**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**
**AT NEW DELHI**
**APPELLATE JURISDICTION**

**APL No. 337 OF 2023 & IA No. 531 OF 2023**

**Dated: 20th February, 2024**

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

**In the matter of:**

**M/S Tata Steel Ltd**
Registered office at:
Bombay House, 24, Homi Mody
Street, Fort,
Mumbai - 400 001

And having Industrial Unit at:
Narendrapur, P.O. Kusunpanga,
Meramandali, District-Dhenkanal,
Odisha–759121
Through its Authorized Representative
Mr. Manish Bhatnaager, … Appellant(s)
Chief Legal Counsel

Versus

1. ***Odisha Electricity Regulatory Commission (OERC)***
***Through its Secretary***
Bidyut Niyamak Bhawan, Plot No.4,
Chunokoli, Shailashree Vihar,
Chandrasekharpur,
Bhubaneswar-751021 … Respondent No.1

2. ***Odisha Renewable Energy Development Agency (OREDA)***
***Through its Private Secretary,***
Government of Odisha
S-59, Sector A, Mancheswar
Industrial Estate, Bhubaneswar,

Odisha 751001 … Respondent No.2

Counsel on record for the Appellant(s) : Ms. Mandakini Ghosh
Ms. Anusha Nagarajan
Ms. Kirti Dhoke
Ms. Aakanskha Bhola
Mr. Rahul Ranjan

Counsel on record for the Respondent(s): Mr. Rutwik Panda for R-1

**JUDGMENT**

**PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON**

## I.INTRODUCTION:

Greenhouse gas emissions, caused by the burning of fossil fuels, are largely responsible for rising temperatures as they produce nitrogen oxide, sulphur dioxide, and carbon dioxide, all of which contribute to air and water pollution, causing irreparable damage to the environment. Renewable energy, commonly referred to as *green energy,* is generated through processes that cause far less pollution to the environment. The contribution of electricity, generated from renewable sources of energy, to climate change is minimal as such generation involves a far lower risk of fossil fuel and greenhouse gas emissions.

The Appellant owns and operates a 323 MW captive generating plant, of which 258 MW is captive co-generation (based on waste heat recovery, blast furnace gas, TRI & DRT), and the remaining 65 MW is a coal-based captive generating plant. They invoked the jurisdiction of the Odisha Electricity Regulatory Commission ("OERC" for short), under Regulations 16, 17 and 20 of the Odisha Electricity Regulatory Commission (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021, seeking a declaration and exemption

that they were not an ‘obligated entity’, and were thereby not required to fulfil the RPO targets in relation to their Meramundali Unit for the period FY 2021 onwards, and for future periods, as long as generation from their Captive Co-Generation Plant/Unit at Meramundali was in excess of their presumptive RPO requirements for the same period; to hold and declare that their Meramandli unit of 258 MW, being a captive co-generator of electricity, is exempt from fulfilling its Renewable Purchase Obligations (“**RPOs**”) from 2021 onwards under the Odisha Electricity Regulatory Commission (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021 (“**2021 RPO Regulations**”); and to declare that they were entitled to set-off their presumptive RPO targets qua the consumption from the 65 MW fossil-due based captive generating plant, against the electricity generated and consumed from their captive co-generation plants irrespective of the fuel utilized in such plants.

By the Impugned Order dated 01.02.2023, in Case No. 71 of 2022, (the contents of which shall be detailed later in this Order), the OERC disallowed the Appellant’s prayers. Consequently, the Appellant was fastened with the liability of RPOs under Regulation 4.2 of the 2021 RPO Regulations qua consumption from their 323 MW Captive Generating Plant (which included 258 MW of captive co-generation) with RPOs with effect from the date of notification of the 2021 Regulations, i.e from 15.02.2022. However, the OERC granted the Appellant exemption from fulfilment of RPOs for consumption from their 258 MW captive co-generation plant for the period 2015 onwards under the OERC (Procurement of Energy from Renewable Sources and its Compliances) Regulations, 2015 (“2015 RPO Regulations”). Exemption was granted in view of the earlier exemption granted to the Appellant’s Kalinganagar unit by the Respondent Commission’s order dated

08.12.2020 in Case No. 66/2019; and exemption was also granted to the Kalinganagar units under the 2015 RPO Regulations.

## II.IMPUGNED ORDER: ITS CONTENTS:

In its order, in "*M/s Tata Steel Ltd vs OREDA & Others*" (Order in Case No. 71 of 2022 dated 01.02.2023), the OERC observed that the petition was filed by the petitioner-M/s Tala Steel Ltd., the owner of a Captive Generation Plant, to relax and/or remove difficulties under Regulations 16, 17 & 20 of the OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021 (" 2021 RPO Regulations"); they had prayed to declare that (a) the Petitioner's Meramundali Unit of 258 MW, being a captive co-generator of electricity, was not required to fulfil its RPOs from FY 2021 onwards, and even for subsequent years, as long as the co-generation was in excess of the presumptive RPO targets, dehors the provisions of the relevant regulations; and (b) the Petitioner's Meramundali Unit was entitled to set-off its presumptive RPO targets qua the consumption from the 65 MW fossil-fuel based captive generating plant against the electricity generated and consumed from its captive co-generation plants irrespective of the fuel utilized in such plants.

In the impugned order, the OERC noted that the appellant - petitioner owned and operated a 5.6 MTPA Integrated Steel Plant, and a 323 MW Captive Generation Plant (including co-generation) at Meramundali, District- Dhenkanal, Odisha; they were engaged in the manufacturing and sale of Sponge Iron and Steel goods in all forms, and in generating power from the co-generation process since 2008; out of the Captive Generation Plant (CGP) of 323 MW ((1x165 MW + 1x77 MW + 1x33 MW + 1x20 MW + 1x16 MW+ 1x12 MW), 258 MW was co-generation based (about 80%), and the remaining 65 MW was coal

based generation (about 20%) which used coal as the primary fuel; the 323 MW plant was entirely owned by the petitioner, and power generated from the same was completely consumed by them; Blast Furnace Gas (BFG), with high calorific value, was a by-product produced during production of Hot Metal (HM); similarly, Coke Oven Gas (COG), with high calorific value, was generated in the Coke Ovens (CO) during the coking process; Top gas Recovery Turbine (TRT) of Blast furnace utilised high pressure and temperature of BFG to generate electricity, and no additional fuel input was required; TRT of Blast furnace was connected to a 16 MW generator; the high calorific value of waste heat energy from BFG & COG was used in heating gas fired boiler to generate steam for rotating turbine for generation of power instead of releasing to the atmosphere, which would have caused environmental damage and equivalent quantum of power generation through fossil-fuel (Coal) based plants was being saved; the waste flue gases with high temperature produced in the rotary kiln of Direct Reduced Iron (DRI) plant/sponge Iron Plant, during manufacturing of Sponge Iron, were channelized through the waste heat recovery boilers (WHRBs) to produce steam & ultimately generation of electricity of 110 MW (1x33 MW + 1x77 MW); hence the Sponge Iron Plant or t h e DRI plant process produced two or more form of useful energy, including electricity simultaneously; and, hence, qualified as a co-generating plant.

The OERC then noted the submissions of the appellant- petitioner which is as follows: (a) the 258 MW captive co-generating unit of the petitioner includes 132 MW of generation using Blast Furnace (BF) & Coke Oven (CO) Gas, 16 MW of generation utilizing Top Gas Recovery Turbine (TRT) and 110 MW of generation utilizing Waste Heat Recovery Boiler (WHRB). Waste heat, in the form of exhaust gases from BF and CO, is used as a fuel in gas fired boilers to produce steam

for 132 MW of power generation that is used internally in the plant operation. In TRT, heat and pressure energy of BF gas is used to drive a turbine which is transferred to a 16 MW generator, and converted to electric power. During the iron ore reduction process, waste flue gases are produced at very high temperature that are channelized through WHRB to produce steam and, consequently, generation of electricity from the steam turbine driven generators of 110 MW (1x33 MW + 1x77 MW). The electricity produced by these Generators is used for consumption in the steel manufacturing process. (b) the 258 MW captive co-generation unit, captures the waste heat released from various iron & steel making processes, and converts it into electricity, thereby adequately and sufficiently minimizing the huge amount of pollution causing waste heat that would have released into the atmosphere leading to atmospheric warming with danger of changing local weather conditions and harmful pollution etc. The co-generating unit helps in utilisation of resources and minimises use of fossil fuel for generation of power. (c) co-generation is a non-conventional method of generating electricity (i.e. fossil fuel is not used directly for generation of electricity), which is recognized internationally as an environmentally friendly way of generation of electricity, because it displaces the need for fossil fuel to generate electricity by using waste steam/ heat. Co-generating is a process which simultaneously produces two or more forms of useful energy (including electricity), and thereby protects the environment and prevents pollution. The Petitioner's co-generation unit at Odisha falls within the definition of 'co- generation' given under Section 2(12) of the Electricity Act, 2003. (d) as per OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010, the 'Obligated Entities' had RPO to purchase electricity from co-generation and from renewable energy sources. Therefore, both renewable and co-

generation were treated at par in compliance with Section 86(1)(e) of the Act. Subsequently, the RPO Regulations, 2010 was repealed on 01.08.2015, and replaced by the OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2015. (e) on 07.08.2015, this Commission passed an order directing entities, such as the petitioner, to fulfil RPO for the period FY 2010-11 to FY 2014-15. This Order has been challenged before the High Court of Odisha by several co- generators, which is pending adjudication. Aggrieved by the RPO Regulations, 2015 (order dt. 07.08.2015), and the Tariff Policy, 2016, the petitioner filed WP No.9694 of 2017 before the High Court of Odisha on 19.05.2017 challenging the vires of Clause 4(e) of the RPO Regulations, 2015, and Clause 6.4 of the Tariff Policy, 2016. The petitioner, through the writ petition, is seeking a declaration that RPOs cannot be imposed on a captive co-generating plant under the RPO Regulations, 2015. The High Court issued notice granting interim relief to the Petitioner on 14.01.2020. The writ petition is currently pending adjudication before the High Court. On 05.09.2022, the Commission filed its counter affidavit in WP (C) No.9694 of 2017 acknowledging that, based on the judgments of APTEL, the Commission has granted exemption to fossil fuel based co-generating plants for fulfilment of RPOs. (f) the RPO Regulations, 2021, notified on 17.01.2022, specifies the RPO targets for obligated entities in the State for the period FY 2021-22 to FY 2024-25. (Refer Regulation 3). (g) as per the judgments of APTEL and the Commission, a captive co-generation plant, irrespective of fuel, is not liable to be fastened with RPOs under the Electricity Act, 2003. Therefore, the petitioner, being a captive co- generating plant, is not liable to be fastened with any RPOs under Regulation 3.1(b) of the 2021 RPO Regulations, to the extent of its consumption from co-generation power. Therefore, this is a fit case wherein this Commission

may exercise their powers of removal of difficulty and relaxation to declare that the petitioner is not liable for fulfilment of RPOs. (h) moreover, the petitioner generates co-generation power in excess of its presumptive RPO targets. Therefore, the petitioner is not required to fulfil any further RPO against its 323 MW captive generating plant. In the matter of **JSW Steel Ltd. vs. TNERC** (Appeal No.278 of 2015 and 293 of 2015), **M/s. NALCO Ltd. vs. OERC & Others.** (Appeal No.260 & 261 of 2015); and **JSW Steel Ltd. vs. MERC & Others** (Appeal No.176 of 2020), APTEL .has held that, even when the Regulations provide for fulfilment of RPOs for fossil-fuel based captive co-generation plant, such regulation has to be read down. The Electricity Act, 2003 does not distinguish between co-generation and renewable sources of energy, and seeks to promote both sources. If the intention of the Electricity Act, 2003 was to promote only renewable sources of energy, there was no need to include the term 'co- generation' in Section 86(1)(e) or define the term 'co-generation' under Section 2(12). Therefore, inclusion of the term 'co-generation' was deliberate and is required to be promoted in addition to renewable sources of energy. (i) similar findings have also been recorded by APTEL in its Order dated 26.04.2010 in respect of **Century Rayon vs. MERC** (Appeal No. 57 of 2009); Order dated 30.01.2013 in respect of **Emami Paper Mills Ltd. vs. OERC** (Appeal No.54 of 2012); Order dt.31.03.2013 in respect of **Vedanta Aluminium Ltd. vs. OERC** (Appeal No.59 of 2012); Order dt.10.04.2013in respect of **Hindalco Industries Limited vs. UPERC** (Appeal No.125 of 2012); Order dt.01.10.2014 in respect of **India Glycols Ltd. vs. UERC** (Appeal No.112 of 2014), **JSW Steel Ltd. vs. KERC** (Appeal No. 333 of 2016) and **JSW Steel Ltd. vs. TNERC** (Appeal No. 278 of 2015). Further, APTEL, by judgment dated 02.11.2020, has again reiterated, in the case of **NALCO vs. OERC &**

**Others** (Appeal No.260 of 2015 & Batch), that a captive co-generation plant cannot be fastened with the liability of purchasing power from renewable sources to meet RPO obligation. It is pertinent to note that, in the aforementioned judgment, APTEL was dealing with the Regulations of the Commission imposing RPOs on obligated entities. On 02.08.2021, the Tribunal, in Appeal No.176 of 2020, has held that JSW Steels Ltd., a captive co-generating plant in Maharashtra, is not liable to fulfil RPOs under the RPO Regulations, 2016 irrespective of the source of fuel used by the captive generating plant. (j) as stated by APTEL, in the aforementioned judgments, entities similar to the petitioner, owning and operating a co-generation based CPP, irrespective of the fuel used, is not liable to be fastened with the RPOs so long as the electricity generated from its co-generation plant is in excess of the presumptive RPO target (qua its captive consumption) for the relevant years. The petitioner's consumption from its co-generation plant has been in excess of its presumptive RPO targets from 2016 onwards, and hence there is no requirement for fulfilling presumptive RPOs by the petitioner. Moreover, from October 2021 to June 2022, the Commission has exempted similarly placed fossil-fuel based captive co-generating plants from fulfilment of RPOs in the matter of M/s.Aarati Steels Ltd. vs OREDA in Case No.35/2021; M/s.Visa Steel Limited vs OREDA in Case No.46/2021; M/s. Dalmia Cement (Bharat) Ltd. vs. OREDA in Case No.87/2021; and M/s. SAIL, Rourkela Steel Plant vs. OREDA in Case No.85/2021. (k) out of the petitioner's 323 MW captive generating plant, 65 MW utilizes coal as its primary fuel. The excess generation from the 258 MW co-generating plant (that remains after satisfaction of the presumptive 3% RPO for the 258 MW) for the relevant years may be allowed to be set-off against the RPOs corresponding to its consumption from the 65 MW thermal based captive generation plant.

The OERC then noted the submissions of the Respondent M/s. OREDA which is as follows: (i) the petitioner does not have a Renewable Energy Power Plant for its own use. However, during FY 2015-16 to FY 2021-22, the petitioner has reported to have generated excess from its co-generation capacity than from the coal based capacity, and to have consumed excess energy from the co-generation plant than the required RPO quantum. (ii) if the Blast Furnace + Coke Oven Gas Generation based power plant, Top Recovery Turbine based power plant & Waste Heat Recovery Boiler based power plant are recognized as co-generation power plant by any agency, and power generated from such plant is considered as renewable power, the Commission may consider relaxing the provisions of applicability of RPO, and its compliance thereof, on both the 258 MW Co-generation based and 65 MW coal based CGP under clause 3.1(b) of the OERC RPO Regulations, 2021, and (iii) to avail exemption of RPO for both CGPs (258 MW Co-generation CGP and 65 MW Coal based CGP), the petitioner has to submit generation data to OREDA annually.

