 416 (SC)**). An authority

created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. As the Tribunal is a creature of the statute it can only decide the dispute in terms of the provisions of the Act and the question of ultra vires is foreign to the scope of its jurisdiction. If such a question is raised, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the objection or decide on it. **(K. S. Venkataraman & Co. v. State of Madras: AIR 1966 SC 1089; Mysore Breweries Lt. vs Commissioner Of Income-Tax: 1987 166 ITR 723 (KAR)).** No one can challenge the validity of provision of an Act or rule made thereunder before the authorities constituted under the Act. (**Kanpur Vanaspati Stores v. CST [1973] 32 STC 655(SC)).**

B.DOES THE LAW DECLARED, IN "*BHARATHIDASAN UNIVERSITY*", APPLY TO TRIBUNALS WITH LIMITED JURISDICTION?

94. As the very basis of the submissions made, on behalf of the Appellant, under this head is the Judgement of the Supreme Court, in **BHARATHIDASAN UNIVERSITY V. ALL-INDIA COUNCIL FOR TECHNICAL EDUCATION, (2001) 8 SCC 676**, it is useful to take note of the facts and the law declared therein.

95. When the appellant University, created under the Bharathidasan University Act, 1981, commenced courses in technology, the All-India Council for Technical Education ("AICTE") filed Writ Petition No. 14558 of 1998 before the Madras High Court seeking a writ of mandamus to forbear the university authorities from running/conducting any courses and programmes in those technical courses. The grievance of the AICTE was that the University did not apply for and secure prior approval for those courses under the All-India Council for Technical Education Act, 1987 ("the AICTE Act") and the statutory Regulations made thereunder by the AICTE, particularly Regulation 4, which obligated even a university to obtain such prior approval. The stand of the appellant-University was that they did not fall under the definition of "technical institution" as defined under Section 2(*h*) of the AICTE Act and, consequently, the Regulations made for seeking prior approval of AICTE even by the universities, to commence a course or programme in technical education or a new department for the purpose, were in excess of the regulation-making powers of the AICTE and, consequently, were null and void and could not be enforced against the appellant University to the extent it obligated even universities to seek and secure such prior approval from AICTE. The learned Single Judge of the Madras High Court accepted the stand of the AICTE, and

ordered cancellation of the admissions. The appeal preferred there against was dismissed by the Division Bench.

96. The question that arose for consideration before the Supreme Court, in **BHARATHIDASAN UNIVERSITY V. ALL-INDIA COUNCIL FOR TECHNICAL EDUCATION, (2001) 8 SCC 676,** was whether the appellant University should seek prior approval of the AICTE to start a department for imparting a course or programme in technical education or a technical institution as an adjunct to the University itself to conduct technical courses of its choice and selection. It is in this context that the Supreme Court held that, when the legislative intent finds specific mention and expression in the provisions of the Act itself, the same cannot be whittled down or curtailed and rendered nugatory by giving undue importance to the so-called object underlying the Act; AICTE could not make any regulation in exercise of its powers under Section 23 of the AICTE Act, when such power was circumscribed by the specific limitation engrafted therein to ensure them to be "not inconsistent with the provisions of the Act and the Rules"; Section 10(1)(*k*) of the AICTE Act confined the power of AICTE only to be exercised vis-à-vis technical institutions, as defined in the Act and not generally; therefore the Regulations, in so far as it compelled Universities to seek and obtain prior approval, and not to start any new department or course or programme in technical education

(Regulation 4) and empower itself to withdraw such approval, in a given case of contravention of the Regulations (Regulation 12) were directly opposed to and inconsistent with the provisions of Section 10(1)(*k*) of the Act, and consequently void and unenforceable; consequently, when the power to make regulations was confined to certain limits, the courts were bound to ignore those actually made outside them, when the question of their enforcement arose; and the mere fact that there was no specific relief sought to strike down or declare them ultra vires, particularly when the party in sufferance was a respondent to the lis or proceedings, could not confer any further sanctity or authority and validity which it was shown and found to patently lack; and thus, the Regulations which the AICTE could not have made, so as to bind universities/UGC within the confines of the powers conferred upon it, could not be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any University.

C. JUDICIAL REVIEW : ITS SCOPE:

97. In **BHARATHIDASAN UNIVERSITY**, the applicability of the Regulations framed by the AICTE was subjected to challenge in a Writ Petition filed, under Article 226 of the Constitution, before the Madras High Court which unlike this Tribunal, has the power of judicial review in terms of which it discharges its

duty under the Constitution to keep different organs of the State, such as the executive and the legislature, within the limits of the power conferred upon them by the Constitution. The power of judicial review, conferred on them, by Articles 32 and 226 of the Constitution, enables the Supreme Court and the High Courts to decide what are the limits on the power conferred upon each organ or instrumentality of the State, and whether such limits are transgressed or exceeded. The power of Judicial review is the power to determine the legality of executive action and the validity of legislation passed by the legislature. **(Minerva Mills Ltd. & Ors vs Union OfIndia & Ors: AIR 1980 SC 17).** Judicial review is the power of Courts to review legislative and executive action, and determine their validity. **(Advanced Law Lexicon by P. Ramanatha Aiyar).** It is a court's power to review the actions of other branches or levels of government, especially its power to invalidate legislative and executive actions as being unconstitutional. **(Black's Law Dictionary 8th Edition).** Judicial Review is the examination or review by Courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of the power granted by it and, if so, to declare them void and of no effect. It is the duty as well as the power of the Court to

not allow any act- whether legislative or executive, if it violates the Constitution.

D. PRESUMPTION OF CONSTITUTIONALITY OF RULES:

98. In **Bharathidasan University** (supra), there was no challenge, by the University before the Madras High Court, to the vires of the Regulations made under the Act, as being contrary to the provisions of either the Parent Act or the Constitution. In this context, it must be borne in mind that, like plenary Legislation, there is a presumption regarding the constitutionality of Rules and Regulations. In the absence of a challenge to the validity of the Regulations, Courts proceed on the premise that the Regulations are constitutionally valid and, notwithstanding the fact that the Regulations may apply harshly, it is ordinarily given effect to, **(Ganga Prasad v. State of Uttarakhand, 2019 SCC OnLine Utt 326; Ramesh Kumar Sharma v. State of Uttarakhand, 2018 SCC OnLine Utt 1012),** and the provision not be declared ultra-vires. **(M. Vasurchana Reddy (Dr.) v. State of Telangana, 2018 SCC OnLine Hyd 40).** There is a Presumption in favour of the constitutionality of an enactment or Rule **(Charanjit Lal Chowdhuri v. Union of India, 1950 SCC 833 : AIR 1951 SC 41; State of Bombay v. F.N. Bulsara, 1951 SCC 860 : AIR 1951 SC 318; Mahant Moti Das v. S.P. Sahi, 1959 Supp (2) SCR 563; Hamdard**

Dawakhana v. Union of India 1960 2 SCR 671, AIR 1960 SC 554; ChiduralaSudakar v. State of Telangana, 2018 SCC OnLineHyd 169), and the onus to prove its invalidity lies on the party which assails the same. (**Pathumma v. State of Kerala, (1978) 2 SCC 1; Independent Thought v. Union of India–(2017) 10 SCC 800; Shri. Ram Krishna Dalmia v. Justice S.R. Tendolkar, 1959 SCR 279; Saurabh Chaudri v. Union of India, (2003) 11 SCC 146 : AIR 2004 SC 361; Charanjit Lal Chowdhury v. Union of India, 1950 SCC 833 : AIR 1951 SC 41; Pinki Devi v. State of Uttarakhand, 2019 SCC OnLineUtt 937).** Even when the constitutional validity of either plenary or subordinate legislation is under challenge, the Court will always raise a presumption of its constitutionality. It would be. reluctant to strike down laws as unconstitutional unless it is shown that the legislation clearly violates constitutional provisions or the fundamental rights of the citizens,**(Independent Thought v. Union of India–(2017) 10 SCC 800)**, and, in addition, in the case of subordinate legislation that it is in violation of the parent Act. The fundamental nature and importance of the legislative process is recognised by Courts, and due regard and deference is accorded thereto. **(Subramanian Swamy v. Director, Central Bureau of Investigation, (2014) 8 SCC 682; Pinki Devi v. State of Uttarakhand, 2019 SCC OnLineUtt 937).**

99. It is evidently because there was no specific challenge to the vires of the Regulations before the Madras High Court, that the Supreme Court in **Bharathidasan University,** after being satisfied that Regulations 4 and 12 of the AICTE Regulations were directly opposed to and inconsistent with the provisions of Section 10 of the AICTE Act and were void and unenforceable, observed that the courts were bound to ignore those Regulations when the question of their enforcement arose, and the mere fact that there was no specific relief sought to strike down or declare them ultra vires, would not confer any sanctity or authority and validity on such Regulations. The Judgement, in **Bharathidasan University,** would apply only to judicial review proceedings, wherein the Court (either the Supreme Court or the High Courts) can, in the absence of a challenge to the vires of subordinate legislation (and as they cannot therefore strike down the Regulations), instead ignore such Regulations. The power to ignore Statutory Regulations, which are found to be ultravires of either the Constitution or the Parent Act, inheres in and forms part of the power of Judicial Review, and is available to be exercised in such judicial review proceedings where there is no challenge to the validity of the Regulations. Such a power is not available to Tribunals of limited jurisdiction such as APTEL. Reliance placed on behalf of the

Appellants, on **BHARATHIDASAN UNIVERSITY,** is therefore misplaced.

E. OTHER JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

100. In **Damodar Valley Corporation V/s. Central Electricity Regulatory Commission and ors (Order in Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007 dated 23.11.2007) (2007 SCC OnLine Aptel 129),** this Tribunal held that in case Parliament, while enacting the Electricity Act, wanted the Rules and Regulations framed thereunder to prevail over the provisions of the DVC Act which were inconsistent therewith, it would have expressly stated so; that was, however, not the case; Parliament did not confer such a privilege to the Rules and Regulations framed under the Electricity Act so as to nullify the statutory provisions of the DVC Act; the operation of Section 40 and other provisions could not be curtailed by Regulations framed by the CERC; such of the Regulations which were restricting the operation of the provisions of the DVC Act, that were not inconsistent with the provisions of the Electricity Act, must be ignored as the Regulations or Rules cannot prevail over the legislation; they could not countenance the argument that the Regulations framed by CERC have a statutory flavour and the force of a statute, and such provisions of the DVC Act

that are contrary to the Regulations must yield and give way to the Regulations; the fourth proviso to Section 14 clearly implied that only such of the provisions of the DVC Act which are inconsistent with the Electricity Act shall not apply; the inconsistency envisaged was between the provisions of the DVC Act and the provisions of the Electricity Act, and not between the provisions of the DVC Act and the rules and the Regulations framed under the Electricity Act; the CERC could not frame Regulations for determination of tariff of DVC which were inconsistent with the provisions of the DVC Act that did not collide with the Electricity Act; in saying that the Regulations could not be framed in violation of the statute, they were not holding them to be ultra-virus of the DVC Act, but they were ignoring such of the Regulations which were contrary to the DVC Act, as the DVC Act being a legislation made by the Parliament must operate in so far as its provisions are not contrary to the provisions of the Electricity Act; in view of the dicta laid down by the Supreme Court in **Kerala Samasthana Chetu Thozhilali Union Vs. State of Kerala (2006) 4 SCC 327**, and in **Bharathidasan University vs. All India Council for Technical Education, (2001) 8 SCC 676**, Regulation 21(ii) of the Regulations will have to be ignored, being contrary to Section 40 of the DVC Act; and, on a parity of reasoning, Sections 38 and 39 of the DVC

Act, that dealt with payment of interest and interest charges and other expenses to be added to and receipts taken for reduction of capital cost respectively, not being contrary to any of the provisions of the Electricity Act, need to be given effect to. In **Kerala Samasthana Chetu Thozhilali Union Vs. State of Kerala (2006) 4 SCC 327**, (on which reliance was placed by this Tribunal), the Supreme Court held that a rule is not only required to be made in conformity with the provisions of the Act, whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any legislation made by the Parliament or the State Legislature.

