IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

APPEAL NO. 383 OF 2022

Dated: 2nd February, 2024

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

In the matter of:

1. **Uttar Haryana Bijli Vitran Nigam Limited**
Through its Chief Engineer
C-6, Vidyut Sadan, Sector-6,
Panchkula – 134109, Haryana

2. **Dakshin Haryana Bijli Vitran Nigam Limited**
Through its Chief Engineer,
Vidyut Sadan, Vidyut Nagar,
Hissar – 125005, Haryana

Collectively represented
Through its Chief Engineer:
Haryana Power Purchase Centre,
Room No. UH 305, 2nd Floor, Shakti Bhawan
Sector 6, Panchkula – 134109, Haryana

3. **Haryana Vidyut Prasaran Nigam Limited**
Through its Managing Director,
Shakti Bhawan Sector – 6,
Panchkula – 134109, Haryana … **APPELLANT(S)**

Versus

1. **Central Electricity Regulatory Commission**
Through its Secretary,
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001.

2. **Power System Operation Corporation Limited**
Through its Managing Director
B-9, first Floor, Qutab Industrial Area,
Katwaria Sarai, New Delhi – 110016.

3. **Central Transmission Utility of India Limited**
(Erstwhile Powergrid Corporation of India Limited),
Through its Managing Director,
"Saudamini", Plot No. 2,
Sector-29, Gurgaon – 122001, Haryana.

4. **Aravali power Company Private Limited**
Through its Managing Director,
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003. … **RESPONDENT(S)**

Counsel on record for the Appellant(s) : Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Ravi Nair
Ms. Shikha Sood
Ms. Reeha Singh for App. 1 to 3

Counsel on record for the Respondent(s) : Mr. Shankh Sengupta
Mr. Sutesh Mukherjee
Mr. Abhishek Kumar
Ms. Harneet Kaur
Mr. Arjun Agarwal
Mr. Nived Veerapaneni
Mr. Karan Arora for Res.2

Ms. Suparna Srivastava for Res.3

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva
Ms. Kriti Soni
Mr. Amal Nair
Ms. Kritika Khanna
Ms. Ashabari Basu Thakur
Ms. Surbhi Gupta
Ms. Sugandh Khanna for Res. 4

J U D G E M E N T

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

1. This appeal is preferred by Uttar Haryana Bijli Vitran Nigam Limited and others aggrieved by the Order passed by the Central Electricity Regulatory Commission ("CERC" for short) in Petition No. 126/MP/2017 dated 30.07.2022. The said Petition was filed by the Appellants herein before the CERC pursuant to the remand Order passed by this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020 which, in turn, was filed against the order of the CERC in Petition No. 126/MP/2017 dated 04.05.2018.

2. Appellant Nos.1 and 2 are distribution licensees in the State of Haryana and are engaged in the distribution and retail supply of electricity, to consumers within the State, in their respective areas of supply. They established the Haryana Power Purchase Centre as their joint forum to undertake procurement and trading of electricity on their behalf as per the Government of Haryana Notification dated 11.4.2008. Appellant No. 3 is the State Transmission Utility of Haryana undertaking the functions as provided in Section 39(2) of the Electricity Act, 2003. It owns, operates and maintains the intra-State Transmission System in the State of Haryana which includes the 400kV D/C Transmission Line from IGSPTS to its Daulatabad sub-station.

3. The dispute in this appeal relates to the levy of Point of Connection Charges ('POC Charges') by the 2nd Respondent Power System Operation Corporation Limited ('POSOCO' for short), and the 3rd Respondent Central Transmission Utility ('CTU' for short), for the period 01.07.2011 till 04.05.2018. These charges were levied with respect to the power flow on

the 400KV Jhajjar-Daulatabad Line ('STU Line') owned, operated and maintained by the Haryana Vidyut Prasaran Nigam Limited ('HVPNL' for short**).** The total amount paid by the Appellant on account of POC charges is said to be approximately Rs. 1258 crores (till 04.05.2018) which they claim is liable to be refunded to them along with applicable interest.

4. In its Order, in Petition No. 126/MP/2017 dated 04.05.2018, the CERC had held that the "STU Line**"** owned, operated and maintained by 'HVPNL' was an Intra-State Line, and not an Inter-State Transmission System (ISTS) in terms of Section 2(36) of the Electricity Act, 2003; however, since bills were raised by POSOCO as per the '*prevailing regulatory regime*', the relief shall be prospective from the date of issue of the order.

5. Aggrieved by the Order of the CERC dated 04.05.2018 being given prospective application, the Appellant preferred Appeal No. 240 of 2018 and, by its judgment dated 04.02.2020, this Tribunal remanded the matter to the CERC on the limited issue of the earlier order of the CERC dated 04.05.2018 being applied prospectively. Pursuant to the remand, the CERC passed the Impugned Order dated 30.07.2022 holding that the issue under consideration related to interpretation and applicability of the Sharing Regulations; and no retrospective application could be granted on the reasoning that a statute that affects substantive rights is prospective in operation; this would avoid re-opening of settled issues; and the bills were issued under the then prevailing regulatory regime**.**

6. The Appellant has filed the present Appeal challenging the impugned order of the CERC whereby it had applied its earlier order dated 04.05.2018 prospectively.

II. RIVAL SUBMISSIONS:

7. Elaborate submissions, both oral and written, were put forth by Sri M.G.Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, Sri Sitesh Mukherjee, Learned Senior Counsel appearing on behalf of the 2nd Respondent -POSOCO, and Mrs. Suparna Srivastava, Learned Counsel appearing on behalf of the 3rd Respondent-CTUIL. It is convenient to consider the rival submissions under different heads. Before doing so, it is useful to note the contents of Petition No. 126/MP/2017 filed before the CERC by the appellant herein, the order passed by the CERC in Petition No. 126/MP/2017 dated 04.05.2018, the appeal filed by the appellant before this Tribunal against the said order, the order passed by this Tribunal, in the Appeal preferred there against, ie in Appeal No. 240 of 2018 dated 04.02.2020, and the impugned Order passed by the CERC in Petition No. 126/MP/2017 dated 30.07.2022.

III. CONTENTS OF PETITION NO. 126/MP/2017 FILED BY THE APPELLANT BEFORE THE CERC:

8. The Appellant herein had filed Petition No. 126/MP/2017, before the CERC, seeking a declaration and direction regarding the status of the 400 kV D/C Transmission Line from Indira Gandhi Super Thermal power Station (Aravali Power Station) ("IGSTPS" for short) owned and operated by Haryana Vidyut Prasaran Nigam Limited. In the said Petition, the appellant had submitted, among others, that, in Petition No. 239 of 2010 filed by Aravali Power Company limited seeking approval of the tariff for the 400 kV D/C Jhajjar-Mundaka Transmission line, the CERC had, vide order dated 08.06.2013 and 13.05.2014, treated the said Line, belonging to Araveli Power Company Ltd, as an Inter-State Transmission system from 01.03.2011; though the 400 kV Transmission Line from ISTPS to Daulatabad was also in operation, the CERC did not then consider the said Line for inclusion under PoC charges, or otherwise as a line for which tariff was required to be determined by the Commission; this was obviously because

the said transmission line from ISTPS to Daulatabad was an intra-state transmission line, outside the jurisdiction of the CERC; since July 2011, they were receiving bills from CTU/PGCIL under the 2010 Sharing Regulations; both POSOCO and CTU/PGCIL had no authority or power to deal with the tariff of an intra-state transmission system; the claim of POSOCO and CTU/PGCIL, for inclusion of the said line under the 2010 Sharing Regulations, was liable to be set aside; such a claim was not tenable when, for all these years, the said transmission line was owned and operated by Haryana Vidyut Prasaran Nigam Limited; POSOCO and CTU/PGCIL had wrongly treated the said transmission system as an inter-state transmission system; the same would lead to application of the POC mechanism provided in the 2010 Sharing Regulations; and such an interpretation, and application from July, 2011, was not only leading to financial hardship to the Petitioners (Appellants in the present appeal), but was also causing undue burden on the 59 lakh consumers in the State of Haryana.

9. The appellant herein prayed that (a) the 400 kV Transmission Line from ISTPS (Aravali power Station) to Daulatabad be declared to be outside the jurisdiction of POSOCO and CTU/PGCIL as well as the Sharing of Transmission Charges and Losses provided under the 2010 Sharing Regulations; (b) to set aside the bills raised by CTU/PGCIL from July 2011 to the extent the claim therein related to sharing of inter-state transmission charges and losses for the 400 kV Transmission Line from Indira Gandhi Thermal Power Station to Daulatabad; and (c) to restrain POSOCO and CTU/PGCIL from recovering any charges from the Petitioners in regard to the 400 kV Transmission line from ISTPS (Aravali power Station) to Daulatabad.

IV. ORDER OF CERC IN PETITION NO. 126/MP/2017 DATED 04.05.2018:

10. In its order, in Petition No. 126/MP/2017 dated 04.05.2018, the CERC framed three issues. On the first issue as to whether the 400kV D/C IGSPTS-Daulatabad Transmission Line was an inter-state or an intra-state line, the CERC, after referring to Section 2(36) of the Electricity Act, observed that the IGSPTS was an ISGS supplying power to more than one State, and its tariff was being determined by the CERC; IGSTPS was connected to both the ISTS network of CTU through the Jhajjar- Mundka Line, and the STU network of Haryana through the Jhajjar-Daulatabad Line; of the installed capacity of 1500 MW of IGSTPS, the share of Haryana was 46.2% ie 693 MW of power, the share of Delhi was 693 MW, and the balance power was allocated to other States of the Northern Region; the Jhajjar-Daultabad Line was an intra-State transmission line constructed, maintained and operated by the STU of Haryana, and its tariff was being determined by the HERC; the Delhi Discoms were drawing their share from the IGSTPS through Jhajjar-Mundka line which was initially constructed as a dedicated transmission line, and was subsequently converted as an ISTS line vide order in Petition No.169/TL/2013 dated 7.11.2013; the subject transmission line emanated and terminated within the territory of Haryana and was, therefore, not covered under Section 2(36)(i) of the Electricity Act; this transmission line was not directly connected to ISTS, it could not therefore be considered as incidental to the ISTS, and was not covered under Section 2(36)(ii) of the Act; Section 2(36)(iii) was also not attracted as, indisputably, the transmission line had been developed, maintained and operated by the Haryana transmission utility; moreover, the tariff of the said line was determined by the HERC; and, therefore, the legal status of the 400 kV IGSTPS-Daulatabad Transmission line was that of an intra-state transmission line covered under Section 2(37) of the Electricity Act.

11. On issue No. 2, ie whether transmission charges and losses under PoC were applicable to evacuation of its share of power by Haryana Utilities

from IGSTPS, Jhajjar through the 400 kV D/C IGSPTS to the Daulatabad Transmission Line, the CERC noted the submissions of POSOCO, and then observed that it was a fact that IGSTPS was connected to both ISTS and STU network for evacuation of power to its beneficiaries; since both networks were connected to the common bus bar, the flow of power can be a disproportionate flow irrespective of the commercial arrangement and allocation of power; and the CERC had earlier examined a similar situation in Petition No.291/MP/2015 (Andhra Pradesh Limited Vs. Southern Region Load Dispatch Centre), Petition No.211/MP/2011 (Steel Authority of India Limited Vs. Western Regional Load Despatch Centre) and in Petition No. 20/MP/2017 (Kanti Bijlee Utpadan Nigam Limited Vs. Central Transmission Utility & others).

12. The CERC then extracted the order passed by it earlier in Petition No. 291/MP/2015 dated 30.03.2017, and observed that, in the said order, it was decided that, since power was evacuated exclusively through the STU network and no part of the regional transmission system was used by Andhra Pradesh for transfer of power from Simhadri STPS Stage-I STPS, PoC charges were not payable by Andhra Pradesh for such transfer of power; further, the point of injection and the point of withdrawal was the same, and both were within Andhra Pradesh; hence, there was no loss in the system; and hence transmission charges and losses under PoC mechanism shall not be applicable in that case.

13. The CERC then noted the contents of its earlier order in Petition No. 211/MP/2011, and observed that, in the said order, the Commission had directed that, since ISTS was not used for wheeling power in that case, ISTS losses shall not be applicable and that the order shall have implications on similarly placed entities which draw power from the bus-bar of an ISGS through the transmission system of the STU without utilizing the ISTS. The

Commission, accordingly, directed its staff to examine the issue and propose amendment to the Sharing Regulations.

14. The CERC then noted the contents of Petition No. 20/MP/2017 dated 09.03.2018 which dealt with the issue of applicability of PoC Regulations where the ISGS was connected to both ISTS and STU network, and observed that the said decision established that an ISGS could be connected to both STU/ISTS network; secondly, where an ISGS is connected to both ISTS and STU networks, the scheduling and energy accounting of such ISGS shall be carried out by either the RLDC or the SLDC concerned as per Regulation 6.4.2 of the Grid Code; thirdly, where RLDC carries out scheduling, ISTS charges and losses shall not be applicable to schedules on the State network involved for evacuation of power from ISGS; and fourthly, deviation charges shall be considered pro-rata on the schedules of the State network and ISTS network.

15. The CERC then observed that, in the light of the principles laid down in Petition No.20/MP/2017 dated 09.03.2018, they were of the view that, since IGSTPS was connected to both CTU network and STU network and its scheduling was being carried out by NRLDC, the ISTS charges and losses shall not be applicable for evacuation of the share of power of Haryana Utilities through 400 kV D/C IGSPTS-Daulatabad Transmission Line; the deviation charges shall be considered on pro-rata basis on the schedules corresponding to ISTS and STU networks; POSOCO had submitted that, in case of non-availability of 400 kV D/C IGSTPS - Daultabad line, the power from IGSTPS could be evacuated through 400 kV D/C IGSTPS-Mundka line; and there was substance in the submission of POSOCO, as power may flow to Haryana Utilities through 400 kV D/C IGSTPS-Mundka line in the event of shut down or outage of the 400 kV D/C IGSTPS - Daultabad line. The CERC, accordingly, directed that, in such an

eventuality, ISTS charges and losses shall be applicable on schedules of Haryana from IGSTPS.

16. On Issue No. 3, which was whether any direction was required to be issued with regard to the bills raised on Haryana Utilities since July 2011, the CERC noted that the Appellant had prayed that the bills raised by the CTUIL be set aside to the extent the claim therein related to sharing of inter-state transmission charges and losses for the 400 KV IGSTPS-Daulatabad Transmission Line; the Appellant had been paying the transmission charges and losses since July, 2011 when the Sharing Regulations came into effect; however, the Appellant had approached the CERC for relief only in 2017 and had claimed relief in the light of the decision in the order in Petition No. 291/MP/2015 dated 30.3.2017; in other words, the Appellant did not have any objection to the 400 KV IGSTPS-Daulatabad Transmission Line being included under PoC mechanism; POSOCO had brought to their notice the regulatory provisions under which long term access for IGSTPS was being considered, and the bills for POC charges and losses were being raised on the Appellants; in the light of the decisions in Petition No.291/MP/2015, 211/MP/2011 and 20/MP/2017, the Commission had decided to exempt the 400 KV IGSTPS-Daulatabad Transmission Line from payment of transmission charges and losses under the PoC mechanism; in other words, relief had been granted to the Appellants by virtue of interpretation of various provisions of the Regulations which made a departure from the prevailing regulatory regime; in its order in Petition No. 211/MP/2011 dated 5.10.2017, the Commission had granted relief to the petitioner therein prospectively from the date of issue of the order; and in the said order, the Commission had also directed the staff to examine the matter and propose suitable amendment for the purpose of clarity.

17. The CERC then noted the observations of the Supreme Court, in **PTC India Limited & Others Vs. Central Electricity Regulatory Commission**,

that the decision-making and regulation-making functions were both assigned to CERC; law comes into existence not only through legislation but also by regulation and litigation; and laws from all three sources are binding. The CERC held that, in the light of the above, law can be laid down by the Commission through its decisions in the litigation brought before it; in the present case, as also in the previous cases quoted in this order, the Commission had laid down the principles for allocation of transmission charges and losses under the PoC mechanism in case of STU lines used exclusively to evacuate power from ISGS by a State for which there was no clarity in the Sharing Regulations; the Commission was of the view that relief in the present case should also be granted prospectively keeping in view the fact that the bills were raised by POSOCO as per the prevailing regulatory regime and the CERC, by way of interpretation of various provisions of the regulations, had exempted the Appellants from payment of PoC charges and losses in the order in the light of the decisions in the earlier cases, pending amendment of the Sharing Regulations as directed in Petition No.211/MP/2011; relief granted in this order shall be applicable prospectively from the date of issue of the order; and they were, therefore, not inclined to set aside the bills raised on the Appellants since July 2011 in respect of 400 KV IGSTPS-Daulatabad Transmission Line as prayed for by the Appellants.

18. In para 32 of its order dated 04.05.2018, the CERC observed that, in the light of the above discussions, the prayers of the Appellant was disposed of as under: (a) with regard to the first prayer the CERC directed that the subject transmission line, being an intra-state transmission line, shall not be subject to sharing of transmission charges and losses under the PoC mechanism; and in the instant case, while RLDC shall continue to carry out scheduling of power from IGSTPS, ISTS charges and losses shall not be applicable to schedules on the State network of Haryana. POSOCO and

CTU were directed not to include the LTA capacity corresponding to the share of Haryana in IGSPTS while computing PoC charges and losses; (b) with respect to the second prayer, which related to setting aside the bills raised by CTU since July, 2011, the CERC observed that POSOCO and CTU were raising bills on the premise that the subject transmission line was connected to ISGS, and therefore Haryana is a deemed LTA holder corresponding to its share in IGSPTS; after considering the hardship faced by Haryana and in the light of the decision of the Commission in Petition No.20/MP/2017, relief was being granted to the petitioners exempting them from payment of ISTS charges and losses; and, in their view, the decision shall operate prospectively; (c) with regard to the third prayer, the Commission observed that, in the light of their decision with regard to exempting the Appellant to pay the transmission charges and losses qua 400 kV IGSPTS-Daulatabad Transmission Line, no further direction was required to be issued with regard to the third prayer.