After taking note of the rival submissions, the OERC observed that the petitioner-Tata Steel owned and operated a 323 MW of Captive Generation Plant (CGP) at Meramundali (Odisha), out of which 258 MW was co-generation based (80%) and 65 MW was fossil fuel (coal) based generation (20%); the petitioner had prayed to declare that it was not liable to fulfill its RPOs under RPO Regulations, 2021 vis-a-vis its 258 MW captive co-generating plant citing various judgments of APTEL where it had been opined that, even if the Regulations impose RPO on co-generation plants, those regulations have to be read down in view of the protection/ special status granted to co-generation plants under Section 86(1)(e) of the Electricity Act, 2003; by referring to Section 2(12) and Section 86(1)(e) of the Electricity Act, 2003, the Petitioner had tried

to establish that both co-generation and generation from renewable energy sources needs to be promoted, and co-generation does not mean co-generation from renewable energy sources alone; therefore, tagging of RPO with the co-generation based CGP defeated the objective of Section 86(1)(e) of Electricity Act, 2003; the petitioner had also sought exemption under RPO Regulations, 2021 for its consumption from the 65 MW captive generation plant citing that APTEL, in the matter of **JSW vs MERC & Others** (Appeal No.176 of 2020), had allowed the Appellant - JSW to set off its RPO obligation for the open access consumption against the electricity generated and consumed from its co- generation plant. The petitioner had prayed that the generation and consumption from the 258 MW co-generating plant may be allowed to be set off against the RPO targets of the balance 65 MW of generation from CGP for the corresponding year; earlier in Case No.66/2019, as well as in some other cases, the Commission had relaxed under the OERC (Procurement of Energy from Renewable Sources and its Compliances) Regulations, 2015, and had exempted RPO for consumption of power generated from fossil fuel based captive co-generating plants basing on various orders of APTEL; in the meantime, the said Regulations have been amended, and replaced by the OERC (Procurement of Energy from Renewable Sources and its Compliances) Regulations, 2021,which is effective from 15.02.2022; therefore, as per Regulation 3.1 (b), consumption of electricity from the captive generating plant, including co-generation plants based on conventional fossil fuel, shall be subject to RPO compliance; the installed capacity of fossil fuel based .captive generation plants (CGPs), in the State of Odisha (about 10GW), is the highest among the States in the country, and this capacity is even more than the total installed generation capacity of Odisha; most of the CGPs in the State have

installed waste heat recovery system to increase energy efficiency; clause 6.4 of the Tariff Policy 2016 of the Ministry of Power, Government of India relates to renewable sources of energy generation including co-generation from renewable energy sources; clause 6.4(1) states that, pursuant to the provisions of Section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. Cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs. Long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by the Ministry of Power in consultation with MNRE. Under the proviso thereto, co-generation from sources other than renewable sources shall not be excluded from the applicability of RPOs; Govt. of India (GoI) has an ambitious target for capacity addition of 500 GW of non- fossil fuel based generation by 2030 to reduce emission levels and a challenging RPO trajectory including RPO trajectory for energy storage system beyond FY 2021-22; similarly, one of the objectives of the new Renewable Energy (RE) Policy, 2022 of the Government of Odisha (GoO) is to accelerate adoption of clean energy alternatives, and de-carbonize the energy sector which includes both grid-based electricity consumption and captive consumption of industrial consumers in the State; moreover, Section 86(1)(e) of the Electricity Act, 2003 states only about promotion of co-generation and generation of electricity from Renewable sources of energy; nowhere in the OERC Regulations, 2021 or in GoI's ambitious program for non-fossil fuel based capacity addition (500 GW) by 2030 & challenging RPO trajectory beyond 2021-22 or in the Electricity Act, 2003 or in new RE policy 2022 of GoO, is there any mention about

considering fossil fuel based captive co-generation as an alternative to RE generation for getting RPO benefit; in view of the above observations and specific provisions in the Tariff Regulations, 2016 & OERC Regulations 2021, the Commission was not inclined to unfasten the Petitioner's consumption from the 323 MW Captive Generating Plant, which included 258 MW of co-generation plant, from RPO compliance; accordingly. the Petitioner's consumption from the 323 MW Captive Generating Plant and co-generation plants, based purely on conventional fossil fuel source, shall be fastened with RPO with effect from the date of the Gazette Notification of the 2021 Regulations i.e., from 15.02.2022; however, in view of the exemption granted to the Petitioner in Case No. 66/2019 under OERC (Procurement of Energy from Renewable Sources and its Compliances) Regulations, 2015, the consumption from the 258 MW captive co-generation plant shall not attract RPO, whereas the extent of consumption, met from the 65 MW of CGP, shall be liable to RPO for the period prior to the notification of the new OERC Regulations, 2021; accordingly, OREDA shall monitor the RPO compliance of the Petitioner's Plant; and the petitioner shall provide necessary data/ information on its consumption and generation to OREDA as and when required by it for verification with regard to RPO compliance.

## III.RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Ms. Mandakini Ghosh, Learned Counsel for the Appellant, and Sri Rutwik Panda, Learned Counsel for the first respondent-OERC. It is convenient to examine the rival submissions under different heads.

## IV.IS THE IMPUGNED ORDER CONTRARY TO THE JUDGEMENTS

**OF APTEL?**

Ms. Mandakini Ghosh, Learned Counsel for the Appellant, would submit that fastening of obligations on the co-generator to procure electricity from renewable energy procurers would defeat the object of Section 86(1)(e) of the Electricity Act; Regulation 3.1(b) of the 2021 RPO Regulations, in terms of which exemption was disallowed, runs contrary to the following judgments of APTEL: **(i) Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors.** (Appeal No. 57 of 2009), **(ii) JSW Steel Ltd. vs. TNERC** (Appeal No. 278 of 2015 and 293 of 2015), **(iii) Ultratech Cement Ltd vs. KERC & Ors.** [Appeal No. 322 & 333 of 2016], **(iv) NALCO v. OERC & Ors.,**[ Appeal No. 260 OF 2015 & Batch], and **(v) JSW Steel Ltd. vs. MERC & Ors** [Appeal No. 176 of 2020]; and, in the afore-said judgments, this Tribunal held that 'co-generation' does not mean co-generation from renewable sources alone.

On the other hand, Sri Rutwik Panda, Learned Counsel for the first respondent-OERC, would submit that the Supreme Court in **Hindustan Zinc Ltd. Versus RERC: (2015) 12 SCC 611**, and the Full Bench of this Tribunal in **LLOYDS Metal & Energy Ltd** (Appeal No. 53 of 2012 dated 2.12.2013), have interpreted Section 86(1)(e) of the Electricity Act, 2003, and have held that promotion of electricity generated from co-generation must be from renewable sources; Section 86(1)(e) of the Electricity Act, 2003 relates only to promotion of co-generation and generation of electricity from Renewable sources of energy; and consumption from their fossil fuel based co-generation plant, as claimed by the appellant, does not exonerate any obligated entity from RPO compliance.

**A.JUDGEMENT OF THE SUPREME COURT IN *"HINDUSTAN ZINC***

***LTD”*:**

In **Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611,** on which reliance is placed on behalf of the Respondent, the question which arose for the consideration of the Supreme Court was whether the impugned Regulations, framed by RERC in exercise of its powers under Section 86(1)(*e*) of the 2003 Act, imposing RE obligation upon captive power plants. was ultra vires the provisions of the Electricity Act. The Supreme Court held that Section 86(1)(*e*) granted the State Commission power to specify a minimum percentage of renewable energy to be purchased out of the total consumption of electricity in the area of the distribution licensee which would include open access consumers and captive power consumers; the impugned Regulations had been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy, as against the polluting sources of energy, which principle is enshrined in the Electricity Act, the National Electricity Policy of 2005 and the Tariff Policy of 2006; the provisions requiring purchase of a minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect the environment and prevent pollution in the area by utilising renewable energy sources as much as possible in larger public interest; and the RE obligation imposed on the captive generating companies, under the impugned Regulations, was neither ultra vires *nor* violative of the provisions of the Electricity Act.

The law declared by the Supreme Court, in **Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission: (2015) 12 SCC 611,** is that power is conferred on the State Commission, by Section 86(1)(*e*) of the Electricity Act, to specify a minimum percentage of renewable energy to be purchased by captive power consumers, as that would

promote generation of electricity from renewable sources of energy, protect the environment, and thereby prevent pollution. While holding that captive power consumers can also be fastened with RE obligations by way of Regulations, the Supreme Court, in **Hindustan Zinc Ltd**, has made no distinction between captive consumers of power generated from co-generation plants and coal based generation plants. Consequently, all captive consumers, be it those consuming power from co-generation or generation of electricity using fossil fuel, such as the Appellant (which completely consumes the entire energy generated by its 323 MW captive generation plant, of which 258 MW is co-generation based, and 65 MW is coal based generation) can also be fastened with RE obligations by way of Regulations.

**B.SECTION 86(1)(E ) OF THE ELECTRICITY ACT: ITS SCOPE:**

Section 86 of the Electricity Act relates to the functions of the State Commission. Sub-section (1) thereof requires the State Commission to discharge the functions specified in Clause (a) to (h) there-under. The function which the State Commission is required to discharge, under Section 86(1)(e), is to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee.

The function which the State Commission is required to discharge, under Section 86(1)(e) of the Electricity Act, relates to (1) promotion of co-generation and generation of electricity from renewable sources of energy; (2) such promotion is by providing suitable measures for (i) connectivity with the grid and (ii) sale of electricity to any person;

(3) to specify, for the purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee.

Besides providing suitable measures for connectivity with the grid, and for the sale of electricity to any person, the State Commission is also required to specify the percentage, of the total consumption of electricity in the area of a distribution licensee, to be purchased from such sources. The words "*such source*" in Section 86(1)(e ) are significant.

The word 'such' means 'of the type previously mentioned' (***Indian City Properties Ltd. v. Municipal Commissioner of Greater Bombay, (2005) 6 SCC 417****)* or of the kind mentioned before' (***Nemai Chand Sen v. Kumud Behari Basti: IIR. (1951) 1. Cal 404****).* It indicates something just before specified or spoken of, proximately and not merely previously. (***Bright Bros. (P) Ltd. V. J.K. Sayani, AIR 1976 Mad 55****).* Generally, the word 'such' refers only to previously indicated, characterized or specified. The word 'such' is an adjective meaning the one previously indicated or referred only to something which has been said before. (***Union of India v. Wazir Singh, AIR 1980 Raj 252****)* (**P.Ramanatha Aiyar: The Major Law Lexicon: 4th Edition, 2010**).

Use of word 'such' as an adjective prefixed to a noun is indicative of the draftsman's intention that he is assigning the same meaning or characteristics to the noun as has been previously indicated or that he is referring to something which has been said before. ***(Central Bank of India v. Ravindra, AIR 2001 SC ;Ombalika Das v. Hulisa Shaw, (2002) 4 SCC 539****).* When the word "such' is used before a noun in a later part of a sentence, the proper construction in the English language is to hold that the same noun is being used after the word 'such' with all

its characteristics which might have been indicated earlier in the same sentence. (***Mohan Lal v. Grain Chamber Ltd., AIR 1959 All 276).*** (**P.Ramanatha Aiyar: The Major Law Lexicon: 4th Edition, 2010**).

Use of word 'such' as an adjective prefixed to the word ‘source’ evidently refers to the ‘source’ referred to in the first limb of Section 86(1)(e) ie renewable source of energy. While the State Commission is required “to promote co-generation and generation of electricity from renewable sources of energy”, it is difficult to visualize co-generation as a source from which electricity can be purchased. In any event, the manner in which the ‘source’ from which electricity should be purchased, as also the percentage of purchase from such ‘source’, to the total consumption of electricity in the area of a distribution licensee, is left to be determined by the State Commission either in the exercise of its regulatory power under Section 86(1)(e), or by way of Regulations to be made under Section 181 of the Electricity Act.

Both the words ‘co-generation’ and ‘generation’ used in Section 86(1)(e) and Section 61(h) are expressions defined under the Electricity Act. Section 2(29) defines ‘generate’ to mean to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given. Section 2(12) defines ‘co-generation’ to mean a process which simultaneously produces two or more forms of useful energy (including electricity).

The word “include” is generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute and, when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. **(*ESI***

***Corpn.* v. *High Land Coffee Works*, (1991) 3 SCC 617**;***Oswal Fats & Oils Ltd.* v. *Commr. (Admn.)*, (2010) 4 SCC 728; Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd., 1991 Supp (2) SCC 18 : AIR 1991 SC 686; Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3 SCC 607;*CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124; P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348).**The word “include”, a word of extension, is used in an interpretation clause when it seeks to expand and enlarge the meaning of the words or phrases occurring in the body of the statute. **(Forest Range Officer v. P. Mohammed Ali, 1993 Supp (3) SCC 627; *Doypack Systems (P) Ltd.* v. *Union of India*, (1988) 2 SCC 299; *CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124).** It gives extension and expansion to the meaning and import of the preceding words or expressions. When the word “include” is used, it must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In using the word “includes”, the legislature does not intend to restrict the definition. It makes the definition enumerative, but not exhaustive. The term defined will retain its ordinary meaning but its scope would be extended to bring within it matters which its ordinary meaning may or may not comprise. (***Mamta Surgical Cotton Industries* v. *Commr. (Anti-Evasion)*, (2014) 4 SCC 87).**

The word ‘including’ in Section 2(12) would therefore mean that, besides electricity, any process which simultaneously produces two or more forms of useful energy would also fall within the definition of *“co-generation”*. For instance, a process which simultaneously produces, say, heat energy and mechanical energy, would also fall within the

definition of *“co-generation”*. If so read, and if the word *“co-generation”* in Section 86(1)(e) is to be understood as distinct from the expression *“generation of electricity from renewable sources of energy”*, then the function of the State Commission, under Section 86(1)(e), must be held to promote processes which simultaneously produce heat and mechanical energy, even if it does not result in production of electrical energy. Such a construction would make little sense, and should be avoided, as the functions which the State Commission discharges under the Electricity Act relates to matters related to electricity and not others.

As the scope and ambit of Section 86(1)(e) of the Electricity Act, has been considered in several judgements of this Tribunal, it is useful to take note of the law declared therein. We shall consider the judgements relied upon by Learned Counsel on both sides, in this regard, in the order in which these judgements were delivered.

## C.JUDGEMENTS OF THIS TRIBUNAL ON THE SCOPE OF SECTION 86(1)(e ) OF THE ELECTRICITY ACT:

In **Century Rayon Ltd vs Maharashtra Electricity Regulatory Commission, (**Order in Appeal No. 57 of 2009 dated 26.04.2010), on which reliance is placed on behalf of the appellant, the appeal filed before this Tribunal was against the order of the State Commission directing the distribution licensees, as well as open access users and captive consumers, to purchase renewable energy from renewable energy generating units.

This Tribunal held that a plain reading of Section 86(1)(e) shows that there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy; both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of

these categories; fastening of obligation on co-generators, to procure electricity from renewable energy producers, would defeat the object of Section 86 (1)(e); as both co-generators and generators of electricity through renewable sources of energy were different, and both were required to be promoted, fastening of liability on one in preference to the other was contrary to the legislative intent; both renewable sources of energy and cogeneration power plant, were equally entitled to be promoted by the State Commission through suitable methods, and cogeneration plants are entitled to be treated at par with other renewable energy sources; and the intention of the legislature is to promote cogeneration irrespective of the nature of the fuel used for such co-generation, and not co-generation or generation from renewable energy sources alone.

In Para 45 of its judgement, in **Century Rayon Ltd** (Appeal No. 57 of 2009), this Tribunal summarized its conclusions thus:-

(i) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means co-generation from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in the definition Section 2 (12) of the Act.

(ii) As per Section 86(1)(e), there are two categories of generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(iii) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(iv) The clear meaning of the words contained in Section 86(1)(e) is

that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(v) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(vi) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

In **M/s. Emami Paper Mills Ltd vs Odisha Electricity Regulatory Commission:** (**2013 SCC OnLine APTEL 23) (Judgement dated 30th day of January, 2013),** the appeal was filed against the order passed by the Orissa State Commission directing the Appellant, a co-generation based captive power plant, to purchase power from renewable sources of energy, as it was an “obligated entity”, and was bound to purchase 1.3% of its energy from renewable sources of energy.

On the question “whether the Appellant, a co-generator, was under a legal obligation to purchase power from renewable sources of energy to meet the Renewable Purchase Obligations of its captive load?”, this Tribunal held that its conclusions in ***Century Rayon case*** were generic in nature, and applied to all co-generation based captive consumers using any fuel; the definition of ‘obligated entity’ only covered an entity consuming power from a conventional captive generating plant or which

procured power from conventional generation through open access and third party sale, and not a person consuming power from a co-generating plant; the intention of the legislature, as held in ***Century Rayon case*** (Appeal No. 57 of 2009), was to promote co-generation irrespective of the nature of fuel used; and the captive generating plant of the Appellant, a co-generating power plant using fossil fuel, was therefore not an 'obligated entity'.

In **Lloyds Metal & Energy Ltd vs Maharashtra Electricity Regulatory Commission: (**Order in Appeal No.53 of 2012 Dated 02.12.2013), the Appellant had filed a petition before the State Commission for determination of tariff for supply of electricity from its fossil fuel based co-generation plant to the Distribution Licensees in Maharashtra, and for fixation of purchase obligation of the Distribution Licensees from the electricity produced from fossil fuel based co-generation plants under Section 86(1)(e) of the Electricity Act, 2003. By the order, impugned in the appeal before this Tribunal, the State Commission refused to grant the reliefs sought for, including interim relief to enable sale of electricity from the Appellant's co-generation plant to the Distribution Licensees against its purchase obligations under Section 86(1)(e) of the Electricity Act. Aggrieved by the impugned order, the Appellant filed Appeal No. 53 of 2012 which was heard by the Division Bench of the Tribunal. After considering the judgment in **Century Rayon Ltd. Vs. Maharashtra Electricity Regulatory Commission** (Appeal No. 57 of 2009 dated 26.4.2010), the Division Bench referred the following question to the Full Bench:

*"Whether the Distribution Licensees could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of the fuel used under Section 86(1)(e) of the Act 2003."*

While answering the Reference, the Full Bench, in its judgement in **Lloyds Metal & Energy Ltd**, observed that though the dispute in **Century Rayon Ltd. Vs. Maharashtra Electricity Regulatory Commission** (Appeal No. 57 of 2009 dated 26.4.2010), was whether a person, consuming electricity, from its captive fossil fuel based co-generation plant, could be compelled to purchase electricity from renewable sources of energy, against the Renewable Purchase Obligations specified by the Commission for obligated entities, under Section 86(1)(e) of the Act, this Tribunal had decided that (1) a person consuming electricity, from its captive fossil fuel based co-generation plant, could not be compelled to purchase electricity from renewable energy sources; and (2) both categories, i.e. (i) co-generators irrespective of fuel used and (ii) generators of electricity through renewable sources of energy, must be promoted by the State Commission by directing the Distribution Licensees to purchase electricity from both these categories.