101. The aforesaid Judgement of this Tribunal, in **Damodar Valley Corporation**, was passed in 2007 long before the Constitution Bench of the Supreme Court, in ***PTC India Ltd.*** **v.** ***CERC*****, (2010) 4 SCC 603**, declared that this Tribunal lacked the power of judicial review. In the light of the subsequent Constitution Bench judgement of the Supreme Court, in ***PTC India Ltd,*** the earlier judgement of this Tribunal, in **Damodar Valley Corporation**, is no longer good law.

102. Further, as noted hereinabove, subordinate legislation constitutes law, and must be followed save its being declared ultravires the plenary legislation or the provisions of the Constitution. Where a challenge is put forth to the

vires of subordinate legislation on the ground that it falls foul of the parent Act, the first step taken, by a Court exercising the power of judicial review, is to ascertain whether, in fact, the Rule or Regulation is in contravention of the Parent Statute. It is only after arriving at the conclusion that it does, would the power of judicial review be exercised to strike down subordinate legislation on this score.

103. That this Tribunal lacks jurisdiction to strike down subordinate legislation is not in doubt. Accepting the Appellant's submission that, on its being found to contravene the Parent Act, this Tribunal can ignore the Regulations would require this Tribunal to do indirectly, what it is not permitted to be done directly for, in both cases ie where a Regulation is either struck down or ignored, the effect is that the said Regulations is not followed or adhered to, though it is otherwise binding on this Tribunal. Such a course of action is, in our view, impermissible as it would amount, in both cases, to the exercise of power of judicial review, which power has not been conferred on this Tribunal.

104. Sri Sanjay Sen, Learned Senior Counsel, would then contend that the judgement of this Tribunal in **Damodar Valley Corporation**, was affirmed by the Supreme Court, in **Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corpn., (2018) 8 SCC 281,** wherein the judgement, in ***PTC India***

Ltd., was also considered. On the issue whether the Tariff Regulations would have an overriding effect to render the parallel provisions in the 1948 Act ineffective, the Supreme Court, in **Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corpn., (2018) 8 SCC 281, (**ie in the appeal preferred against the Order of this Tribunal in **Damodar Valley Corporation: 2007 SCC OnLine Aptel 129)**, opined that the primary issue considered by the Constitution Bench, in ***PTC India Ltd.*** **v.** ***CERC*****, (2010) 4 SCC 603,** was whether the Appellate Tribunal, constituted under the Electricity Act, 2003, had the jurisdiction under Section 111 of the Act to examine the validity of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the Electricity Act; the observations in **PTC India Ltd,** with regard to the efficacy of the Tariff Regulations in the light of its statutory character must necessarily be understood in the above context; and the opinion rendered in ***PTC India Ltd.*** itself makes it clear that the Tariff Regulations, though statutory in character, are a species of subordinate delegated legislation.

105. Relying on ***Indian Express Newspapers (Bombay) (P) Ltd.*** **v.** ***Union of India*****, (1985) 1 SCC 641** and ***Delhi Laws Act, 1912, In re*****: AIR 1951 SC 332,** the Supreme Court, in **Bhaskar Shrachi Alloys Ltd**, held that it may be wholly

unnecessary to detract from the fundamental principles of law laid down in the **Presidential Reference** (ie ***Delhi Laws Act, 1912***), which would be an inevitable consequence, if the contentions advanced on behalf of the appellants to the effect that the Tariff Regulations must override the provisions of the 1948 Act as the said Regulations are statutory in character is to be accepted; this is also what has been subsequently emphasised in ***Bharathidasan University*** **v.** ***AICTE*****, (2001) 8 SCC 676,** and ***Kerala Samsthana Chethu Thozhilali Union*** **v.** ***State of Kerala*****, (2006) 4 SCC 327**; no error could therefore be found in the implicit reliance placed on the ratio of the above decisions by the Appellate Tribunal in ***Damodar Valley Corpn.*** **v.** ***CERC*****, 2007 SCC OnLine Aptel 129;** a careful comparative reading of the third and the fourth provisos to Section 14 of the 2003 Act clearly indicates the intention of the legislature that the second part of the fourth proviso is to bring in the continued application of some of the provisions of the 1948 Act which are not inconsistent with the provisions of the 2003 Act; there are no licensing provisions in the 1948 Act to be saved; and the obvious reference in the second part of the proviso is to provide for the continued application of the provisions of the 1948 Act insofar as they are not inconsistent with the provisions of the 2003 Act.

106. The question whether this Tribunal, which was held in ***PTC India Ltd*** to lack the power of judicial review, could nonetheless consider whether the Regulations were contrary to plenary legislation, and then ignore the Regulations on this score, did not arise for consideration in **Bhaskar Shrachi Alloys Ltd**.

F. WHAT IS BINDING IS THE RATIO OF A JUDGEMENT:

107. It cannot be lost sight of that the decision in ***PTC India Ltd*** was rendered by a Constitution Bench, and it is settled law that a decision by a Constitution bench of the Supreme Court cannot be overlooked to treat a latter decision by a bench of lesser strength as of binding authority **(N.S Giri vs Corporation of City of Mangalore : (1999) 4 SCC 697),** more so when the scope and extent of the power of judicial review did not arise for consideration before the two judge bench in **Bhaskar Shrachi Alloys Ltd**.

108. It must also be borne in mind that it is only the principle underlying the decision which would be binding as a precedent in a case which comes up for decision subsequently. Hence, while applying the decision to a later case, the Court/Tribunal, which is dealing with it, should carefully try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The

scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. **(Shah Prakash Amichand vs State of Gujarat: AIR 1986 SC 468).** As a judgement is only an authority for what it actually decides, it cannot be quoted for a proposition that may seem to follow logically from it. It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. What is of the essence in a decision is its ratio. (**State of Orissa v. Sudhansu Sekhar Misra; Quinn v. Leathem, AIR 1968 SC 647**). Judgments ought not to be read as statutes. (**Sri. Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171**)(**Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026).** A decision is available as a precedent only if it decides a question of law **(STATE OF PUNJAB AND OTHERS VS SURINDER KUMAR AND OTHERS, 1992 1 SCC 489),** and cannot be relied upon in support of a proposition that it did not decide.**(MITTAL ENGINEERING WORKS(P) LTD VERSUS COLLECTOR OF CENTRAL EXCISE, MEERUT, 1997 1 SCC 203).** A decision, which does not proceed on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. That which escapes in the judgment without any occasion is not the ratio decidendi. (**Jaisri Sahu v. Rajdewan Dubey, AIR**

1962 SC 83 ; B. Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480; State of Uttar Pradesh v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139).

109. As the questions (1) whether or not this Tribunal can examine whether the Regulations are contrary to the Parent Act; (2) as it lacks jurisdiction to strike it down on this ground, whether it can instead ignore the said Regulation, and (3) whether such action taken does not also amount to exercise of the power of judicial review, did not arise for consideration in **Bhaskar Shrachi Alloys Ltd**. Reliance placed thereupon, on behalf of the Appellant, is also of no avail.

110. We are satisfied, for the reasons aforementioned, that the power to ignore a statutory regulation, on the ground that it violates the provisions of the Constitution or Plenary Legislation, is incidental to the power of judicial review to strike down subordinate legislation, and is not available to be exercised by this Tribunal under Section 111 of the Act.

VII.REGULATIONS CONTEMPLATE A NOTICE BEING ISSUED:

111. Sri Sanjay Sen, Learned Senior Counsel for the Appellant, would submit that, from a reading of the aforesaid Regulations, it is apparent that for triggering Regulation

6(2), under which the Respondent Commission passed the impugned order imposing transmission charges upon the Appellant, it is mandatory to issue a statutory notice as per the proviso of Regulation 5(2); admittedly, no statutory notice was ever issued by PGCIL under the above Regulation to the Appellant; as such the impugned order, qua the Appellant, is liable to be set aside; the impugned order records the above objection of the Appellant; however, it seeks to justify compliance of the aforesaid provision on the basis of the alleged knowledge of the said Appellant in view of certain meetings; and no such justification can correct the above non-fulfilment of a statutory requirement.

112. In Para 16 of the Order under Appeal, the CERC noted the Appellant's submission that PGCIL, in its petition, had made submission that it had charged Asset-6 on 25.9.2019; as the associated transmission system, i.e. the 765 kV FBTL, which was under the scope of the Appellant, was not executed by the said date, PGCIL had requested to approve COD of Asset-6 as 27.9.2019 in accordance with Regulation 5(2) of the 2019 Tariff Regulations; however, in terms of the proviso to Regulation 5(2) of the 2019 Tariff Regulations, PGCIL was required to issue a prior notice of at least one month before COD to the transmission licensee; no such notice was issued to the Appellant; further, the Appellant

had submitted that the proviso mentioned under Regulation 5(2) of the 2019 Tariff Regulations was necessarily required to be followed, without which, the main Regulation 5(2) of the 2019 Tariff Regulations could not be implemented; and, therefore, PGCIL's prayer in this regard may be rejected.

113. Regulation 5 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (the "2019 Regulations" for short), relates to the date of Commercial Operation. Under the first proviso thereto, the transmission licensee, seeking approval of the date of commercial operation under this clause, shall give prior notice of at least one month, to the generating company or the other transmission licensee and the long term customers of its transmission system, as the case may be, regarding the date of commercial operation. Under the second proviso, the transmission licensee, seeking approval of the date of commercial operation of the transmission system under this clause, is required to submit certain documents along with the petition, which include the notice issued by the transmission licensee as per the first proviso under this clause and the response.

114. In Petition No.9/TT/2021 filed by them before the CERC, PGCIL had prayed that the transmission charges for the 2019-24 period may be allowed to be recovered on monthly basis in accordance with Regulation 57 of the 2019

Regulations, and should be shared by the beneficiaries and long-term customers as per the 2010 Regulations as amended from time to time. PGCIL has not complied with the requirement of the first proviso to Regulation 5(1), evidently because they made no claim against the Appellant, but sought recovery from the beneficiaries and long-term customers. The requirement of a notice, as stipulated by the first proviso to Regulation 5(1), is to make the recipient thereof aware that the transmission licensee is seeking approval of the Commission regarding the date of commercial operation. In the present case, the Appellant had appeared before the CERC and had claimed that there should not be any underlying consequence upon them. They have not disputed the date of commercial operation of the transmission asset of PGCIL either before the Commission or even before this Tribunal in the present Appeal.