V. APPEAL NO. 240 OF 2018 FILED BY THE APPELLANT:

19. The Appellant herein filed Appeal No. 240 of 2018 before this Tribunal seeking a direction to modify the order of the CERC in Petition No. 126/MP/2017 dated 04.05.2018, to implement the decision dated 04.05.2018 with effect from July, 2011, and to direct that the Appellant be given refund of the entire charges collected by POSOCO and CTU from July 2011 with carrying costs. It is evident from the reliefs sought by the Appellant, in Appeal No. 240 of 2018, that their grievance related only to that part of the order dated 04.05.2018 whereby the decision of the CERC was given prospective operation, and the Appellant was held disentitled for refund of the amount paid by them from July, 2011 onwards. The Appellant's grievance was only with respect to issue No.3, and they had no grievance regarding the decision of the CERC on issues 1 and 2.

VI. ORDER OF THIS TRIBUNAL IN APPEAL NO. 240 OF 2018 DATED 04.02.2020:

20. In its order in Appeal No. 240 of 2018 dated 04.02.2020 this Tribunal extracted the contents of para 32 (b) of the Order of the CERC dated 04.05.2018, which reads as under:-

> *"(b) The Petitioner, in the Second prayer, has sought direction to set aside the bills raised by CTU since the month of July, 2011 to the extent the claim related to ISTS Charges and Losses for the 400 KV IGSPTS-Daulatabad Transmission Line. In our view, POSOCO and CTU were raising the bills on the basis of the premise that the subject transmission line is connected to ISGS and therefore, Haryana is a deemed LTA holder corresponding to its share in IGSPTS. After considering the hardship faced by Haryana and in the light of the decision of the Commission in Petition No.20/MP/2017, relief is being granted to the Petitioners exempting them from payment of ISTS charges and losses. In our view, the decision shall operate prospectively."*

21. This Tribunal then observed that, though the contention of the Appellant was appreciated considering the hardship faced by Haryana especially in light of the earlier decision of CERC in Petition No. 20/MP/2017, the CERC had held that the said decision would apply prospectively; and this opinion of the CERC, that the decision would operate prospectively, was not supported by any reasoning. This Tribunal was of the opinion that the Appeal deserved to be remanded to the CERC with regards only the last sentence of prospective application of the decision of CERC. The CERC was directed to look into the matter and hear both the parties in accordance with law whether such benefit could be granted with retrospective effect. Both the parties were given liberty to argue before CERC on this aspect.

VII. IMPUGNED ORDER DATED 30.07.2022 PASSED BY THE CERC ON REMAND:

22. In the impugned order dated 30.07.2022, passed by it consequent upon remand, the CERC noted the submissions of POSOCO, of the

Appellant and the contents of the order of this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020. On the plea of POSOCO that the Appellant's claim was barred by limitation, the CERC noted that POSOCO had raised objections on limitation, and it had submitted that a majority of the claim was barred by limitation; they had also submitted that, if retrospective revision of PoC charges was allowed, computational exercise would require review of 24 application periods starting from Quarter II of 2011-12 to Quarter-I of 2018-19; this would result in revision of LTA slab rates of 50 to 80 entities for each of the 24 application periods; it would also require reopening of settled transactions and resettlement of old transactions for the past 8 years which would additionally change the tax liability of the parties and, therefore, all such affected parties must be impleaded as respondents in the present Petition; it had also submitted that retrospective revision of PoC charges for 24 application periods would result in revision of 72 months RTA of each RPC; therefore all five RPCs, being necessary parties, ought to be heard before any direction is passed. The CERC found these submissions of POSOCO to be misplaced. The CERC observed that the matter had already been heard, and came to be decided by the Commission by its order dated 04.05.2018; none of these issues were raised by POSOCO at that time; and, in any case, the scope of the present proceedings was in terms of the order of this Tribunal dated 04.02.2020, and as such the CERC could not enlarge the scope of the present remand proceedings by impleading parties which were not originally impleaded in the petition.

23. After taking note of judgment of the Supreme Court, in **A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd. (2016) 3 SCC 468**, and that of APTEL in **Appeal No. 10 of 2020 and batch dated 02.11.2020**, the CERC held that, as the issue under consideration related to interpretation and applicability of the Sharing Regulations of the Commission, the plea of applicability of Limitation was devoid of merits.

24. The CERC then examined the matter on merits regarding the prospective application of the decision of the Commission dated 04.05.2018. After extracting a part of its earlier order dated 04.05.2018, the CERC observed that, in the said order, it had held (a) bills raised by CTUIL since July 2011 was in compliance with the then prevailing regulatory regime which were duly paid by the Appellant without raising any objection in this regard; (b) the Commission had decided to exempt the transmission line from payment of transmission charges and losses under PoC mechanism in the light of the pleadings made by the Appellant, and the decision in Petition No. 291/MP/2015, Petition No. 211/MP/2011 and Petition No. 20/MP/2017; relief had been granted to the Appellant by virtue of interpretation of various provisions of the Regulations, departing from the prevailing procedure being followed; (c) the Commission had laid down the law through its decisions in the aforesaid litigation brought before it regarding principles for allocation of transmission charges and losses under the PoC mechanism, in the specific circumstances brought before the Commission, where adequate transmission system had been constructed by STU to evacuate for the State from ISGS whose treatment was not clear under the prevailing 2010 Sharing Regulations; the Supreme Court, in **PTC India Limited Vs CERC**, had observed that law comes into existence not only through legislation but also by regulation and litigation; (d) the Commission had opined that the relief should be granted prospectively keeping in view the fact that bills were raised by POSOCO as per the prevailing regulatory regime and the Commission, by way of interpretation of various provisions of the Regulations, had exempted the petitioners from payment of POC charges and losses, in its order dated 04.05.2018, in the light of the decision in the earlier cases, pending amendment of the Sharing Regulations as directed in Petition No. 211/MP/2011.

25. The CERC then observed that it had, accordingly, directed that the relief granted in its order dated 04.05.2018 shall be applicable prospectively from the date of issue of the order, and had therefore declined to set aside the bills raised for payment since July, 2011 in respect of the 400kV D/C IGSPTS- Daulatabad Transmission Line as prayed for by the Appellant; the Supreme Court, in **Hitendernath Vishnu Thakur Vs the State of Maharashtra: (1994) 4 SSC 602,** had held that statutes, which affect substantive rights, are prospective in operation unless made retrospective; the Supreme Court, in **Baburam vs CC Jacub (1999) 3 SSC 362,** had observed that prospective declaration of law was a devise innovated by the Supreme Court to avoid reopening of settled issues, and to prevent multiplicity of proceedings; it was also a devise adopted to avoid uncertainty and avoidable litigation; by the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated; and this is done in the larger public interest.

26. The CERC concluded holding that they did not find reason to allow the Appellant's request for quashing of the bills, raised by CTUIL, retrospectively, considering that the same were issued under the then prevailing regulatory regime.

VIII. SCOPE OF AN ORDER OF LIMITED REMAND:

27. Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the judgement of this Tribunal dated 04.02.2020 was a limited remand; and the scope of a limited remand has been considered by this Tribunal in **Meghalaya State Electricity Board v. Meghalaya State Electricity Regulatory Commission & Anr.** (Judgment in Appeal No. 37 of 2010 dated 10.08.2010**).**

28. On the other hand Sri Sitesh Mukherjee, learned Senior Counsel appearing on behalf of the 2nd Respondent- POSOCO, would submit that three issues were framed and decided under the CERC's previous order dated 04.05.2018; save and except the finding in the CERC's previous order at para 32 (b) pertaining to issue no.3, and prayer (b) of the petition, APTEL, in its remand order dated 04.02.2020, did not disturb any of the other findings or reasons given by the CERC in its previous order dated 04.05.2018; the remand Order only set aside the last sentence of para 32 (b) i.e. *"In our view, the decision shall operate prospectively"* which is a finding qua prayer (b); this Tribunal found that the CERC's finding, in the last sentence of para 32 (b), was not supported by reasons; the subject matter of prospective operation is the relief granted to the Appellants in prayer (a), based on the findings and reasons in the previous order qua issue Nos. (1) and (2); the said findings and reasons qua issue Nos. (1) and (2) were not interfered with by this Tribunal in its remand order; hence, the remand order directed the CERC to examine prayer (b) i.e., whether the bills raised on the Appellants since 2011 ought to be set aside, albeit keeping in view what had already become final i.e. the CERC's reasons, observation and findings in the previous order qua issue nos.1 & 2; and the intent of the Remand Order is for the CERC to take a fresh look / re-look after hearing both parties, with all rights and contentions on the issue being left open.

A. REMAND ORDER: ITS EFFECT:

29. In ***K.P. Dwivedi v. State of U.P.*, (2003) 12 SCC 572,** the Supreme Court held that from the order of the High Court, it was clear that the order of the District Judge was was set aside only with respect to categorisation of lands in the two villages, and the remand was restricted to fresh determination of the same; the order of the District Judge passed in appeal, to the extent it was in favour of the appellant, had attained finality and could not have been disturbed; the Prescribed Authority and the appellate court

had overlooked this aspect of the finality of the order of the District Judge; and they had misdirected themselves by assuming that the whole case was open before them for re-consideration and redetermination of the ceiling area.

30. It is settled law that matters finally disposed of by the order of remand cannot be reopened when the matter comes back after the final order upon remand on appeal or otherwise to the Court remanding the matter. If no appeal is preferred against the order of remand, the matters finally decided in the order of remand can neither be subsequently re-agitated before the Court to which it was remanded nor before the Court where the order passed upon remand is challenged in appeal or otherwise from such order. The Court, to which the matter is remanded, has to act within the order of remand. It is not open to such Court or authority to do anything but to carry out the terms of the remand even if it considers it to be not in accordance with law. Once a finality is reached, it cannot be reopened. **(Bidya Devi v. Commissioner of Income-tax, Allahabad: AIR 2004 Cal 63 (Calcutta HC DB)).**

31. **In Meghalaya State Electricity Board v. Meghalaya State Electricity Regulatory Commission (Order in Appeal No. 37 of 2010 Dated 10th August, 2010),** this Tribunal, after referring to the judgements in (1) **Mohan Lal vs. Anandibat (1971) 1 SCC 813; (2) Paper Products Ltd. vs.CCE (2007) 7 SCC 352; (3) Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad AIR 2004 Calcutta 63; (4) K.P. Dwivedi vs. Tate of U.P. (2003) 12 SCC 572; (5) Mr. Muneswar and Ors. vs. Smt. Jagat Mohini Des AIR (1952) Calcutta 368; (6) Amrik Singh vs. Union of India (2001) 10 SCC 424; and (7) Union of India & Anr. Vs. Major Bhadur Singh (2006) 1 SCC 3670,** held that the principles laid down in those authorities were as under :- (i) The Court below to which the matter is remanded by the Superior Court is bound to act within the scope of remand. It is not open to

the Court below to do anything but to carry out the terms of the remand in letter and spirit; (ii) Ordinarily, the Superior Court can set aside the entire judgment of the Court below and remand it to the subordinate court to consider all the issues afresh. This is called ‘open Remand’. The subordinate court can decide on its own afresh on the available materials; and (iii) The Superior Court can remand the matter on specific issues with a specific direction through a “Remand Order”. This is called ‘Limited Remand Order’. In case of Limited Remand Order, the jurisdiction of the Court below is confined only to the extent to which it was remanded”.

B. SCOPE OF ENQUIRY IN PROCEEDINGS BEFORE THE CERC CONSEQUENT TO THE REMAND ORDER PASSED BY THIS TRIBUNAL:

32. The order, impugned in this Appeal, was passed by the CERC in Petition No. 176/MP/2017 dated 30.07.2022. The said order is an order passed on remand by this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020. Appeal No. 240 of 2018 was filed against the order passed by the CERC in Petition No. 126/MP/2017 dated 04.05.2018.

33. The last part of para 32(b) of the Order of the CERC dated 04.05.2018, reads as under:-

> *“After considering the hardship faced by Haryana and in the light of the decision of the Commission in Petition No.20/MP/2017, relief is being granted to the Petitioners exempting them from payment of ISTS charges and losses. In our view, the decision shall operate prospectively.”*

and the operative portion of the remand order passed by this Tribunal, in Appeal No. 240 of 2018 dated 04.02.2020, reads thus:

> “*In that view of the matter, we are of the opinion that the Appeal deserves to be remanded to CERC with regard to only the last sentence of prospective application of decision of CERC. Therefore, we direct CERC to look into the matter and hear both the parties in accordance with law whether such*

benefit could be granted with retrospective effect. Both the parties are at liberty to argue before CERC on this aspect. The said exercise shall be completed within three months from the date of copy of this order. With the above observations, the instant Appeal is disposed of."

34. What was remanded to the CERC, by the order of this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020, is the prospective exemption granted to the appellant, from payment of ISTS charges and losses, ie exemption only from 04.05.2018 when the CERC passed the order which was under challenge in Appeal No. 240 of 2018. As no appeal has been preferred thereagainst to the Supreme Court, the order of this Tribunal, in Appeal No. 240 of 2018 dated 04.02.2020, has attained finality.

35. The remand order of this Tribunal required the CERC to hear both the parties in accordance with law, and examine whether such benefit (ie exempting the appellant from payment of ISTS charges and losses) could be granted with retrospective effect (ie from July 2011 instead of from 04.05.2018). The said order required the CERC to assign reasons for applying the relief, granted by it in its earlier order dated 04.05.2018, prospectively; and the parties to Appeal No. 240 of 2018 were permitted to put-forth their submissions before the CERC only on this issue. The limited liberty granted to both the parties, by the remand order, was only to argue before the CERC on this aspect of prospective application, and nothing more. Consequently, it is only such of those contentions which were urged by the parties before the CERC consequent to the remand, confined to the prospective application and operation of the order dated 04.05.2018, which can be examined in the present appeal and none else.

36. As held in **Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155,** a subordinate court/tribunal is bound by the directions of the appellate court/tribunal, and the same appellate court/tribunal, hearing the matter on

a second occasion, or any other court of coordinate authority hearing the matter, cannot discard the earlier holding/finding in a remand order. The remand order is a finding in an intermediate stage of the same litigation, and when it came to the trial court and escalated to the- appellate court/tribunal, it remained the same litigation.

37. The order of remand, passed by this Tribunal in Appeal No. 240 of 2018 dated 04.02.2022, not only binds the parties to the said order, but also the CERC while passing the impugned order dated 30.07.2022, and this Tribunal while hearing the present appeal. It is impermissible for this Tribunal to go behind the said order, or to add to the conclusion arrived at by the CERC in its order in Petition No. 126/MP/2017 dated 04.05.2018, except on the issue of prospective application of the said order. Consequently examination of the rival submissions, urged on behalf of all the parties to the present appeal, must be confined only to the terms of the remand order passed by this Tribunal in Appeal No. 240 of 2018 dated 04.02.2022

IX. WAS THERE A 'PREVALENT REGULATORY REGIME' IN TERMS OF WHICH THE SUBJECT INTRA-STATE LINE WAS TREATED AS AN INTER-STATE LINE EARLIER?

38. Sri Sitesh Mukherjee, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the reasons given by the CERC, in the Impugned Order, to justify and re-iterate the prospective operation of its findings on Issue Nos.1 and 2 (particularly Issue no. 2) are clearly found in the CERC's previous order dated 04.05.2018; hence the correctness of the Impugned Order depends on the question "whether in deciding Issue No.2 in the CERC's Previous Order, the CERC has declared the law (purely adjudicatory function) or made substantive changes to the law (using its regulatory powers); at para 27 of Impugned Order, the CERC has assigned reasons for giving prospective operation to the relief given in prayer (a) which

makes it clear that the CERC had exercised its regulatory power in order to grant relief ie to *"decide to exempt"* the power evacuated through the 400kV ISGTPS- Daulatabad transmission line from PoC mechanism; it was also noted by the CERC at para 27 that the bills since July 2011 (i.e since notification of Sharing Regulations) were raised by CTU *"in compliance with the then prevailing regulatory regime"*; it has been further noted in the Impugned Order that relief was granted to the Appellants by an interpretation of the CERC (Sharing of inter-state transmission charges and losses) Regulations, 2010 "departing from the prevailing procedure being followed"; at sub-para (c) of para 27 of the Impugned Order, the CERC has noted that it "laid down the law" through its decisions in various similar litigations "regarding principles of allocation of transmission charges and losses under PoC mechanism in specific circumstances brought before the commission where adequate transmission system has been constructed by STU to evacuate for the State from ISGS, whose treatment was not clear under the prevailing Sharing Regulations 2010"; at para 27(d), the CERC observed that it had granted relief, presumably as per prayer (a), to the Appellant "pending amendment of Sharing Regulations, 2010 as directed in Petition No. 211/MP/2011"; the CERC, while deciding Issue No.2 in its previous order dated 04.05.2018, has extensively relied upon its earlier decision in Petition No. 211/MP/ 2011 titled as *Steel Authority of India Limited vs. Western Regional Load Despatch Centre* ("SAEL Case"); it was observed that *the order shall have implications on similarly placed entities which draw power from bus-bar of an ISGS through the transmission systems of STU without utilizing the ISTS*; accordingly, the CERC directed the staff to examine the issue and propose amendment to the Sharing Regulations; the relief in the said case was also allowed to operate prospectively; all findings, observation and reasons under Issue No.2 of the CERC's Previous Order have become final by virtue of the Remand Order that was not challenged by the Appellant; and the findings at para 27 of the Impugned Order spring from the reasons

and findings contained in Issue No.2 of the CERC's Previous Order which was never disturbed in the Remand Order.