The findings and the conclusions of the Full Bench, in **Lloyds Metal & Energy Ltd,** can be briefly summarized as under:-

(i) the Report of the Standing Committee on Energy (on the Electricity Bill presented to Lok Sabha on 19.12.2002) indicated that the intention of the legislature, while enacting the Electricity Act, 2003, was that generation from non-conventional and renewable sources should be promoted, and the Commissions may prescribe a minimum percentage of power to be purchased from such (non-conventional and renewable) sources.

(ii) Clause 5.12.2 of the National Electricity Policy ('NEP') required the stipulated percentage of purchase of power from non-conventional sources should be made applicable in the tariff to be determined by the State Electricity Regulatory Commissions; and the State Commission, in order to promote generation from non-conventional sources of energy, may determine appropriate differential in prices

of non- conventional sources of energy.

(iii) Electricity generation, from co-generation from fossil fuel, was not a generation from non-conventional sources of energy or renewable sources of energy.

(iv) As co-generation, based on fossil fuel, would result in production of electricity at a lower price, considering the high efficiency of the co-generation process, there was no need to provide for preferential tariff for such co-generation plants based on fossil fuel.

(v) The National Electricity Policy required the State Commission to specify a percentage of the total consumption, in the area of the Distribution Licensee, only from non-conventional or renewable sources of energy.

(vi) Determination, of appropriate differential prices of electricity, by the State Commission was also only with respect to non- conventional sources of energy; there was no mention of specifying a purchase obligation for the Distribution Licensees from co-generation based on fossil fuel; there was also no requirement of determining appropriate differential prices for co-generation based on fossil fuel as the thermal efficiency of a co- generation plant based on fossil fuel is higher compared to fossil fuel based generating station of a similar size; and, therefore, no differential prices of electricity had been stipulated in the NEP for fossil fuel based co-generation plants.

(vii) even assuming that the word *"co- generation"*, used in Clause 5.12.3 of the NEP, also included fossil fuel based co-generation, this Clause only provided that the State Commission may promote arrangements for purchase of surplus power from such plants in the overall interest of energy efficiency and grid stability; and there was no binding purchase obligation on the Distribution Licensee from co-generation based on fossil fuel.

(viii) If the State Commission was approached to determine the price of electricity, from such fossil fuel based co-generation to the Distribution Licensee, it should determine the same under Section 62 of the Electricity Act, 2003.

(ix) If the Distribution Licensee purchases surplus power, of fossil fuel based co-generation plants to meet its consumers demands, the State Commission shall facilitate the said arrangement and may also determine tariff for procurement of power from fossil fuel based co-generation plants under Section 62 of the Act.

(x) The **Century Rayon** judgment only referred to Sub-Clause 5.12.3, and not Sub-Clauses 5.12.1 & 5.12.2 of the NEP.

(xi) Clause 6.4 of the Tariff Policy pertained only to non-conventional sources of energy, and co-generation also from non- conventional sources of energy. The said clause required the State Commission, under Section 86(1)(e), to fix a minimum percentage for purchase of energy from non-conventional sources of energy, and to determine the preferential tariffs for procurement of power by distribution licensees from such sources.

(xii) The Tariff Policy also stipulated fixation of purchase obligation and preferential tariff only from non- conventional or renewable sources of energy, and not fossil fuel based co-generation.

(xiii) In the **Century Rayon judgment,** the complete Clause 6.4 of the Tariff Policy was not referred to, and reliance was placed only on a part of Clause 6.4.

(xiv) Clause 6.4 of the Tariff Policy, as amended by the Government of India by Resolution dated 20.1.2011, provided for reservation of a minimum percentage for purchase of solar energy in the Renewable Purchase Obligation of the distribution licensee, and purchase of Renewable Energy Certificates to fulfil the Renewable Purchase Obligations.

(xv) The amended Clause 6.4 of the Tariff Policy clearly indicated that, under Section 86(1)(e), the Commission has to fix the minimum percentage of total consumption of Electricity, in the area of a Distribution Licensee, for purchase of energy from non-conventional and renewable sources of energy, including co-generation also from non- conventional and renewable sources.

(xvi) *“co-generation”*, as defined in Section 2(12) of the Electricity Act, is

only a process of generation of electricity and another form of energy, and cannot be termed as a source of electricity; and this aspect has not been considered in the **Century Rayon judgment,** wherein this Tribunal had held that the State Commission had to promote both co- generation as well as generation of electricity from renewable sources of energy.

(xvii) The State Commission can promote fossil fuel based co-generation by any other measures such as facilitate sale of electricity from such sources, grid connectivity, etc., but the State Commission cannot compel the Distribution Licensee to procure electricity from fossil fuel based co-generation, against the purchase obligation to be specified under Section 86(1)(e) of the Electricity Act.

(xviii) Under the State Commission's Regulations, there is no obligation on the Distribution Licensee to purchase from fossil fuel based co-generation plants; no preferential tariff has been determined for purchase of energy from fossil fuel based co-generation plants; these Regulations have been made in consonance with the provisions of the Act, the National Electricity Policy and the Tariff Policy which do not provide for any obligation on the Distribution Licensees to purchase from fossil fuel based cogeneration.

(xix) The State Commission has correctly rejected the prayer of the Appellant to determine the tariff and purchase obligation of the Distribution Licensees from fossil fuel based co- generation.

(xx) On a conjoint reading of the provisions of the Electricity Act, the National Electricity Policy, the Tariff Policy, and the intent of the legislature while passing the Electricity Act as reflected in the Report of the Standing Committee on Energy presented to the Lok Sabha on 19.12.2002,

(a) A distribution company cannot be fastened with the obligation to purchase a percentage of its consumption from fossil fuel based co-generation under Section 86(1)(e) of the Electricity Act, 2003; and such purchase obligation, under Section 86(1)(e), can be fastened only from electricity generated from renewable sources of energy.

(b) however, the State Commission can promote fossil fuel based co-

generation by other measures such as facilitating sale of surplus electricity available at such co-generation plants in the interest of promoting energy efficiency and grid security, etc.

In **India Glycols Limited vs Uttarakhand Electricity Regulatory Commission (Order in Appeal Nos.112, 130 and 136 of 2014 dated 01.10.2014)**, the appeal was filed against the order passed by the Uttarakhand Electricity Regulatory Commission holding that a majority of obligated entities (Open Access Consumers) in the State had not complied with their obligation under the Regulations to procure Renewable Energy (RE) power, and thereby fulfil its Renewable Power Obligations (RPOs).

On the issue, whether co-generation based captive power plant can be fastened with Renewable Purchase Obligation (RPO) after the judgment, in **Century Rayon vs MERC (**Appeal No. 57 of 2009 dated 26.4.2010), this Tribunal observed that co-generation based captive power plant/captive user cannot be fastened with renewable purchase obligations; in compliance with the judgment in ***Century Rayon,*** the State Commission had amended the definition of 'Obligated entity' in the 2010 Regulations, in the year 2013; this amendment was applicable from the date of the judgment in ***Century Rayon***; the State Commission should have exercised its *power to relax,* according to its own Regulations, to give effect to the judgment in ***Century Rayon***; dated 26.4.2010).

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In **M/s JSW Steel Limited vs Tamil Nadu Electricity Regulatory Commission (Order in Appeal Nos. 278 and 293 of 2015 dated 02.01.2019),** the Appellants had approached the Commission seeking a

declaration that their captive co-generation plants were not required to procure power from renewable sources of energy in order to meet their Renewable Purchase Obligation (RPO obligation).The Commission held that the judgment of this Tribunal in ***Century Rayon Vs. Maharashtra Electricity Regulatory Commission & Ors*** **dated 26.04.2010** had been set aside by the Full Bench judgment of this Tribunal in ***Lloyds Metal & Energy Ltd Vs. Maharashtra Electricity Regulatory Commission & Ors.*** **dated 02.12.2013,** and therefore the Appellants would not be entitled to the relief claimed by them.

In the appeals preferred there-against, this Tribunal held that the appellants were captive co-generators; it was manifest from the judgment, in ***Century Rayon vs. Maharashtra Electricity Regulatory Commission & Ors*: 2010 SCC OnLine APTEL 37 : [2010] APTEL 37 ( judgment dated 26.04.2010)** that captive consumers having cogenerating plants could not be fastened with the obligation to procure electricity from renewable energy sources, as that would defeat the object of Section 86(1)(e) of the Electricity Act, 2003; co-generating plants should be treated at par with renewable energy generating plants for the purpose of RPO obligations; the judgment in ***Century Rayon*** has been consistently followed by this Tribunal in several cases e.g. ***Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission (*** **A ppeal No. 54 of 2012 dated 30.01.2013)**; in ***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors.*** **order dated 23.09.2013,** the limited question for reference to the Full Bench was *"Whether the distribution licensee could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of the fuel used under Section 86(1)(e) of the Act 2003";* only paragraph 45(II) of the judgment in ***Century Rayon Case*** had been set aside by the Full Bench judgment

in ***Lloyds Metal Case**,* and not the ***Century Rayon*** judgment in its entirety; the effect of this being that the distribution licensee could not be compelled to procure electricity from fossil fuel based co-generation against its renewable purchase obligation; however, it had no effect on the finding in ***Century Rayon*** **(judgment dated 26.04.2010)** that a co-generation based captive power plant cannot be fastened with Renewable Purchase Obligations irrespective of the nature of the fuel used for such cogeneration; this Tribunal, in ***India Glycols Case*** **(Judgement dated 01.10.2014**, much after the judgment of the Full Bench in ***Lloyds Metal case***, continued to rely on ***Century Rayon case*** in so far as the question whether co-generation based captive power plant could be fastened with renewable purchase obligations; in **Hindustan Zinc Ltd. vs. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611**, the validity of the 2007 and the 2010 Rajasthan Regulations had been questioned which imposed renewable energy obligation on captive generating companies and open access consumers; the Supreme Court was not considering the case of co-generation plants, as was involved in the present appeals before this Tribunal; the appellants were not questioning the correctness of the Regulations, and were merely claiming exemption therefrom as envisaged under Section 86(1)(e) of the Electricity Act, 2003; this Tribunal has consistently held that co-generation plants are exempted from these regulations by virtue of the special status granted to them in the light of Section 86(1)(e) of the Electricity Act, 2003; this Tribunal has further held that, even where the Regulations provide for the imposition of renewable purchase obligations on co-generation, the Regulations need to be read down in view of the interpretation of Section 86(1)(e) of the Electricity Act, 2003; a co-generation facility, irrespective of fuel used, should be promoted in terms of Section 86(1)(e); such an entity

cannot be fastened with renewable purchase obligation under the same provision; and as long as co-generation is in excess of the renewable purchase obligations, there can be no additional purchase obligation placed on such entities.

In **M/s Ultratech Cement Ltd vs Karnataka Electricity Regulatory Commission** (Order in Appeal Nos 322 and 333 of 2016 dated 09.04.2019), the dispute pertained to imposition of Renewable Purchase Obligations on captive co-generation plants using fuel, other than renewable sources, for power generation.

On the questions whether co-generators were under a legal obligation to purchase power from renewable sources of energyin order to meet their renewable purchase obligations, and whether the exemption granted to co-generation plants would depend on the type of fuel used by them, this Tribunal observed that it was manifest from the judgment, in **Century Rayon vs. Maharashtra Electricity RegulatoryCommission & Ors: 2010 SCC OnLine APTEL 37,** that captive consumers, having co-generating plants, could not be fastened with the obligation to procure electricity from renewable energy sources, as that would defeat the object of Section 86(1)(e), and co-generating plants have to be treated at par with renewable energy generating plants for the purpose of RPO obligations; the aforesaid judgment has been consistently followed in several cases e.g. **Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission: (Appeal No. 54 of 2012 dated 30.01.2013): 2013 SCC OnLine APTEL 23**; only paragraph 45(II) of the judgment in **Century Rayon's Case** had been set aside by the Full Bench judgment in **Lloyds Metal Case**, and not the **Century Rayon judgment** in its entirety; the effect of the Full Bench Judgement was that the distribution licensee could not be compelled to procure electricity from fossil fuel based co-generation against its renewable

purchase obligation; however, it had no effect on the finding in **Century Rayon Case** that a co-generation based captive power plant cannot be fastened with renewable purchase obligations irrespective of the nature of the fuel used for such cogeneration; this Tribunal, in **India Glycols Case** dated 01.10.2014, much after the judgment of the Full Bench in **Lloyds Metal case**, continued to rely on **Century Rayon case** on the question whether cogeneration based captive power plant can be fastened with renewable purchase obligations; in **Hindustan Zinc Ltd. vs. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611,** the validity of the 2007 and 2010 Rajasthan Regulations, which imposed renewable energy obligation on captive generating companies and open access consumers, had been questioned; the Supreme Court was not considering the case of co-generation plants, which was involved in the present appeals before this Tribunal; the appellants were not questioning the correctness of the Regulations and were merely claiming exemption therefrom as envisaged under Section 86(1)(e); this Tribunal has consistently held that co-generation plants are exempted from these regulations by virtue of the special status granted to them in the light of Section 86(1)(e), and, even where the Regulations provide for imposition of Renewable Purchase Obligation on co-generation, the Regulations need to be read down in view of the interpretation of Section 86(1)(e); and there was no reason to differ from the view expressed by the co-ordinate Bench with regard to co-generation plant vis-a-vis RPOs.

**In M/s. National Aluminum Company Limited & others vs Odisha Electricity Regulatory Commission**, and others (Order in Appeal Nos. 260 of 2015 & batch dated 02.12.2020), the Appellant NALCO had installed a Captive Power Plant (CPP), a Steam Power Plant (SPP), and a co- generation plant. The OERC had rejected their

contention that it should be deemed to have fulfilled its RPO obligations, since power consumption from its co-generation source was 5.59% and 5.5% of its total consumption against the total renewable purchase obligations of 5% and 5.5% for the financial year 2011-12 & 2012-13 respectively.

In appeal, this Tribunal observed that, f r o m ***Century Rayon*** *judgement,* it is clear that, in terms of Section 86(1)(e), co-generating plants should be treated on par with renewable energy generating plants; captive consumers of power, from their own co-generating plants, cannot be imposed with the obligation of procuring electricity from renewable energy sources; this judgment was followed consistently by this Tribunal in several cases including **Emami Paper Mills Limited's** case; in "***JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission***" (Appeal No. 278 of 2015), this Tribunal pointed out that, in spite of this consistent view regarding the obligation of co-generating plants to purchase renewable energy, the Regulatory Commissions consistently failed to take judicial note of the precedents; the Full Bench judgment in "***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Others"*** had set aside only para 45(ii) of the Judgment in **Century Rayon's** case and not the entire judgment of **Century Rayon's** case**;** subsequent to the judgment of the Full Bench in **Lloyds Metal & Energy Limited's** case, this Tribunal continued to place reliance on the opinion expressed in **Century Rayon** case on the point that co-generation based captive power plants cannot be fastened with the liability of RPO; one such judgment was in **"India Glycols Ltd. Vs. Uttarakhand Electricity Regulatory Commission"** (Appeal No. 112 of 2014); in **"*Hindustan Zinc Le td. vs. RERC"* (C.A No. 4417/2015),** the Supreme Court was not considering the controversy like that of these appeals i.e.,

whether captive generating plants were obliged to comply with RPO obligations; in the instant appeals, none of the Appellants were questioning the validity of any of the Regulations; they were claiming exemption from RPO, and were taking protection under Section 86(1)(e) of the Electricity Act; this Tribunal has consistently opined that co-generating plants are exempted from complying with RPO Regulations in the light of having special status/protection under Section 86(1)(e) of the Act; this Tribunal has also held that, even if Regulations impose renewable purchase obligation on co-generation plants, those Regulations should be read down in view of the protection/special status granted to co-generation plants under Section 86(1)(e); in the following appeals, it has opined that a co-generation facility, irrespective of the nature of fuel used in such plants, should be promoted and encouraged in terms of Section 86(1)(e) ie (i) Judgment dated 02.01.2019 in Appeal No. 278/15 titled **"*JSW Steel Limited & Ors., vs. Tamil Nadu Electricity Regulatory Commission & Ors.*,"** and (ii) Judgment dated 09.04.2019 in Appeal Nos. 322 of 2016 and 333 of 2016 titled **"*M/s Ultratech Cement Limited vs. Karnataka Electricity Regulatory Commission.*"**; and all the Appellants, being co-generation plants, cannot be fastened with the liability of purchasing power from renewable sources to meet RPO obligations.