115. The very object of giving of a notice, a statutory requirement under the first proviso to Regulation 5(1), is to comply with an important facet of the rules of natural justice ie to make the recipient aware that a claim, to which they may have a grievance, is intended to be made, thereby enabling them, if they so choose, to contest such a claim before the Commission.

A. APPLICATION OF THE RULES OF NATURAL JUSTICE DEPENDS ON THE FACTS AND CIRCUMSTANCES OF A CASE:

116. In this context, it is useful to note that natural justice is no unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation**,** no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. No man shall be hit below the belt — that is the conscience of the matter. (***Chairman, Board of Mining Examination and Chief Inspector of Mines* v. *Ramjee*: (1977) 2 SCC 256).** Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of the statutory provision, nature of the right which may be affected and the consequences which may entail; its application depends upon the facts and circumstances of each case. These principles do not apply to all cases and situations. **(*R.S. Dass* v. *Union of India*, 1986 Supp SCC 617).** Whether any particular principle of natural justice would be applicable to a particular situation and whether there has been any

infraction of the application of that principle, has to be judged, in the light of the facts and circumstances of each particular case. The basic requirement is that there must-be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the material and reasons. **(*K.L. Tripathi* v. *State Bank of India*, (1984) 1 SCC 43).** The requirements of natural justice should be moulded in such a way as to take care of the two basic facets of this principle: (1) to make known the nature of accusation; and (2) to give opportunity to state the case. (***Shiv Sagar Tiwari* v. *Union of India*, (1997) 1 SCC 444**)**.**

B. PREJUDICE MUST BE SHOWN TO HAVE BEEN CAUSED BY NON-OBSERVANCE WITH THE RULES OF NATURAL JUSTICE:

117. To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him by its non-observance. (***Syndicate Bank* v. *Venkatesh GururaoKurati*, (2006) 3 SCC 150 : AIR 2006 SC 3542 and *State Bank of Patiala* v. *S.K. Sharma*, (1996) 3 SCC 364 : AIR 1996 SC 1669)**. All that the courts have to see is whether non-observance of any of these principles in a given case is likely to have resulted in deflecting the course of justice. (***State of U.P.* v. *Om Prakash Gupta*, (1969) 3 SCC 775 : AIR 1970 SC 679**;

Gudimetla Venkata Reddy v. State of A.P., 2009 SCC OnLine AP 942)

118. The Court cannot look at the law in the abstract, or natural justice as a mere artifact. Nor can the Court fit into a rigid mould the concept of reasonable opportunity. **(Chairman,Board of Mining Examination and Chief Inspector of Mines v. Ramjee, (1977) 2 SCC 256; Rajeev Agarwal v. State of Uttarakhand, 2019 SCC OnLineUtt 1849).** Principles of natural justice cannot be stretched too far. **(Bar Council of India v. High Court of Kerala, (2004) 6 SCC 311).** They are not codified canons, but are principles ingrained in the conscience of man. Natural justice is the administration of justice with a common-sense It is the substance of justice which should determine its form. **(Canara Bank v. V.K. Awasthy, (2005) 6 SCC 321; Rajeev Agarwal v. State of Uttarakhand, 2019 SCC OnLineUtt 1849).** The objective is to ensure a fair hearing and a fair deal to the person whose rights would be affected.(**Mysore Urban Development Authority v. Veer Kumar Jain, (2010) 5 SCC 791; State Bank of Patiala v.S.K. Sharma,(1996) 3 SCC 364; ECIL v. B. Karunakar, (1993) 4 SCC 727; C.B. Gautam v. Union of India, (1993) 1 SCC 78; Russell v. Duke of Norfolk,(1949) 1 All ER 109 (CA); Mohinder Singh Gill v. Chief Election Commr.**

(1978) 1 SCC 405). The applicability of the principles of natural justice is not a rule of thumb or an abstract proposition of law. It depends on the facts of the case, nature of the inquiry, the effect of the order/decision on the rights of the person, and other attendant circumstances. (**Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi, (1991) 2 SCC 716**; **Rajeev Agarwal v. State of Uttarakhand, 2019 SCC OnLineUtt 1849)**

119. In the application of the concept of fair play, there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a technical infringement of natural justice. (**Administrative Law : Wade & Forsyth; Rattan Lal Sharma, (1993) 4 SCC 10)**. The ultimate and overriding objective, underlying the rule of audi alteram partem to ensure a fair hearing and prevent failure of justice, should serve as a guide in applying this rule to varying situations. (**Mysore Urban Development Authority v.Veer Kumar Jain,(2010) 5 SCC 791;.Rajeev Agarwal v. State of Uttarakhand, 2019 SCC OnLineUtt 1849).** The objectives of the rules of natural justice is to ensure a fair hearing, a fair deal to the person whose rights may be affected. It is from the standpoint of fair hearing -- applying the test of prejudice -- that any and every complaint of violation of the

rules of natural justice should be examined. (**State Bank of Patiala v. S.K. Sharma,(1996) 3 SCC 364; A.K. Roy v. Union of India, (1982) 1 SCC 271; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664; A.K. Kraipak v. Union of India, (1969) 2 SCC 262; Council of Civil Service Unions v. Minister for the Civil Service, (1984) 3 All ER 935).** The object of principles of natural justice is to ensure that justice is done, that there is no failure of justice and that every person whose rights are going to be effected by the proposed action gets a fair hearing.**(*State Bank of Patiala* v. *S.K. Sharma*, (1996) 3 SCC 364**;**K.S. Sanjeeva Rao v. District Tribal Welfare Officer, Kharnmam, 2005 SCC OnLine AP 884).**

120. Except to claim that a notice, in terms of the first proviso to Regulation 5(1), has not been issued, the Appellant has not even contended that they had suffered prejudice thereby either before the CERC or even before this Tribunal. Even otherwise the Appellant, despite being given an opportunity of being heard before the CERC, has not even disputed the claim of PGCIL regarding commissioning of the transmission asset. We see no reason, in such circumstances, to interfere with the impugned Order on this score.

VIII.DO THE 2019 REGULATIONS APPLY ONLY TO PROJECTS UNDER SECTION 62 OF THE ACT?

121. Sri Sanjay Sen, Learned Senior Counsel, would submit that Regulation 2 of the 2019 Regulations, provides that the said regulations apply only to transmission projects commissioned under Section 62 of the Act; as such, the scope of Regulation 6(2) cannot be expanded by including transmission licensees who have been granted such a license for developing transmission system under Section 63 of the Act (such as the Appellant); alternatively, if the Regulations are not ignored, the above provision can only be made applicable upon transmission licensees who developed their transmission system under Section 62 of the Act, and not those under Section 63; the Appellant was awarded the transmission system to be constructed through a bidding process, in terms of Section 63 of the Act; the Appellant had already executed the TSA dated 10.01.2018 (*as upon becoming successful bidder, Adani Transmission Limited was made to acquire 100% shareholding of the Appellant*); as such, the TSA became a *fait-accompli* for the Appellant, qua bidding; Regulation 6(2) of the 2019 Regulations are only applicable qua Section 62 projects, and not qua Section 63 projects; and, to this extent, the aforesaid Regulations are not applicable.

122. Mrs. Suparna Srivastava, Learned Counsel for CTUIL, would submit that the regulatory regime, in Regulation 5(2) and 6(2) of the 2019 Regulations, is fundamentally based upon the readiness of both the inter-connected transmission systems so that the entire transmission system achieves 'regular service' i.e. it is able to evacuate the power intended for its end users i.e. the beneficiaries (distribution companies) and ultimately their consumers; the settled legal position is that no liability, for payment of transmission charges, can be fastened upon the said beneficiaries/consumers till they start receiving power through the commissioned inter-connected transmission assets; where more than one inter-State transmission licensee is involved, or both transmission system and generating station are delayed, the clear regulatory position, as envisaged both under the 2019 and the 2020 Regulations (Regulation 13(12)), is that, in case the COD, of the assets implemented by an RTM transmission licensee (such as PGCIL), has been approved by the Commission in terms of Regulation 5 of the 2019 Regulations, but the inter-connected assets of the TBCB licensee (such as the Appellant) are yet to achieve their COD, then the transmission charges are to be borne by the TBCB transmission licensee till its assets achieve COD; the same is the position in a reverse situation where the assets of the

RTM licensee are delayed; the said Regulations provide for a strict liability qua payment of transmission charges in case of delay in implementing the inter-connected transmission assets, notwithstanding the reasons for such delay being on account of force majeure or otherwise; as such, any liability imposed under the said Regulations is by operation of law and has necessarily to be discharged by the delaying entity; under the 2020 Regulations, the Central Transmission Utility, under Section 38 of the 2003 Act, is mandated to raise bills for recovery of the transmission charges payable under Regulation 13(12), and disburse the same to the concerned transmission licensee directly in accordance with the procedure prescribed in that regard; in furtherance of Regulation 23(3) of the 2020 Regulations, the Billing, Collection and Disbursement Procedure, 2020 has been notified on 1.1.2021, and bilateral bills for the mismatch period are raised by the CTU accordingly; the 2020 Regulations require Yearly Transmission Charges (YTC) (as defined in Regulation 2(y)) to be paid by all designated customers of ISTS (DICs), including the generating stations; Regulation 3 stipulates that the said YTC, as approved by the CERC, are to be shared amongst the specified categories of DICs; further, the regulatory scheme under the 2020 Regulations provides for a pooled system of sharing of transmission charges to be paid by ISTS users as per the

prescribed methodology known as the Point of Connection (PoC) mechanism; Regulation 12(6) casts a statutory obligation upon the CTU to collect these charges from the DICs in proportion to their monthly charges; the charges so collected are placed in a pool known as the PoC pool; from the said PoC Pool, the CTU is required to disburse the monthly transmission charges, to various transmission licenses owning the transmission assets, in terms of their approved transmission tariff; and any non-payment of transmission charges results in a deficit in the shared pool which, in turn, results in under-servicing of the transmission assets comprised in the ISTS.