39. Learned Senior Counsel would further submit that, whilst deciding Issue No.2 in its previous order, the CERC has admittedly continued with the substantial change in the Sharing Regulations, it had initiated in previous similar matters so as to "exempt" Haryana Discoms from the ambit of the Sharing Regulations 2010, and thereby from payment of transmission charges thereunder; the directions at Para 28 of the CERC's previous order is peremptory in nature; they do not arise from an interpretation of the Sharing Regulations, 2010 but was rather a substantive change made in exercise of the CERC's regulatory power; and the same directions contained in para 28 were subsequently incorporated in Regulation 13(11) of the Sharing Regulations 2010 by way of amendment in year 2020.

40. Mrs. Suparna Srivastava, Learne Counsel for the CTUIL, would submit that the directions passed by the CERC, in its Order dated 4.5.2018 and reiterated in the impugned Order, have been passed in exercise of its regulatory powers; this Tribunal, in its Orders, has analysed the regulatory powers of the CERC, and has observed that the directions given by the Commission in relation to *'an amendment to be carried out'* cannot be said to be in exercise of its adjudicatory power which decides disputes *inter-se* parties; rather it would amount to an exercise of the regulatory powers of the Commission under Section 79 of 2003 Act; in the present case, the Order dated 4.5.2018 passed by the CERC wherein it directed the staff to carry out an amendment, is clearly in exercise of its regulatory power, and is liable to operate only prospectively; such operation of the Order can only be prospective in nature as retrospective applicability of the Order would lead to unsettling of settled affairs; respondent No.3 seeks to rely upon the following judgments: (i) **Maharashtra State Electricity Distribution Company Ltd. vs. Central Electricity Regulatory Commission & Ors:**

(Judgment in Appeal No.92/2011 dated 28.7.2011); (ii) No.L-1/44/2010-CERC dated 4.4.2011, Removal of Difficulties Order in the matter of National Load Despatch Centre; (iii) Judgment in **East Delhi Waste Processing Company Ltd. vs. Delhi Electricity Regulatory Commission & Ors.** (**APPEAL NO.148 OF 2021 Dated: 20.09.2022**)*;* and (iv) Judgment in: **Uttar Pradesh Sugar Mills Co-Gem Association vs. Uttar Pradesh Electricity Regulatory Commission & Ors;** (Appeal No.125/2015 and 130/2015 dated 12.10.2015)***.***

41. On the other hand, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that CTU/POSOCO have, in an arbitrary manner and without any statutory backing and rather, in blatant contravention of the statutory provisions, been wrongly accounting for POC Charges with respect to the STU Line from 01.07.2011, and are now seeking to contend that the same was as per the prevalent regulatory regime; the legal status of the 400kV Daulatabad Transmission Line as an STU Line has been the same since inception, and there has been no change either in July 2011, or at any time thereafter, either by any amendment in the provisions of the Electricity Act, 2003 or by any Regulations (Connectivity Regulations or Sharing Regulations) or any order or directions of the CERC; at no point of time, could the STU line have been considered in law to be an ISTS Line; there was no prevalent regulatory regime, whether in terms of the Connectivity Regulations or the Sharing Regulations, in terms of which POSOCO/STU could have converted an STU Line to an ISTS Line; even the third amendment, 2015 to the Sharing Regulations, 2010 (as sought to be relied upon) which provides that the deemed LTA consumers would be liable to pay POC charges, by virtue of being a beneficiary of a Central Generating Station (CGS), has been held to be not applicable to the Appellant; in any event, the third amendment was notified in 2015; there

was no rationale for including the allocation of the Appellant, from the Aravali Generating Station, under the POC regime from 01.07.2011; this is particularly when the STU Line was commissioned in March, 2011 and between March, 2011 and 30.06.2011, the appellant had paid for the transmission charges as per the tariff determined by the Haryana Electricity Regulatory Commission to HVPNL treating it to be a part of the Intra State System; there is neither any explanation nor justification for the same line to be treated differently during different time periods ie: (i) from 01.03.2011 to 30.06.2011- as an intra-state transmission line; (ii) from 01.07.2011 to 04.05.2018- as an inter-state transmission line; and (iii) from 05.05.2018 onwards- as an intra-state transmission line; the change in the regulatory regime, as sought to be claimed by POSOCO/CTU, is the difference between the period during which they had arbitrarily, capriciously and without any justification treated an intra-state transmission line as an ISTS Line - a rank illegality in the light of the provisions of the Electricity Act 2003, and the regulations of the CERC; the CERC has also re-iterated the same in the Order dated 04.05.2018; such illegal exercise by POSOCO/CTU cannot be considered as a valid regulatory regime, to deny relief to the Appellant; and though the CERC exercises various powers, namely, administrative, supervisory, legislative and adjudicatory, as laid down in **PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603,** it cannot be said that, while exercising power under one jurisdiction, it can assume powers under another jurisdiction to issue subordinate legislation. **(Madhya Pradesh Generating Company v. Madhya Pradesh Electricity Regulatory Commission (**Order of this Tribunal in Review Petition No. 03 of 2011 dated 01.03.2012**).**

42. We may not be justified in examining the orders of the CERC relied on behalf of the 3rd respondent since such orders, unlike orders of APTEL,

cannot even be said to have any pursuasive value in adjudication of the present lis before this Tribunal. Before examining the rival submissions under this head, we shall take note of the judgements of APTEL relied on behalf of the 3rd Respondent.

A. JUDGEMENTS RELIED ON BEHALF OF CTUIL:

43. **In Maharashtra State Electricity Distribution Company Ltd. vs. Central Electricity Regulatory Commission & Ors:** (Judgment in Appeal No.92/2011 dated 28.7.2011), this Tribunal held that the constitutional bench of the Supreme Court, in **PTC India Limited** case **(2010(4) SCC 603)**, has held that the validity of the Regulations framed while exercising the regulatory powers cannot be questioned before this Tribunal; the main Regulations were framed on 15.6.2010 and were amended by the Central Commission on 4.4.2011 while exercising power under Section 178 of the Electricity Act,2003; the Appellant had specifically raised the point that though the powers have been exercised under Section 178 of the Act, the mandatory requirement of previous publication as contemplated in sub-section (3) of Section 178 had not been followed; If that was the stand of the Appellant, the Regulation framed on 15.6.2010, as well as the amendment of the Regulations carried out on 4.4.2011, under Section 178 of the Act, 2003 cannot be questioned in this Appeal; and merely because the required procedure have not been followed while framing the Regulations, this Tribunal cannot set aside those Regulations.

44. This Tribunal further observed that the question which arose was "whether the impugned order, amending the Regulations by the Central Commission, was the outcome of the exercise of the power by the Central Commission under Regulatory power or under adjudicatory power?; even assuming that the exercise is not a legislative exercise, the Appeal cannot be maintained as the impugned order passed by the Commission was only by exercising its Regulatory power and not adjudicatory power; as the

Supreme Court has held, twin powers have been conferred to the Central Commission with regard to their functions by the Act; Section 61 of the Act deals with the powers of the Central Commission under which the ISTS Regulations have been framed by exercising the Regulatory Power; under Section-62 of the Act, the Central Commission has been vested with the adjudicatory power in connection with determination of the tariff; the submission that the ISTS Regulations must be considered to be the order relating to tariff determination under Section 62 of the Electricity Act, 2003. deserved outright rejection; the ISTS Regulations were notified on 15.06.2010 and they were to come into force with effect from 01.01.2011; by this order, the NLDC (R-2) was designated as Implementation Agency to implement theRegulations; as R-2 experienced difficulties inimplementing these Regulations, it approached the Central Commission under Regulation 21 for removal ofcertain difficulties which were being encountered in the run up to the implementation of the said Sharing Regulations; exercise of the power while passing this impugned order, was not under adjudicatory power of the Central Commission but was under the regulatory power; tariff of Inter State Transmission System under Section 62 of the Act is fixed in accordance with principles and methodology laid down in Chapter 3 & 4 of the Tariff Regulations of the Central Commission; merely because the presentation through the petition was submitted by the NLDC (R 2), and the same was entertained by the Central Commission which heard theNLDC and passed the impugned order amending the Regulations by giving reasons; it cannot be held that this order has been passed by exercising the adjudicatory or quasi-judicial powers conferred upon the Commission under Section-62 of the Electricity Act, 2003; a bare reading of the impugned order dated 4.4.2011 clearly shows that the directions given by the Commission becomes integral part of ISTS Regulationsof 2010; when the direction in relation to the amendment of Regulations is given, it cannot be said that it is an adjudicatory order which decides the disputes between the

parties; and the Electricity Act, 2003 contains separate provisions for performance of dual functions of the Commission.

45. This Tribunal further held that Section-61 is the enabling provision for framing of the Regulations by the Central Commission; as per this Section the determination of terms and conditions of tariff i.e. Regulations that have been left to theRegulatory function of the Commission; however, Section 62 is the provision conferring powers to the Commission for actual tariff determination on the basis of Regulations framed under Section-61; and, as held by the Supreme Court, specific terms and conditions for the determination of the tariff are different from the actual tariff determination in accordance with the provision of the Act for supply of electricity.

46. As noted hereinabove, in **Maharashtra State Electricity Distribution Company Ltd,** the main regulations framed by the Central Commission were amended by it later, exercising its powers under Section 178 of the Electricity Act,2003. The challenge to the amended regulations was on the ground that, though the powers had been exercised under Section 178 of the Act, the mandatory requirement of previous publication, as contemplated in sub-section (3) of Section 178, had not been followed. This Tribunal expressed its disinclination to examine this aspect, among others, on the ground that the validity of statutory regulations could only be examined in judicial review proceedings, and not in appellate proceedings before this Tribunal. The observations in the afore-said order of this Tribunal cannot be read out of context to contend that exercise of regulatory power by the Commission cannot be examined in appellate proceedings under Section 111 of the Electricity Act for, as shall be detailed later in this order, the Supreme Court, in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603),** has held that, unlike statutory regulations, exercise of regulatory power by way of orders passed by the CERC are amenable to appellate scrutiny.

47. In **East Delhi Waste Processing Company Ltd. vs. Delhi Electricity Regulatory Commission & Ors (ORDER IN APPEAL NO.148 OF 2021 Dated: 20.09.2022),** the State Commission, by virtue of the impugned order, had clarified that the 2019 Exemption Order was applicable only to such WtE projects of Delhi which sold part of the power to distribution licensees of Delhi. The appellant contended that, by the above quoted clarification given by the impugned order, it had been unfairly denied the benefit of exemptions accrued under the 2019 Exemption Order even in relation to the sale of 51 per cent electricity to Open Access consumers; the impugned order amounted to arbitrary modification of the 2019 Exemption Order; the order took away the benefits already granted under the law, and discouraged WtE projects; and, thus, was contrary to the public policy as reflected in the Electricity Act, 2003, (as indeed the rules of Green Energy Open Access notified on 06.06.2022) whereunder non-renewable sources of energy were to be promoted.

48. It is in this context that this Tribunal observed that the operative part of the order under challenge only clarified the directions in the *2019 Exemption Order* which were generic in nature; the clarifications thus given were in *sync* with the meaning and impart of the *2019 Exemption Order* leaving no uncertainty that, for being entitled to avail the exemptions thereunder (i.e. waiver of Wheeling Charges, Termination Charges or relaxation of Deviation Settlement Mechanism), it was necessary for the WtE generator to sell the energy to distribution licensee of Delhi; the generic order dated 01.06.2017, as indeed the *2019 Exemption Order* which carved out certain exemptions vis-à-vis the former, followed by the impugned order dated 15.02.2021, were not adjudicatory orders respecting a dispute *inter se* the parties but in the nature of regulatory orders which laid down generic rules on the subject of tariff and, therefore, not amenable to challenge before this Tribunal under Section 111 of Electricity Act; by its judgment, in **PTC India Ltd. v. Central**

Electricity Regulatory Commission (2010) 4 SCC 603, the Supreme Court (in Paras 49 to 55) had clarified that a State Commission under the Electricity Act had the power to regulate which was not restricted to the framing of subordinate legislation in the form of regulations; the *2019 Exemption Order* was regulatory in nature specifically in relation to WtE plants, the impugned order being only clarificatory in its respect; the judgement of the Supreme Court, in ***State of Gujarat v. Utility Users' Welfare Assn*., (2018) 6 SCC 21** (Paras 90, 101 to 104), is relevant; this tribunal, in **MSEDCL v CERC, 2011 SCC Online Aptel 119 (Appeal No.92 of 2011: Para 15, 24, 28)**, had the occasion to examine the maintainability of similar appeal against the backdrop of challenge to an order on the subject of removal of difficulties passed by the Central Commission; this Tribunal held that the impugned order was passed by the Comission by exercising its Regulatory power and not adjudicatory power; as per the ratio laid down by the Supreme Court in **PTC India**, this Tribunal, under Section 111 of the Act, cannot interfere with the orders passed by the exercise of the Regulatory Powers vested with the Central Commission under Sections 61 and 178 of Electricity Act 2003; it could only entertain the Appeal related to the orders passed by the Commission for determination of tariff and for resolution of the disputes through the exercise of the adjudicatory power, but not against the orders passed under Regulatory Power; and the appeal at hand, bringing a challenge to the clarifications given by the State Commission vis-à-vis *2019 Exemption Order,* was actually an endeavor to assail exercise of the regulatory power by the State Commission, there being no component of adjudication or fixation of any levy or tariff involved.

49. We have no quarrel with the observations, in **East Delhi Waste Processing Company Ltd,** that this Tribunal, under Section 111 of the Act, cannot interfere with the orders passed in the exercise of the regulatory powers vested with the Central Commission under Sections 61 and 178 of

Electricity Act 2003, in as much exercise of power thereunder is the power to make Regulations which is in the nature of subordinate legislation; and the validity, of such an exercise of power to make regulations, can only be examined in judicial review proceedings.

50. Unlike the power to make regulations under Sections 61 and 178 of Electricity Act 2003, exercise of regulatory power under Section 79(1) is amenable to appellate scrutiny under Section 111 of the Electricity Act. In **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603**, the Supreme Court held that making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1); if there is a Statutory Regulation in force, then the measure under Section 79(1) should be in conformity with such a Regulation made under Section 178; for example, under Section 79(1)(*g*), the Central Commission is required to levy fees for the purpose of the 2003 Act; an order imposing regulatory fees could be passed even in the absence of a regulation under Section 178; and, if the levy, imposed by the Central Commission in the exercise of its regulatory power under Section 79(1)(*g*) is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process.

51. **In Uttar Pradesh Sugar Mills Co-Gem Association vs. Uttar Pradesh Electricity Regulatory Commission & Ors;** (Order in Appeal No.125/2015 and 130/2015 dated 12.10.2015), this Tribunal held that, in order to decide the issue of maintainability of the appeals, they would first have to go to the Constitution Bench's judgment in **PTC India**; the question which fell for consideration of the Constitution Bench was whether Parliament had conferred power of judicial review on this Tribunal under Section 121 of the Electricity Act; the Constitution Bench held that Section 121 of the Electricity Act did not confer powers of judicial review on this

Tribunal; a regulation made under Section 178 of the Electricity Act was made under the authority of delegated legislation, and consequently its validity could be tested only in judicial review proceedings before Courts, and not by way of appeal before this Tribunal under Section 111 of the Electricity Act; it must, therefore, be borne in mind that this Tribunal does not have the power of judicial review; the appellants wanted it to set aside the impugned order by which the State Commission had directed that proviso 2 be added to Clause 1(2) of the CRE Regulations, 2014; as the Appellants were questioning the procedure adopted by the State Commission to amend the regulation, and it was the Appellants contention that the amendment was improperly made and was illegal, as per **PTC India**, the Appellants should seek review of the amended regulation by adopting appropriate remedy; in this appeal, this Tribunal had to decide whether the amended regulation was validly framed or not; it would then be entering upon the forbidden field of judicial review which it could not do; in **MSEDCL v. CERC (Order in Appeal No. 92 of 2011 dated 28.07.2011)**, this Tribunal held that the impugned order was passed by the CERC in exercise of its regulatory power and not adjudicatory power and hence the appeal was not maintainable; Regulation 21 of the ISTS Regulations conferred power on the CERC to remove difficulties; the CERC under Regulation 21 may direct the Implementing Agency or other entities to take suitable action; exercise of power, while passing the impugned order, was not under adjudicatory power of CERC but was under regulatory power; the directions given by the Commission became an integral part of the ISTS Regulations; when direction, in relation to the amendment of regulations, is given it cannot be said that it is an adjudicatory order which decides the disputes between the parties; the impugned order was not passed in exercise of the adjudicatory power, but it is the outcome of the exercise of regulatory power; and hence the appeal is not maintainable.