In **JSW Steel Limited vs Maharashtra Electricity Regulatory Commission** (Order in Appeal Nos. 176 and 1298 of 2020 dated 02. 08.2021), the appeal was filed challenging the order passed by the Maharashtra Electricity Regulatory Commission ("MERC") whereby the Appellant's Petition, seeking exemption from the applicable RPO Regulations in respect of their manufacturing unit, was rejected on the ground that their consumption from their co-generation plants were in excess of the presumptive RPO targets for the relevant year.

This Tribunal observed that the consistent view, taken in the judgements in ***Century Rayon vs. Maharashtra Electricity*** **[Appeal No. 57 of 2009];** ***JSW Steel Limited vs. Tamil Nadu Electricity Regulatory Commission*** **[Appeal No. 278 of 2015 and 293 of 2015, January 2, 2019];** and **Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission (Appeal No. 54 of 2012 dated 30.01.2013), JSW Steel Limited vs. Karnataka Electricity Regulatory Commission [Appeal No. 333 of 2016];** ***M/s. National Aluminum Company Limited v. OERC & Ors.*** **[Appeal No. 260 & 261 of 2015],** was that Section 86(1)(e) contemplated two categories of generators; one was cogeneration and the other was 'generation of power from renewable sources', and mandated that both categories of generators must be promoted by the Appropriate Commission by issuing directions to distribution licensees to purchase electricity from both the categories'; cogeneration plant cannot be fastened with the liability of purchasing power from renewable sources to meet its RPO obligation irrespective of the fuel used for cogeneration; both are required to be promoted, one cannot be given preference to the other, if such preference is given, it would amount to defeating the purpose and intention of the Section itself, and one category of generation of power cannot be allowed to affect the other category of generation of power; the impugned order over looked the well settled position of law by this Tribunal, and placed reliance on Century Rayon Case 2 (ie the Full Bench Judgement) where the issues adjudicated upon were entirely different from the controversy raised in the present appeal.

**D.THE LAW DECLARED IN THE JUDGEMENTS OF THE TWO MEMBER BENCHES OF THIS TRIBUNAL:**

In **Century Rayon Vs. Maharashtra Electricity Regulatory**

**Commission (Order in Appeal No.57 of 2009 dated 26.04.2010),** this Tribunal held that co-generation power plants were equally entitled to be promoted by the State Commission irrespective of the nature of the fuel used for such co-generation; and their conclusions would apply to all co-generation based captive consumers who may be using fuel from any source.

In **Emami Paper Mills Ltd. Vs. Odisha Electricity Regulatory Commission (Order in Appeal No. 54 of 2012 dated 30.01.2013),** this Tribunal held that the definition of 'obligated entity' equally covered entities consuming power from conventional captive generating plant which procured power from conventional generation through open access and third-party sale, and not a person consuming power from a co-generation plant.

In **India Glycols Limited Vs Uttarakhand Electricity Regulatory Commission (Order in Appeal No. 112, 130 and 136 of 2014 dated 01.10.2014),** this Tribunal held that co-generation based captive power plant/captive users could not be fastened with renewable purchase obligations as provided under the RPO Regulations;

In **M/s JSW Steel Ltd. Vs. Tamil Nadu Electricity Regulatory Commission (Order in Appeal No. 278 of 2015 and batch dated 02.01.2019)**, this Tribunal held that the Appellant, being co-generation plants, were not under a legal obligation to purchase power from renewable sources of energy in order to meet their renewable purchase obligations, as long as co-generation was in excess of their renewable purchase obligations; and there could be no additional power purchase obligation placed on such entities.

In **Ultratech Cement Ltd. Vs. Karnataka Electricity Regulatory Commission (Order in Appeal No. 322 and 333 of 2016 dated 09.04.2016),** this Tribunal set aside the order passed by the

Commission imposing renewable purchase obligations on captive co-generation plants using fuel other than renewable sources for power generation.

In **M/s National Aluminum Company Limited Vs. Odisha Electricity Regulatory Commission (Order in Appeal No. 260 of 2015 dated 02.11.2020)**, this Tribunal held that the Appellants, being co-generation plants, could not be fastened with the liability of purchasing power from renewable sources to meet their RPO obligations.

In **JSW Steel Ltd. Vs Maharashtra Electricity Regulatory Commission (Order in Appeal NO. 176 of 2020 dated 02.08.2021),** this Tribunal held that the Appellant was exempted from RPO obligations/targets as long as the power consumed from their co-generation plant was in excess of their presumptive RPO targets, dehors the provisions of the relevant regulations; and, irrespective of the type of the fuel utilized in the co-generation captive power plants, the Appellant was entitled to set off its presumptive RPO obligations vis-à-vis open access consumption against the electricity generated and consumed from its co-generation plants.

In short, the judgement of this Tribunal in **Century Rayon,** and the judgements following it, lay down that entities, owning and operating a co-generation based CPP, irrespective of the fuel used, cannot be fastened with renewable purchase obligations, as long as the electricity generated from its co-generation plant is in excess of the presumptive RPO target (qua its captive consumption) for the relevant years.

These judgements (all of which were delivered by two-member benches of this Tribunal), in short, permit the quantum of energy consumed by a captive consumer, from the electricity generated by its co-generation plant, to be set off against its RPO obligations.

While the judgement of the Full Bench in **Llyod Metals & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission (Order in Appeal No. 53 of 2012 dated 02.12.2013)** is binding on a bench of lesser strength, the said judgement was distinguished on the ground that it only laid down that the distribution licensee could not be compelled to procure electricity from fossil fuel based co-generation against its renewable purchase obligation; and, it had no effect on the finding in **Century Rayon,** that a co-generation based captive power plant cannot be fastened with renewable purchase obligations irrespective of the nature of the fuel used for such cogeneration.

We shall consider, later in this order, whether the two-member benches of this Tribunal were justified in distinguishing the judgement of the Full Bench of this Tribunal, in **Llyod Metals & Energy Ltd**, on this score.

**E.DOES THE LAW DECLARED IN "*CENTURY RAYON LTD VS MAHARASHTRA ELECTRICITY REGULATORY COMMISSION,* (ORDER IN APPEAL NO. 57 OF 2009 DATED 26.04.2009)", CONSTITUTE A BINDING PRECEDENT EVEN AFTER THE FULL BENCH JUDGMENT IN "*LLOYDS METAL & ENERGY LTD"* ?**

The law declared in **Century Rayon Ltd vs Maharashtra Electricity Regulatory Commission, (Order in Appeal No. 57 of 2009 dated 26.04.2009)** was followed in **M/s. Emami Paper Mills Ltd ( Judgement dated 30th day of January, 2013),** which was pronounced before the Full Bench Judgement in "***Lloyds Metal & Energy Ltd"***. Even after the said Full Bench Judgement was delivered, the judgement in **Century Rayon Ltd** was followed in **India Glycols Limited (Order in Appeal No.112of 2014 & batch dated 01.10.2014)**, **M/s JSW Steel Limited (Order in Appeal Nos. 278 and**

**293 of 2015 dated 02.01.2019), M/s Ultratech Cement Ltd (Order in Appeal Nos 322 and 333 of 2016 dated 09.04.2019), M/s. National Aluminum Company Limited** (Order in Appeal Nos. 260 of 2015 & batch dated 02.12.2020), and **JSW Steel Limited** (Order in Appeal Nos. 176 and 1298 of 2020 dated 02. 08.2021).

In **M/s JSW Steel Limited (Order in Appeal Nos. 278 and 293 of 2015 dated 02.01.2019), M/s Ultratech Cement Ltd (Order in Appeal Nos 322 and 333 of 2016 dated 09.04.2019),** and **M/s. National Aluminum Company Limited** (Order in Appeal Nos. 260 of 2015 & batch dated 02.12.2020), this Tribunal held that the Full Bench judgment in "***Lloyds Metal & Energy Ltd. Vs. Maharashtra Electricity Regulatory Commission & Others"*** had set aside only para 45(ii) of the Judgment in **Century Rayon's** case and not the entire judgment of **Century Rayon's** case**.** The conclusion drawn, in these judgements, is that sub-paras (i) and (iii) to (vi) of Para 45 of the judgement in **Century Rayon** continues to be the governing law even after the Full Bench judgment in "***Lloyds Metal & Energy Ltd.***

As noted hereinabove, the conclusion in sub-para (ii) of Para 45 of the judgement in **Century Rayon Ltd vs Maharashtra Electricity Regulatory Commission, (Order in Appeal No. 57 of 2009 dated 26.04.2009)** is that, as per Section 86(1)(e), there are two categories of generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy; and the said Section requires both these categories to be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories. This is acknowledged in **M/s JSW Steel Limited (Order in Appeal Nos. 278 and 293 of 2015 dated 02.01.2019), M/s Ultratech Cement Ltd (Order in Appeal Nos 322 and 333 of 2016 dated 09.04.2019),** and **M/s. National Aluminum Company Limited**

**(Order in Appeal Nos. 260 of 2015 & batch dated 02.12.2020)**, to be no longer good law in the light of the Full Bench Judgement in "***Lloyds Metal & Energy Ltd".***

Does the mere fact that the reference was answered in the negative, mean that the law declared by the Full Bench, in **Lloyds Metal & Energy Ltd,** over-ruled only para 45(ii) of the Judgement in **Century Rayon,** and not the said judgement in its entirety?; and whether, as held in the aforesaid judgements, the conclusions in sub-para (i) and (iii) to (vi) of Para 45 of the judgement in **Century Rayon Ltd,** still continue to remain the governing law, even after the Full Bench judgement in **Lloyds Metal & Energy Ltd.**

It is, therefore, necessary to examine whether each of these conclusions (ie the conclusions in sub-para (i) and (iii) to (vi) of Para 45 of the judgement in **Century Rayon Ltd** have been considered and dealt with by the Full Bench, for, if they have been, it would then be difficult to hold that the law laid down in the aforesaid sub-paras of Para 45 of the judgement in **Century Rayon Ltd** continue to constitute a binding precedent even after the Full Bench Judgement in ***Lloyds Metal & Energy Ltd*.**

In Para 45(i) of its judgement in **Century Rayon Ltd,** this Tribunal held that Section 86(1)(e) does not show that the expression 'co-generation' means co-generation from renewable sources alone; and the meaning of the term 'co- generation' has to be understood as defined in Section 2 (12) of the Act. In Para 45 (iii), it was held that fastening of the obligation on the co-generator, to procure electricity from renewable energy producers, would defeat the object of Section 86(1)(e) of the Electricity Act. In Para 45 (iv), it was held that the meaning of the words contained in Section 86(1)(e) is that both (namely (1) co-generators (2) Generators of electricity through renewable sources of energy) are

different and both are required to be promoted; and fastening of liability on one in preference to the other is contrary to the legislative intent. In Para 45 (v), it was held that, under the scheme of the Electricity Act, both renewable source of energy and co-generation power plant, are equally entitled to be promoted by the State Commission through suitable methods and suitable directions; and, as co-generation plants provide many benefits to environment as well as to the public at large, they are entitled to be treated at par with other renewable energy sources. In Para 45 (vi). it was held that the intention of the legislature is to promote co-generation in the electricity industry generally, irrespective of the nature of the fuel used for such co-generation, and not co-generation or generation from renewable energy sources alone.

The observations of the Full Bench of this Tribunal, in **Lloyds Metal & Energy Ltd**, are: (i) the legislative intent, in enacting the Electricity Act, 2003, is to promote generation from non-conventional and renewable sources, and to enable the Commissions to prescribe a minimum percentage of power to be purchased from such (non-conventional and renewable) sources; (ii) the obligation, under Section 86(1)(e), can be fastened only for purchase of electricity generated from renewable sources of energy, and not from fossil fuel based co-generation; (iii) the Tariff Policy stipulated that (a) under Section 86(1)(e), the Commission had to fix the minimum percentage of total consumption of Electricity, in the area of a Distribution Licensee, for purchase of energy from non-conventional and renewable sources of energy, including co-generation also from non- conventional and renewable sources, and (b) purchase obligation and preferential tariff should be fixed only from non-conventional or renewable sources of energy, and not fossil fuel based co-generation; (iv) the State Commission should specify a percentage of the total consumption, in

the area of the Distribution Licensee, only from non-conventional or renewable sources of energy; (v) determination, of appropriate differential prices of electricity, by the State Commission, was only with respect to non- conventional sources of energy; (vii) *"co- generation"*, as defined in Section 2(12) of the Electricity Act, is only a process of generation of electricity and another form of energy, and cannot be termed as a source of electricity; (viii) there was no requirement of determining appropriate differential prices for co-generation based on fossil fuel, as the thermal efficiency of a co-generation plant based on fossil fuel is higher compared to fossil fuel based generating station of a similar size; (ix) considering the high efficiency of the co-generation process, and production of electricity therefrom at a lower price; there was no need to provide for preferential tariff for co-generation plants based on fossil fuel; and (x) the State Commission can, however, promote fossil fuel based co-generation by measures such as facilitating sale of surplus electricity available at such co-generation plants in the interest of promoting energy efficiency and grid security, etc.

In the light of the law declared by the Full Bench, in **Lloyds Metal & Energy Ltd**, the obligation, under Section 86(1)(e), can be fastened only for purchase of electricity generated from renewable sources of energy, and not from fossil fuel based co-generation; *"co- generation"*, as defined in Section 2(12) of the Electricity Act, is only a process of generation of electricity and another form of energy, and cannot be termed as a source of electricity like renewable sources of energy; the State Commissions are required to specify and the captive consumers are required to procure, as a part of their total consumption, electricity only from non-conventional or renewable sources of energy, and not from co-generation based on fossil fuel; as electricity generated by the co-generation process is highly efficient and is at a lower price, there is

no need to provide for preferential tariff for co-generation plants based on fossil fuel; and fossil fuel based co-generation can only be promoted, by the State Commission, by measures such as facilitating sale of surplus electricity, from such co-generation plants, in the interest of promoting energy efficiency and grid security, etc.

In short, the law declared by the Full Bench, in **Lloyds Metal & Energy Ltd**, is that, under Section 86(1)(e), while the State Commission can promote co-generation based on fossil fuel, by facilitating sale of surplus electricity, from such plants, in the interest of promoting energy efficiency and grid security, etc, it can specify a percentage, of the total consumption of electricity by a captive consumer, to be purchased only from generation and co-generation of electricity from renewable sources of energy, and not from co-generation based on fossil fuels.

It is thus clear that the decisions rendered by the above referred two member benches of this Tribunal following **Century Rayon Ltd,** wherein it was held that entities, owning and operating a co-generation based CPP irrespective of the fuel used, cannot be fastened with renewable purchase obligations as long as the electricity generated from its co-generation plant is in excess of the presumptive RPO target (qua its captive consumption) for the relevant years, are contrary to and fall foul of the Full Bench judgement (of three members) of this Tribunal in **Lloyds Metal & Energy Ltd.**

## F.LARGER BENCH JUDGMENTS BINDING ON SMALLER BENCHES:

It is inappropriate for a bench of two Judges to overrule the decision of a Full Bench of three. To do so would be detrimental not only to the rule of discipline and the doctrine of binding precedents, but will also lead to inconsistency in decisions on points of law. Consistency and

certainty in the development of law and its contemporary status — both would be the immediate casualty. A decision, delivered by a Bench of larger strength, is binding on any subsequent Bench of lesser or co-equal strength. A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of a larger quorum. (**Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673; Union of India v. Raghubir Singh (Dead) By Lrs (1989) 2 SCC 754; Trimurthi Fragrances (P) Ltd. v. Government of N.C.T. of Delhi, 2022 SCC OnLine SC 1247).**

The practice is to regard the precedent of a larger Bench as having greater efficacy and binding authority than the precedent of a Bench consisting of a smaller number of Judges. When a Bench consists of a larger number of Judges, then the decision is not merely of a greater number of Judges, but it is one arising from out of the joint deliberations and discussions of a greater number of Judges, and this fact may give to the decision of a Bench consisting of a larger number of Judges a greater binding authority than that of a Bench consisting of a smaller number of Judges. The decision of a larger Bench should be followed in preference to the decision of a smaller Bench. (**Trimurthi Fragrances (P) Ltd. v. Government of N.C.T. of Delhi, 2022 SCC OnLine SC 1247).** All subsequent decisions have to be read in the light of the Larger Bench decision since they are decisions by Benches comprised of lesser number of Judges. (**N. MEERA RANIC v. GOVERNMENT OF TAMIL NADU, 1989 4 SCC 418)**.