123. Mrs. Swapna Seshadri, Learned Counsel for PGCIL, would submit that Section 63 is an enabling provision, and an alternative for tariff discovery which mandates the Commission to adopt the tariff, if discovered through a transparent process of bidding and in accordance with the Guidelines issued by the Central Government; Section 63 is a route by which the Appellant has chosen to set up its transmission line; the said provision cannot be so construed as coming in the way of the CERC prescribing a Regulation to deal with tariff determination and recovery under Section 178 read with Sections 61 & 62 of the Act; the subject levy are the transmission charges determined by the CERC for Asset 6 (*2 numbers 400 KV line bays at Bhadla Sub-station*)

which had been made ready by PGCIL on 27.09.2019; the 765 Kv Fatehgarh-Bhadla Transmission line of the Appellant got commissioned on 31.07.2021; Asset 6 had been commissioned by PGCIL to connect to the 765 kv (operating at 400 kv) Fatehgarh-Bhadhla line of the Appellant, and forms part of a larger transmission scheme known as *"Transmission system for Solar Power Park at Bhadla in the Northern region";* in so far as PGCIL as a transmission licensee is concerned, its tariff determination and recovery are governed by the provisions of the Tariff Regulations notified by the Central Commission under Section 178 r/w Section 61 and 62 of the Electricity Act, 2003; the assets of PGCIL receive tariff on a cost-plus basis, and the right to receive tariff has been crystallized under the provisions of the CERC (Terms and conditions of Tariff) Regulations, 2019 (the "2019 Regulations" for short); the 2019 Regulations recognise a situation where the assets of one licensee may be ready while the interconnecting system of the other licensee may not be ready; a licensee which comes in time is entitled to seek a declaration of deemed Commercial Operation Date under Regulation 5; a plain reading of the 2019 Regulations, which binds all parties including the CERC, make it clear that, if PGCIL's assets are ready but they are prevented from achieving Commercial Operation due to the default of either the

interconnected transmission system of the other transmission licensee or the generating station, it is entitled to seek declaration of deemed COD under Regulation 5(2) proviso 2; once the deemed COD is recognised by the CERC, PGCIL is entitled to recover its tariff from the transmission licensee which has delayed the interconnecting transmission assets; if the case is reversed and PGCIL delays, it would have to bear the transmission charges of the other licensee; the manner of determination of tariff of either licensee (either Section 62 or Section 63) is not relevant for the purposes of recovery of transmission charges inter-se the two licensees; in other words, the treatment of mismatch provided in Regulation 6, either between a generating company and a transmission licensee or between two interconnected transmission licensees, cannot be made subject to how either of these parties recover their own tariff for their respective assets; the primary argument of the Appellant, that the above Regulations do not apply to it as its tariff is determined under Section 63 of the Act, is not tenable; the Tariff Regulations apply in every case where a deemed COD approval has been granted by the CERC; for Asset 6, the Appellant has accepted the CERC's determination of deemed COD as on 27.09.2019 under Regulation 5, but challenges application of Regulation 6 which deals with

treatment of mismatch; an argument of such selective non-application of the Regulations cannot therefore be accepted; if the Appellant's contention is accepted, the tariff recovery under a Section 62 process read with the 2019 Regulations will be held hostage to the manner of determination of tariff of the delaying entity; in a given case, there may be a mismatch / delay between a generating company and a transmission company; if the generator gets delayed, it will contend that it is not liable to pay the charges for mismatch, since it may or may not be able to pass on the same in its own tariff exercise; and such an interpretation would amount to reading down Regulation 5 and 6 of the 2019 Regulations, which is impermissible.

124. Before examining the rival submissions under this head, it is useful to take note of the relevant provisions of the Act, the 2019 and the 2020 Regulations.

Section 62 and 63 of Electricity Act, 2003

125. Section 62 of the Electricity Act relates to determination of tariff and, under sub-section (1) thereof, the Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for, among others, (b) Transmission of electricity. Section 62(2) enables the Appropriate Commission to require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination

of tariff. Section 62(3) provides that the Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. Under Section 62(4), no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. Section 62(5) enables the Commission to require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover. Under Section 62(6), if any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

126. Section 63 of the Electricity Act relates to determination of tariff by bidding process, and thereunder, notwithstanding

anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations,2019

127. The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (the "2019 Regulations" for short) came into force on 01.04.2019, and is to remain in force for a period of five years from 1.4.2019 to 31.3.2024. Regulation 2 of the 2019 Regulations relates to the scope and extent of application. Regulation 2(1) provides that these regulations shall apply in all cases where tariff for a generating station or a unit thereof and a transmission system or an element thereof is required to be determined by the Commission under Section 62 of the Act read with section 79 thereof. Regulation 2(2) (a) stipulates that these regulations shall not apply to the Generating stations or transmission systems whose tariff has been discovered through tariff based competitive bidding in accordance with the guidelines issued by the Central Government and adopted by the Commission under section 63 of the Act.

128. Regulation 3(9) defines ‘Capital Cost’ to mean the capital cost as determined in accordance with Regulation 19. Regulation 3(10) defines ‘Change in Law’ to mean the occurrence of any of the following events (a) enactment, bringing into effect or promulgation of any new Indian law; or (b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or (c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or (d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or licence available or obtained for the project; or (e) coming into force or change in any bilateral or multilateral agreement or treaty between the Government of India and any other Sovereign Government having implication for the generating station or the transmission system regulated under these regulations. Regulation 3 (25) defines ‘Force Majeure’, for the purpose of these regulations, to mean the events or circumstances or combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the

control of the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices (a) Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or (b) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or (c) Industry wide strikes and labour disturbances having a nationwide impact in India; or (d) Delay in obtaining statutory approval for the project except where the delay is attributable to project developer. Regulation 3 (73)(f) defines 'Useful Life', in relation to a unit of a generating station, integrated mines, transmission system and communication system from the date of commercial operation, to mean 35 years for a Transmission line (including HVAC & HVDC) or a Communication system. Under the proviso thereto, the extension of life of the projects beyond the completion of their useful life shall be decided by the Commission on case to case basis.

129. Chapter 2 of the 2019 Regulations relates to the date of commercial operation, and Regulation 5 talks about the date

of commercial operation. Regulation 5(1) provides that the date of commercial operation of a generating station or unit thereof or a transmission system or element thereof and associated communication system shall be determined in accordance with the provisions of the Grid Code. Regulation 5(2) provides that, in case the transmission system or element thereof executed by a transmission licensee is ready for commercial operation, but the interconnected generating station or the transmission system of other transmission licensee as per the agreed project implementation schedule is not ready for commercial operation, the transmission licensee may file petition before the Commission for approval of the date of commercial operation of such transmission system or element thereof. Under the first proviso thereto, the transmission licensee seeking the approval of the date of commercial operation under this clause shall give prior notice of at least one month, to the generating company or the other transmission licensee and the long term customers of its transmission system, as the case may be, regarding the date of commercial operation.

130. Regulation 6 relates to the treatment of mismatch in the date of commercial operation and, under sub-section (2) thereof, in case of mismatch of the date of commercial operation of the transmission system and the transmission

system of other transmission licensee, the liability for the transmission charges shall be determined as under: (a) where an interconnected transmission system of other transmission licensee has not achieved the commercial operation as on the date of commercial operation of the transmission system (which is not before the SCOD of the interconnected transmission system) and the Commission has approved the date of commercial operation of such transmission system in terms of clause (2) of Regulation 5 of these regulations, the other transmission licensee shall be liable to pay the transmission charges of the transmission system in accordance with clause (5) of Regulation 14 of these regulations to the transmission licensee till the interconnected transmission system achieves commercial operation:; (b) where the transmission system has not achieved the commercial operation as on the date of commercial operation of the interconnected transmission system of other transmission licensee (which is not before the SCOD of the transmission system), the transmission licensee shall be liable to pay the transmission charges of such interconnected transmission system to the other transmission licensee or as may be determined by the Commission, in accordance with clause (5) of Regulation 14 of these regulations, till the transmission system achieves the commercial operation.

131. Chapter 3 relates to the procedure for tariff determination, and Regulation 8 to Tariff Determination. Regulation 8(1) provides that the tariff in respect of a generating station may be determined for the whole of the generating station or unit thereof, and tariff in respect of a transmission system may be determined for the whole of the transmission system or element thereof or associated communication system. Under proviso (ii) thereunder, in the case of commercial operation of units of generating station or elements of the transmission system on or after 1.4.2019, the generating company or the transmission licensee shall file a consolidated petition, in accordance with the provisions of the Procedure Regulations, combining all the units of the generating station or all elements of the transmission system which are anticipated to achieve commercial operation during the next two months from the date of application. Regulation 10 relates to determination of tariff, and Regulation 14 to tariff structure. Regulation 14(5) provides that the tariff for transmission of electricity on inter-State transmission system shall comprise transmission charges for recovery of annual fixed cost consisting of the components specified in Regulation 15 of these regulations. Regulation 15 relates to capacity charges and provides that the capacity charges shall be derived on the basis of annual fixed cost. The Annual Fixed Cost (AFC) of a generating

station or a transmission system including communication system shall consist of the following components: (a) Return on equity; (b) Interest on loan capital; (c) Depreciation; (d) Interest on working capital; and (e) Operation and maintenance expenses. Under the proviso thereto, Special Allowance in lieu of R&M, where opted in accordance with Regulation 28 of these regulations, shall be recovered separately and shall not be considered for computation of working capital.

132. Chapter 6 relates to computation of capital cost. Regulation 19 relates to capital cost and, under sub-section (1) thereof, the capital cost of the generating station or the transmission system, as the case may be, as determined by the Commission after prudence check in accordance with these regulations, shall form the basis for determination of tariff for existing and new projects. Regulation 19(2) provides that the capital cost of a new project shall include the following: (a) the expenditure incurred or projected to be incurred up to the date of commercial operation of the project; (b) Interest during construction and financing charges, on the loans (i) being equal to 70% of the funds deployed, in the event of the actual equity in excess of 30% of the funds deployed, by treating the excess equity as normative loan, or (ii) being equal to the actual amount of loan in the event of

the actual equity less than 30% of the funds deployed; (c) any gain or loss on account of foreign exchange risk variation pertaining to the loan amount availed during the construction period; (d) interest during construction and incidental expenditure during construction as computed in accordance with these regulations; (e) capitalised initial spares subject to the ceiling rates in accordance with these regulations; (f) expenditure on account of additional capitalization and de-capitalisation determined in accordance with these regulations; (g) adjustment of revenue due to sale of infirm power in excess of fuel cost prior to the date of commercial operation as specified under Regulation 7 of these regulations; (h) adjustment of revenue earned by the transmission licensee by using the assets before the date of commercial operation; (i) capital expenditure on account of ash disposal and utilization including handling and transportation facility; (j) capital expenditure incurred towards railway infrastructure and its augmentation for transportation of coal up to the receiving end of the generating station but does not include the transportation cost and any other appurtenant cost paid to the railway; (k) capital expenditure on account of biomass handling equipment and facilities, for co-firing; (l) capital expenditure on account of emission control system

necessary to meet the revised emission standards and sewage treatment plant; (m) expenditure on account of fulfilment of any conditions for obtaining environment clearance for the project; (n) expenditure on account of change in law and force majeure events; and (o) capital cost incurred or projected to be incurred by a thermal generating station, on account of implementation of the norms under Perform, Achieve and Trade (PAT) scheme of Government of India shall be considered by the Commission subject to sharing of benefits accrued under the PAT scheme with the beneficiaries.

133. Regulation 20 relates to prudence check of capital cost , and sub-section (1) thereof requires the following principles to be adopted for prudence check of capital cost of the existing or new projects, in case of the thermal generating station and the transmission system, prudence check of capital cost shall include scrutiny of the capital expenditure, in the light of capital cost of similar projects based on past historical data, wherever available, reasonableness of financing plan, interest during construction, incidental expenditure during construction, use of efficient technology, cost over-run and time over-run, procurement of equipment and materials through competitive bidding and such other matters as may be considered appropriate by the

Commission. Under the proviso thereto, while carrying out the prudence check, the Commission shall also examine whether the generating company or transmission licensee, as the case may be, has been careful in its judgments and decisions in execution of the project.