52. In **Uttar Pradesh Sugar Mills Co-Gem Association,** this Tribunal further observed that in this case there was no provision in the original CRE Regulations 2014 to remove difficulty; but in this case Regulation 7 of the CRE Regulations 2014 vested in the State Commission general power to amend; Regulation 8 contained the Commission's power to relax; in view of these provisions it could not be said that the State Commission in this case lacked the power to amend regulations; the power contained in Regulations 7 & 8 was a regulatory power; it was the case of the Appellants that, under Section 94(1)(f), the State Commission cannot review a regulation, it can only review its decisions, directions and orders; it was the case of the Respondents that the State Commission had exercised regulatory powers under Regulations 7 and 8 of the CRE Regulations, 2014 and the amendment was carried out in exercise of the powers conferred under Section 181 read with Sections 9, 61, 86(1)(a), 86(1)(b) & 86(1)(e) of the Electricity Act; if by admitting the appeal, the Tribunal embarked upon the task of deciding this issue, it would be undertaking judicial review of the amended regulation which it could not do; the fact that the CRE Regulations 2014 did not vest power to remove difficulties on the State Commission did not make this judgment inapplicable to the present case.

53. This Tribunal also observed that, in **Madhya Pradesh Power Generation Company Ltd vs MPERC: 2011 ELR (APTEL) 1041,** the Appellant generating company had filed a petition before the State Commission for relaxation of the operating norms of tariff determination by virtue of the power under the relevant regulations because the norms were impossible to be met with on the ground that the generating stations were old; the State Commission rejected the prayer; in the appeal filed by the generating company, this Tribunal observed that the regulations framed by the State Commission or the Central Commission partake the character of subordinate or delegated legislations having the force of law. Referring to

PTC India, this Tribunal held that it had no jurisdiction to examine the validity of the regulations; the validity of the regulations can be only challenged by seeking judicial review thereof; It was argued that the Appellant was only asking for a direction to modify the norms in exercise of the Commission's power to relax or to remove difficulties or to apply inherent power; this submission of the Appellant was rejected by this Tribunal holding that relaxation of norms was possible only when the notified regulation was again notified by bringing about an amendment thereof; asking the State Commission to amend its regulations, virtually implies that the regulations framed by it are deficient and that would amount to exercising powers of judicial review which this Tribunal does not possess as stated by the Constitution Bench in **PTC India;** if it asks the State Commission to exercise the power of removal of difficulty or to relax norms or to exercise inherent power, it would be giving directions indirectly which it cannot give directly; if it gives directions to the State Commission to amend the regulations, it would be required to observe that the norms set out in the regulations are unjust or improper or illegal and hence amendment is necessary; that would mean it would have to undertake judicial review of the regulations which it cannot do; and, therefore, the appeal was not maintainable.

54. In **Uttar Pradesh Sugar Mills Co-Gem Association,** the appellants sought to have the impugned order, whereby the State Commission had directed that proviso 2 be added to Clause 1(2) of the CRE Regulations, 2014, to be set aside. The law laid down by this Tribunal is that, as the Appellants were questioning the procedure adopted by the State Commission to amend the regulation, and it was their contention that the amendment was improperly made and was illegal, the Appellants should seek review of the amended regulation by adopting appropriate remedy; in this appeal, this Tribunal was being called upon to decide whether the

amended regulation was validly framed or not; and it would then be entering upon the forbidden field of judicial review which it could not do. As we are not concerned in the present appeal with any statutory regulation, made under Section 178, reliance placed on behalf of the 3rd Respondent, on **Uttar Pradesh Sugar Mills Co-Gem Association**, is misplaced.

B. ANALYSIS:

55. Let us now examine the rival submissions under this head. It is true that, in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603),** the Supreme Court held that law comes into existence not only through legislation but also by regulation and litigation; laws from all three sources are binding; and between legislative and administrative functions are regulatory functions.

56. In this context, it must be borne in mind that statutory instruments, such as a rule or regulation, emanates from the exercise of delegated legislative power resembling enactment of law by the legislature. (***Shri Sitaram Sugar Co. Ltd.*** **v.** ***Union of India*** **[(1990) 3 SCC 223**; **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).** A regulation, under Section 178 of the Electricity Act, is made under the authority of delegated legislation. In the hierarchy of regulatory powers and functions under the Electricity Act, 2003, Section 178, which deals with the making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than the regulatory power available to be exercised by the CERC under Section 79(1) of the 2003 Act. (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).** The validity of Regulations, made under Section 178, can be tested only in judicial review proceedings and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act, as the word “order” in Section 111 of the 2003 Act does not include Regulations made under Section 178

thereof. (***PTC India Ltd. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603).**

57. Before considering the scope of the regulatory powers of the Central/State Commissions under Sections 79(1)/86(1), it is useful to understand what the word "Regulate" means. The term "Regulate" is defined in *Oxford Dictionary*, as follows: "to control, to govern, to protect by Rules or regulations, to subject to guidance or restrictions, to adopt to circumstances or surroundings." In Corpus Juris Secondum, Volume 76, Page 610, the meaning of the word "regulate" is stated thus: "the word 'regulate' is derived from the latin word 'rego and regula'. It is a word of broad import having a broad meaning and is very comprehensive in scope" **(D.K.V. Prasada Rao v. Government of Andhra Pradesh, 1983 SCC OnLine AP 61).** The dictionary meaning of the word "regulation", in *Shorter Oxford Dictionary,* is 'the act of regulating' and the word 'regulate' is given the meaning 'to control, govern, or direct by rule or regulation". (**Indu Bhushan v. Rama Sundari: AIR 1970 SC 228; D.K.V. Prasada Rao v. Government of Andhra Pradesh, 1983 SCC OnLine AP 61).** The power to regulate includes the power to restrain, which embraces limitations and restrictions on all incidental matters connected with the right. (**Deepak Theatre v. State of Punjab [Deepak Theatre v. State of Punjab, 1992 Supp (1) SCC 684).**

58. Under the Electricity Act, the Central/State Commission is a decision-making as well as regulation-making authority, simultaneously. Decision-making under Section 79(1)/ 86(1) is not dependent upon making of regulations under Section 178/ 181 by the Central/State Commissions. The functions of the Central Commission/State Commissions enumerated in Section 79/86 are separate and distinct from its functions under Section 178/181. The former are administrative/adjudicatory functions whereas the latter are legislative. (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).**

59. The Central Commission. is empowered to take measures/steps in the discharge of the functions enumerated in Section 79(1) ie to regulate the tariff of generating companies, to regulate inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, should be in conformity with the regulations under Section 178, wherever such regulations are applicable. (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).**

60. Section 79(1) enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions). Statutory Regulations, made under Section 178, stand on a higher pedestal vis-à-vis an order (decision) of CERC in the sense that such an order should be in conformity with the Regulations. That does not, however, mean that existence of a statutory regulation is a pre-condition to the order (decision). (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).** As noted hereinabove, unlike Statutory Regulations made under Section 178, exercise of regulatory powers by the appropriate commissions, which are in the form of orders, are amenable to appellate scrutiny under Section 111 of the Electricity Act. (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).**

61. Quasi-judicial orders (passed by Tribunals such as the Commission or APTEL) is as a result of adjudication resembling a judicial decision by a court of law. (***Shri Sitaram Sugar Co. Ltd.*** **v.** ***Union of India*** **[(1990) 3 SCC 223**; **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).** If a dispute arises in adjudication by the Commission, on the interpretation of a regulation made under Section 178, an appeal would lie

before the Appellate Tribunal under Section 111. (***PTC India Ltd. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603).**

62. Petition No. 126/MP/2017, initially filed by the appellant before the CERC, was on the ground that both POSOCO and CTUIL had no authority to deal with the tariff of an Intra-State Transmission system or to raise bills on the appellant from July 2011 under the 2010 Sharing Regulations. While seeking a declaration that the subject Transmission Line be held to fall outside the jurisdiction of POSOCO and CTUIL as well as the 2010 Sharing Regulations, the appellant also sought for the bills raised by CTUIL from July 2011 to be set aside.

63. In its order in Petition No. 126/MP/2017 dated 04.05.2018, the CERC, after noting that the IGSTPS was connected both to the STU network of CTUIL through the Jhajjar-Mundka Transmission Line and the Haryana STU network through the Jhajjar-Daulatabad Line, and that Haryana was receiving 693 MW of power of the installed capacity of 1500 MW of IGSTPS, had observed that the Jhajjar-Daulatabad Line was an Intra-State Transmission Line constructed, maintained, and operated by Haryana STU and its tariff was determined by the HERC; the said Transmission Line emanated and culminated within the State of Haryana; it was not directly connected to the ISTS; it had also been maintained, developed and operated by the Haryana Transmission Utility; none of the three clauses of Section 2(36) of the Electricity Act were attracted; and the said Transmission Line was an Intra-State Transmission Line covered under Section 2(37) of the Electricity Act.

64. On issue No. 2, the CERC referred to its earlier orders in Petition No. 291/MP/2015, Petition No. 211/MP/2011 and Petition No. 20/MP/2017, and observed that ISTS charges and losses shall not be applicable to schedules on the State network involved for evacuation of power from ISGS; and ISGS

charges shall not be applicable for evacuation of the share of power of Haryana utility through the subject Transmission Line. After noting that the Appellant had been paying transmission charges and losses since July 2011 after the Sharing Regulation came into effect, and that they had approached the CERC for relief only in 2017, the CERC held that the Appellant was entitled to relief on an interpretation of the various provisions of the Regulations which made a departure from the prevailing regulatory regime; and the CERC had granted relief to the petitioner in Petition No. 211/MP/2011, by order dated 05.10.2017, prospectively from the date of the issue of the order, and had directed its staff to examine the matter and propose suitable amendments.

65. After holding that, in the previous cases and in the present case, the Commission had laid down principles of allocation of transmission charges and losses under the PoC mechanism in case of STU Lines used exclusively to evacuate power from the ISGS by a State, for which there was no clarity in the Sharing Regulations, the CERC was of the view that relief should be granted prospectively in view of the fact that bills were raised by POSOCO as per the prevailing regulatory regime; and, by way of interpretation of various provisions of the regulations, it had exempted the appellant from payment of PoC charges and losses in the order in the light of the decisions in the earlier cases, pending amendment of the Sharing Regulations.

66. It was only the Appellant herein which had preferred the Appeal against the order passed by the CERC in Petition No. 126/MP/2017 dated 04.05.2018, and neither POSOCO nor CTUIL chose to prefer an appeal there against. In the said appeal, ie Appeal No.240 of 2018, the appellant had referred to the orders passed by the CERC in Petition No. 239 of 2010 dated 08.06.2013 and 13.05.2014 which determined the tariff of the 400 kV D/c Jhajjar – Mundka Transmission Line treating the said Line as the Inter State Transmission system from 01.03.2011. The appellant had pointed out

that, though the subject 400 kV Transmission Line from Indira Gandhi Super Thermal power Station to Daulatabad was also in operation during the said period, the CERC had not considered the said line to be included under the PoC mechanism, or for their tariff to be determined by the Commission. This, according to the appellant, was because the said transmission line was an Intra-State Transmission Line falling beyond the jurisdiction of the CERC.

C. DECLARATION OF LAW OPERATES FROM THE VERY INCEPTION:

67. The decision of the Court/Tribunal, enunciating a principle of law, is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Court/Tribunal is, in fact, the law from the inception. **(M.A. Murthy v. State of Karnataka, (2003) 7 SCC 517).** When the court/tribunal decides that the interpretation of a particular provision as given earlier was not legal, it in effect declares that the law as it stood from the beginning was as per its decision, and that it was never the law otherwise. **(Suresh Chandra Verma (Dr.) v. Chancellor, Nagpur University: (1990) 4 SCC 55; P.V. George v. State of Kerala, (2007) 3 SCC 557).**

68. Normally, the decision of the Court, enunciating a principle of law, is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Court is, in fact, the law from the inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to this normal principle of law. **(M.A. Murthy v. State of Karnataka: (2003) 7 SCC 517; P.V. George v. State of Kerala, (2007) 3 SCC 557).**

69. As noted hereinabove, the CERC had, in its order dated 04.05.2018, held that Section 2(36) of the Electricity Act was inapplicable and the subject Transmission Line was an Intra-State Transmission Line under Section

2(37) of the Electricity Act. The CERC had examined the question whether the subject Transmission Line fell within the ambit of Section 2(36) or Section 2(37) of the Electricity Act. As decisions of Courts/Tribunals are applicable from the very inception, and are ordinarily retrospective in its operation, such a finding by the CERC would relate back to the date on which the Electricity Act came into force in 2003. Likewise, the interpretation placed by the CERC, on the provisions of the 2010 Sharing Regulations, would also be the law applicable from the date on which the 2010 Sharing Regulations came into force, and not from the date on which it passed the order on 04.05.2018.

70. The CERC has only undertaken the exercise of interpretation of Section 2(36) and (37) of the Electricity Act, besides holding that provisions of the 2010 Sharing Regulations are not attracted. The exercise undertaken by the CERC, of interpreting statutory provisions in a petition filed by the appellant, is undoubtedly an adjudicatory function, and the order passed by the CERC would consequently relate back to the date on which the 2003 Act and the 2010 Sharing Regulations came into force. The law declared by the CERC, in its order dated 04.05.2018, must be held to be the law prevailing from when the 2003 Act and the 2010 Sharing Regulations were made, and not from 04.05.2018 when it passed the earlier order.

71. It is no doubt true, as held by the Supreme Court in **PTC India**, that the CERC, under the provisions of the Electricity Act, exercises legislative functions (i.e it has been conferred the power to make regulations under Section 178), regulatory functions (mainly under Section 79) and adjudicatory functions (also under Section 79) of the Electricity Act. The order passed by the CERC on 04.05.2018 is in a petition filed by the appellant seeking a declaration and raising a claim and, consequently, the CERC must be held to have exercised its adjudicatory powers to pass both the orders dated 04.05.2018 and 30.07.2022.

72. In **Madhya Pradesh Power Generation Company Ltd v. MPERC (Order in Review Petition No. 3 of 2011 dated 1st March, 2012),** this Tribunal held that the Commission has manifold powers, namely, administrative, supervisory, legislative and adjudicatory, but each power must be exercised at the appropriate field. Simply because a Commission has many powers, it cannot be said that, while exercising one power, it oversteps its limit in that power and assumes another jurisdiction.
Applying the law declared by this Tribunal in the aforesaid judgement, would require us to hold that the CERC, while passing the adjudicatory order dated 04.05.2018, was disabled from exercising its regulatory powers.

73. Even if we were to proceed on the premise that the CERC can also exercise its regulatory powers, while adjudicating a dispute in the exercise of its adjudicatory functions, such exercise of regulatory power cannot fall foul of any regulations made by the CERC under Section 178 of the Electricity Act. Consequently, the Commission cannot exercise its regulatory powers under Section 79 contrary to the statutory regulations, if any, made under Section 178 of the Electricity Act.

74. There is nothing in the order dated 04.05.2018 to indicate that the CERC had exercised its regulatory power to make a regulation which is of general application. While the order dated 04.05.2018, no doubt, records that POSOCO had brought to its notice the regulatory provisions under which long term access for IGSTPS has been considered and the bills for PoC charges and losses were raised on the appellant, the CERC has not expressed any opinion on such submissions of POSOCO and has, instead, observed that they had granted relief to the appellant by virtue of interpretation of the various provisions of the Regulations. The conclusion of the CERC that its interpretation was a departure from the prevailing regulatory regime is not borne out by any reference either to a statutory regulation then in existence, or to any regulatory order of general application

having been passed by the CERC prior to its jurisdiction being invoked by the appellant on 02.06.2017 by way of a petition which resulted in the order dated 04.05.2018 being passed.

75. The fact that POSOCO and CTUIL were of the view that the subject Transmission Line was a Inter-State Transmission Line, falling under the POC mechanism, does not amount to a regulatory regime being in existence, in as much as the regulatory power, permissible to be exercised in the absence of Statutory Regulations, is conferred by the Electricity Act only on the CERC, and not on POSOCO or CTUIL. In the light of the specific finding recorded by the CERC that the 2010 Sharing Regulations did not contain any specific provision in this regard, which is why it had directed its staff to take steps to have the 2010 Sharing Regulations amended to clarify the position, it is only if the CERC had passed a specific order of general application exercising its regulatory powers, can it then be said that a regulatory regime was then in existence. No such regulatory exercise, having been undertaken by the CERC, has been referred to either in the order passed by it on 04.05.2018 or even in the impugned order dated 30.07.2022.

76. As shall be elaborated later in this Order, the CERC, in its order in **"Steel Authority of India Limited vs. Western Regional Load Despatch Centre (WRLDC)** (Order in Petition No. 211/MP/2011 dated 05.10.2017)", held that the present case had implication to similarly placed entities, and States which draw power from the bus-bar of an ISGS through the transmission systems of STU without utilizing the ISTS; and the staff was directed to examine the issue and propose amendment to the Sharing Regulations for clarity. Such instructions neither amount to exercise of regulatory power nor exercise of the regulation making power by the CERC, since the Electricity Act requires the CERC to exercise such powers and not its staff.

77. It does appear that, eventually the Regulations were amended in 2020, making a specific provision in this regard. As the 2020 amendment would only apply prospectively, there was neither a statutory regulation nor a regulatory order passed by the CERC to the contrary in force prior thereto. As shall be detailed later in this order, the submissions urged regarding the scope of Sections 38 and 39 of the Electricity Act, as also the other provisions of the Sharing Regulations, are beyond the scope of inquiry in the present appeal, since the order of remand passed by this Tribunal, which is binding, requires us to confine our enquiry only to the issue of prospective application of the order of the CERC dated 04.05.2018.