Consequently, it is the law declared by the Full Bench of this Tribunal, in **Lloyds Metal & Energy Ltd**, which is binding on us, and not the judgements of two member benches of this Tribunal which had followed the judgement in **Century Rayon Ltd.**

**G.JUDGEMENT OF TWO MEMBER BENCH IN "INDIA GLYCOLS LIMITED", PASSED AFTER THE FULL BENCH JUDGEMENT IN "LLOYDS METAL & ENERGY LTD" : ITS EFFECT:**

In **M/s JSW Steel Limited (Order in Appeal Nos. 278 and 293 of 2015 dated 02.01.2019), M/s Ultratech Cement Ltd (Order in Appeal Nos 322 and 333 of 2016 dated 09.04.2019),** and **M/s. National Aluminum Company Limited** (Order in Appeal Nos. 260 of 2015 & batch dated 02.12.2020), this Tribunal observed that, much after the judgment of the Full Bench in **Lloyds Metal case**, this Tribunal, in **India Glycols (Judgement dated 01.10.2014),** had continued to rely on **Century Rayon** on the question whether co-generation based captive power plants can be fastened with renewable Purchase Obligations.

It is true that, in **India Glycols Limited,** this Tribunal did hold that the order passed by the State Commission suffered from the vice of illegality as it was against the legal proposition laid down by this Tribunal in its judgment, in **Century Rayon vs MERC** (Appeal No. 57 of 2009 dated 26.4.2010). What this Tribunal, in its judgements in **M/s JSW Steel Limited**, **M/s Ultratech Cement Ltd** and **M/s. National Aluminum Company Limited,** failed to notice was that, though the judgement in **India Glycols Limited** was passed on 01.10.2014 after the judgement of the Full Bench of this Tribunal in **Lloyds Metal & Energy Ltd (**Order in Appeal No.53 of 2012 dated 02.12.2013), the two member bench of this Tribunal, in **India Glycols Limited,** had failed to notice or refer to the earlier Full Bench Judgement of this Tribunal in **Lloyds Metal & Energy Ltd.**

**H.RULE OF PER INCURIAM : ITS SCOPE:**

"**Incuria**" literally means carelessness. Law declared is not that can

be culled out, but that which is stated as the law to be accepted and applied. **(STATE OF U.P. v. SYNTHETICS AND CHEMICALS LTD., 1991 4 SCC 139)**. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (**Young v. Bristol Aeroplane Ltd. : [1944] K.B. 718; Nirmal Jeet Kaur v. State of M.P., 2004 (2) ALD (Cri) 651 (SC) : (2004) 7 SCC 558, STATE OF U.P. v. SYNTHETICS AND CHEMICALS LTD., 1991 4 SCC 139).** The Latin expression "per incurium" means through inadvertence. A decision can be said generally to be given per incurium when the Court has acted in ignorance of a previous decision of its own or when it has acted in ignorance of a decision of the High Court or the Supreme Court. (**Punjab Land Devl., & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court : (1990) 3 SCC 682; Commissioner of Income Tax v. B.R. Constructions, 1992 SCC OnLine AP 121).**

*Halsbury's Laws of England*, Fourth Edition, para 578 at page 297 states the rule of per incurium as follows:—

*"A decision is given per incurium when the Court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."*

## I. FAILURE OF A SUBSEQUENT SMALLER BENCH TO NOTICE AN EARLIER LARGER BENCH JUDGEMENT: ITS EFFECT:

When a smaller Bench lays down a proposition contrary to and without noticing the ratio decidendi of the earlier Full Bench, such a decision will not have binding effect. (**Sakinala Harinath v. State of A.P., 1993 SCC OnLine AP 195 (FB))**. A decision by a Bench of more

strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available. (***N.S. Giri* v. *Corpn. of City of Mangalore,* (1999) 4 SCC 697).** The proper course is to follow the opinion expressed by larger benches of in preference to those expressed by smaller benches. (**UNION OF INDIA v. K.S. SUBRAMANIAN, (1976) 3 SCC 677 : AIR 1976 SC 2433).**

Where by obvious inadvertence or oversight, a judgment fails to notice an obligatory authority running counter to the reasoning and result reached, it may not have the sway of a binding precedent. (**Mamleshwar *v.* Kanahaiya Lal, (1975) 2 SCC 232; Morelle *v.* Wakeling, [1955] 1 All ER 708; Mandava Rama Krishna v. State of Andhra Pradesh, 2014 SCC OnLine AP 294;** and **Somprakash *v.* State of Uttarakhand, 2019 SCC OnLine Utt 648).** Likewise, a judgment delivered without argument and without reference to the relevant statutory provisions (**Gurnam Kaur, (1989) 1 SCC 101**) or even if it has been decided in ignorance thereof is not binding. **(Paritosh Pramanik v. Manju Koyal, 2015 SCC OnLine Cal 7044; Abdul Suvan v. Abdul Hossain, 2015 SCC OnLine Cal 6890).**

The judgement of the two member bench of this Tribunal, in **India Glycols Limited**, passed without reference to and in ignorance of the law declared by the Full Bench in **Lloyds Metal & Energy Ltd**, would therefore not constitute a binding precedent.

**J.JUDGEMENT OF THE SUPREME COURT IN "HINDUSTAN ZINC LTD": ITS SCOPE:**

In **M/s JSW Steel Limited vs Tamil Nadu Electricity Regulatory Commission (Order in Appeal Nos. 278 and 293 of 2015 dated 02.01.2019), M/s Ultratech Cement Ltd vs Karnataka Electricity**

**Regulatory Commission (Order in Appeal Nos 322 and 333 of 2016 dated 09.04.2019),** and **M/s. National Aluminum Company Limited vs Odisha Electricity Regulatory Commission** (Order in Appeal Nos. 260 of 2015 & batch dated 02.12.2020), this Tribunal was of the view that, in **Hindustan Zinc Ltd. vs. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611**, the validity of the 2007 and the 2010 Rajasthan Regulations had been questioned which imposed renewable energy obligations on captive generating companies and open access consumers; the Supreme Court was not considering the case of co-generation plants, as was involved in the present appeals before this Tribunal; the appellants were not questioning the correctness of the Regulations; and they were merely claiming exemption therefrom as envisaged under Section 86(1)(e) of the Electricity Act, 2003.

As noted hereinabove, the law declared by the Supreme Court, in **Hindustan Zinc Ltd: (2015) 12 SCC 611,** is that power is conferred on the State Commission, by Section 86(1)(*e*) of the Electricity Act, to specify a minimum percentage of renewable energy to be purchased by captive power consumers, as they promote generation of electricity from renewable sources of energy, protect the environment, and thereby prevent pollution. No distinction has been drawn by the Supreme Court, in **Hindustan Zinc Ltd**, between captive consumers of power generated from co-generation plants and coal based generation plants, nor have captive consumers, utilizing power from co-generation plants, been exempted from RE obligations.

**K.BINDING EFFECT OF JUDGEMENTS OF SUPREME COURT:**

In view of Article 141 of the Constitution, all courts/tribunals in India are bound to follow the decisions of the Supreme Court. Judicial discipline

requires, and decorum known to law warrants, that appellate directions should be taken as binding and followed. In the hierarchical system of courts which exists, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. (**Cassell & Co. v. Broome : [1972] 1 ALL ER 801 (HL); SMT. KAUSHALYA DEVI BOGRA (SMT) v. THE LAND ACQUISITION OFFICER, 1984 2 SCC 324).**

When the Supreme Court decides a principle it would be the duty of the subordinate Court (or for that matter a statutory tribunal) to follow the said decision. A judgment of the High Court (or Tribunal) which refuses to follow the decision and directions of the Supreme Court is a nullity. (***Narinder Singh* v. *Surjit Singh*, (1984) 2 SCC 402); *Kausalya Devi Bogra* v. *Land Acquisition Officer*, (1984) 2 SCC 324; *Municipal Corporation of Guntur, Guntur* v. *B. Syamala Kumari*, 2006 SCC OnLine AP 838; *Somprakash* v. *State of Uttarakhand*, 2019 SCC OnLine Utt 648; *Director of Settlements, A.P.* v. *M.R. Apparao*, (2002) 4 SCC 638).**

In the light of the law declared by the Supreme Court, in **Hindustan Zinc Ltd,** fastening of RE obligations by way of Regulations, on captive consumers such as the Appellant (which utilizes the entire energy generated by its 323 MW Captive Generation Plant, of which 258 MW is co-generation based, and 65 MW is coal based generation) is valid.

## V.DOES SECTION 86(1)(e) OF THE ELECTRICITY ACT REQUIRE BOTH CO-GENERATION AND RENEWABLE ENERGY GENERATION TO BE PROMOTED EQUALLY?

Ms. Mandakini Ghosh, Learned Counsel for the Appellant, would submit that the clear meaning of Section 86(1)(e) is that both renewable

generation and co-generation are different, and both are required to be promoted; fastening of liability on one in preference to the other is contrary to the legislative intent; under the scheme of the Act; both renewable sources of energy and co-generation power plants, are equally entitled to be promoted by the State Commission through suitable methods and suitable directions, in view of the fact that co-generation plants, which provide several benefits to the environment as well as to the public at large, are entitled to be treated at par with other renewable energy sources; when both are required to be promoted, it is incongruous to suggest that one form of energy will be additionally promoted over the other form of energy; and this is the principle on which the above judgments have been passed by this tribunal even in the teeth of the regulations made by the State Commission; and, contrary to the settled law, it is clear that the Impugned Order wrongfully fastens RPO's on the Appellant's consumption from its 258 MW captive co-generation plant.

Learned Counsel would further submit that, in ***JSW v. MERC & Ors., (Appeal No. 176 of 2020),*** this Tribunal had allowed the Appellant therein, JSW, a captive co-generating plant to set-off its presumptive RPO obligations vis-à-vis open access consumption against the electricity generated and consumed from its co-generation plants; this Tribunal has recognised that excess co-generation can be utilised to set-off presumptive RPOs corresponding to the obligated entity's consumption from sources other than the captive co-generation plant; and the Impugned Order, to the extent it imposes RPOs upon the Appellant's consumption from its 65 MW captive generation under the RPO Regulations, 2015 & 2021, is liable to be set aside.

**A. ANALYSIS:**

Apart from the fact that the judgement of the two-member bench of this Tribunal in **Century Rayon Ltd vs Maharashtra Electricity**

**Regulatory Commission, (**Order in Appeal No. 57 of 2009 dated 26.04.2010), and the judgements which followed it, run contrary to and fall foul of the Full Bench judgement (of three members) of this Tribunal in **Lloyds Metal & Energy Ltd,** the basis, for all these judgements to hold that entities, owning and operating a co-generation based CPP irrespective of the fuel used, cannot be fastened with renewable purchase obligations as long as the electricity generated from its co-generation plant is in excess of the presumptive RPO target (qua its captive consumption) for the relevant years, is that Section 86(1)(e ) of the Electricity Act, 2003 requires both co-generation and generation of electricity from renewable sources of energy to be promoted equally.

The question which necessitates examination is whether a plain and literal reading of Section 86(1)(e) justifies the conclusion that the State Commission is required to promote, both co-generation and generation of electricity from renewable sources of energy, equally.

Section 86(1)(e) of the Electricity Act requires the State Commission to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. On a plain and literal reading, the said provision does not expressly stipulate that, both co-generation and generation of electricity from renewable sources of energy, should be promoted equally.

**B.PRIMARY RULE OF INTERPRETATION IS A LITERAL CONSTRUCTION OF THE PROVISION:**

The primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. The question is

not what may be supposed and has been intended but what has been said. (**Unique Butyle Tube Industries P. Ltd. v. Uttar Pradesh Financial Corporation [2003] 2 SCC 455).** Courts should not, ordinarily, add words to a statute or read words into it which are not there, especially when a literal reading thereof produces an intelligible result. (**Delhi Financial Corporation v. Rajiv Anand [2004] 11 SCC 625 ; [2006] 131 Comp Cas 285).** There is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. Courts expound the law, they do not legislate. (**State of Kerala v. Mathai Verghese [1986] 4 SCC 746, Union of India v. Deoki Nandan Aggarwal, AIR 1992 SC 96).** A judge is not entitled to add something more than what is there in the statute by way of a supposed intention of the Legislature. (**Union of India v. Elphinstone Spinning and Weaving Co. Ltd. [2001] 4 SCC 139).** The legislative casus omissus cannot be supplied by the judicial interpretative process. **(Maruti Wire Industries P. Ltd. v. STO [2001] 3 SCC 735, State of Jharkhand v. Govind Singh [2005] 10 SCC 437)**.

A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. **(Raghunath Rai Bareja v.Punjab National Bank (2007) 2 SCC 230 and Shiv Shakti Coop. Housing Society v. Swaraj Developers AIR 2003 SC 2434).** A provision must be construed according to the natural meaning of the language used. The court, in interpreting a statute, must therefore proceed without seeking to add words which are not to be found in the statute. (**Southern Petrochemical Industries Co. Ltd. (2007) 5 SCC 447 ; Union of India v. Mohindra Supply Co. AIR 1962 SC 256, Bank of England v. Vagliano Brothers [1891] AC 107, Commissioner of Income-tax v. Anjum M. H. Ghaswala [2001] 252 ITR 1 (SC) ; (2002) 1 SCC 633 and J. Srinivasa Rao v. Govt. of A. P. (2006) 12 SCC 607).** Statutory language must always be given presumptively the most natural and

ordinary meaning which is appropriate in the circumstances, **(Chertsey Urban District Council v. Mixnam's Properties Ltd. (1964) 2 All ER 627),** and must be construed according to the rules of grammar. When the language is plain and unambiguous, and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. The meaning must be collected from the expressed intention of the Legislature. **(State of Uttar Pradesh v. Dr. Vijay Anand Maharaj (1963) 1 SCR 1).** In construing a statutory provision, the first and the foremost rule of construction is the literal construction. All that the court has to see, at the very outset, is what does that provision say. If the provision is unambiguous and if from that provision the legislative intent is clear, the court need not call into aid other rules of construction of statutes. **(Raghunath Rai Bareja (2007) 2 SCC 230 and Hira Lal Rattan Lal v. Sales Tax Officer [1973] 31 STC 178 (SC) ; (1973) 1 SCC 216).**

As held by the Full Bench of this Tribunal, in **Lloyds Metal & Energy Ltd**, the suitable measures which should be provided to promote co-generation are that the State Commission can promote fossil fuel based co-generation by other measures such as facilitating sale of surplus electricity available at such co-generation plants in the interest of promoting energy efficiency and grid security, etc. The power conferred on the State Commission under Section 86(1)(e) to specify procurement, of a percentage of the total consumption of electricity by a captive consumer, is confined only from renewable sources of energy, and not from co-generation.

Section 61(h) stipulates that the appropriate Commission, while specifying the terms and conditions for determination of tariff, should be guided by the requirement of promoting co-generation and generation of electricity from renewable sources of energy. Neither Section 86(1)(e) nor Section 61(h) of the Electricity Act expressly stipulate that co-generation

and generation of electricity from renewable sources of energy should be promoted equally.

Therefore, even while promoting generation of electricity from renewable sources of energy, it is open to the concerned State Commission to promote one source of renewable energy over another or to fix different percentages for the minimum procurement from such sources. For instance, while promoting generation of electricity from renewable sources of energy, it is open to the State Commission to fix a higher percentage, of the total consumption of a captive consumer, to be purchased from solar energy as compared to wind or hydel energy or vice-versa.

## C.EFFECT OF THE NATIONAL TARIFF POLICY ON THE DISCHARGE OF FUNCTIONS BY STATE COMMISSIONS UNDER SECTION 86(1)(E ) OF THE ELECTRICITY ACT:

Section 3 of the Electricity Act, 2003 relates to the National Electricity Policy and Plan. Section 3(1) stipulates that the Central Government shall, from time to time, prepare the National Electricity Policy and Tariff Policy, in consultation with the State Government and the Central Electricity Authority for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. The 2016 Tariff Policy, framed by the Government of India under Section 3(1), relates to Renewable Purchase Obligations, and for increased procurement of power from renewable source of energy, thereby reducing dependence on fossil fuels.

Section 3(2) of the Electricity Act provides that the Central Government shall publish the National Electricity Policy and Tariff Policy from time to time. The National Tariff Policy, prepared by the Government of India under Section 3(1), has been published in the Official Gazette

under Section 3(2). Section 3(3) enables the Central Government from time to time, in consultation with the State Governments and the Central Electricity Authority, to review or revise the National Electricity Policy and the Tariff Policy referred to in Section 3(1). The 2016 Tariff Policy was made on review of the 2006 Tariff Policy framed by the Government of India earlier, which policy has been subjected to amendment from time to time.