134. Regulation 21 relates to interest during construction (IDC) and incidental expenditure during construction (IEDC). Regulation 21(1) provides that interest during construction (IDC) shall be computed corresponding to the loan from the date of infusion of debt fund, and after taking into account the prudent phasing of funds upto SCOD. Sub-Section (2) stipulates that incidental expenditure during construction (IEDC) shall be computed from the zero date, taking into account pre-operative expenses upto SCOD. Regulation 21(3) provides that, in case of additional costs on account of IDC and IEDC due to delay in achieving the COD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justifications with supporting documents for such delay including prudent phasing of funds in case of IDC and details of IEDC during the period of delay and liquidated damages recovered or recoverable corresponding to the delay. Sub-Section (4)

provides that, if the delay in achieving the COD is not attributable to the generating company or the transmission licensee, IDC and IEDC beyond SCOD may be allowed after prudence check and the liquidated damages, if any, recovered from the contractor or supplier or agency shall be adjusted in the capital cost of the generating station or the transmission system, as the case may be. Sub-Section (5) provides that, if the delay in achieving the COD is attributable either in entirety on in part to the generating company or the transmission licensee or its contractor or supplier or agency, in such cases, IDC and IEDC beyond SCOD may be disallowed after prudence check either in entirety or on pro-rata basis corresponding to the period of delay not condoned and the liquidated damages, if any, recovered from the contractor or supplier or agency shall be retained by the generating company or the transmission licensee, as the case may be.

135. Regulation 22 relates to controllable and uncontrollable factors: The following shall be considered as controllable and uncontrollable factors for deciding time over-run, cost escalation, IDC and IEDC of the project: Under Regulation 22(1), the “controllable factors” shall include but shall not be limited to the following (a) efficiency in the implementation of the project not involving approved

change in scope of such project, change in statutory levies or change in law or force majeure events; and (b) delay in execution of the project on account of contractor or supplier or agency of the generating company or transmission licensee. Regulation 22 (2) provides that the “uncontrollable factors” shall include but shall not be limited to the following (a) Force Majeure events; (b) Change in law; and (c) Land acquisition except where the delay is attributable to the generating company or the transmission licensee.

Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020

136. The Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020 (the “2020 Regulations” for short) applies to all Designated ISTS Customers (DICs), Inter-State Transmission Licensees, National Load Despatch Centre (NLDC), Regional Load Despatch Centres (RLDCs), State Load Despatch Centres (SLDCs) and Regional Power Committees (RPCs). Regulation 2(i)(j) defines ‘Designated ISTS Customer’ or ‘DIC’ to mean the user of any transmission element(s) of the Inter-State Transmission System (ISTS), and to include generating station, State

Transmission Utility (STU), distribution licensee including State Electricity Board or its successor company, Electricity Department of State and any other entity directly connected to the ISTS and shall include an intra-State entity or a trading licensee that has obtained Medium Term Open Access or Long Term Access to ISTS. Clause (n) defines Monthly Transmission Charges' or 'MTC' in a billing month to mean the transmission charges derived from the Yearly Transmission Charges for the corresponding billing period or part thereof; and clause (ee) defines 'Yearly Transmission Charges' or 'YTC' to mean the annual transmission charges as determined or adopted by the Commission for the transmission elements of ISTS which have achieved COD upto the last day of a billing period, and for intra-State transmission lines used for inter-State transmission of electricity as approved by the Commission.

137. Regulation 3 prescribes the principles of sharing transmission charges and, under Clause (1) thereof, the transmission charges shall be shared amongst the DICs on monthly basis based on the Yearly Transmission Charges such that (a) the Yearly Transmission Charges are fully recovered; and (b) any adjustment on account of revision of the Yearly Transmission Charges are recovered. Regulation 3(2) stipulates that the yearly transmission charges for transmission system shall be shared on monthly basis by

DICs in accordance with Regulations 5 to 8 of these regulations subject to the exceptions provided in Clauses (3), (6), (9) and (12) of Regulation 13 of these regulations. Regulation 3(3) provides that (1) Long Term Access or Medium Term Open Access for projects covered under Clause (1) of Regulation 13 shall not be considered for apportionment of Yearly Transmission Charges under Regulations 5 to 8 of these regulations and (2) sharing of transmission charges for DICs shall be based on the technical and commercial information provided by the DICs, inter-State transmission licensees, NLDC, RLDCs, SLDCs and CTU to the Implementing Agency.

138. Chapter 3 relates to specific cases, and Regulation 13 thereunder prescribes the treatment of transmission charges and losses in specific cases. Regulation 13(12) provides that, in case of a transmission system where COD has been approved in terms of proviso (ii) of Clause (3) of Regulation 4 of the Tariff Regulations, 2014 or Clause (2) of Regulation 5 of the Tariff Regulations, 2019 or where deemed COD has been declared in terms of Transmission Service Agreement under Tariff based Competitive Bidding, the Yearly Transmission Charges for the transmission system shall be (a) paid by the inter-State transmission licensee whose transmission system is delayed till its transmission system achieves COD, or (b) paid by the

generating company whose generating station or unit(s) thereof is delayed, till the generating station or unit thereof, achieves COD, or (c) shared in the manner as decided by the Commission on case to case basis, where more than one inter-State transmission licensee is involved or both transmission system and generating station are delayed.

139. Chapter 4 relates to accounting, billing and collection of transmission charges, and Regulation 15 thereunder relates to billing. Regulation 15(3) provides that the Central Transmission Utility shall raise separate bills, as per the timelines for the first bill, for transmission systems covered under Clauses (3), (6), (8), (9) and (12) of Regulation 13 and not covered under Regulations 5 to 8 of these regulations.

140. As referred to hereinabove, Chapter 2 of the 2019 Regulations relates to the date of commercial operation. Regulation 5 thereunder relates to the date of commercial operation and Regulation 6 relates to the treatment of mismatch in the date of commercial operation. Chapter 3 relates to the procedure for tariff determination, and Regulation 8 to Tariff Determination. Regulation 10 relates to ddetermination of tariff, and Regulation 14 to tariff structure. Regulation 15 relates to capacity charges. Chapter 6 relates to computation of capital cost. Regulation

19 relates to capital cost. Regulation 20 relates to prudence check of capital cost. Regulation 21 relates to interest during construction (IDC) and incidental expenditure during construction (IEDC). Regulation 22 relates to controllable and uncontrollable factors etc. It is only because the exercise of tariff determination is prescribed in Section 62, and Section 63 provides for adoption of tariff and not its determination and specifically excludes Section 62, that Regulation 2(1) provides for application of the 2019 regulations where tariff for a transmission system or an element thereof is required to be determined by the Commission under Section 62 of the Act read with section 79 thereof, and Regulation 2(2) (a) excludes application of the 2019 Regulations to transmission systems whose tariff has been discovered through tariff based competitive bidding in accordance with the guidelines issued by the Central Government and adopted by the Commission under section 63 of the Act.

141. As noted earlier in this order, an integrated transmission system scheme is often implemented through a combination of both the Regulated Tariff Mechanism (RTM) route and the Tariff Based Competitive Bidding (TBCB) route, and the decision/agreement, as regards segregation of transmission assets for their implementation through the RTM route and the TBCB route, is taken in the meetings held for approving

the said system. Implementation of the transmission assets, comprised in such an integrated transmission system scheme, must ensure that it matches with the commissioning of the generating stations(s) whose power is to be evacuated through the transmission system under the scheme. For the transmission assets implemented under the RTM route, the RTM licensee (in the present case PGCIL) is entitled to receive regulated tariff as determined by the CERC under Section 62 of the Act in accordance with the principles enshrined under Section 61 thereof for determination of tariff, and the applicable Tariff Regulations framed in that behalf by the CERC. For the assets implemented under the Tariff Based Competitive Bidding (TBCB) route, the TBCB licensee (in the present case the Appellant) is entitled to receive the tariff discovered through the bidding process and adopted by the CERC.

142. The readiness of both the inter-connected transmission systems to achieve COD are so arranged, and the COD of the transmission assets of both the RTM and TBCB licensees are so matched, as to ensure that the entire transmission system achieves 'regular service' i.e. it is able to evacuate the power intended for its end users i.e. the beneficiaries (distribution licensees) and ultimately their consumers. The problem arises in the case of mismatch ie when the transmission assets of one licensee is ready to be

commissioned, while those of the other licensee are not. As the COD of the transmission asset of PGCIL was determined as 27.09.2019, they were entitled to recover the capital cost of the subject transmission asset, from that date, through the yearly transmission charges to be determined by the CERC. The right of PGCIL to recover transmission charges from the beneficiaries/Consumers, and the latter's liability for payment of transmission charges, would arise only when they start receiving power through the commissioned inter-connected transmission assets. Recovery of transmission charges in such cases from the pool of consumers would, in effect, mean that, even without receiving power, these consumers would be forced, for no fault of theirs, to make such payment. On the other hand, failure to pay transmission charges to the transmission licensee, whose asset has achieved COD, would require them to bear the loss for this period for no fault of theirs either. As there is no contractual arrangement between the two transmission licensees, there is no contractual mode of compensation for the loss suffered. It is evidently to resolve this issue that the 2019 Regulations now contains provisions, ie Regulation 5(2) and 6(2), making the delaying licensee liable to compensate the other licensee for their delay in commissioning their transmission asset.

143. The object sought to be achieved by the CERC, in introducing these provisions in the 2019 Regulations, is evident from the Statement of Reasons. Para 4.2 of the Statement of Reasons issued by the CERC, with respect to the draft Regulations, relates to the treatment of mismatch in the date of commercial operation, and explains the rationale behind Regulation 6 of the 2019 Regulations. Para 4.2.1 states that the draft 2019 Tariff Regulations provides for commercial implications of mismatch in the date of commercial operation between a generating station and transmission system and also between two transmission systems. Para 4.2.2 records that the CERC had received several suggestions in respect of this provision, wherein the generating companies and the transmission licensees had expressed divergent views. The generating companies had suggested that levying of transmission charges was not adequate compensation against the loss of generation due to delay in commissioning of the transmission system. The transmission licensees had suggested that levying of transmission charges of the region, without considering the portion of the transmission system being built by the transmission licensee, would be disproportionate. Besides, many distribution licensees had suggested that whatever may be the treatment or commercial settlement between the generating company or the transmission licensee on

account of mismatch, the cost should be borne by the defaulting parties and the same should not be passed on to the distribution licensee.

144. Para 4.2.3 states that, after detailed discussion on this issue and considering the suggestions received, the CERC agreed with the suggestion that the defaulting party should be liable to pay the transmission charges and the same should not be passed on to the beneficiaries. With regard to the amount of compensation, it had been decided that the compensation should be equal to the transmission charges of the associated transmission system which remained unutilized. Accordingly, the words ‘at the rate the applicable transmission charges of the region' had been substituted by the word "in accordance with clause (5) of Regulation 14 of these regulations” to limit the compensation to the extent of the associated transmission charges. Para 4.2.4 records that further, the CERC had added a phrase ‘(which is not before the SCOD) of the transmission system’ in order to clarify that the liability for transmission charges, on account of mismatch after the date of commercial operation of the transmission system, shall not commence before the SCOD of the transmission system.”

145. The above principle has also been recognised by the CERC while framing the **CERC (Sharing of Inter-State**

Transmission Regulations 2020 (the **"2020 Regulations**"). Regulation 13(12) thereof provides that, in case of a transmission system where COD has been approved in terms of clause (2) of Regulation 5 of the 2019 Regulations, or where deemed COD has been declared in terms of Transmission Service Agreement under Tariff based Competitive Bidding, the Yearly Transmission Charges for the transmission system shall be (a) paid by the inter-State transmission licensee whose transmission system is delayed till its transmission system achieves COD, or (b) paid by the generating company whose generating station or unit(s) thereof is delayed, till the generating station or unit thereof, achieves COD, or (c) shared in the manner as decided by the Commission on case to case basis, where more than one inter-State transmission licensee is involved or both transmission system and generating station are delayed.