X. RIVAL CONTENTIONS ON MERITS:

78. Sri Sitesh Mukherjee, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the status of the 400kV IGSTPS – Daulatabad DC transmission line, as an "intra-state" line, was a necessary but not a sufficient condition for grant of the relief sought as prayer (a) in the Petition filed by the Appellants before the CERC; hence Issue No.2 had to be framed and decided in the CERC's previous order; under the Sharing Regulations, 2010 payment of transmission charges was not dependant on the actual/real use of any transmission line; a user's liability to pay transmission charges is based on the quantum for which open access has been "granted" to the user in question; hence, the determinant factors in the said regulations, for computing sharing of transmission charges or losses, are "Approved Injection" or "Approved Drawal"; in the usual course, grant of "open access" to the transmission system is based on (and in fact the process itself commences from) a written requisition for a specified quantum of open access by the user in question; however, in respect of allocation made from Central Sector Generating Stations (as in this case the allocation made to the Haryana Discoms was from IGSTPS) the Sharing Regulations, 2010 automatically

recognise Haryana Discoms as a Long Term open access customer to the "inter-state" system (ISTS) for its entire central sector allocation of 693 MW; hence, under the Sharing Regulations, 2010, Haryana Discom is a "Long term Customer" to ISTS for the 693 MW power they have been allocated from IGSTPS Station; "Long -Terms Customer" is defined in clause 2(1) (m) of the CERC (Grant of connectivity, long term access and medium term open access in inter-state transmission and related matters) Regulations, 2009; the definition of "Approved Injection", in the 2nd proviso to clause 2 (1) (c) the Sharing Regulations 2010 (*as amended by CERC (Sharing of inter-state transmission charges and losses) (Third Amendment) Regulations, 2015*), clarifies that Approved Injection (in relation to a Long term Customer) shall be the injection in MW corresponding to the quantum of long term access granted by Respondent No. 3 ie the Central Transmission Utility of India Limited or where no non-long term access is granted, then the installed capacity of the generating unit less auxiliary consumption shall be taken as the Approved Injection; in the instant case, Haryana Discoms are deemed to be "Long term Customers" by virtue of the central sector allocation of 693 MW; hence no open access was needed or granted by the CTU; accordingly, the installed capacity of IGSTPS, corresponding to 693 MW, was taken as the Haryana Discoms approved injection under the Sharing Regulations, 2010 for the computation of transmission charges in the billing done since 2011; therefore, Issue No.2 in the CERC's previous order had to deal with the specific situation where Haryana Discoms were falling in the ambit of the Sharing Regulations, 2010 for payment of inter-state transmission charges (arising from their status as deemed Long-term Customer), even though there existed another "intra-state" line which they were also using from IGSTPS to evacuate power; the CERC noticed that the Sharing Regulations, 2010 could not cater to the specific situation (which did not normally arise) when a state discom was evacuating power from a central

generating station by being connected to both inter-state as well as intra-state network; and hence, while deciding similar cases which previously arose (duly discussed under Issue No.2 of the previous order), the CERC asked its staff to initiate the process to make suitable regulations by amending the Sharing Regulations, 2010.

79. Mrs. Suparna Srivastava, Learne Counsel for the CTUIL, would submit that, under Section 38(1) of the Electricity Act, 2003, Respondent No.3 has been notified as the Central Transmission Utility and has been enjoined under Section 39(2)(d) to provide non-discriminatory open access into the inter-State transmission system *[ISTS]* on payment of transmission charges; in exercise of the powers conferred upon it under Section 178 of the 2003 Act, the CERC framed the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) *[the 'Connectivity Regulations'];* which govern the grant of open access into the ISTS; a *"long term customer*" has been defined *in Regulation 2(m)* of the said Regulations; a beneficiary of a central sector generating station *[CSGS]* who has been allocated power by the Government of India, Ministry of Power *[MoP]*, is also a long-term customer of ISTS, even though it has not been granted long-term access *[LTA]* under the Connectivity Regulations; the present Appellant is one such long-term customer of ISTS to whom 693 MW power has been allocated from IGSTPS under an MoP allocation, and for which it is liable to pay transmission charges as per the applicable Regulations; the transmission charges, for the use of ISTS, are payable in the manner laid down under the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 *[the 'Sharing Regulations, 2010'];* under the said Regulations, (i) PoC charges are computed based on "*Approved Injection*" *[Regulation 2(c)]* and "*Approved Withdrawal*" *[Regulation 2(f)]* as validated by the Validation Committee

constituted under the Regulations; (ii) all entities that are physically connected with the ISTS are required to share the Yearly Transmission Charges *[YTC] [Regulation 2(y)]* for existing lines determined by the Respondent No.1 Commission *[Regulation 3]*; (iii) the implementing agency (Respondent No.2 herein) is required to compute the PoC charges based on the YTC *[Regulation 4]*; (iv) the PoC charges are computed for each zone/node in Rs./MW/month *[Regulation 7]* in the manner set out in the Regulation; and (v) the scheme of PoC billing and payment is envisaged under Regulations 10 and 11; in this entire scheme, the regulatory mandate is that the YTC is to be recovered fully and exactly; further, under the Sharing Regulations, 2010, the Regional Power Committees *[RPCs]* have been entrusted with the responsibility to prepare monthly Regional Transmission Accounts *[RTAs]* for the ISTS customers and, based on these RTAs, Respondent No.3 raises the transmission charges bills on the respective ISTS customers; as such, Respondent No.3 has a limited role in determining the YTC and the transmission charges for the ISTS customers, particularly in the present case where power allocation from the subject CSGS has been made by the MoP; Respondent No.3 has no role in the preparation of RTAs; Respondent No.3 has raised the bills for ISTS charges on the Appellants from July, 2011 onwards, based on the RTAs issued as per the Sharing Regulations, 2010; the 3rd Amendment, 2015 to the Sharing Regulations, 2010 amended the definition of "Approved Injection" with the insertion of a proviso; thus, for a long-term customer of ISGS who is a central sector allocatee, the monthly transmission charges are to be computed considering the installed generation capacity (minus auxiliaries) and the PoC transmission rate of the generation zone as per the above-mentioned formula.

80. Learne Counsel for CTUIL would further submit that, with respect to an ISGS, the scheme of allocation requires a certain percentage to be

allocated to the State in which the generating station is located *[the 'Home State share']*; *a*s such, for every ISGS situated in a given State, there is the Home State beneficiary whose allocated power is carried through the STU line and the PoC billing for such beneficiary is also undertaken in the manner set out in the Sharing Regulations, 2010 (read with its amendments); the 3rd amendment *[in clause(t)(vii)]* reiterates that, if an STU line is carrying ISTS power, such an STU line is to be considered as an ISTS for the purposes of the Sharing Regulations, 2010, and consequently the ISGS beneficiary, availing the allocated power by use of such line, is liable to pay the ISTS transmission charges; there is no provision either in the original Regulations or inserted under any of its amendments by which an STU line connected to the ISTS, and delivering the State's share of power from a CSGS situated within that State, can be excluded from being considered for recovery through the PoC mechanism; to the contrary, there is a categoric provision inserted by way of the 3rd amendment *[clause(t)(vii)]* which states that irrespective of the nature of the line, if the power is being drawn by a central sector beneficiary, the PoC charges are necessarily to be paid; the said provision has continued to exist on the statute book till the Sharing Regulations, 2010 subsisted; the methodology for raising transmission charges bills for long-term access into the ISTS has been provided under the Billing, Collection and Disbursement Procedure *["BCD Procedure"]* notified under the Sharing Regulations, 2010; under the said procedure, Respondent No.3 has been entrusted with the responsibility of billing of PoC charges, ensure recovery of the same (from long term customers including the central sector beneficiaries) and, upon receipt thereof, disburse the same amongst the transmission licensees in the prescribed manner; in the course of performing the BCD functions, neither the Appellants nor any other ISTS user(s) are adversaries of Respondent No.3, except that Respondent No.3 is bound to carry out the billing strictly in accordance with the provisions of the 2003 Act read with the provisions, as they exist; accordingly, the billing

has been carried out in the present case; importantly, till the filing of the Petition before the CERC in 2017, there has been *consensus ad idem* that ISTS transmission charges bills have been rightly raised on the Appellant as per the existing provisions in the Sharing Regulations, 2010; and, as such, the Appellant has duly discharged the same.

81. On the other hand, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that POC charges or Long Term Access ('**LTA**') charges or Transmission charges or charges under any related nomenclature, as claimed by CTU etc, can only be imposed for an Inter-State Transmission Line **(ISTS)** as defined in Section 2(36) of the Electricity Act, 2003, and cannot be levied on an Intra-State Transmission Line in terms of Section 2(37) of the 2003 Act, which is wholly outside the scope of levy of transmission charges by or under Section 79(1)(c) and (d) of the 2003 Act; the CERC lacked jurisdiction over an Intra-State Transmission Line, and could not provide for any levy of charges on the said Line; these aspects have been considered by the CERC itself in its Order in Petition No. 126/MP/2017 dated 04.05.2018 under Issue Nos. 1 and 2; as the said decision on Issue Nos. 1 and 2 has not been challenged either by POSOCO or CTU before the Supreme Court, the Orders of the CERC dated 04.05.2018 and the order of this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020, on Issue Nos. 1 and 2, have attained finality.

82. Learned Senior Counsel would further submit that the legal regime, prevailing during the relevant period, i.e from 01.07.2011 to 04.05.2018, was that the STU Line was to be considered only as an Intra-State Transmission line, and not an Inter-State Transmission line; no power from the Aravali Generating Station was being evacuated/transmitted through any part of the ISTS network to the Appellants; the entire quantum earmarked for the Appellant was

evacuated only through the STU line; therefore, there could be no consideration of any impact of any charges – POC or otherwise, related to Inter-state, on the Appellant in so far as conveyance of power on the STU line was concerned; the alleged differentiation sought to be made by POSOCO, that transmission charges are different from LTA charges and therefore LTA charges can be levied is patently erroneous and illegal; and what was earlier referred to as transmission charges is now being termed as LTA charges.

83. Learned Senior Counsel would also submit that, in any event, the CERC has not made any such differentiation in its order dated 04.05.2018; it has held that the LTA charges are not leviable on the STU line considering that the said line is an intra-State Line and not an Inter-State line; the CERC has considered all the relevant provisions - Section 2(36) of the Electricity Act, 2003, Regulation 2(m) of the Connectivity Regulations, and Regulation 3 of the Sharing Regulations, 2010 as amended; and the CERC has also held that there was no change in the treatment of the STU Line by virtue of the notification of the Third Amendment to the Sharing Regulations, 2010 in 2015 – Definition of 'Approved Injection' – Second Proviso to Regulation 2(1)(c).

A. ANALYSIS:

84. As noted hereinabove, it was only the Appellant herein which had preferred the Appeal against the order passed by the CERC in Petition No. 126/MP/2017 dated 04.05.2018, and neither POSOCO nor CTUIL chose to prefer an appeal there against. No appeal was also filed against the order of remand passed by this Tribunal in Appeal No.240 of 2018 dated 04.02.2020, and the said order has attained finality. Even against the impugned order of the CERC, in Petition No. 126/MP/2017 dated 30.07.2022, it is only the

appellant which has preferred the present appeal, and neither POSOCO nor CTUIL have chosen to do so.

B. IN AN APPEAL, THE RESPONDENT CAN ATTACK AN ADVERSE FINDING TO SUSTAIN THE ORDER OF THE LOWER COURT:

85. Order XLI Rule 22(1) CPC, 1908, prior to its amendment, by Act 104 of 1976 wef 01-02-1977, read thus:

> *"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objections to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."*

86. The scope of the pre-amended Order XLI Rule 22(1) CPC was considered by the Full bench of the Madras High Court in ***Gaddam Chinna Venkata Rao v. Koralla Satyanarayanamurty*, 1943 SCC OnLine Mad 173 : AIR 1943 Mad 698,** and it was held that the Court cannot set the decree aside, because it has become final, but it is open to the defendants to repel the plaintiffs' case for an increased decree by showing that they were not really entitled to a decree at all; when an appeal is preferred, the appellant is, generally speaking, seeking to get rid of an adverse decision, adverse to him wholly or in part, which means that the opposite party had succeeded wholly or in part; that success might be the result of a decision in his favour on one or some of several grounds urged by him, the Court negativing the other or others; as regards these latter grounds, he cannot and need not appeal, however erroneous the decision, because there is no right of appeal to a party who has succeeded; but when the opposite party prefers an appeal, he may find himself in a difficult situation if he is obliged

to remain content with supporting the decision on the only point or points on which he had succeeded, without resorting to the others on which he had failed; for instance it may turn out on examination that some or all of these other grounds are good, while those accepted by the lower Court are unsubstantial; it is to provide for such a contingency, and to avoid injustice to the respondent in such a case, that the rule has been enacted giving him liberty to support the decree, if necessary, by relying on any of the grounds decided against him in the Court below; the use of the word *support* makes it plain that the right given is limited, to the sustaining of the decree in so far as it is in his favour, and does not extend beyond it, so as to enable him to obtain an alteration, giving him a further advantage; this, he can secure only by an appeal or cross-objection; where a suit is wholly dismissed or wholly decreed it is open to the respondent to support the decision by re-agitating grounds negatived by the lower Court; where however the suit is decreed in part and dismissed as to the rest, we have in reality what may be described as a double or composite decree; there is a decree for the plaintiff in respect of the part decreed, and a decree for the defendant in respect of the part dismissed; if the plaintiff appeals, he does so for the purpose of displacing the decree in so far as it is in favour of the defendant; if the defendant appeals, he again does so for the purpose of getting rid of the decree in so far as it has gone in the plaintiff's favour; in either case the party, who figures as the respondent, has a decree in his favour, which he is allowed to support on any of the grounds decided against him by the Court which passed the decree; when he does this and no more, he is only supporting and not attacking the decree; where a plaintiff sues for a debt of say Rs. 1,000, and the suit is contested by the defendant on two grounds, (i) discharge and (ii) limitation, and the trial Court dismisses the suit on the ground of limitation, while negativing the plea of discharge; the plaintiff, in an appeal from that decree, may be able to satisfy the appellate Court that the decision on the point of limitation is incorrect; in such an eventuality, Order XLI, Rule 22 CPC

enables the defendant to sustain the decree by making good the plea of discharge found against him by the Court below; in a case where the claim and defence are of the same character, as in the last illustration, but the trial Court gives a decree to the plaintiff for Rs. 600 only, disallowing the claim for the balance on the ground of limitation; in essence the decree, as already explained, bears a double character; there is a decree for the plaintiff for Rs. 600 and a decree for the defendant in respect of the sum of Rs. 400 disallowed by the Court, because to that extent the decision was in his favour; when the matter is taken before the appellate Court in an appeal by the plaintiff in which, let us say, he asks for a decree for the balance of Rs. 400 disallowed by the Court below, it is open to the defendant-respondent to support the disallowance of the claim to the extent of Rs. 400 by making good his plea of discharge which will avail him to that extent and no more; in doing so, he is only relying on a ground decided against him in the Court below, and this is precisely what the rule permits; in other words, where there is a decree for a part only of a claim, it means that it is partly in favour of the plaintiff and partly in favour of the defendant, and when the respondent is given liberty by the rule to support the decree, it is to enable him to support that part of the decree which is really in his favour. In doing so he is not attacking the decree in so far as it is in favour of the plaintiff nor is he supporting it; for obviously he is not interested in supporting it at all; and, in fact, he is only attempting to prevent the plaintiff from increasing the burden of the liability beyond the limit fixed by the decree appealed against.

87. In ***Sri Chandre Prabhuji Jain Temple v. Harikrishna*, (1973) 2 SCC 665,** the Supreme Court noted that the Full Bench of the Madras High Court, in **Venkata Rao v. Satyanarayanamurthy : AIR 1943 Mad 698**, had held that it is open to a respondent, who had not filed cross-objection with respect to the portion of the decree which had gone against him, "to urge in opposition to the appeal of the plaintiff, a contention which if accepted by the

trial court would have necessitated the total dismissal of the suit", but that the decree in so far as it was against him would stand. The Supreme Court observed that, to the extent the respondents had a decree in their favour, they could support that decree on any of the grounds decided against them by the court which passed the decree; when they did this, they were only supporting and not attacking that decree; and the rule laid down by the Madras High Court in the above decision was sound.

88. After the aforesaid judgements of the Full Bench of the Madras High Court and the Supreme Court, Order 41 Rule 22 CPC was amended by Act 104 of 1976 with effect from 01.02.1977. After its amendment, Order 41 Rule 22 CPC stipulates that, upon hearing, respondent may object to the decree as if he had preferred a separate appeal. Sub-rule (1) thereof provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may *see* fit to allow.

89. In **Ravindra Kumar Sharma vs. State of Assam and Ors.**, **(1999) 7 SCC 435,** the Supreme Court, after referring to **Nishambhu Jena case: (1984-85) 86 CWN 685; and Tej Kumar case: AIR 1981 MP 55,** held that the respondent-defendant in an appeal can, without filing cross-objections, attack an adverse finding upon which a decree in part had been passed against the respondent, for the purpose of sustaining the decree to the extent the lower court had dismissed the suit against the defendant-respondent. The filing of cross-objection, after the 1976 Amendment, is purely optional and not mandatory. In other words, the law as stated by the Madras High

Court Full Bench in **Venkata Rao case: AIR 1943 Mad 698,** and by the Supreme Court in **Sri Chandre Prabhuji Jain Temple v. Harikrishna, (1973) 2 SCC 665,** is merely clarified by the 1976 Amendment, and there is no change in the law after the amendment.