**D. NATIONAL TARIFF POLICY 2016: ITS SCOPE:**

In compliance with Section 3 of the Electricity Act 2003, the Central Government had earlier notified the 2006 Tariff Policy on 6th January, 2006. Further amendments to the Tariff Policy were notified on 31st March, 2008, 20th January, 2011 and 8th July, 2011. In exercise of the powers conferred under Section 3(3) of Electricity Act, 2003, the Central Government notified the revised Tariff Policy ("the 2016 tariff policy) which came into force, on its publication in the Gazette of India, on 28th January 2016. The 2016 tariff policy stipulates that any action taken or purported to have been done or taken under the provisions of the 2006 Tariff Policy, and amendments made thereunder shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under the provisions of this revised policy.

The 2016 tariff Policy states that it has been evolved in consultation with the State Governments, the Central Electricity Authority (CEA), the Central Electricity Regulatory Commission and various stakeholders; the Central Electricity Regulatory Commission (CERC) and the State Electricity Regulatory Commissions (SERCs) shall be guided by the tariff policy in discharging their functions including framing the regulations; and the regulatory commissions shall be guided by the principles and methodologies specified by the central commission

for determination of the tariff applicable to generating companies and transmission licensees.

The objectives of this tariff policy are, among others, to promote generation of electricity from renewable sources; and to promote Hydro-electric power generation including Pumped Storage Projects (PSP) to provide adequate peaking reserves, reliable grid operation and integration of variable renewable energy sources.

Clause 5 relates to the general approach to tariff, and the second proviso to Clause 5.2 stipulates that the State Government can notify a policy to encourage investment in the State by allowing setting up of generating plants, including from renewable energy sources out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff may be determined under Section 62 of the Electricity Act, 2003. The third proviso stipulates that, notwithstanding the provision contained in para 5.11(j) of the policy, the tariff for such 35% of the installed capacity shall be determined by SERC, however, 15% of power outside long term PPAs allowed under para 5.7.1 of the National Electricity Policy shall not be included in the 35% allowed to be procured by Distribution Licensees of the State.

Under the heads “Benefits under Clean Development Mechanism (CDM)”, the tariff policy states that the tariff fixation for all electricity projects (generation, transmission and distribution) that result in lower Green House Gas (GHG) emissions than the relevant base line should take into account the benefits obtained from the Clean Development Mechanism (CDM) into consideration, in a manner so as to provide adequate incentive to the project developers.

Clause 6.4 relates to renewable sources of energy generation

including co-generation from renewable energy sources. Clause 6.4(1) stipulates that, pursuant to the provisions of Section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs; cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs; and long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by the Ministry of Power in consultation with MNRE. Under the proviso thereto, co-generation from sources, other than renewable sources, shall not be excluded from the applicability of RPOs.

Clause 6.4(1)(i) stipulates that, within the percentage so made applicable, to start with, the SERCs shall also reserve a minimum percentage for purchase of solar energy from the date of notification of this policy which shall be such that it reaches 8% of the total consumption of energy, excluding Hydro Power, by March 2022 or as notified by the Central Government from time to time.

Clause 6.4(1)(iii) states that it is desirable that purchase of energy from renewable sources of energy takes place more or less in the same proportion in different States; to achieve this objective in the current scenario of large availability of such resources only in certain parts of the country, an appropriate mechanism, such as Renewable Energy Certificate (REC), would need to be promoted; through such a mechanism, the renewable energy based generation companies can sell the electricity to local distribution licensees at the rates for conventional power, and can recover the balance cost by selling certificates to other distribution companies and obligated entities enabling the latter to meet their renewable power purchase obligations; and the REC mechanism should

also have a solar specific REC.

Clause 6.4(1)(iv) enables the Appropriate Commission to also provide for a suitable regulatory framework for encouraging such other emerging renewable energy technologies by prescribing separate technology based REC multiplier (i.e. granting higher or lower number of RECs to such emerging technologies for the same level of generation); similarly, considering the change in prices of renewable energy technologies with passage of time, the Appropriate Commission may prescribe vintage based REC multiplier (i.e. granting higher or lower number of RECs for the same level of generation based on the year of commissioning of the plant).

Clause 6.4(2) stipulates that States shall endeavor to procure power from renewable energy sources through competitive bidding to keep the tariff low, except from the waste to energy plants; procurement of power, by Distribution Licensee from renewable energy sources from projects above the notified capacity, shall be done through competitive bidding process, from the date to be notified by the Central Government; however, till such notification, any such procurement of power from renewable energy sources projects, may be done under Section 62 of the Electricity Act, 2003; while determining the tariff from such sources, the Appropriate Commission shall take into account the solar radiation and wind intensity which may differ from area to area to ensure that the benefits are passed on to the consumers.

Clause 6.4(3) requires the Central Commission to lay down guidelines for pricing intermittent power, especially from renewable energy sources, where such procurement is not through competitive bidding; the tariff stipulated by CERC shall act as a ceiling for that category; in order to incentivize the Distribution Companies to procure

power from renewable sources of energy, the Central Government may notify, from time to time, an appropriate bid-based tariff framework for renewable energy, allowing the tariff to be increased progressively in a back-loaded or any other manner in the public interest during the period of PPA, over the life cycle of such a generating plant; correspondingly, the procurer of such bid-based renewable energy shall comply with the obligations for payment of tariff so determined.

Clause 6.4(5) stipulates that, in order to promote renewable energy sources, any generating company proposing to establish a coal/lignite based thermal generating station after a specified date shall be required to establish such renewable energy generating capacity or procure and supply renewable energy equivalent to such capacity, as may be prescribed by the Central Government from time to time after due consultation with stakeholders; the renewable energy produced by each generator may be bundled with its thermal generation for the purpose of sale; in case an obligated entity procures this renewable power, then the SERCs will consider the obligated entity to have met the Renewable Purchase Obligation (RPO) to the extent of power bought from such renewable energy generating stations. Under the first proviso thereto, in case any existing coal and lignite based thermal power generating station, with the concurrence of power procurers under the existing Power Purchase Agreements, chooses to set up additional renewable energy generating capacity, the power from such plant shall be allowed to be bundled, and tariff of such renewable energy shall be allowed to be pass through by the Appropriate Commission; and the Obligated Entities, who finally buy such power, shall account towards their renewable purchase obligations. Under the second proviso, scheduling and despatch of such conventional and renewable generating plants shall be done separately.

Clause 6.4(6) provides that, in order to further encourage renewable sources of energy, no inter-State transmission charges and losses may be levied till such period as may be notified by the Central Government on transmission of the electricity generated from solar and wind sources of energy through the inter- state transmission system for sale. Clause 6.4(7) enables the appropriate commission to provide regulatory framework to facilitate generation and sale of electricity from renewable energy sources particularly from roof-top solar system by any entity including local authority, Panchayat Institution, user institution, co-operative society, Non- Governmental Organization, franchisee or by Renewable Energy Service Company. The Appropriate Government may also provide complementary policy support for this purpose. Under the Explanation thereto, “Renewable Energy Service Company” means an energy service company which provides renewable energy to the consumers in the form of electricity.

**E.MINISTRY OF POWER LETTER DATED 22.07.2022:**

On the subject of Renewable Purchase Obligation (RPO) and Energy Storage Obligation Trajectory till 2029-30, the Ministry of Power, Government of India issued order dated 22.07.2022. The said order takes note of Para 6.4(1) of the 2016 Tariff Policy dated 28.01.2016, and thereafter records that, to recommend RPO trajectory beyond 2021-2022, a Joint Committee, under the Co-chairmanship of Secretary, Ministry of Power, and Secretary, Ministry of New and Renewable Energy (MNRE), was constituted on 17.12.2020; and, based on their recommendations and further discussions with MNRE, the Ministry of Power was specifying the following RPO Trajectory beyond 2021-2022. The table thereunder gives the year-wise break-up of Wind RPO, HPO and other RPO from the year 2022-23 till 2029-30. From the said table, it is clear that the total RPO of 24.61% in the year 2022-23 is to progressively increase upto 43.33%

during the year 2029-30. The Order then states that (a) Wind RPO shall be met only by energy produced from Wind Power Projects (WPPs) commissioned after 31.03.2022; (b) HPO shall be met only by energy produced from I.HPs (including PSPs) commissioned after 08.03.2019; and (c) other RPO may be met by energy produced from RE power projects not mentioned in (a) and (b) above.

Para 15 of the said order states that the following percentage of total energy consumed shall be solar/wind energy along with/through storage. The table below gives the yearly consumption from 2023-24 to 2029-30. Para 20 of the Order further states that the State Commission may consider notifying RPO trajectory including HPO and Energy Storage Obligation trajectory for their respective States, over and above the RPO, HPO and Energy Storage Obligation trajectory give in Para-5; and, moreover, the Central Commission shall consider devising a suitable mechanism similar to Renewable Energy Certificate (REC) mechanism to facilitate fulfilment of HPO,

**F.STATE COMMISSIONS ARE GUIDED BY THE NATIONAL TARIFF POLICY FRAMED UNDER SECTION 3 OF THE ELECTRICITY ACT:**

As noted hereinabove, Clause 6.4(1) of the 2016 National Tariff Policy obligates the Appropriate Commission, pursuant to the provisions of Section 86(1)(e) of the Electricity Act, to fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. The Policy has entrusted the Ministry of Power, in consultation with MNRE, with the obligation to prescribe a long term growth trajectory of Renewable Purchase Obligations (RPOs), which they have by the letter dated 22.07.2022 referred to hereinabove.

More importantly, the proviso to Clause 6.4(1) prohibits co-generation from sources, other than renewable sources, to be excluded from RPO obligations. The mandate, of the proviso to Clause 6.4(1) of the 2016 National Tariff Policy, is for the RPO obligations to also apply to captive consumers which consume electricity from co-generation based on fossil fuel, including coal.

Section 86(4) of the Electricity Act stipulates that, in the discharge of its functions, the State Commission shall be guided by the National Electricity Policy, the National Electricity Plan and the Tariff Policy published under Section 3. While we may not be understood to have held that the State Commission is bound by the National Tariff Policy, it is not in doubt that it is required to be guided thereby. In the present case, the OERC has abided by the National Tariff Policy made by the Government of India under Section 3(1) and (2), and has framed the 2021 Regulations, in compliance therewith, in the exercise of its powers under Section 181 of the Electricity Act.

The Commissions (both Central and State) exercise regulatory and legislative functions. In the absence of any restriction on the exercise of such functions under the Electricity Act, it is impermissible for this Tribunal to place any fetters or restrictions on the exercise of powers or the discharge of functions by the regulatory Commissions. As both Section 86(1)(e) and Section 61(h) do not expressly stipulate that "co-generation" and "generation of electricity from renewable sources of energy" should be promoted equally, this Tribunal may not be justified in reading the word 'equally' into Sections 86(1)(e) and 61(h), as that would amount to judicial legislation, which is impermissible. It is also not open to this Tribunal to add or subtract a word in a statutory provision as that would be a legislative exercise, which power has not been conferred by the Electricity Act on this

Tribunal. This aspect has not been considered in the afore-said judgments of this Tribunal in **Century Rayon Ltd**, and in the judgements following it.

## G.WHEN IS A PRECEDENT BINDING?

It must 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. (**Shah Prakash Amichand v. State of Gujarat : (1986) 1 SCC 581 : AIR 1986 SC 468).** 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**). The view, if any, expressed without analysing the statutory provision cannot be treated as a binding precedent. (**N. Bhargavan Pillai v. State of Kerala (2004) 13 SCC 217; Somprakash v. State of Uttarakhand and Others, 2019 SCC OnLine Utt 648).** A decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. **(Mandava Rama Krishna v. State of Andhra Pradesh, 2014 SCC OnLine AP 294; Jaisri Sahu v. Rajdewan Dubey AIR 1962 SC 83; Gurnam Kaur (1989) 1 SCC 101; B. Shama Rao v. Union Territory of Pondicherry AIR 1967 SC 1480; Synthetics and Chemicals Ltd (1991) 4 SCC 139; Somprakash v. State of Uttarakhand and Others, 2019 SCC OnLine Utt 648).**

A decision cannot be relied upon as a precedent in support of a proposition that it did not decide. (**MITTAL ENGINEERING WORKS(P) Ltd. v. COLLECTOR OF CENTRAL EXCISE, MEERUT, 1997 1 SCC 203)**. A decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have binding effect. That which escapes in the judgment, without any occasion, is not the ratio decidendi. Any declaration or conclusion arrived at, preceded without any reason, cannot be deemed to be the declaration

of law or authority of a general nature binding as a precedent. (**Jaisri Sahu v. Rajdewan Dubey, AIR 1962 SC 83; Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101; 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).**

As none of the judgements of this Tribunal, relied on behalf of the appellant, state why both "co-generation" and "generation of electricity from renewable sources of energy" should be promoted equally, and a plain reading of Section 86(1)(e) shows that no such requirement is stipulated therein, it is difficult for us to hold that the said provision should be construed as requiring the State Commissions to promote "co-generation" and "generation of electricity from renewable sources of energy" equally.

## VI.DOES THIS TRIBUNAL HAVE THE POWER TO IGNORE OR TO READ DOWN REGULATIONS ON THE GROUND THAT THEY ARE CONTRARY TO THE PARENT ACT?

Ms. Mandakini Ghosh, Learned Counsel for the Appellant, would submit that the primary reason for the Commission to disallow exemption is Regulation 3.1(a) to (c) of the 2021 RPO Regulations; it was inter-alia argued before this Tribunal that Regulation 3.1(b) of the 2021 RPO Regulations should be ignored; even where the Regulations provide for imposition of Renewable Purchase Obligations on co-generation, the Regulations need to be read down/ignored as it would otherwise fall foul of Section 86(1)(e) of the Act; ignoring or reading down Regulation 3.1(b), the Appellant should be exempted from fulfilling RPOs under the applicable regulations; while this Tribunal, as a statutory body, does not have the powers of judicial review so as to quash a regulation/delegated

legislation, it has the power to ignore regulations which are contrary to the parent statute; not only in the above-mentioned judgments, but also 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), this Tribunal has held that it has the power to ignore Regulations being contrary to the parent statute; and, in the afore-mentioned judgment, it was held that the operation of Section 40 of the DVC Act, 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 plenary legislation; the judgment, in **Damodar Valley Corporation,** was affirmed in **Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corpn., (2018) 8 SCC 281** wherein the Supreme Court held that they found no cause for interference with the Aptel's judgment; however, in a subsequent judgment dated 02.05.2023 in **Fatehgarh Bhadla Transmission Company Limited v. CERC & Ors.,** (Appeal No.352 of 2022), this Tribunal has taken a different view, and has not accepted the submissions for ignoring the regulations; however, the present case is based on the settled proposition of law wherein, keeping in view Section 86(1)(e) and the provisions of the Tariff Policy, this Tribunal has held, in a series of judgments, that consumption of power from co-generation, irrespective of the nature of fuel, cannot be imposed with RPOs, and to do so would be in violation of the mandatory provision of the parent statute which requires both co-generation (based on any fuel) and generation from renewable sources to be promoted; from 2010 onwards, this Tribunal has consistently held that, under no circumstances, can consumption of power from co-generation be obligated to promote renewable energy by fulfilling RPOs; since this is the consistent view, the

only issue that remains is regarding the powers of this Tribunal to ignore regulations; and this Tribunal may consider squarely addressing the issue – whether it may ignore regulations which (a) have been deliberately issued by the State Commissions in order to circumvent the judgments of this Tribunal, and (b) are contrary to the parent statute; and this may be required to provide regulatory certainty and maintain sanctity of the parent statute.

On the other hand, Sri Rutwik Panda, Learned Counsel for the first respondent-OERC, would submit that the proviso to Para 6.4 (1) of the 2016 Tariff Policy stipulates that promotion of electricity, generated from co- generation, must be from Renewable sources; the Tariff Policy, which is statutory in nature, is binding; one of the objectives of the new Renewable Energy (RE) Policy, 2022 of the Government of Odisha (GoO) is to accelerate adoption of clean energy alternatives and decarbonize the energy sector which includes both grid-based electricity consumption and captive consumption of industrial consumers in the State; the new RE Policy, 2022 of GoO does not consider fossil fuel based captive co-generation as an alternative to RE generation for getting RPO benefit; the Policy of the State of Odisha is in consonance with the National Tariff Policy dated 28th January, 2016; in view of the specific provisions in the OERC Regulations, 2021, the Appellant's consumption from the 323 MW Captive Generating Plant and co-generation plants, based purely on conventional fossil fuel, must be fastened with RPO with effect from the date of notification of the 2021 Regulations, i.e., from 15.02.2022; as encouraging use of Renewable Energy is a necessity, the Ministry of Power, in consultation with MNRE, issued an Order on 22nd July 2022 in which it prescribed the road map of renewable energy from FY 2022- 2023 to 2029 -2030; in the said order, Ministry of Power has divided renewable energy in three categories ie Wind, Hydro and others; and these

provisions/clauses, several of which have statutory sanction, can neither be ignored nor read down.