146. The exercise undertaken by the CERC, under the impugned order, is only to determine the tariff, for the transmission asset of PGCL, under Section 62 of the Act, and not the tariff of the Appellant which had been discovered and adopted by the CERC earlier under Section 63. The stipulation in Regulation 2(2) of the 2019 Regulations, regarding its inapplicability, is only with respect to tariff

discovered under Section 63 of the Act. In the present case, the CERC has only determined the tariff of PGCIL under Section 62, and not the tariff of the appellant. Reliance by the Appellant on Regulation 2(2) of the 2019 Regulations is therefore misplaced.

147. The liability was fastened on the Appellant, to pay transmission charges for the mismatch period to PGCIL, not while determining their tariff, but only because of their delay in commissioning their transmission asset which resulted in failure to supply power to the beneficiaries/consumers, and PGCIL being deprived thereby from recovering these charges.

148. The Appellant has, in the present proceedings, invoked the first proviso to Regulation 5(1) complaining of the failure of PGCIL to issue notice to them. Having sought protection under the 2019 Regulations, the Appellant cannot approbate and reprobate to contend that, when it comes to payment for the mismatch period, the 2019 Regulations have no application. Further, the 2019 Regulations are attracted both in cases (1) where the COD, of the assets implemented by an RTM transmission licensee (such as PGCIL), has been approved by the Commission, but the inter-connected assets of the TBCB licensee (such as the Appellant) are yet to achieve their COD, and (2) in a reverse situation where the assets of the TBCB licensee achieve

COD, but the transmission assets of the RTM licensee are delayed. In both cases, the transmission charges are to be borne by the transmission licensee which has delayed commissioning its assets. In case PGCIL had delayed commissioning its asset, these Regulations would have been applied, while determining their tariff, and they would have been held liable to pay transmission charges to the appellant for the mismatch period. It is evident, therefore, that the 2019 Regulations are inapplicable only for tariff determination of a licensee who falls within the ambit of Section 63, and would apply in situations such as the present. In short, the Regulations provide for a strict liability regarding payment of transmission charges in case of delay in implementing the inter-connected transmission assets. The contention that these Regulations have no application in any situation, to transmission licensees who have come through the Section 63 route, (ie even in situations other than the one relating to their tariff), is without merit and necessitates rejection.

IX.HAVE THE 2019 AND 2020 REGULATIONS BEEN APPLIED RETROSPECTIVELY?

149. Sri Sanjay Sen, Learned Senior Counsel, would submit that the Appellant has established the project under Section 63, and its liabilities are capped in terms envisaged under the

said Section 63 regime; the Request for Qualification was issued on 11.04.2017, the Request for Proposal was issued on 21.11.2017, the last date for submission of the bid was 22.01.2018, the letter of Award is dated 22.01.2018, the tariff was adopted in Petition No. 93/AT/2018 on 27.08.2018, and the Transmission license was granted in Petition No. 94/TL/2018 on 27.08.2018, all of which were prior to the 2019 and the 2020 Regulations coming into force; the CERC cannot, post facto (i.e. after the bids are called on the basis of the Central Government Guidelines, adoption of tariff, approval and execution of TSA, grant of transmission license etc.) impose a liability / penalty using its general regulatory powers; at the time of bidding (which was conducted in the year 2018), the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 ("CERC Sharing Regulations 2010") were in force; the said Regulations did not contain any provision, equivalent to Regulations 5(2) and 6(2) of the 2019 Regulations, and Regulation 13(12) of the 2020 Regulations, which impose transmission charges upon an inter-state transmission licensee on account of delay in constructing the transmission project; the sanctity of the bidding process would be completely destroyed if the levy is allowed - for the bidders, in terms of the provisions in the draft Transmission Services Agreement, and subject to the conditions

contained therein, were required to compensate the counter-parties to the contract by payment of liquidated damages in case of delay in commissioning the project, and nothing more; in the present case, Regulations 5(2) & 6(2) of the 2019 Regulations and Regulation 13(12) of the 2020 Regulations were framed subsequent to the bid of the Appellant, by the Respondent Commission, which now seek to impose transmission charges from one inter-state transmission licensee upon another inter-state transmission licensee on account of alleged delay in constructing its transmission project; delegated legislation cannot, unless the parent statute so provides, apply retrospectively so as to upset vested rights; reliance placed on the Constitution Bench judgment, in ***PTC India Ltd* : *(2010) 4 SCC 603,*** is misplaced; in the present case, admittedly, there is no underlying contract with PGCIL that needs to be aligned with the new regulations; PGCIL, being a co-licensee, is not a party to the Transmission Services Agreement; and the PTC principle cannot be stretched and made applicable to impose a new contract (and consequential liability) when there is no underlying contract in existence.

150. Mrs. Swapna Seshadri, Learned Counsel for PGCIL, would submit that the Appellant's contention that its tariff based competitive bidding process got concluded prior to notification of the 2019 Regulations, and it is, therefore, not

bound by the provisions thereof, has no basis in view of the judgement of the Supreme Court in

A. RETROSPECTIVE OPERATION: ITS SCOPE:

151. In considering the merits of this contention, it is useful to first understand when a provision of a statute, rule or regulation is retrospective in its operation. In **Craies on *Statute Law* (7th edn., page 389)** it is stated that no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Retrospective, according to **Black's *Law Dictionary*,** means looking backward; contemplating what is past; having reference to a statute or things existing before the Act in question. Retrospective law, according to the same dictionary, means a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights occurring, before it came into force. **Halsbury's Laws of England (4th edn., Vol. 44, at paragraph 921)** gives the meaning of “retrospective”, as Courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the

future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects existing rights nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. It would not be retrospective merely because a part of the requisites for its action was drawn from a time antecedent to the Act (or rule or regulation) coming into force. Merely because an Act (or Rule or Regulation) envisages a past act or event in the sweep of its operation, it may not necessarily be said to be retrospective. **(Darshan Singh v. Ram Pal Singh, 1992 Supp (1) SCC 191).** A statute (or a rule or regulation) is not retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. **(*Mithilesh Kumari* v. *Prem Behari Khare*: (1989) 2 SCC 95)).**

152. While the submission of Sri Sanjay Sen, Learned Senior Counsel, that, when a transaction is controlled by a special competitive bidding procedure/guideline (*statutorily established by the Central Government*) the CERC cannot use its regulatory powers to impose penalty/liability that was not contemplated under the competitive bidding procedure that has resulted in execution of binding contracts, cannot be readily brushed aside, it must be borne in mind that the exercise of power by the CERC, in terms of the 2019 and

2020 statutory regulations made under Section 178 of the Act, is distinct and different from its using its general regulatory powers under Section 79 of the Act, for Regulations made under Section 178 can also over-ride existing contracts. (**PTC India Ltd. v. CERC (2010) 4 SCC 603)**. The aforesaid Regulations were made to protect transmission licensees, involved in commissioning transmission assets as part of an integrated transmission system, who had no contractual relationship with the delaying transmission licensee or the Generating unit. As these Regulations are statutory in character, and have the force of law, they would govern even in situations where there exists no contractual relationship between the regulated entities as these regulations are binding on all of them, irrespective of whether or not they are parties to a contract.

153. It is no doubt true that the Request for Qualification, the Request for Proposal, the last date for submission of the bid, the letter of Award, adoption of the tariff under Section 63, and grant of the Transmission license were all prior to the 2019 and the 2020 Regulations coming into force. If the Appellant's tariff or the conditions of their transmission license were sought to be varied by way of these Regulations, it would then have amounted to a retrospective

application of the Regulations impairing the vested rights of the Appellant.

154. As shall be detailed later in this Order, the schedule to the Transmission Supply Agreement stipulates the date by which the Appellant should commission its transmission asset. Admittedly the Appellant has failed to do so. They have also delayed commissioning even after the transmission asset of PGCIL was ready, and as a result thereof the PGCIL transmission asset remained unutilised. It is for the loss they have suffered on account of the Appellant's delay, do the 2019 and 2020 Regulations provide for the recovery of transmission charges by PGCIL from the Appellant for the period of delay.

155. As noted hereinabove, a statute (or statutory rule or regulation) is not retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. The fact that the bidding process was finalised, the work was awarded and a transmission license was granted to the Appellant prior to the 2019 Regulations coming into force, would not, therefore, make application of the said Regulations retrospective, as the liability imposed on the Appellant is for a period subsequent to the said Regulations coming into force, and not prior thereto. It is after the 2019 Regulations came into force on 01.04.2019, that the liability towards transmission charges of Asset-6, for

the mismatch period from 27.9.2019 to 29.7.2021, was fastened on the Appellant. As generation under the control of AREPRL was not ready even by 30.07.2021, the transmission charges of Asset-6 was directed to be borne by AREPRL from 30.7.2021 onwards till COD of the generation under the control of AREPRL.

156. The contention, that the 2019 and the 2020 Regulations have been applied retrospectively, therefore necessitates rejection.

X. IS THE LIABILITY OF THE APPELLANT CONFINED ONLY IN TERMS OF THE TSA AND NOT UNDER THE REGULATIONS?

157. Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Appellant was never ever put to notice that it would be required to make payment of 'transmission charges' over and above the liquidated damages as contemplated under the bid and the TSA; the levy of transmission charges is not supported by any contract between the parties; since there is no contract, it cannot be in the nature of a levy of damages under Section 73 and 74 of the Contract Act, 1872; even common law principles of damages is not applicable on account of remoteness and, in any event, there is no such plea to support any claim of damages against the Appellant by

PGCIL; as per the TSA, the Appellant is liable only to pay liquidated damages on account of any delay in constructing its transmission project; and no further charges can be levied upon the Appellant, over and above what was contemplated at the time of bid, and recorded in the TSA.

158. Mrs. Swapna Seshadri, Learned Counsel for PGCIL, would submit that the Appellant also declared a deemed COD of its transmission line vide letter dated 30.07.2021; the Transmission Service Agreement (TSA) entered into by the Appellant with the Generator also captures under Article 6.2 that if the Appellant is unable to declare its COD due to reasons not attributable to it, it will have a deemed COD from the date it is ready and will be entitled to claim tariff from the said date; specifically, the Appellant has declared a deemed COD with effect from 31.07.2021, and its transmission charges, for the period from 31.07.2021 till completion of COD of the Generator, are being billed by the CTUIL to the Generating Company – Adani Renewable Energy Park Rajasthan Ltd. (AREPRL); and, while the Appellant has no difficulty in receiving its transmission charges from the entity which caused the mismatch qua its assets i.e. AREPL, it does not wish to honour the bills of PGCIL for charges for the period of mismatch caused by the Appellant.

159. Before examining the rival submissions under this head, it is useful to take note of the relevant clauses of the Transmission Service Agreement.