90. It is no doubt true that it is open to the Respondents in an appeal to sustain the impugned order even on grounds on which the CERC had held against them. As a result, the 2nd and 3rd Respondents can, in the present appeal, rely on the findings held against them by the CERC in its order dated 30.07.2022, even though it has not preferred an appeal there-against. That does not, however, enable either CTUIL or POSOCO to raise contentions on issues which fell for consideration before the CERC while passing the earlier order dated 04.05.2018, in as much as such the findings recorded by the CERC in the said order has attained finality, consequent to the order of this Tribunal in the appeal preferred thereagainst, ie Appeal No. 240 of 2018 dated 04.02.2020, which order has also attained finality. It was no doubt open to POSOCO and CTUIL, during the hearing of Appeal No. 240 of 2018, to seek to sustain the order of the CERC dated 04.05.2018 even on grounds on which the CERC had held against them in Petition No. 126/MP/2017. Having permitted the order of this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020 to attain finality, and having not preferred an appeal there-against to the Supreme Court, both the Appellant and the Respondents are bound by what has been held by this Tribunal in Appeal No. 240 of 2018 dated 04.02.2020, and the observations of the CERC in Petition No. 126/MP/2017 dated 04.05.2018, except to the extent of remand which is confined only to the issue of prospective application of the said order.

91. The order of remand passed by this Tribunal, in Appeal No. 240 of 2018 dated 04.02.2020, not only binds the parties to the said order but was also binding on the CERC while passing the impugned order dated 30.07.2022, and this Tribunal while hearing the present appeal. It is

impermissible for this Tribunal to go behind the order passed by this Tribunal in Appeal No. 240 of 2018 dated 04.02.2022, or to add to the conclusions arrived at by the CERC in its order in Petition No. 126/MP/2017 dated 04.05.2018 or to re-examine the conclusions arrived at on issues 1 and 2 by the CERC in its order dated 04.05.2018, or the submission urged on behalf of the appellant and respondents 2 and 3 on the scope of certain clauses of the CERC grant of connectivity, long-term access and medium term open access (inter-state transmission and related matters), Regulations 2009 or the 2010 Sharing Regulations, both before and after its amendment in 2015, since any such consideration in the present appeal would amount to its sitting in judgement over the order of the CERC dated 04.05.2018 to the extent it was not interdicted in the appellate order of this Tribunal dated 04.02.2020, which order has attained finality. It is settled law that this is impermissible.

92. The remand order passed by this Tribunal, in Appeal No.240 of 2018 dated 04.02.2020, required the CERC to assign reasons for applying the relief, granted by it in its earlier order dated 04.05.2018, prospectively; and the parties to Appeal No. 240 of 2018 were permitted to put-forth their submissions before the CERC only on this issue, and not beyond. Consequently, it is only such of those contentions which were urged by the parties before the CERC consequent to the remand, confined to the prospective application and operation of the order dated 04.05.2018, which can be examined in the present appeal and none else.

XI. ARE THE ORDERS PASSED BY THE CERC IN OTHER CASES APPLICABLE TO THE PRESENT CASE?

93. Mrs. Suparna Srivastava, Learne Counsel for the CTUIL, would submit that, in exercise of its regulatory power and by force of the Judgment passed by the Supreme Court, in ***PTC India Ltd. Vs. Central Electricity Regulatory Commission [(2010) 4 SCC 603]***, the CERC has

passed the following Orders: (I) Order dated 5.10.2017 in Petition No.211/MP/2011: *Steel Authority of India Limited Vs. Western Regional Load Despatch Centre* decided vide Order dated 5.10.2017; (II) Order dated 30.3.2017 in Petition No.291/MP/2015: *Transmission Corporation of Andhra Pradesh Ltd. & Ors. v. Southern Region Load Despatch Centre & Anr.* decided vide Order dated 30.3.2017; and (III) Order dated 9.3.2018 in Petition No. 20/MP/2017: *Kanti Bijlee Utpadan Nigam Limited v. Central Transmission Utility & Ors.* decided vide Order dated 9.3.2018; by way of the above Orders, the CERC has held that the status of *"deemed LTA"* is not applicable to a CSGS beneficiary who is an embedded customer of a State, and is drawing its share of power by using the State network only and, as such, no ISTS charges are to be leviable on it; each of the above Orders have been made prospective in their application, and the CERC has further directed its staff *"to examine the issue and propose amendment to the Sharing Regulations for clarity"*; in this manner, by exercise of the regulatory powers through judicial Orders, the CERC has prescribed for the exclusion of STU lines from the computation of ISTS transmission charges and losses allocations, while carrying a State's share of power from a CSGS; none of the parties in the above mentioned Orders, have challenged the said Orders and have accepted the dispensation therein; during the proceedings, the Appellants have relied upon a compilation of Judgments to support their contention of retrospective applicability of the impugned Order; however, the said Judgments are in respect of tariff and are therefore inapplicable to the present case; and, in view of the submissions made hereinabove and more particularly in the Reply filed to the present Appeal, there is no infirmity in the impugned Order of the CERC so as to warrant interreference from this Tribunal.

94. On the other hand, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Orders passed in the case of Andhra Pradesh Limited (Order dated 30.03.2017 in Petition 291/MP/2015), NTPC Sail Power Company Limited (Order dated 05.10.2017 in Petition 211/MP/2011), and Kanti Bijlee Utpadan Nigam Limited (09.03.2018 in Petition 20/MP/2017) have no bearing on whether the STU Line qualifies to be an ISTS within the meaning of Section 2(36) of the Electricity Act, the Connectivity Regulations and the Sharing Regulations (including the amendments); there cannot be any valid objection to grant relief to the Appellant on the ground that the claim relates to the past period; in any event, tariff is a continuous process and can be altered/modified on account of subsequent events; this is the consistent manner in which any past dues are adjusted when the same is found to be due and payable to an entity; similarly, even when there is an issue of refund, the same methodology should be followed; and reliance in this regard is placed on (a) **M.P. Power Management Co. Ltd v. CERC & Ors.** (Order of this Tribunal in Appeal No. 232 of 2013 dated 01.07.2014); (b) **Chhattisgarh State Power distribution Co. Ltd v. Chhattisgarh Biomass Energy Developers Association & Ors (**Order of this Tribunal in Appeal No. 164 of 2010 dated 08.02.2011); (c) **Madhya Pradesh Power Transmission Co. Ltd. v. Power Grid Corporation of India Limited & Ors.** (Order of CERC in Petition No. 2/RP/2018 dated 16.07.2018); (d) **Rajasthan Rajya Vidyut Prasaran Nigam Limited v. Power Grid Corporation of India Limited & Ors** (Order of CERC in Petition No. 47/RP/2017 dated 18.07.2018); (e) **NHPC Limited v. West Bengal State Electricity Distribution Co. Ltd. & Ors.**(Order of CERC in Petition No. 05/MP/2012 dated 05.12.2012); and, in **Kerela HT and Extra HT Industrial Electricity Consumers Association v Kerela Electricity Regulatory Commission and Anr 2013 ELR (APTEL) 988,** it has been clarified that past dues or refund

thereof shall be borne by the consumers since they were the beneficiaries of the previous tariff years.

A. ANALYSIS:

95. Since reliance is placed by the CERC, in the impugned order dated 30.07.2022, on its earlier orders in **Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) vs. Southern Region Load Despatch Centre** (Order in Petition No. 291/MP/2015 dated 30.03.2017), **Steel Authority of India Limited vs. Western Regional Load Despatch Centre (WRLDC)** (Order in Petition No. 211/MP/2011 dated 05.10.2017) and **Kanti Bijlee Utpadan Nigam Limited vs. Central Transmission Utility** (Order in Petition no. 20/MP/2017 dated 09.03.2018), it is useful to note the contents of all the aforesaid three Orders.

B. Order of the CERC in "Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) vs. Southern Region Load Despatch Centre" (Order in Petition No. 291/MP/2015 dated 30.03.2017).

96. The order passed by the CERC, in Petition No. 291/MP/2015 dated 30.03.2017, was in a Miscellaneous Petition filed by the Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) & Others seeking exemption from payment of PoC charges and losses in respect of power flowing from Simhadri STPS Stage-I to the State of Andhra Pradesh in the Southern Region under the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, and the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010.

97. The CERC framed two issues: (1) who shall exercise control area jurisdiction over Simhadri STPS Stage-I of NTPC, and (2) whether PoC charges and losses shall be applicable on Andhra Pradesh for scheduling its share of power from Simhadri STPS Stage-I generating station. On issue

No. 1, the CERC observed that the Simhadri STPS Stage-I was connected to the STU system of Andhra Pradesh, and to the Simhadri STPS Stage-II, through bus coupler, and Simhadri STPS stage-II was connected to ISTS; Andhra Pradesh was availing its share of power from Simhadri STPS Stage-I through its own system, and injection and drawl of power from Simhadri STPS Stage-I takes place at the same point; ISTS system is not being used to wheel power of Simhadri STPS Stage-I to Andhra Pradesh, and no ISTS losses are being caused because of wheeling of this power; since the injection point and drawal point for evacuation of power to Andhra Pradesh are the same, there cannot be losses and therefore, for computation of drawal schedule of Andhra Pradesh from Simhadri STPS Stage-I, PoC injection losses and drawal losses shall not be applied; ISTS transmission charges shall not be leviable on Andhra Pradesh for drawal of its share from Simhadri STPS Stage-I as ISTS is not used for transmission of power; APTRANSCO had approached the Commission for determination of transmission charges for the transmission lines crossing from Andhra Pradesh to Telangana; these lines could be included in the PoC after the tariff was determined by the Commission; till that time, the transmission lines should not be covered in the PoC, and Telangana should not be levied transmission charges towards drawal of its share from Simhadri STPS Stage-I; however, since the injection and drawal points of Telangana were different, it should be liable to pay the PoC transmission losses; and, in case of any difficulty in implementation of the directions issued in the order, SRPC should submit a report to the Commission within 6 months of issue of the order. The parties were granted liberty thereafter to approach the Commission.

98. The aforesaid Order, in Petition No. 291/MP/2015 dated 30.03.2017, was passed in a Miscellaneous Petition filed by the Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) & Others seeking

exemption from payment of PoC charges and losses in respect of power flowing from Simhadri STPS Stage-I to the State of Andhra Pradesh. The said order, passed in adjudication of the claims made by APTRANSCO, is not an order passed in exercise of the regulatory power conferred on the CERC.

99. As noted hereinabove, in the afore-said Order, the CERC held that, since the ISTS system was not being used to wheel power of Simhadri STPS Stage-I to Andhra Pradesh, no ISTS losses were being caused because of wheeling; and, since the injection point and drawal point for evacuation of power to Andhra Pradesh were the same, there could not be losses. On these findings, the CERC held that PoC injection losses and drawal losses shall not be applied for computation of the drawal schedule of Andhra Pradesh from Simhadri STPS Stage-I, and ISTS transmission charges shall not be leviable on Andhra Pradesh for drawal of its share from Simhadri STPS Stage-I as ISTS was not used for transmission of power.

100. The said order does not disclose any regulatory regime in existence which necessitated the CERC to exercise its regulatory power to lay down the law afresh to apply thereafter. The said Order does not expressly state that the said order would apply only prospectively.

C. Order of the CERC, in "Steel Authority of India Limited vs. Western Regional Load Despatch Centre (WRLDC)" (Order in Petition No. 211/MP/2011 dated 05.10.2017).

101. Petition No. 211/MP/2011 dated 05.10.2017 was filed by Steel Authority of India Limited (SAIL) challenging the action of the Western Regional Load Dispatch Centre (WRLDC) calling upon SAIL to bear the transmission losses on the dedicated transmission lines used by Bhilai Steel Plant of SAIL (SAIL-BSP) for getting electricity from the generating station/units of NTPC SAIL Power Company Limited (NSPCL). The CERC

had, in its earlier order dated 20.11.2013, held that SAIL was liable to share the transmission losses. Aggrieved thereby, SAIL had filed Appeal No. 41 of 2014 before this Tribunal and, by its judgement dated 22.04.2015, this Tribunal had remanded the matter to the CERC to consider the submission of SAIL with regard to its arrangement for contract demand from Chhatisgarh State Power Distribution Company Limited (CSPDCL) to meet the exigencies arising out of tripping of the dedicated transmission lines and pass appropriate orders.

102. The CERC's order, in Petition No. 211/MP/2011 dated 05.10.2017, was passed in compliance with the remand order of this Tribunal dated 22.04.2015. In the remand proceedings, the following issues were framed by the CERC: (1) whether the dedicated transmission lines between NSPCL and SAIL-BSP lose the character of dedicated transmission lines and acquire the character of ISTS in the light of the correct power flow diagram submitted by WRLDC; (2) whether transmission losses of the dedicated transmission lines from NSPCL, which is an ISGS and regional entity for supply of power to a captive user, to SAIL-BSP are required to be included in the PoC mechanism in terms of the Sharing Regulations; (3) whether the case of SAIL-BSP has larger implications on other ISGS / Regional Entities in the matter of calculation of transmission charges and losses under PoC mechanism; (4) whether dedication of a particular unit of NSPCL to SAIL-BSP and/or reversion of control area jurisdiction from RLDC to SLDC is a possible solution to the problem; and (5) the relief to be granted.

103. On issue No. 1, the CERC observed that it could not be said that SAIL-BSP used the Inter State Transmission System of either the PGCIL or any other licensee or for that matter even the Intra-State Transmission System of CSPTCL or any other distribution system for supply of power from NSPCL to SAIL-BSP; as regards power supply by CSPDCL, the same was pursuant to the contract demand maintained by SAIL-BSP, namely, as HT consumer;

WRLDC did not dispute that till date there had been no claim for transmission charges against SAIL-BSP for any use of ISTS; the claim made by WRLDC was only for adjustment for transmission losses, while there had been no claim for transmission charges; the HT consumer was not concerned with either the Inter State Transmission System or the Intra State Transmission System through which power is conveyed up to Kedarmara sub-station from where CSPDCL, as a distribution licensee, supplies electricity to SAIL-BSP; and there was also no supply of power procured by SAIL-BSP from NSPCL to any third party, including CSPDCL at the Kedarmara sub-station of CSPTCL.

104. On issue No. 2, the CERC observed that both arrangements, namely drawal of power from NSPCL through the dedicated transmission lines and drawal of contract demand from CSPDCL, were independent of each other; drawal of its share of power by SAIL-BSP from NSPCL through the dedicated transmission lines for captive consumption could neither be considered as a long term contract qualifying as long term access from ISGS nor drawal of power by an embedded entity from CSPDCL; dedicated transmission lines between NSPCL and SAIL-BSP did not qualify as ISTS in terms of Section 2(36)(ii) of the Electricity Act; the injection and drawal losses, in respect of the power supplied by NSPCL to SAIL-BSP for captive consumption, could not be included for calculating the transmission losses; and, since the ISTS was not utilized for drawal of power by SAIL-BSP from NSPCL, no transmission losses could be levied on SAIL-BSP.

105. On issue No. 3, the CERC observed that the present case had implication to similarly placed entities like SAIL-BSP, and the States which draw power from the bus-bar of an ISGS through the transmission systems of STU without utilizing the ISTS; and the staff was directed to examine the issue and propose amendment to the Sharing Regulations for clarity.

106. On issue No. 4, the CERC observed that, in view of the decision on issue No. (1) and the direction to amend the Sharing Regulations, there was no need to consider the option of dedicating a unit for captive consumption or change of control area jurisdiction of NSPCL.

107. On issue No. 5, the CERC observed that SAIL-BSP shall not be liable to pay the transmission losses on the conveyance of power from NSPCL to SAIL-BSP for captive consumption; however, this would be subject to two exceptions, firstly, if SAIL-BSP sells any power scheduled from NSPCL to any other entity, transmission losses would be applied on such power, and secondly, in the event of outage of all the four dedicated lines between NSPCL and SAIL-BSP; if it was proved that SAIL-BSP had drawn its share of power from NSPCL from Khedamnara (Bhilai) Sub-Station, then, in such cases, PoC losses shall be applicable as per the extant regulations; and, therefore, the decision in this order shall be applicable prospectively from the date of issue of the order.

108. As noted hereinabove, the CERC passed the order in Petition No. 211/MP/2011 dated 05.10.2017 pursuant to the order of remand order passed by this Tribunal in Appeal No. 41 of 2014 dated 22.04.2015. Petition No. 211/MP/2011 was filed by Steel Authority of India Limited (SAIL) challenging the action of the Western Regional Load Dispatch Centre (WRLDC) calling upon SAIL to bear the transmission losses on the dedicated transmission lines used by Bhilai Steel Plant of SAIL (SAIL-BSP) for getting electricity from the generating station/units of NTPC SAIL Power Company Limited (NSPCL). The order dated 05.10.2017 is an adjudicatory order and not a regulatory order. Even otherwise, the said order was passed after the appellant herein had first invoked the jurisdiction of the CERC on 02.06.2017. It is in this order that the CERC had directed its staff to examine the issue and propose amendment to the Sharing Regulations for clarity; and the said order was made applicable prospectively from the date of its issue

ie 05.10.2017. The question whether applying this order prospectively, disables the appellant from questioning the impugned order dated 30.07.2022, whereby prospective application was given to the earlier order dated 04.05.2018, shall be examined later in this order.

D. Order of CERC, in "Kanti Bijlee Utpadan Nigam Limited vs. Central Transmission Utility" (Order in Petition no. 20/MP/2017 dated 09.03.2018)

109. Petition No. 20/MP/2017 was filed by Kanti Bijlee Utpadan Nigam Limited seeking certain directions with regard to signing of the LTA Agreement by the beneficiaries of the generating station MGTS Stage II with the CTU, issue of jurisdiction for scheduling of the power from the generating station, and non-applicability of PoC charges for the power scheduled to Bihar.