**A.OERC RPO REGULATIONS, 2021:**

In the exercise of the powers conferred under Sections, 61, 66, 86(1)(e) and 181 of the Electricity Act, 2003, and all other powers enabling it on that behalf, the Odisha Electricity Regulatory Commission made the "Odisha Electricity Regulatory Commission (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021" ("the 2021 RPO Regulations" for short), for promoting the procurement of energy from renewable sources by distribution licenseeS (or any entity procuring power on their behalf), conventional captive users and Open Access customers within the State of Odisha. These Regulations came into force on the date of its publication in the Official Gazette.

Regulation 2(q) of the 2021 RPO Regulations defines **"Obligated Entity" to** mean the entity mandated under clause (e) of subsection (1) of Section 86 of the Act to fulfill the renewable purchase obligation, and any other entities identified under clause 3.1 of these Regulations. Regulation 2(s) defines "**Renewable Energy Sources"** to mean renewable sources such as Mini Hydro, Micro Hydro, Small hydro, Wind, Solar, Biomass, Bio fuel cogeneration (such as Bagasse based co-generation), generation from exothermic heat, Urban or Municipal Waste based generation, power generated from co-firing of biomassin coal based thermal power plants, and such other sources as recognized or approved by MNRE. Regulation 2(t) defines **"Renewable Purchase Obligation (RPO)"** to mean the requirement specified through these Regulations by the Commission under Clause (e) of sub-section (1) of Section 86 of the Act or by way of orders from time to time for the obligated entity to purchase electricity from Renewable Energy Sources.

Regulation 3 relates to the Scope of Regulations and Extent of their Application. Regulation 3.1 stipulates that these Regulations shall apply to all "Obligated Entities" in the State of Odisha, including (a) distribution licensee (or any other entity procuring power on their behalf); (b) any person who owns Captive Generating Plant including co-generation plants based on conventional fossil fuel with installed capacity of 1 MW & above, and consumes electricity generated from such Plant for his own use shall be subject to RPO to the extent of a percentage of his consumption met through such fossil fuel-based captive source; and (c) any person who consumes electricity procured from conventional fossil fuel- based generation through Open Access and third party sale shall be subject to RPO to the extent of a percentage of his consumption met through such fossil fuel-based source. The proviso thereto enables the State Commission, by order, to modify/revise the minimum capacity referred above from time to time.

Regulation 4 relates to Purchase Obligation from Renewable Sources. Regulation 4.1 requires every "Obligated Entity" to meet its RPO target from its own Renewable Sources or procurement of power from other developers of Renewable Energy Sources or by purchase of Renewable Energy from other licensees or eligible renewable power from exchanges or by way of purchase of Renewable Energy Certificates (RECs).

Under Regulation 4.2, the Commission has specified the Hydropower Purchase Obligation (HPO) along with Solar RPO and Other Non-Solar RPO. The said Regulation provides that every Obligated Entity shall at least purchase, source wise electricity from Renewable sources, to the percentage of its total consumption of electricity from all sources excluding the consumption met from hydro sources of power (State & Central), as

indicated in the table below:

**Minimum quantum of electricity to be procured from Renewable ources by Obligated Entity as percentage of total Consumption in KWh**

| Year | Solar RPO | Non-Solar RPO | | | Total RPO |
|---|---|---|---|---|---|
| | | HPO | Other Non-Solar RPO | Total Non-Solar RPO | |
| 2021-22 | 7.25% | 0.18% | 5.82% | 6.00% | 13.25% |
| 2022-23 | 8.00% | 0.35% | 6.15% | 6.50% | 14.50% |
| 2023-24 | 8.75% | 0.66% | 6.59% | 7.25% | 16.00% |
| 2024-25 | 9.75% | 1.08% | 7.17% | 8.25% | 18.00% |

Regulation 4.3 provides that the RPO shall be calculated in energy terms as a percentage of total consumption of electricity excluding consumption met from hydro sources. Regulation 4.4 enables Solar RPO to be met by power procured from solar power plants – solar photo voltaic or solar-thermal. Other Non-Solar RPO (excluding HPO), may be met from any renewable source other than solar and LHPs. Regulation 4.5 stipulates that HPO shall be met from the power procured from eligible LHPs commissioned on and after 08.03.2019. Regulation 4.6 stipulates that, on achievement of Solar RPO compliance to the extent of 85% and above, remaining shortfall, if any, can be met by excess non-solar energy consumed beyond the specified Non-Solar RPO for that particular year. Similarly, on achievement of Other Non-Solar RPO compliance to the extent of 85% and above, remaining shortfall, if any, canbe met by excess solar or eligible hydro energy consumed beyond specified Solar RPO or HPO for that particular year. Further, on achievement of HPO compliance

to the extent of 85% and above, remaining shortfall, if any, can be met by excess solar or other non-solar energy consumed beyond specified Solar RPO or other Non-Solar RPO for that particular year. Regulation 4.7 stipulates that, in case of Hybrid Sources, the power procured from the hybrid project may be used for fulfillment of solar RPO and non-solar RPO in the proportion of rated capacity of solar and wind power in the hybrid plant respectively.

Regulation 4.8 provides that, for CPPs commissioned before 01.04.2016, RPO should be at the level as mandated by OERC for the year 2015-16; for CPPs commissioned from 01.04.2016 onwards, the RPO level as mandated by OERC or Ministry of Power, whichever is higher, for the year of commissioning of the CPP shall be applicable. Under the first proviso thereto, in case of any augmentation in the capacity, the RPO for augmented capacity shall be the RPO applicable for the year in which the CPP has been augmented. Under the second proviso, in case, for meeting the RPO obligation, CPP has surplus power than its consumption requirement, such a CPP may sell its surplus power to the Distribution licensee or any other entity procuring power on their behalf under the prevailing arrangements or in the power exchange.

Regulation 4.9 provides that, if the RPO for any of the years is not specified by the Commission, the RPO specified for the previous year shall be continued beyond the specified period till any revision is effected by the Commission in this regard. Regulation 4.10 provides that all purchase from Renewable Energy Sources by the Licensees shall be made at tariffs determined by the Commission from time to time. However, the Commission may fix a ceiling price for renewable power purchase to be made by the licensee through bidding process.

Regulation 4.11 provides that, in respect to subsequent amendments to the provisions of the Electricity Act, 2003 or the National

Tariff Policy, 2016 or guidelines issued by Central Government from time to time or on its own, the Commission through a Special Order may notify any changes to Regulation 4 above.

Regulation 8 relates to the functions of Captive User(s) and Open Access Consumer(s). Regulation 8.1 provides that the quantum of RPO mentioned in Clause 4.2, shall be applicable to captive user(s) and open access consumer(s) as mentioned in Regulation 3.1 of this Regulations. Regulation 8.2 requires every captive user(s) and open access consumer(s) to submit necessary details regarding total consumption of electricity and purchase of energy from Renewable Energy Sources for fulfillment of RPO certified by SLDC on regular basis to the State Agency.

Regulation 8.3 provides that, if the Captive user(s) and Open Access consumer(s) are unable to fulfill the criteria of the present Regulations, the shortfall of the targeted quantum would attract penalty as per Clause 10 of these Regulations. Under the proviso thereto, captive users, availing its entire requirement of power from renewable based captive power plants, are exempted from applicability of RPO targets and other related conditions as specified in these Regulations. Under the second proviso, sale of surplus energy from a Renewable Energy based captive power project over and above captive consumption will qualify for availing REC as provided in Regulation 5.

Regulation 10 provides for the consequences of default, Regulation 10.1 provides that, in the event of the Obligated Entities not being able to fulfill the RPO as provided in these regulations during any year and also does not purchase the certificates, the obligated entity should deposit a penalty as calculated by State Agency into a separatefund (RPO Fund), to be created and maintained by such State Agency. The first proviso requires the amount of penalty to be calculated by State Agency on the basis of the shortfall in units of RPO and the forbearance price decided by

the Central Commission.

Regulation 10.2 provides that, where any Obligated Entity fails to comply with the obligation to purchase the required percentage of power from Renewable Energy Sources or purchase Renewable Energy Certificates in lieu thereof or make payment of penalty as stated above or fails to provide required information sought for within specified time frame, it shall be liable for penalty as may be decided by the Commission under Section 142 of the Act. Under the first proviso, the unmet capacity of RPO shall not be allowed to be carried forward by the obligated entities from one financial year to another, unless there is genuine difficulty. Under the second proviso, in case of genuine difficulty in complying with the RPO because of non-availability of certificates, the obligated entity can approach the Commission for carry forward of compliance requirement to the next year.

Regulation 14 relates to Inconsistency with other Regulations/ Orders of the Commission. Regulation 14.1 stipulates that, notwithstanding anything contained in other Regulations / Orders of the Commission, this Regulation shall have overriding effect; and any action already taken before the effective date of this Regulation under any other Orders/Regulations of the Commission shall remain valid till the date of Notification of this Regulation. Regulation 15 relates to Issue of Orders and practice directions. Regulation 15.1 stipulates that, subject to the provisions of the Act and these Regulations, the Commission may, from time to time, either on suo motu basis or on a Petition filed by the applicant, issue Orders and practice directions in regard to the implementation of these Regulations. Regulation 16 relates to the power to remove difficulties. Under Regulation 16.1, if any difficulty arises in giving effect to any of the provisions of these Regulations, the Commission may, by general or special Order, do anything not being inconsistent with the

provisions of the Act, which appears to it to be necessary or expedient for the purpose of removing the difficulties.

Regulation 17 relates to the power to relax. Regulation 17.1 enables the Commission, for reasons to be recorded in writing, to relax any of the provisions of these Regulations on its own motion or on an application made before it by an interested person. Regulation 18 relates to the power to amend. Regulation 18.1 enables the Commission, for reasons to be recorded in writing, to at any time vary, alter or modify any of the provisions of these Regulations by amendments.

Regulation 19 relates to interpretation. Regulation 19.1 stipulates that, if a question arises relating to the interpretation of any provision of these Regulations, the decision of the Commission shall be final. Regulation 20 relates to the inherent Powers of the Commission. Regulation 20.1 stipulates that, nothing contained in these Regulations shall limit or otherwise affect the inherent powers of the Commission from adopting a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of special circumstances of the matter or class of matters and for the reasons to be recorded in writing, deems it necessary or expedient to depart from the procedure specified in these Regulations.

**B.APPELLANT'S CONSUMPTION FROM FOSSIL FUEL BASED CO-GENERATION, CANNOT BE SET OFF AGAINST THEIR RPO OBLIGATIONS:**

Regulation 3.1 of the 2021 RPO Regulations makes the said Regulations applicable to all "Obligated Entities" in the State of Odisha, including distribution licensees, owners of captive generating plants including co-generation plants based on conventional fossil fuel with an installed capacity of 1 MW & above, and which consumes electricity generated from such plants for its own use. Regulation 3(1) subjects them

to RPO (ie Renewable Purchase Obligation) which is defined in Regulation 2(t) of the 2021 RPO Regulations to mean the requirement specified through these Regulations by the Commission under Clause (e) of sub-section (1) of Section 86 of the Act or by way of orders from time to time for the obligated entity to purchase electricity from Renewable Energy Sources.

The RPO, to which these obligated entities are subjected to, is a percentage of their consumption met through such fossil fuel-based captive source. Regulation 4.1 requires every "Obligated Entity" to meet its RPO target from its own renewable sources or procurement of power from other developers of Renewable Energy Sources or by purchase of Renewable Energy from other licensees or eligible renewable power from exchanges or by way of purchase of Renewable Energy Certificates (RECs). Regulation 4.2 provides that every Obligated Entity shall at least purchase source wise electricity from Renewable sources to the percentage of its total consumption of electricity from all sources, excluding the consumption met from hydro sources of power (State & Central), as indicated in the table thereunder. For 2021-22 as against the total RPO of 13.25% to be procured, it is stipulated in the table that 7.25% should be from solar and the balance 6.0% from non-solar; for 2022-23 as against the total RPO of 14.50% to be procured, 8.0% should be from solar and the balance 6.50% from non-solar; for 2023-24 as against the total RPO of 16.00% to be procured, 8.75% should be from solar and the balance 7.25% from non-solar; for 2024-25 as against the total RPO of 18.00% to be procured, 9.75% should be from solar and the balance 8.25% from non-solar, and so on. Further, from out of the non-solar RPO obligations, a certain percentage is required to be procured from HPO.

As Regulation 3(1) subjects captive consumption of electricity, generated from co-generation plants based on conventional fossil fuel, to

RPO to the extent of a percentage of their total consumption met through such fossil fuel-based captive sources, it is evident that the 2021 RPO Regulations exclude electricity, consumed from fossil fuel based co-generation plants, from the minimum quantum of RPO obligations to be fulfilled by them. Regulation 8.1 provides that the quantum of RPO, mentioned in Clause 4.2, shall be applicable to captive user(s) as mentioned in Regulation 3.1 of the 2021 RPO Regulations. Regulation 8.2 requires every captive user(s) to submit necessary details, regarding total consumption of electricity and purchase of energy from Renewable Energy Sources for fulfillment of RPO, certified by SLDC on a regular basis to the State Agency. Regulation 8.3 provides that, if the captive user(s) are unable to fulfill these criteria, the shortfall of the targeted quantum would attract penalty.

**C.REGULATIONS MADE BY THE STATE COMMISSION IS STATUTORY IN CHARACTER AND IS BINDING:**

Section 181 of the Electricity Act confers power on the State Commission to make regulations and, under sub-section (1) thereof, the State Commissions may, by notification, make regulations consistent with the Electricity Act, and the rules generally to carry out the provisions of the Electricity Act. Section 181(2) stipulates that, in particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the matters enumerated in clauses (a) to (zo) of Section 181(2). Clause (zo) of Section 181(2) refers to *"any other matter which is to be, or may be, specified".*

The 2021 RPO Regulations made by the OERC are statutory in character as they are made in exercise of the powers conferred under Section 181 of the Electricity Act. In the light of the law declared by the Supreme Court in **PTC India Limited vs CERC: (2010) 4 SCC 603,** this Tribunal does not exercise the power of judicial review to examine the

validity of the Statutory Regulations, made under Section 181, which are in the nature of subordinate legislation. The validity of the 2021 RPO Regulations cannot, therefore, be subjected to scrutiny by this Tribunal in appellate proceedings under Section 111 of the Electricity Act.

**D.IGNORING OR READING DOWN SUBORDINATE LEGISLATION IS EXERCISE OF THE POWER OF JUDICIAL REVIEW:**

In the present case, Regulation 3.1 of the 2021 RPO Regulations, framed by the OERC, provides that these Regulations shall apply to all Obligated Entities in the State of Odisha. The Obligated Entities include (b) any person who owns a Captive Generating Plant including co-generation plants based on conventional fossil fuel with installed capacity of 1 MW & above, and consumes electricity generated from such plant for his own use. Such entities are also subject to RPO to the extent of a percentage of their consumption met through fossil fuel-based generation including co-generation.

In short, these Regulations fasten RPO obligations on entities, (which consume electricity. from their own co-generation plants based on conventional fossil fuel), as a percentage of their consumption from such fossil fuel-based captive co-generation plants.

**E.JUDGEMENT IN APPEAL NO.252 OF 2015 DATED 28.01.2020:**

In **Century Rayon v. Maharashtra Electricity Regulatory Commission: 2020 SCC OnLine APTEL 5 (Order in Appeal No. 252 of 2015 dated 28.01.2020),** a similar question regarding the binding nature of the Regulations stipulating RE obligations arose for consideration. On the question whether such regulations could be given a go-bye on the ground that they were in discord with plenary legislation, this Tribunal observed that Regulatory Commissions also perform legislative functions;

the Regulations made under Section 181 are in the nature of subordinate legislation, and have the force of law; challenge to the *vires* of Regulations is not permitted before this Tribunal, it being a subject of judicial review, which power is vested elsewhere (***PTC India Limited* v. *Central Electricity Regulatory Commission*, (2010) 4 SCC 603**); they were not impressed by the submissions that the 2016 modified Regulations, being in the teeth of the 2010 decision of this Tribunal in ***Century Rayon***, should be ignored or read down; the State Regulatory Commission, while framing Regulations in the discharge of its functions under Section 86, is statutorily "*guided by*" the National Electricity Policy, the National Electricity Plan and the Tariff Policy published under Section 3; if the said Policies, or Plan or the Regulations framed by the State Electricity Regulatory Commission under such guidance, fall foul of the letter and spirit of the statutory scheme, the validity can be challenged but only by way of judicial review before the appropriate Court of competence, and not before this Tribunal; they were not persuaded, in the present case, to read down the modified regulations; and so long as the modified 2016 Regulations stand, no relief could be granted to the Appellant.