A.RELEVANT CLAUSES OF THE TRANSMISSION SERVICE AGREEMENT:

160. Article 4.4 of the TSA relates to Extension of Time. Article 4.4.1 provides that, in event that the TSP (ie the Appellant) is prevented from performing its obligations under Article 4.1 (a), (b), (e) by the stipulated date, due to any Long Term Transmission Customer's event of default, the Scheduled COD shall be extended by a day for day basis, subject to the provisions of Article 13. Article 4.4.2 provides that, in the event that an element of the project cannot be commissioned by its Scheduled COD on account of any force majeure event as per Article 11, the Scheduled COD shall be extended, by day for day basis, for a maximum period of one hundred and eighty (180) days. In case the force majeure event continues even after the maximum period of one hundred and eighty (180) days, the TSP or the Majority Long Term Transmission Customer/s may choose to terminate the agreement as per the provisions of Article 13.5. Article 4.4.3 stipulates that, if the parties have not agreed, within thirty (30) days after the affected party's performance has ceased to be affected by the relevant

circumstance, on how long the Scheduled COD should be deferred by, any party may raise the dispute to be resolved in accordance with Article 16. Article 16 relates to Dispute Resolution.

161. Article 6 of the Transmission Service Agreement relates to “commissioning of the Project”, and Article 6.1 relates to Connection with the Inter-Connection Facilities. Article 6.1.1 required the appellant to give the RLDC(s), CTU/ STU, as the case may be, the Long Term Transmission Customers and any other agencies as required, at least sixty (60) days advance written notice of the date on which it intends to connect an Element of the Project, which date is not to be earlier than its Scheduled COD or Schedule COD extended as per Article 4.4.1 of the Agreement, unless the Lead Long Term Transmission Customer otherwise agrees. Article 6.2 relates to “Commercial Operation”, and Article 6.2.1 thereunder stipulates that an Element of the Project shall be declared to have achieved COD seventy two (72) hours following the connection of the Element with the Interconnection Facilities or seven (7) days after the date on which it is declared by the TSP to be ready for charging, but is not able to be charged for reasons not attributable to the TSP or seven (7) days after the date of deferment, if any, pursuant to Article 6.1.2. Under the proviso thereto, an Element shall be declared to have achieved COD only after

all the Elements, if any, which are pre-required to have achieved COD as defined in Schedule 3 of the Agreement, have been declared to have achieved their respective COD. Article 6.2.2 stipulates that, once any Element of the Project has been declared to have achieved deemed COD as per Article 6.2.1, such Element of the Project shall be deemed to have availability equal to the Target availability till the actual charging of the Element and, to this extent, shall be eligible for payment of the Monthly Transmission Charges applicable for such Element. Article 6.3 relates to 'Liquidated Damages for delay due to Long Term Transmission Customer Event of Default or Direct Non-Natural Force Majeure Events or Indirect Non-Natural Force Majeure Events or Natural Force Majeure Event (affecting the Long Term Transmission Customer).

162. Article 6.4 relates to "Liquidated Damages for delay in achieving COD of the Project". Article 6.4.1 provides that, if the TSP fails to achieve COD of any Element of the Project or the Project, by the Element's / Project's Scheduled COD as extended under Articles 4.4.1 and 4.4.2, then the TSP shall pay to the Long Term Transmission Customers, as communicated by the Lead Long Term Transmission Customer, in proportion to their Allocated Project Capacity as on the date seven (7) days prior to the Bid Deadline, a sum equivalent to 3.33% of Monthly Transmission Charges

applicable for the Element of the Project in case where no Elements have been defined, to be on the Project as a whole / Project, for each day of delay up to sixty (60) days of delay and beyond that time limit, at the rate of five percent (5%) of the Monthly Transmission Charges applicable to such Element / Project, as liquidated damages for such delay and not as penalty, without prejudice to the Long Term Transmission Customers' rights under the Agreement. Article 6.4.2 stipulates that the TSP's maximum liability under this Article shall be limited to the amount of liquidated damages calculated in accordance with Article 6.4.1 for and up to six (6) months of delay for the Element or the Project. Under the proviso thereto, in case of failure of the TSP to achieve COD of the Element of the Project even after the expiry of six (6) months from its Scheduled COD, the provisions of Article 13 shall apply.

163. Article 6.4.3 requires the TSP to make payment of the liquidated damages calculated pursuant to Article 6.4.1 within ten (10) days of the earlier of: (a) the date on which the applicable Element achieves COD; or (b) the date of termination of this Agreement, and provides that the payment of such damages shall not relieve the TSP from its obligations to complete the Project or from any other obligation and liabilities under the Agreement. Under Article 6.4.4, if the TSP fails to pay the amount of liquidated

damages within the said period of ten (10) days, the Long Term Transmission Customers shall be entitled to recover the said amount of the liquidated damages by invoking the Contract Performance Guarantee. If the then existing Contract Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the TSP to the Long Term Transmission Customers under this Article, the TSP shall be liable to forthwith pay the balance amount.

164. Article 11 of the TSA relates to FORCE MAJEURE, and Article 11.2 to the Affected Party. Article 11.2.1 defines an Affected Party to mean any of the Long Term Transmission Customers or the TSP whose performance has been affected by an event of Force Majeure. Article 11.2.3 stipulates that any event of Force Majeure shall be deemed to be an event of Force Majeure affecting the TSP only if the Force Majeure event affects and results in, late delivery of machinery and equipment for the Project or construction, completion, commissioning of the Project by Scheduled COD and/or operation thereafter. Article 11.3 defines “Force Majeure” to mean any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances

are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices: (a) Natural Force Majeure Events: act of God, including, but not limited to drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years, (b) Non-Natural Force Majeure Events:

i. Direct Non-Natural Force Majeure Events

- Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the TSP; or
- the unlawful. unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the TSP to perform their obligations under the RFP Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other Consents, Clearances and Permits required for the development/ operation of the Project, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or

- any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality which is directed against the Project, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

ii. Indirect Non - Natural Force Majeure Events

- act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or
- radioactive contamination or ionizing radiation originating from a source in India or resulting from any other Indirect Non Natural Force Majeure Event mentioned above, excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Site by the Affected Party or those employed or engaged by the Affected Party; or
- industry wide strikes and labour disturbances, having a nationwide impact in India.

165. Article 11.4 relates to Force Majeure Exclusions. Article 11.4.1 stipulates that Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (i) the following conditions, except to the

extent that they are consequences of an event of Force Majeure: (a) Unavailability, late delivery, or changes in cost of the machinery, Equipment, materials, spare parts etc. for the Project; (b) Delay in the performance of any Contractors or their agents; (c) Non-performance resulting from normal wear and tear typically experienced in transmission materials and equipment; (d) Strikes or labour disturbance at the facilities of the Affected Party; (e) Insufficiency of finances or funds or the Agreement becoming onerous to perform; and (f) Non-performance caused by, or connected with, the Affected Party's: (i). negligent or intentional acts, errors or omissions; (ii). failure to comply with an Indian Law; or (iii). breach of, or default under this Agreement or any Project Documents.

166. Article 11.5 relates to Notification of Force Majeure Event. Article 11.5.1 requires the Affected Party to give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after re-instatement of

communications, but not later than one (1) day after such reinstatement. Under the Proviso thereto, such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure. Article 11.5.2 requires the Affected Party to give notice to the other Party of the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

167. Article 11.6 relates to the “Duty to perform and duty to mitigate”, and provides that, to the extent not prevented by a Force Majeure Event, the Affected Party shall continue to perform its obligations as provided in this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable. Article 11.7 relates to the Available Relief for a Force Majeure Event, and provides that, subject to Article 11, (a) no Party shall be in breach of its obligations pursuant to this

Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event; (b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement; (c) for the avoidance of doubt, it is clarified that the computation of Availability of the Elements under outage due to Force Majeure Event, as per Article 11.3 affecting the TSP shall be as per Appendix Ill to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2014 as on seven (7) days prior to the Bid Deadline. For the events, for which the Element(s) is/are deemed to be available as per Appendix Ill to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2014, then only the Non-Escalable Transmission Charges, as applicable to such Elements) in the relevant Contract Year, shall be paid by the Long Term Transmission Customers as per Schedule 5, for the duration of such Event(s); (d) for so long as the TSP is claiming relief due to any Force Majeure Event under this Agreement, the Lead Long Term Transmission Customer may, from time to time on one (1) day notice, inspect the Project and the TSP shall provide the Lead Long Term Transmission Customer's personnel with access to the Project to carry out such inspections, subject to the Lead Long Term Transmission

Customer's personnel complying with all reasonable safety precautions and standards.

168. Article 12.1 of the TSA relates to Change in Law. Article 12.1.1 defines Change in Law to mean the occurrence of any of the following after the date, which is seven (7) days prior to the Bid Deadline, resulting into any additional recurring / non-recurring expenditure by the TSP or any income to the TSP:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits;
- any change in the licensing regulations of the Appropriate Commission, under which the Transmission License for

the Project was granted if made applicable by such Appropriate Commission to the TSP

- any change in the Acquisition Price; or
- any change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP as per the terms of this Agreement.

169. Article 12.1.2 provides that notwithstanding anything contained in the TSA, Change in Law shall not cover any change: (a) on account of regulatory measures by the Appropriate Commission including calculation of Availability; and (b) in any tax applied on the income or profits of the TSP.

170. Article 12.2 relates to the Relief for Change in Law. Article 12.2.1 provides that during the Construction Period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given therein. Article 12.2.3 stipulates that, for any claims made under Articles 12.2.1 and 12.2.2, the TSP shall provide to the Long Term Transmission Customers and the Appropriate Commission documentary proof of such increase/decrease in cost of the Project/revenue for establishing the impact of such Change in Law. Article 12.2.4 provides that the decision of the Appropriate Commission, with regards to the determination of the compensation mentioned in Articles 12.2.1 and 12.2.2, and the date from

which such compensation shall become effective, shall be final and binding on both the Parties subject to rights of appeal provided under applicable Law.

171. Article 12.3 relates to the Notification of Change in Law. Article 12.3.1 provides that, if the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law under Article 12, it shall give notice to the Lead Long Term Transmission Customer of such Change in Law as soon as reasonably practicable after becoming aware of the same. Article 12.3.2 provides that the TSP shall also be obliged to serve a notice to the Lead Long Term Transmission Customer even when it is beneficially affected by a Change in law. Under Article 12.3.3, any notice served pursuant to Articles 12.3.1 and 12.3.2 shall provide, amongst other things, precise details of the Change in Law and its effect on the TSP. Article 12.4 relates to payment on account of Change in Law. Article 12.4.1 provides that the payment for Change in Law shall be through Supplementary Bill as mentioned in Article 10.10. However, in case of any change in Monthly Transmission Charges by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the TSP after such Transmission Charges shall appropriately reflect the changed Monthly Transmission Charges.

172. Article 13 relates to events of default and termination. Article 13.1 relates to TSP Event of Default which, among others, includes a force majeure event. Article 13.2 relates to the Long Term Transmission Customers' Event of Default which, among others, includes a force majeure event. Article 13.3 relates to the Termination Procedure for TSP Event of Default. Article 13.4 prescribes the Termination Procedure for Long Term Transmission Customers Event of Default. Article 13.5 relates to Termination due to Force Majeure. Article 13.5.1 provides that, in case the Parties could not reach an agreement pursuant to Article 4.4.2 of the Agreement and the Force Majeure Event or its effects continue to be present, either Party shall have the right to cause termination of the Agreement. The Long Term Transmission Customers shall also have the right to cause termination of the Agreement and to approach the Appropriate Commission to seek further directions in this regard. In such an event, subject to the terms and conditions of the Financing Agreements, this Agreement shall terminate on the date of such Termination Notice. In case of such termination, the Contract Performance Guarantee shall be returned to the TSP as per the provisions of Article 6.5.2.