110. In its order dated 09.03.2018 the CERC framed the following issues: (1) who should sign the Long Term Access Agreement with CTU in the present case; (2) whether PGCIL is entitled to cancel the LTAs for the failure of the beneficiaries to enter into LTA Agreements; (3) who should carry out scheduling and dispatch of MTPS Stage II, (WRLDC or SLDC) as per CERC (Indian Electricity Grid Code) Regulations, 2010; and (4) what should be the treatment of transmission charges and losses in case Generator is connected to both STU & ISTS system.

111. On issue No. 1, the CERC observed that the basis for the application and grant of LTA was the PPAs signed by the beneficiaries with the Petitioner, and the basis of the PPAs were the allocation by the Government of India, Ministry of Power; unless and until the allocation of power in favour of the particular beneficiaries was rescinded by fhe Ministry of Power, the PPAs shall subsist and the concerned beneficiaries shall be liable to comply with the provisions of the PPAs including their obligations to sign the LTA Agreement, and the liability to pay the transmission charges; the

beneficiaries do not have any option to unilaterally abandon the PPAs and their obligations thereunder; in the present case, the Government of India, Ministry of Power had allocated the power from the generation station to the beneficiaries of Eastern Region; the beneficiaries had entered into the PPAs with the Petitioner which authorized the Petitioner to seek LTA on their behalf; after grant of LTA, the beneficiaries were under contractual obligations to sign the LTA Agreement directly with CTU; the beneficiaries of the MSTS Stage II were directed to sign the LTA Agreements with PGCIL within one week from the date of issue of the order; on their failure to do so, PGCIL was directed to operationalize the LTA qua the said beneficiary who would be liable to bear the transmission charges in terms of its contractual obligations in the PPA with the petitioner; in case, the share of any beneficiary had been re-allocated by the Government of India, Ministry of Power, then the concerned beneficiary should be relieved from its obligations under the LTA Agreement from the date of re-allocation coming into effect; the new beneficiaries should enter into LTA Agreement within a reasonable time; and if the said beneficiary fails to enter into LTA Agreement by the stipulated date, PGCIL shall operationalize the LTA and the said beneficiary shall be required to bear the transmission charges proportionate to its share in the capacity of the generating station.

112. On issue No. 2, the CERC observed that, as per the PPA between the Petitioner and JVNL, the Petitioner was required to deliver the power at the delivery point which was the bus bar of the generating station; it was the responsibility of JVNL to off-take power from the bus bar; JVNL had already signed the LTA Agreement based on the LTA granted by the CTU to the Petitioner; in so far as JVNL was concerned, the interest of PGCIL was secured; it was the responsibility of PGCIL to operationalize the LTA for JVNL since the LTA Agreement was already in place; since sale of power to the beneficiaries was taking place at the bus bar of the generating station,

the generating station was within its right to give Declared Capacity on daily basis, which shall be taken into account in deciding the fixed charge liability of the generating station in accordance with the Commission`s Tariff Regulations; on account of non-operationalisation of LTA by PGCIL, JBVNL was receiving the bills for capacity charges without scheduling of power; and PGCIL was directed to immediately operationalize the LTA of JVNL to enable it to draw its allocated power from MTPS-II.

113. On issue No. 3, the CERC observed that the case of MTPS-II squarely fell under Regulation 6.4.3 (a) of the Grid Code; there was no operational expediency which necessitates scheduling of power from the generating station by Bihar SLDC; since a number of stations, apart from Bihar, were scheduling power from MTPS-II which was a Central Generating Station, the control area jurisdiction should vest in the ERLDC; and, accordingly, the control area jurisdiction of MTPS-II should be transferred to ERLDC with effect from 01.04.2018.

114. On issue No. 4, the CERC observed that, as per its Order in Lanco Anpara Power Limited, Hyderabad vs. Uttar Pradesh Power Transmission Corporation Limited, Lucknow & Others (Petition No. 189/MP/2012 dated 08.06.2013), the state charges were not payable on the conveyance of power through ISTS network; ERPC had confirmed that Bihar system was sufficient to evacuate its share of power from MTPS-II; PoC charges and losses should be applicable on Bihar for drawing its MW share from MTPS-II, and STU charges and losses should not be applicable on other beneficiaries of the Eastern Region for drawal of their MW shares from MTPS-II; and, while computing schedules of Bihar from MTPS Stage-II, ISTS Charges and losses should not be applicable on schedules of Bihar.

115. The CERC concluded holding that, in accordance with the Detailed Procedure, the application for grant of connectivity to ISTS was required to

be submitted as per Format CON-2; therefore, CTU had the information about installed capacity of the generating station, and capacity (MW) for which connectivity was sought from ISTS; in case, a generator plans to get connected to both ISTS and State network, while granting connectivity CTU should ensure that adequate State system was available or should be made available; in such cases, scheduling may be either with RLDC or SLDC as per applicable provisions of the Grid Code; in case, RLDC carries out scheduling, ISTS charges and losses should not be applicable to schedules on State network; and Deviation charges shall be considered pro-rata on the schedules on the State network and ISTS network. .

116. This order of the CERC dated 09.03.2018 is also an order passed by it in the exercise of its adjudicatory powers, and not its regulatory powers. It is relevant to note that the CERC has, in the said order, observed that in case a generator plans to get connected to both ISTS and State network, and in case, RLDC carries out scheduling, ISTS charges and losses should not be applicable to schedules on the State network.

117. It is relevant to note that, though the CERC had referred to all the three orders passed by it earlier in Petition No. 291/MP/2015 dated 30.03.2017, Petition No. 211/MP/2011 dated 05.10.2017, and Petition no. 20/MP/2017 dated 09.03.2018, it had relied on the principles laid down in Petition No.20/MP/2017 dated 09.03.2018, to hold that, since IGSTPS was connected to both CTU network and STU network and its scheduling was being carried out by NRLDC, the ISTS charges and losses shall not be applicable for evacuation of the share of power of Haryana Utilities through 400 kV D/C IGSPTS-Daulatabad Transmission Line. It is also relevant to note that this order was also passed more than nine months after the appellant had first invoked the jurisdiction of the CERC on 02.06.2017, and no specific direction was issued by the CERC giving this order dated 09.03.2018 prospective application.

E. JUDGEMENTS RELIED ON BEHALF OF APPELLANT:

118. While the appellant has relied on judgements of this Tribunal and on orders passed by the Commission, it would not be appropriate for us to refer to the orders passed by the Commission, as such orders passed by the original authority cannot be said even to have pursuasive value in proceedings before the appellate authority under the Electricity Act. We shall, therefore, only take note of the judgements of this Tribunal relied on behalf of the appellant.

119. In **M.P. Power Management Co. Ltd v. CERC (Order in Appeal No. 232 of 2013 Dated: 1st July, 2014),** this Tribunal held that it is always open to the Central Commission or any State Commission to make an amendment or an alteration to the tariff if any occasion arises therefor, because making of tariff is a continuous process and this power can be suo-motu exercised by the Commission on its own motion also; since the tariff determination involves some period of time, and thus there is some gap from the effective date of tariff and the date of implementation of the revised tariff, the tariff is bound to be revised from time to time having an impact on the recovery of money relating to past period, and such revision of tariff can be on account of subsequent developments including truing up and implementation of Court order.

120. In **Chhatisgarh State Power Distribution Co.Ltd. v. Chhatisgarh Biomass Energy Developers Association (Appeal No. 164 of 2010 Dated- 8th February, 2011),** this Tribunal, relying on the judgement of the Supreme Court, in **Kannodia Chemicals & Anr. V/s State of UP & Ors. Reported in (1992) 2 SCC 124,** held that, in a batch of appeals namely SEIL India, New Delhi V/s PSERC reported in 2007 (APTEL) 931, it had considered the question of retrospectivity; in this decision also the tariff order. though made some time after commencement of the financial year. was made effective from 1.4.2005, and this Tribunal had upheld the order of

the Commission; it had observed that, in the event of a tariff order being delayed, it could be made effective from the date the tariff order commences or by annualisation of the tariff, so that the deficit is made good for the remaining part of the year or it can be recovered after truing up exercise by loading it in the tariff of the next year; thus law empowered the Commission to specify the date from which the tariff was to commence or the date when it will expire; and it was neither Section 62 nor Section 64 that constituted a bar to retrospectivity of a tariff order.

121. This Tribunal further observed that the Electricity Act 2003 in all its provisions have been made effective by the Central Government through a gazette notification from 10th June, 2003; this enactment speaks of prospectivity; in the same wave, the concerned Regulations framed by the authority which was a creature of the Statute was also not retrospective; the Regulation was a current law that mandated how to govern the current activities; when the intention of the legislator or of the Regulator was to give effect to the tariff order from the date of the commencement of a financial year then, by necessary implication, the so called retrospectivity was permissible; the mere fact that a change was operative with regard to the price of fuel last determined does not mean that it is objectionably retrospective; making tariff order retrospective from the date of the commencement of the financial year did not amount to inflicting legal injury to some other person because whatever was allowed in the tariff was necessarily passed through; and it could not cause legal injury if the claim of the Appellant was legally justifiable.

122. As the said judgements are sought to be distinguished, by the learned Counsel for CTUIL on the ground that they relate to tariff orders, which is not the case in the present appeal, we shall proceed on the basis that these judgements have no application.

XII. PROSPECTIVE APPLICATION OF ORDERS: ITS SCOPE:

123. Sri Sitesh Mukherjee, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that, in ***Ajmer Vidyut Vitaran Limited (AVVNL) vs. Hindustan Zinc Limited & Ors.***, **(2022) 6 SCC 282,** the Supreme Court noticed that it was not the case of the Appellant that the conditions of the open access agreement and, particularly, clauses 29(1)(e) and 29(1)(f) of the agreement were either in contra-distinction to, or in contravention of, the 2004 Regulations, and the tariff to be charged for inadvertent drawal from temporary supply rate was equally permissible under the scheme of the 2004 Regulations, and the agreement was accordingly executed between the parties in compliance thereof; and, therefore, it was held that the substantial change/modification which had been given effect to by RERC under its order dated 15.09.2007 under Clause 29(1)(f), effecting the tariff for inadvertent drawal from temporary supply rate to regular supply rate was indeed a substantial change in the condition of the agreement and was prejudicial to the interest of the parties (respondents herein) and could not be read to apply retrospectively from the date of agreement.

124. Learned Counsel for the 2nd Respondent would also rely on ***Tamil Nadu Spinning Mills Association vs. Tamil Nadu Electricity Board***, **2011 SCC OnLine APTEL 4**, to submit that this case pertained to imposition of "*Excess demand & energy charges*" by the Tamil Nadu Electricity Board (**TNEB**) on High Tension Industrial & Commercial consumers for drawl of electricity during peak hours; it was finally, on 04.05.2010, in a petition filed by HT Industrial & HT Commercial consumers (i.e., current Appellants), that the TNERC gave clarity on who would be levied with penalty; however, while clarifying, TNERC held that penalties would apply from 28.11.2008 i.e., retrospectively; and one of the arguments, upheld by this Tribunal is that, when complete clarity on penalty came only on 04.05.2010, TNERC could

not have authorized levy of penalty even though it amended its supply code in the meantime giving such amendment retrospective effect.

125. Mrs. Suparna Srivastava, Learned Counsel for the CTUIL, would submit that, under the impugned Order, the CERC has reiterated its earlier finding of prospective application of the dispensation permitted for the Appellants in exercise of its regulatory powers; the same is in consonance with the settled legal principles that, where a statute affects substantive rights, the same is presumed to be prospective in its operation unless made retrospective either expressly or by necessary intendment; the CERC has not found any reason, and rightly so, to allow the Appellants' request for quashing of the transmission charges bills retrospectively considering that the same have been issued under the then prevailing regulatory regime; Respondent No.3 reiterates that there is no infirmity in the impugned Order; it cannot be disputed that billing should always be in accordance with the prevailing Regulations, and where the billing has been carried out as per the Regulations as has been done in the present case (as opposed to a billing which is contrary thereto and is therefore illegal and liable to be set aside), such a billing cannot be set aside retrospectively, lest it may run contrary to the then prevailing Regulations, which is impermissible in law; further, pursuant to the passing of the above-mentioned Orders by the CERC, an amendment has been carried out under the Sharing Regulations, 2020 under Regulation 13(11); thus, it is only in the year 2020 that the regulatory regime has changed and, up till then, the bills have been raised by Respondent No.3 upon the Appellants in accordance with the provisions of the Sharing Regulations, 2010 read with the Orders of the CERC; and, as such, the prospectivity with regard to the Appellants' billing may be upheld by this Tribunal.

126. On the other hand, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the

Orders passed by the CERC dated 04.05.2018 and 30.07.2022, in exercise of the regulatory powers under Section 79(1)(c) and (d) of the Electricity Act, cannot run contrary to the legal position; in the face of the Act and the Regulations, and after the CERC itself had held that the subject line is an STU line, there cannot be any direction contrary to the above; admittedly, there is no regulation, notified by the Central Commission under Section 178 of the Act, to give prospective effect; the order of the CERC cannot, therefore, be construed to be a statute, particularly when it merely clarifies the existing position in terms of the Electricity Act, the Connectivity Regulations and the Sharing Regulations; even otherwise, it is settled principle that declaratory or clarificatory statutes operate retrospectively **(Ref: Commissioner of Income Tax v. Vatika Ownership Private Limited; (2015) 1 SCC 1**); the doctrine of prospective overruling can only be applied by the Supreme Court; in respect of all other Courts/Tribunals, including the CERC, the decision has to relate back to the cause of action i.e. namely from July, 2011 in the present case, when POSOCO/CTU started raising bills on the Appellants; and the decisions relied on by CTU during arguments are clearly distinguishable and have no application to the present case.

127. Learned Senior Counsel would further submit that POSOCO/CTU are also wrong in alleging that there will be re-opening of settled issues; the arbitrary action, by POSOCO/CTU till 04.05.2018, cannot be a settled issue when the decision of the CERC on Issue Nos. 1 and 2 are in favour of the Appellant; the Appellant cannot be denied reliefs when the wrongful levy was on account of a mis-reading of the Sharing Regulations and the Connectivity Regulations by POSOCO/CTU, and not for any act of omission/commission attributable to the Appellant; the inconvenience to POSOCO/CTU, for the mistake perpetuated by them for a period of 8 years to the financial detriment of the Appellant, cannot be a valid

consideration to deny the Appellant their legitimate relief; and it is settled principle that a party cannot be left remediless, particularly when public bodies have erroneously collected amounts. Reliance is placed in this regard on (a) **Shiv Shankar Dal Mills & Ors. v. State of Haryana & Ors. – (1980) 2 SCC 437;** (b) **Sales Tax Officer, Banaras & Ors. v. Kanhaiya Lal Makund Lal Saraf & Ors. – 1959 SCR 1350; and** (c) **Chandi Prasad Uniyal & Ors. v. State of Uttarakhand & Ors. – (2012) 8 SCC 417.**

128. Before examining the rival submissions under this head, we shall take note of the judgements relied on by Learned Senior Counsel on both sides.

A. JUDGEMENTS RELIED ON BEHALF OF POSOCO:

129. In **Ajmer Vidyut Vitaran Limited (AVVNL) vs. Hindustan Zinc Limited & Ors.**, **(2022) 6 SCC 282,** the question which arose for consideration- was whether the Order of the Commission was a mere interpretation/clarification of the standard format agreement, or whether the order substantially changed the position resulting in the terms of the format having prospective effect for raising future bills.

130. It is in this context that the Supreme Court held that the substantial change/modification which had been given effect to by the Commission under its Order, under Clause 29(1)(f) effecting the tariff for inadvertent drawal from temporary supply rate to regular supply rate, was indeed a substantial change in the condition of the agreement, and prejudicial to the interest of the parties (respondents herein); and it could not be read to apply retrospectively from the date of the agreement executed between the parties; although, a straitjacket principle could not be laid as to what was to be considered a clarification or what may tantamount to a substantial change or modification but if the guiding principles from Section 152 of the Code of Civil Procedure, 1908 were taken note of, in a way where there is an

unintentional omission or mistake or an arithmetic or typographical error, if any, while drafting the agreement that may have been permissible to give an effect at a later stage from its inception but, at the same time, where there is a substantial amendment/alteration in the conditions of the agreement, if taken place with its inception, may certainly cause prejudice to the rights of the parties inter se financially or otherwise; as they were dealing with the commercial agreement, if any modification, that too substantial is being permitted to be altered under the agreement executed between the parties at a later stage with retrospective effect even by the statutory authority in the garb of correction or mistake or any typographical error, if any, that may, if prejudicial to the interest of the parties inter se in law be neither permissible nor advisable to give effect anterior to the date of modification/altercation in the terms and conditions of the agreement.