## F.STATUTORY REGULATIONS CANNOT BE IGNORED OR READ DOWN ON THE PREMISE THEY ARE CONTRARY TO THE PROVISIONS OF THE PARENT ACT:

Regulations are made, by the State Commissions under Section 181 of the Electricity Act, 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 an 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 181 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; Fatehgarh Bhadla Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 16)**

The power to interpret the Regulations, which power is available to this Tribunal, does not extend to examining its vires. 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. (**Fatehgarh Bhadla Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 16).** It is only if the law violates the fundamental rights guaranteed to the citizens, or in the case of subordinate legislation violates the Parent Act, then the law or subordinate legislation can either be struck down or be read down to bring it in consonance with the Constitution of India, and in case of subordinate legislation to bring it in conformity with the Parent Act. A provision may be read down and its creases ironed out, to save it from being declared unconstitutional (***Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd. (2008) 13 SCC 30*),** and thereby ensure that it does not fall foul of Part III of the Constitution or the Parent Act. It is only if it cannot, that legislation (plenary or subordinate) should be struck down as ultra-vires Part III of the Constitution of India or the Parent Act. (**Independent Thought** *(2017) 10 SCC 800*; ***Subramanian Swamy v. State of Uttarakhand, 2020 SCC OnLine Utt 329).***

As the Court must start with the presumption that the plenary/subordinate legislation is *intra vires*, it should be read down to save it from being declared ultra vires, if the Court finds, in a given case,

that the presumption of constitutionality stands rebutted. ***(J.K. Industries Limited* v. *Union of India (2007) 13 SCC 673*; and *Hindustan Zinc Limited* v. *Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611***). A provision of an Act (or Regulation) is read down to sustain its constitutionality (***Pannalal Bansilal Patil (1996) 2 SCC 498*; and *Delhi Transport Corporation* v. *D.T.C. Mazdoor Congress 1991 Supp (1) SCC 600***), and by separating and excluding that part of the provision which is invalid, or by interpreting the word in such a manner as to make it constitutionally valid. ***(B.R. Enterprises* v. *State of U.P. (1999) 9 SCC 700*)**. The question of reading down a provision arises if it is found that the provision is *ultra vires* as they stand. (***Electronics Corporation of India Ltd.* v. *Secretary, Revenue Department, Govt. of Andhra Pradesh (1999) 4 SCC 458*)**. In order to save a statute or a statutory regulation or a part thereof, from being struck down, it can be suitably read down. (***C.B. Gautam* v. *Union of India (1993) 1 SCC 78***; ***Subramanian Swamy v. State of Uttarakhand, 2020 SCC OnLine Utt 329)***

A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. ***(*Calcutta Gujarati Education Society v. Calcutta Municipal Corpn: (2003) 10 SCC 533; B.R. Enterprises v. State of U.P: (1999) 9 SCC 700; *Union of India v. Ind-Swift Laboratories Ltd.,* (2011) 4 SCC 635).** In the garb of reading down a provision, it is not open to read words and expressions not found in the provision/statute/regulation, and venture into the forbidden area of judicial legislation. ***(Calcutta Gujarati Education Society* v. *Calcutta Municipal Corpn:* (2003) 10 SCC 533; *B.R. Enterprises* v. *State of U.P:* (1999) 9 SCC 70).**

It is evident from the earlier judgements of this Tribunal, relied on behalf of the appellants, that, while seeking to read down the applicable RPO Regulations on the ground that it is ultra vires or contrary to Section

86(1)(e) of the Electricity Act, the word “equally” was read into the said Section in order to hold that both “co-generation” and “generation of electricity from renewable sources of energy” should be promoted equally. This is clearly impermissible.

**JUDICAL REVIEW : ITS SCOPE:**

Unlike this Tribunal, High Courts, under Article 226 of the Constitution of India, have the power of judicial review in terms of which they discharge their 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.* v. *Union Of India*, (1979) 4 SCC 602 : 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.

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. 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 Judgment, 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 ultra vires 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.

The Judgment of this Tribunal in **Damodar Valley Corporation**, (on which reliance is placed on behalf of the Appellant), 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

judgment of the Supreme Court, in ***PTC India Ltd,*** the earlier judgment of this Tribunal, in **Damodar Valley Corporation**, is no longer good law.

Even otherwise, as noted hereinabove, subordinate legislation constitutes law, and must be followed save its being declared ultra vires 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 read the regulation down to bring it in conformity with the parent act, and in case it cannot be so read down, to then strike down subordinate legislation on this score. The 2021 RPO Regulations were made by the OERC taking guidance from, and in compliance with, the 2016 Tariff Policy. No bad faith can therefore be attributed to the Commission in making these Regulations. Even otherwise, the question whether these Regulations were made to overrule the judgements of Courts/Tribunals can only be examined in judicial review proceedings where the Court has the power to strike down the Regulations on this score. This Tribunal lacks jurisdiction to examine the motives behind making of the Regulations, for it does not have the power of judicial review to declare them to be illegal.

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 or read it down, would require this Tribunal to do indirectly, what is not permitted to be done directly for, in cases where a Regulation is either read down or 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 t would amount, in these cases, to the exercise of the power of judicial review, which power has not been conferred on this Tribunal.

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 or read down the Regulations on this score, did not arise for consideration in **Bhaskar Shrachi Alloys Ltd.**

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* v. *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.**

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* v. *State of Gujarat*, (1986) 1 SCC 581 : AIR 1986 SC 468**). As a judgment 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*, 2018 SCC OnLine UTT 1026)**. A decision is available as a precedent only if it decides a question of law (***STATE OF PUNJAB* v. *SURINDER KUMAR*, (1992) 1 SCC 489**), and cannot be relied upon in support of a proposition that it did not decide. (***MITTAL ENGINEERING WORKS(P) LTD.* v. *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).**

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 or read it down, 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.

We are satisfied, for the reasons aforementioned, that the power to ignore or read down 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.

It is no doubt true that this Tribunal has, in its earlier judgments, observed that, if it is satisfied that a regulation is contrary to the provisions

of the Electricity Act, it can either ignore the regulation or read it down. In our view, both courses of action are impermissible, since that would amount to the exercise of the power of judicial review. As the 2021 RPO Regulations are binding on the appellant, they are required, in terms thereof, to fulfil their RPO obligations, and cannot set-off the electricity consumed by them, from their coal based co-generation plant, against the stipulated percentage, of their total electricity consumption, which they are required to procure and consume from renewable sources of energy.

## VII.SHOULD THE ISSUE BE REFERRED FOR THE CONSIDERATION OF A FULL BENCH OF THIS TRIBUNAL:

Ms. Mandakini Ghosh, Learned Counsel for the Appellant, would submit that this Tribunal may also appreciate that there is a series of judgments rendered by co-ordinate benches regarding ignoring regulations which impose RPOs on co-generating plants; and, in the event this Tribunal is pleased to take a different view, this Tribunal may consider referring the present issues to a larger bench.

### A.REFERENCE TO A LARGER BENCH:

Reference to a Full bench of this Tribunal (ie a bench of three) would be justified only if we were taking a view different from that of a co-ordinate bench even if there were no judgements of the Supreme Court or a High Court or a Full Bench of this Tribunal covering the subject. In the present case, we are merely deciding this Appeal following the law declared by the Supreme Court in **Hindustan Zinc Ltd**, and the Full bench of this Tribunal in **Lloyds Metal & Energy Ltd,** both of which are not only binding on us but were also binding on the earlier two member benches of this Tribunal. As noted hereinabove, the earlier judgments of the two member benches of this Tribunal are not in accordance with the law declared by the Supreme Court in **Hindustan Zinc Ltd**, and the Full bench of this Tribunal

in **Lloyds Metal & Energy Ltd.** which make it abundantly clear that Section 86(1)(e) of the Electricity Act does not require "co-generation" to be treated equally and at par with "generation of electricity from renewable sources of energy", and captive consumers are not only required to fulfil their RPO obligations in terms of the Regulations but cannot also seek to set off such obligations from co-generation based on fossil fuel.

Even otherwise it is clear, from the judgments of the Supreme Court referred to hereinabove, that the power to ignore or read down statutory regulations, on the ground that such regulations are ultra vires the parent Act, (ie Section 86(1)(e) of the Electricity Act in the present case), is an exercise of the power of judicial review which power, in the light of the law declared by the Constitution Bench of the Supreme Court in **PTC India Limited vs CERC: (2010) 4 SCC 603,** is not available to be exercised by this Tribunal. No useful purpose would therefore be served in referring the matter to a Full Bench of this Tribunal, for the Full Bench would be equally bound by the judgments of the Supreme Court referred to hereinabove.

**VIII.EXERCISE OF THE POWER TO RELAX:**

Ms. Mandakini Ghosh, Learned Counsel for the Appellant, would submit that, in order to give effect to the parent statute, this Tribunal has directed that State Commissions may exercise its *powers to relax* when a provision of the regulation is incons istent with the parent statute; in **India Glycols Ltd. Vs. Uttarakhand Electricity Regulatory Commission & Ors** (Appeal Nos. 112, 130 and 136 of 2014 dated 01.10.2014), this Tribunal, after considering the precedents holding the field, held that Co-generation based Captive Power Plant/Captive user cannot be fastened with renewable purchase obligations as are provided under the UERC (Compliance of RPO) Regulations, 2010; and, accordingly, the State Commission should have exercised its power to relax in order to implement the judgment dated 26.4.2010 passed by this Appellate

Tribunal in **Century Rayon vs. MERC** (Appeal No. 57 of 2009). and also to give relief to the Appellant captive co-generators [**Refer para 14-23 of the judgment**).

Learned Counsel would further submit that this Tribunal may be pleased to grant relief in line with the series of its earlier judgments, and exempt captive co-generators from fulfilment of RPOs; the petition, culminating in the Impugned Order, was filed invoking the Respondent No. 1's power to relax under Regulation 17 of the RPO Regulations, 2021; however, no finding has been returned by Respondent No. 1 regarding its power to relax under the RPO Regulations, 2021; and, therefore, this Tribunal may consider remanding the present appeal back to the State Commission for an adjudication on the issue of power to relax under the RPO Regulations, 2021.

On the other hand, Sri Rutwik Panda, Learned Counsel for the first respondent-OERC, would submit that, in view of the exemption granted to the Petitioner in Case No. 66/2019 under OERC (Procurement of Energy from Renewable Sources and its Compliances) Regulations, 2015, consumption from the 258 MW captive co-generation plant shall not attract RPO, and the extent of consumption met from 65 MW of CGP shall be liable to RPO for the period prior to the coming into force of the new OERC Regulations, 2021; the earlier exemption cannot be cited as a precedent because the Government of India Policy, and the subsequent Renewable policy of the State Government, 2022, have clarified the matter casting responsibility on the Commission to promote renewable energy; and if the State Commissions gives relaxation in this matter, it will violate the Statute.

**A. Power to Relax**

In the light of what we have held hereinabove, no reliance can be placed on the two-member bench of this Tribunal in **India Glycols Ltd,** as the said judgement is contrary to the law declared by the Full Bench of this

Tribunal in **Lloyds Metal & Energy Ltd.** The question whether OERC has the power to relax the rigour of the Regulations in the facts and circumstances of a particular case and, if so, whether it should exercise such power in the present case, need not be gone into present proceedings, as we see no reason to interfere with the impugned order passed by the OERC. Suffice it to make it clear that the order now passed by us shall not disable the Appellant, if they so choose, from approaching OERC seeking relaxation of the applicable regulations. We have no reason to doubt that, if any such petition is filed, the OERC will consider the said petition in accordance with law after giving the affected parties a reasonable opportunity of being heard.

## IX.CONCLUSION:

We summarize our conclusions as under:-

**(i)** The State Commission has been conferred the power, by Section 86(1)(*e*) of the Electricity Act, to frame Regulations specifying a minimum percentage of renewable energy to be purchased, from out of the total consumption of electricity by captive power consumers, as such Regulations promote generation of electricity from renewable sources of energy, protect the environment, and thereby prevent pollution. (**Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611).**

**(ii)** The Report of the Standing Committee on Energy (on the Electricity Bill presented to Lok Sabha on 19.12.2002) indicates the intention of the legislature, while enacting the Electricity Act, 2003, that generation from non-conventional and renewable sources should be promoted, and the Commissions may prescribe a minimum percentage of power to be purchased from such non-conventional

and renewable sources. (**Lloyds Metal & Energy Ltd).**

**(iii)** Electricity generated, from fossil fuel based co-generation plants, is not generation from non-conventional sources of energy or renewable sources of energy. (**Lloyds Metal & Energy Ltd).**

**(iv)** Determination by the State Commission, of appropriate differential prices of electricity, can only be with respect to non- conventional sources of energy. No obligation is placed on the Distribution Licensees to purchase electricity from co-generation based on fossil fuel. (**Lloyds Metal & Energy Ltd).**

**(v)** As thermal efficiency, of a co- generation plant based on fossil fuel, is higher compared to a fossil fuel based generating station of a similar size, there is also no requirement of determining appropriate differential prices, or to provide preferential tariff, for co-generation based on fossil fuel. (**Lloyds Metal & Energy Ltd).**

**(vi)** The Tariff Policy clearly indicates that, under Section 86(1)(e), the Commission is required to fix the minimum percentage of total consumption of Electricity by a captive consumer for purchase of energy from non-conventional and renewable sources of energy, including co-generation also from non- conventional and renewable sources. (**Lloyds Metal & Energy Ltd).**

**(vii)** *"co- generation"*, as defined in Section 2(12) of the Electricity Act, is only a process of generation of electricity and another form of energy, and cannot be termed as a source of electricity like renewable sources of energy. (**Lloyds Metal & Energy Ltd).**

**(viii)** A distribution licensee cannot be fastened with the obligation to purchase a percentage of its consumption from fossil fuel based co-generation under Section 86(1)(e) of the Electricity Act, 2003; Such

purchase obligation, under Section 86(1)(e), can be fastened only with respect to electricity generated from renewable sources of energy. (**Lloyds Metal & Energy Ltd).**

**(ix)** The State Commission can promote fossil fuel based co-generation by other measures such as facilitating sale of surplus electricity, available at such co-generation plants, in the interest of promoting energy efficiency and grid security, etc.

**(x)** The Regulations, made in consonance with the provisions of the Electricity Act, the National Electricity Policy and the Tariff Policy, neither place any obligation on the Distribution Licensee to, nor has preferential tariff been determined, for purchase of electricity from fossil fuel based co-generation.

**(xi)** In the two-member bench judgement of this Tribunal in **Century Rayon Ltd vs Maharashtra Electricity Regulatory Commission (**Order in Appeal No. 57 of 2009 dated 26.04.2010), and the judgements which followed it, it has been held that entities, owning and operating a co-generation based CPP irrespective of the fuel used, cannot be fastened with renewable purchase obligations as long as the electricity generated from its co-generation plant is in excess of the presumptive RPO target (qua its captive consumption) for the relevant years.

**(xii)** These judgements run contrary to and fall foul of the Full Bench judgement (of three members) of this Tribunal in **Lloyds Metal & Energy Ltd.** Consequently, it is the judgement of the Full Bench of this Tribunal in **Lloyds Metal & Energy Ltd.** which is binding, and not the law declared in **Century Rayon Ltd (**Order in Appeal No. 57 of 2009 dated 26.04.2010), and the judgements of the two member

benches of this Tribunal which followed it.

**(xiii)** RPO obligations can, therefore, be fastened on captive power consumers. Such RPO obligations, to procure and consume power from renewable sources of energy, can neither be adjusted nor set-off against the quantum of power consumed from co-generation plants based on fossil fuel.

**(xiv)** As it is impermissible for any Court or Tribunal to add words into a statutory provision, the earlier judgments of two member benches of this Tribunal wherein it was held that the Commission was obligated to promote equally both *"co-generation"* and *"generation of electricity from renewable sources of energy"* would, in effect, require the word *"equally"* to be read into Section 86(1)(e) of the Electricity Act. As it would amount to judicial legislation, such a course is impermissible.

**(xv)** The 2021 RPO Regulations, made by the Respondent-Commission, are in accordance with the National Tariff Policy made and amended by the Government of India in the exercise of its powers under Section 3 of the Electricity Act.

**(xvi)** As the OERC has chosen to be guided by the Tariff Policy, in making the RPO Regulations which are in the nature of subordinate legislation, its validity cannot be examined in appellate proceedings under Section 111 of the Electricity Act.

**(xvii)** Exercise of the power either to read down statutory regulations or to ignore them on the premise that it falls foul of, or runs contrary to, the Parent Act amounts to exercise of the power of judicial review, which power is not available to be exercised by this Tribunal.

Viewed from any angle, we are satisfied that the impugned order passed by the OERC does not necessitate interference in appellate proceedings under Section 111 of the Electricity Act. The Appeal fails and, is accordingly, dismissed. All other pending IAs also stand disposed of accordingly.

Pronounced in the open court on this ***20th day of February, 2024.***

**(Sandesh Kumar Sharma)**
**Technical Member**

**(Justice Ramesh Ranganathan)**
**Chairperson**

√
**REPORTABLE/NON-REPORTABLE**

*tpd/mk*