173. Schedule 3 of the TSA relates to the timelines for execution and, thereunder, the Scheduled COD is detailed. In terms

thereof, all the elements of the Project are required to be commissioned progressively as per the schedule given in the table ie the elements of (1) establishment of 400 KV Pooling Station at Fatehgarh; (2) Fatehgarh Pooling Station – Bhadla (PG) 765 KV D/C line (to be operated at 400 KV). (3) 2 Nos. of 400 KV line bays at Fatehgarh Pooling Station, (4) 1X 125 MVAR Bus reactor at 400KV Fatehgarh Pooling Station along with associated bay, (5) Space for future 220 KV (12 Nos) line bays, (6) Space for future 400 KV (8 Nos.) line bays along with line reactors at Fatehgarh Pooling Station, (7) Space for future 220/400 KV transformers (5Nos) along with associated transformer bays at each level, (8) space for future 400 KV Bus Reactor (2 N0s.) along with associated bays. The Scheduled COD from the effective date, for all the above transmission elements, has been specified in the said table as 30.09.2019. The payment of Transmission Charges for any Element irrespective of its successful commissioning on or before its Scheduled COD shall only be considered after successful commissioning of the Element(s) which are pre-required for declaring the commercial operation of such Element as mentioned in the above table. The Scheduled COD for overall Project was stipulated therein as Sept 30’ 2019.

174. Section 73 of the Indian Contract Act relates to compensation for loss or damage caused by breach of

contract, and Section 74 relates to compensation for breach of contract where penalty is stipulated for. As there exists no contract as between the Appellant and PGCIL, neither Section 73 nor 74 of the Indian Contract Act are applicable to the present case. Article 6.4.1 of the Transmission Service Agreement required the appellant, in case they failed to achieve COD, to pay the Long Term Transmission Customers,(with whom the Transmission Service Agreement was entered into), a sum equivalent to 3.33% of Monthly Transmission Charges applicable for the Element of the Project for each day of delay up to sixty (60) days of delay, and beyond that time limit, at the rate of five percent (5%) of the Monthly Transmission Charges applicable to such Element / Project, as liquidated damages for such delay and not as penalty. Payment of liquidated damages under the TSA is without prejudice to the Long Term Transmission Customers' rights thereunder, which includes the right of termination. The appellant's liability under the TSA, to pay liquidated damages, is only towards the Long Term Transmission Customers. It is evidently because there was no contractual relationship between two transmission licensees, and the delay by one could result in the other suffering losses for no fault of theirs, that the need to frame Regulations, to provide for such a contingency, arose. Schedule 3 of the TSA relates to the timelines for execution

and, thereunder, the Scheduled COD is detailed. While we do not wish to dwell on whether failure of the Appellant to commission its transmission asset on the scheduled date is in violation of the TSA, and whether they are liable thereunder, subject to the conditions stipulated therein relating to Force Majeure, change in law etc, to pay liquidated damages, as that appears to be the subject matter of the Petition filed by the Appellant which is pending before the CERC, we are satisfied that the delay on their part, in commissioning their transmission asset, is in violation of the 2019 and 2020 Regulations rendering them liable to make payment of transmission charges to PGCIL which has suffered losses as a result.

SHOULD THE LIABILITY TO PAY TRANSMISSION CHARGES, FOR THE PERIOD OF DELAY IN COMMISSIONING THE TRANSMISSION ASSET BY THE APPELLANT, BE IMPOSED ON THE CONSUMERS?

175. Sri Sanjay Sen, Learned Senior Counsel, would submit that the transmission charges of PGCIL, in the present case, should be mandatorily paid by the general body of open access customers of the meshed inter-state system (as per Sections 38(2)(d) and 40(c)), who have been granted open access, and their power, in any case, is flowing through alternate lines in the meshed inter-state transmission

system/ network without any hindrance; if there is any hindrance in such power flow, then the affected open access customer is not obliged to pay any transmission charges in terms of the aforesaid provisions of EA 2003; none of the Respondents, who are open access customers, have made out a case of hindrance in their power flow; routine/ continuing augmentation of inter-state transmission system (which includes network development by Appellant and PGCIL in the present case) is an ongoing process whose transmission charges have to be necessarily borne by the open access customers of such system; when PGCIL commissioning of the project gets delayed, subject to prudence check, the additional cost on account of time overrun is allowed to be recovered from the beneficiaries; and, thus, the 'defaulter pays' principle is not applicable when it comes to imposition of transmission charges, as the same is governed by the Parent Statute.

176. As noted hereinabove, Asset 6 had been commissioned by PGCIL to connect to the 765 kv (operating at 400 kv) Fatehgarh-Bhadhla line of the Appellant, and formed part of a larger transmission scheme known as *"Transmission system for Solar Power Park at Bhadla in the Northern region".* While Asset 6 (*2 numbers 400 KV line bays at Bhadla Sub-station*) had been made ready by PGCIL on 27.09.2019, the 765 Kv Fatehgarh-Bhadla Transmission line

of the Appellant got commissioned much later on 31.07.2021. The transmission assets of PGCIL received tariff on a cost-plus basis under the 2019 Regulations, and for the mismatch period from 27.09.2019 till 31.07.2021, they were held entitled to recover yearly transmission charges from the appellant. The contention that the 'defaulter pays' principle is not applicable when it comes to imposition of transmission charges is not tenable as the 2019 and the 2020 Regulations, in effect, make the defaulter liable for the delay in commissioning their transmission asset. The applicable Regulations enable the CERC to deny IDC and IEDC in cases where it is satisfied that the delay in commissioning the transmission asset, by a transmission licensee including PGCIL, is not justified. Section 38(2)(d)(ii) and Section 40(c)(ii) respectively, stipulate that it shall be the function of the Central Transmission Utility and the duty of the Transmission Licensee to provide non-discriminatory open access to its transmission system for use by any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission. Neither Section 38(2)(d)(ii) nor Section 40(c)(ii) of the Act make the DICs

liable for the delay on the part of one of the transmission licensees in commissioning their transmission asset.

177. Yearly Transmission Charges, as approved by the CERC, are required to be shared and paid by all designated customers of ISTS (DICs), including the generating stations. The methodology prescribed, for a pooled system of sharing of transmission charges to be paid by ISTS users, is known as the Point of Connection (PoC) mechanism. The CTU is required to collect these charges from the DICs in proportion to their monthly charges, and to place them in a pool known as the PoC pool. From the said PoC Pool, the CTU is required to disburse the monthly transmission charges, to various transmission licensees owning the transmission assets, in terms of their approved transmission tariff. Non-payment of transmission charges results in a deficit in the shared pool which, in turn, results in under-servicing of the transmission assets comprised in the ISTS. No liability, for payment of transmission charges, can be fastened upon the beneficiaries/consumers of the transmission system till they start receiving power through the commissioned inter-connected transmission assets. Where more than one inter-State transmission licensee is involved, and the transmission system of one is delayed, the DICs do not receive power through the inter-connected transmission assets. Fastening liability of payment of

transmission charges on them, when they have not received any benefit therefrom, would be wholly unjustified.

DID THE CERC ERR IN NOT HEARING BOTH THE PETITIONS TOGETHER?

178. Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that propriety demanded that both the Appellant's Petition seeking extension of time and PGCIL's tariff petition should have been decided together, more so when the CERC in Para Nos. 84 & 85 of the Impugned Order records the *force majeure* events affecting the Appellant; however, no finding is returned on the same, and the separate petition of Appellant was kept pending;. Article 11 of the TSA provides for force majeure events; the project of the Appellant was delayed from 30.09.2019 to 30.07.2021 on account of force majeure events; the above reasons of delay have been elaborately captured in Para 84 of the impugned order; however, the Commission does not deal with the said contentions of the Appellant; the aforesaid is also contrary to the judgment passed by this Tribunal in **NRSS XXXI (B) Transmission Ltd v. CERC & Ors** (Appeal No. 17 of 2019 dated 14.09.2020) which contemplates that, if the delay is on account of *force majeure* (which means the scheduled commissioning date stands extended), then transmission charges cannot be imposed; at the time of bidding for the

transmission system, the 2010 Sharing Regulations were in force which did not contain a provision for payment of such transmission charges; and, therefore, the notification of the 2020 Sharing Regulations was a “change in law” event in terms of Article 12 of the TSA.

179. It does appear that the Appellant filed Petition No. 87/MP/2022, before the CERC, under Sections 79(1)(c), 79(1)(d), 79(1)(f) and 79(1)(k) of the Act, read with Articles 11, 12 and 16 of the Transmission Services Agreement dated 10.01.2018, against the Generator ie Adani Renewable Energy Park Rajasthan Ltd. (AREPRL), the CTUIL and the BPC, seeking declaration, extension of the time period for achieving COD of the Project, and compensation on account of occurrence of force majeure and change in law events, and other consequential reliefs. Before the CERC, the Appellant has contended that their project achieved commercial operation on 31.7.2021 against the Scheduled COD of 30.9.2019 and, thus, there had been a delay of approximately 22 months on account of various events beyond their control. On the contention, urged on behalf of CTUIL, that there was a possibility of the charges being passed on to the beneficiaries/ Discoms and they also ought to be impleaded as parties to the Petition, the Appellant herein had contended that the only signatory

to the TSA was AREPRL; since their claims were under the TSA, they had impleaded ARERPL as a party to the Petition along with CTUIL and BPC; and there was no privity of contract between the Appellant and the beneficiaries located in the Solar Park. The CERC, however, directed the Appellant to implead the beneficiaries of the Northern Region as parties to the Petition. Suffice it to note that the PGCIL is not a party to this Petition.

180. On the Appellant's own showing, the TSA was entered into with the Generator ie AREPRL. The Appellant's claim of force majeure events resulting in delay in commissioning the project is in terms of clause 11, and their claim of a change in law is in terms of clause 12, thereof. Any relief they are entitled to in terms of the TSA can only be against the other party to the said Agreement ie AREPRL, and not PGCIL which was neither a party to the TSA nor to the petition filed before the CERC by the appellant. The scope and purport of the Order of this Tribunal in **NRSS XXXI (B) Transmission Ltd v. CERC & Ors** (Appeal No. 17 of 2019 dated 14.09.2020), and the reasons why it is not applicable to the present case, has been extensively dealt with earlier in this Order, and does not bear repetition. As PGCIL had filed its tariff petition in the year 2021 and the Appellant had filed its petition in the year 2022, and as both petitions are

not inter-connected, we may not be justified in faulting the CERC in not hearing both the petitions together.

CONCLUSION:

For the reasons afore-mentioned, we are satisfied that the Appeal as filed is devoid of merits, and no case has been made out for interference with the Order under Appeal passed by the CERC. The Appeal fails and is, accordingly, dismissed.

Pronounced in the open court on this **2nd day of May, 2023**.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

mk/ks