131. In ***Tamil Nadu Spinning Mills Association vs. Tamil Nadu Electricity Board***, **2011 SCC OnLine APTEL 4,** this Tribunal held that, while dealing with this issue, they had to bear in mind the following three principles: (i) the State Commission is a delegate under The Electricity Act, 2003; (ii) a delegate does not have power to issue any order which has retrospective effect unless specifically authorized under the enactment; (iii) in the present case, none of the provisions contained in the Electricity Act, 2003, dealing with the powers, duties and functions of the authorized State Commission, permitted it to pass order with retrospective effect; on the day when the order was passed in MP No. 42/2008, i.e. on 28.11.2008 there was no power vested with the State Commission to levy excess demand charges and excess energy charges since the Electricity Supply Code had not been amended; this power was vested only on 15.12.2008 when the Electricity Supply Code was amended; the excess demand charges and excess energy charges for evening peak restriction were clarified only in the impugned order dated 4.5.2010; in these circumstances, the order amending

the Electricity Supply Code retrospectively from 28.11.2008 was invalid in so far as it was applied retrospectively; pursuant to the said order dated 28.11.2008, the Electricity Supply Code had been amended only on 15.12.2008; further the excess demand charges and excess energy charges for evening peak restrictions was to be given effect to only from 4.5.2010 wherein it had been clearly stated that such charges were leviable in addition to restriction of 5/10% for 48 hours for exceeding the evening peak quota; accordingly, the order passed by the State Commission on 28.11.2008 and the amendment order dated 15.12.2008 would come into effect only from 15.12.2008 and the excess demand and excess energy charges for evening peak hours in excess of evening peak quota are given effect to only from 4.5.2010 bearing in mind that the State Commission had to pay the excess demand charges and excess energy charges for evening peak restriction prospectively, i.e. from 4.5.2010 and not retrospectively from 28.11.2008 as ordered by the State Commission; and, accordingly, the order regarding the amendment giving the powers to the State Commission would come into effect prospectively only from 15.12.2008.

132. The law laid down by the Supreme Court, in **Ajmer Vidyut Vitaran Limited (AVVNL),** is that a substantial amendment/alteration in the conditions of the agreement, if applied retrospectively, would cause prejudice to the rights of the parties financially; and making substantial modifications to commercial agreements, executed between the parties, with retrospective effect is impermissible. In the present case, collection of POC charges from the appellant was not in terms of any statutory regulation or a regulatory order passed by the CERC, but on an erroneous understanding of the applicable law by POSOCO/CTUIL. In the absence of any statutory regulation or a regulatory order then in existence, the question of its modification by the impugned order, necessitating such a modification being

given prospective effect, does not arise. Reliance placed on **Ajmer Vidyut Vitaran Limited (AVVNL),** is therefore of no avail.

133. In ***Tamil Nadu Spinning Mills Association***, this Tribunal held that the the Electricity Act, 2003 did not permit the State Commission, to pass order with retrospective effect; the Electricity Supply Code had been amended only on 15.12.2008; and the order passed by the State Commission on 28.11.2008 and the amendment order dated 15.12.2008 would come into effect only from 15.12.2008 and not retrospectively. The law declared by this Tribunal, in the aforesaid judgement, that the statutory regulations cannot be applied retrospectively, has no application to the present case as no statutory regulation governed the field when the CERC passed the order dated 04.05.2018.

B. JUDGEMENTS RELIED ON BY CERC:

134. In **Hitendernath Vishnu Thakur Vs the State of Maharashtra: (1994) 4 SSC 602,** on which reliance has been placed by the CERC in the impugned order dated 30.07.2022, the Supreme Court held that the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows: (*i*) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits; (*ii*) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature; (*iii*) Every litigant has a vested right in substantive law but no such right exists in procedural law; (*iv*) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new

disabilities or obligations or to impose new duties in respect of transactions already accomplished; and (*v*) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

135. In the present case, we are not concerned with an Amending Act and its retrospective operation, the principles relating to which were detailed by the Supreme Court in **Hitendernath Vishnu Thakur.** Reliance placed by the CERC on the said judgement, in giving its earlier order dated 04.05.2018 prospective application, is wholly misplaced.

C. JUDGEMENTS RELIED ON BEHALF OF APPELLANT:

136. In ***Shiv Shankar Dal Mills v. State of Haryana*****, (1980) 2 SCC 437,** the appellants and writ petitioners had paid market fees at the increased rate of 3 per cent (raised from the original 2 per cent) under Haryana Act 22 of 1977. Many dealers challenged the levies as unconstitutional, and the Supreme Court in ***Kewal Kishan Puri* v. *State of Punjab*****, (1980) 1 SCC 416** had ruled that the excess of 1 per cent over the original rate of 2 per cent was ultra vires. This cast a consequential liability on the Market Committees to refund the illegal portion. The petitioners who had, under mistake, paid larger sums which, after the decision of the Supreme Court holding the levy illegal, had become refundable, demanded a direction to that effect to the Market Committees concerned.

137. It is in this context that the Supreme Court observed that the question what the period of limitation was and whether Article 226 would apply were moot; where public bodies, under colour of public laws, recovered people's moneys, later discovered to be erroneous levies, the dharma of the situation admitted of no equivocation; there was no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to

whom it belonged; nor was it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy", since the root principle of law married to justice, is *ubi jus ibi remedium*; Long ago Dicey wrote: "The law *ubi jus ibi remedium*, becomes from this point of view something more important than a mere tautological proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually formed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or for averting definite wrongs, than upon any declarations of the Rights of Man or Englishmen.... The Constitution of the United States and the Constitutions of the separate States are embodied in written or printed documents, and contain declaration of rights. But the statesmen of America have shown an unrivalled skill in providing means for giving legal security to the rights declared by American Constitutions. The rule of law is as marked a feature of the United States as of England."

138. In **Sales Tax Officer, Banaras & Ors. v. Kanhaiya Lal Makund Lal Saraf & Ors. – 1959 SCR 1350,** the Supreme Court observed that there was no conflict between the provisions of Section 72 on the one hand and Sections 21 and 22 of the Indian Contract Act on the other; the true principle enunciated was that if one party under a mistake, whether of fact or law, pays to another party money which was not due by contract or otherwise that money must be repaid; the mistake lay in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitled the party paying the money to recover it back from the party receiving the same; the respondent committed the mistake in thinking that the monies paid were due when in fact they were not due and that mistake on being established entitled it to recover the same back from the State under Section 72 of the Indian Contract Act; if it is once established that the payment, even

though it be of a tax, had been made by the party labouring under a mistake of law, the party was entitled to recover the same and the party receiving the same was bound to repay or return it; no distinction could, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act; merely because the State of U.P. had not retained the monies paid by the respondent, but had spent them away in the ordinary course of the business of the State, would not make any difference to the position; and, under the plain terms of Section 72 of the Indian Contract Act, the respondent would be entitled to recover back the monies paid by it to the State of U.P. under mistake of law.

139. In **Chandi Prasad Uniyal v. State of Uttarakhand, (2012) 8 SCC 417,** the Supreme Court was concerned with the excess payment of public money which belonged neither to the officers who had effected over payment nor to the recipients; the question to be asked was whether excess money had been paid or not, may be due to a bona fide mistake; possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee; any amount paid/received without the authority of law could always be recovered barring few exceptions of extreme hardships but not as a matter of right; and, in such situations, law implied an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

140. In ***Shiv Shankar Dal Mills,*** the Supreme Court held that the question what the period of limitation was and whether Article 226 would apply were moot; and where public bodies, under colour of public law, recovered people's moneys, later discovered to be erroneous levies, there was no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belonged. This judgement also has no application in the light of the judgement of the Supreme Court, in **A.P. Power**

Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468, holding that the provisions of the Limitation Act are applicable to adjudicatory proceedings before the Commissions under the Electricity Act. This question shall be considered in greater detail later in this order.

141. In **Kanhaiya Lal Makund Lal Saraf**, the Supreme Court held that if payment, even though it be of a tax, had been made under a mistake of law, the party was entitled to recover the same and the party receiving the same was bound to repay or return it. The question whether recovery of dues, which are barred by limitation, is permissible did not arise for consideration in the said judgement.

142. In **Chandi Prasad Uniyal,** the Supreme Court held that amounts, paid/received without authority of law, could be recovered barring few exceptions of extreme hardships but not as a matter of right. Among the exceptions would include claims for recovery of amounts which are otherwise barred by limitation. The aforesaid judgements, relied on behalf of the appellant, are also of no avail.

D. DECLARATORY STATUTES ARE RETROSPECTIVE:

143. As noted hereinabove, the CERC, in its order dated 04.05.2018 relied on its earlier order in Petition No. 211/MP/2011 dated 05.10.2017 wherein it had directed its staff to examine the issue and propose amendment to the Sharing Regulations for clarity. Subsequently the Sharing Regulations 2010 was amended in year 2020, incorporating therein Regulation 13(11) which specifically provides that. where a generating station is connected to both ISTS and intra-State transmission system, only ISTS charges and losses shall be applicable on the quantum of Long Term Access and Medium Term Open Access corresponding to capacity connected to ISTS.

144. It is settled law that, under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such

statutory provisions are labelled as "declaratory statutes". The presumption against retrospective operation is not applicable to declaratory statutes. For modern purposes, a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. ***(CIT v. Vatika Township (P) Ltd.*, (2015) 1 SCC 1 : 2014 SCC OnLine SC 712; W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971); *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, para 29**); **Justice G.P. Singh [*Principles of Statutory Interpretation*, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012).**

145. As the afore-said amendment to the 2010 sharing regulations, in the year 2020, is to bring clarity, such a clarificatory amendment can be said to apply retrospectively from when the 2010 Regulations were made, in which case this amendment would apply to the present case requiring the bills raised on the appellant by POSOCO/CTUIL, from July 2011 to 04.05.2018, to be declared illegal. It is unnecessary for us to delve on this aspect any further, as the impugned order must be set aside on the ground that CERC lacks jurisdiction to apply its adjudicatory order dated 04.05.2018 prospectively.

E. PROSPECTIVE DECLARATION OF LAW:

146. In **Baburam v. C.C. Jacob, (1999) 3 SCC 362,** on which reliance is placed by the CERC in the impugned Order, the Supreme Court observed that prospective declaration of law is a devise innovated by the Supreme Court to avoid reopening of settled issues, and to prevent multiplicity of proceedings; it is also a devise adopted to avoid uncertainty and avoidable litigation; by the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated; this is done in the larger public interest; subordinate forums which are legally bound to apply the declaration of law made by the Supreme Court, are also duty-bound to apply such dictum to cases which would arise in future; and decisions opposed to the said principle, which have been taken prior to such declaration of law, cannot be interfered with on the basis of such declaration of law.

147. It is also well settled that Courts can make the law laid down by them prospective in operation to prevent unsettlement of the settled position, to prevent administrative chaos and to meet the ends of justice. **(ECIL v. B. Karunakar, (1993) 4 SCC 727).**

148. In **Golak Nath v.State of Punjab: AIR 1967 SC 1643,** the Supreme Court held that Articles 141 and 142 of the Constitution are couched in such wide and elastic terms as to enable the Supreme Court to formulate legal doctrines to meet the ends of justice; the only limitation therein is reason, restraint and injustice; these Articles are designedly made comprehensive to enable the Supreme Court to declare the law and to give such direction or pass such order as is necessary to do complete justice; in the circumstances to deny the power to the Supreme Court, to declare the operation of law prospectively, is to make ineffective a powerful instrument of justice placed in the hands of the highest judiciary of this land; the doctrine of prospective overruling can be invoked only in matters arising under the Constitution; it can be applied only by the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; and the scope of the retroactive operation of the law declared by the Supreme Court, superseding its earlier decisions, is left to its discretion to be moulded in accordance with the justice of the cause or matter before it. **(ECIL v. B. Karunakar, (1993) 4 SCC 727).**

149. It is settled principle, right from **Golak Nath v. State of Punjab: AIR 1967 SC 1643,** that prospective overruling is a part of the principles of the constitutional canon of interpretation. Though the ***Golak Nath*** *ratio* of unamendability of fundamental rights under Article 368 of the Constitution was overruled in **Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225,** the doctrine of prospective overruling was upheld and followed in several decisions. (**ECIL v. B. Karunakar, (1993) 4 SCC 727).**

150. Accepting the lead given in **Golak Nath v. State of Punjab: AIR 1967 SC 1643**, the Supreme Court has extended the doctrine of prospective overruling to the interpretation of ordinary statutes as well. (**ECIL v. B. Karunakar, (1993) 4 SCC 727).** The sum and substance of this innovative principle is that when the Supreme Court finds or lays down the correct law

in the process of which the prevalent understanding of the law undergoes a change, the Supreme Court, on considerations of justice and fair deal, restricts the operation of the new-found law to the future so that its impact does not fall on the past transactions. The doctrine recognises the discretion of the Supreme Court to prescribe the limits of retroactivity of the law declared by it. It is a great harmonizing principle equipping the Supreme Court with the power to mould the relief to meet the ends of justice. Justification for invoking this doctrine is found in Articles 141 and 142 of the Constitution. (**ECIL v. B. Karunakar, (1993) 4 SCC 727).**

151. The doctrine of prospective overruling is an exception to the normal principle of law, and can be resorted to by the Supreme Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (***Ashok Kumar Gupta*** **v.** ***State of U.P.*** **(1997) 5 SCC 201; Baburam v. C.C. Jacob [(1999) 3 SCC 362; M.A. Murthy v. State of Karnataka, (2003) 7 SCC 517).**

152. That an earlier decision is being prospectively overruled must be stated expressly. The power must be exercised in the clearest possible terms. **(P.V. George v. State of Kerala, (2007) 3 SCC 557)**. It is for the Supreme Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. **(M.A. Murthy v. State of Karnataka, (2003) 7 SCC 517; P.V. George v. State of Kerala, (2007) 3 SCC 557).**

153. The Supreme Court, in exercise of its jurisdiction under Article 32 or Article 142 of the Constitution of India, may declare a law to have a prospective effect. The power of overruling is vested only in the Supreme Court. **(P.V. George v. State of Kerala, (2007) 3 SCC 557),** by virtue of Article 142 of the Constitution, and it is not open to the High Court (or for that matter any other court or tribunal) to neutralize the effect of unconstitutional law by having resort to the principle of prospective overruling or analogous principles. **(Kailash Chand Sharma v. State of Rajasthan, (2002) 6 SCC 562).**

154. As the power to give its judgment prospective application, with a view to avoid reopening settled issue, is conferred only on the Supreme Court, and not on any other court/tribunal, the CERC lacks jurisdiction to give its adjudicatory order prospective application from the date on which it passed the order i.e. 04.05.2018. The fact that it had earlier given its order, in Petition No. 211/MP/2011 dated 05.10.2017, prospective application does not confer on it the power to pass a similar order in the present case, as the CERC lacks jurisdiction to do so. The impugned order of the CERC is liable to be set aside on this score.

XIII. LIMITATION:

155. Sri Sitesh Mukherjee, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that, in para 18 of the impugned order, the CERC relied on the judgement of the Supreme Court dated 16.10.2015, in A.P. Power Co-ordination Committee v. Lanco Kondapalli Power Ltd. [(2016) 3 SCC 468, to hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court; in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act; such limitation

upon the Commission would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory; APTEL in its judgment dated 2.11.2020 in Appeal No 10 of 2020 (Batch matters) had held that the issue of LPSC was one of enforcement of Regulations and not a contractual dispute leading to a claim for recovery, even in Lanco, the Supreme Court had held that the provisions of the limitation act would apply only in respect of its judicial power, and not in respect of its other powers or functions which may be administrative or regulatory; the CERC had therefore held that, as the issue under consideration being of interpretation and applicability of Sharing Regulations of the Commission, the plea of applicability of Limitation is devoid of merit; the relief at prayer (b) of the Petition, filed by the Appellants before the CERC, was the subject matter of remand; the Appellants had filed the said petition on 02.06.2017 praying for the quashing of bills raised since July 2011, and duly paid by the Appellants without any demur or protest; the CERC had also held, at sub-para (a) of Para 27 of the Impugned Order, that the bills raised by CTUIL since July 2011 were in compliance with the then prevailing regime, which were duly paid by the Petitioners without raising any objections in this regard*;* POSOCO was entitled to take support from this finding on the question of limitation; further, in the event that the CERC's findings in the Impugned Order with regard its exercise of regulatory power does not find favour with this Tribunal, the respondents are entitled in law to oppose the grant of relief qua said prayer (b) by this Tribunal on the ground of limitation which has been disregarded by the CERC in the Impugned Order; POSOCO's stand before the CERC, on the question of limitation, is reflected in Para 17 to 20 of the Impugned Order: and reference in this regard may be made to the Hon'ble Supreme Court's judgement in ***Ravindra Kumar Sharma vs. State of Assam and Ors.***, **(1999) 7 SCC 435.**

156. Learned Senior Counsel would further submit that, in ***AP Power Coordination Committee and Ors. v. Lanco Kondapalli Power Ltd and Ors***., **(2016) 3 SCC 468**, the Supreme Court held that the limitation period of three years would apply in adjudication proceedings initiated under Section 86(1)(f) of the Electricity Act, 2003, which is identical to Section 79(1)(f) of the Electricity Act, 2003; the question of limitation is ex-facie writ large on the admitted facts; bills were raised and duly paid since July 2011; the Petition came to be filed in 2017, after relief was granted (prospectively in a few similar cases); in order to grant relief to the Appellants, as per prayer (a) of the Petition, a substantive change was introduced by the CERC in the Sharing Regulations 2010 in exercise of the regulatory powers; prayer (a) is not founded on a declaration of law that is to say mere interpretation of the relevant regulations; hence, the question of allowing prayer (b) and quashing transmission bills raised on the Appellants retrospectively from July, 2011 cannot arise; and it would be impermissible in law to allow retrospective application to the said instances of admitted use of regulatory power by the CERC.

A. JUDGEMENTS RELIED ON BEHALF OF POSOCO:

157. In ***A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd.*****, (2016) 3 SCC 468),** the Supreme Court held that the Limitation Act will not be applicable to the Commission under the Electricity Act, 2003 as the Commission is not a court stricto sensu. The Commission, being a statutory tribunal, cannot also act beyond the four walls of the Electricity Act. However, a plain reading of Section 175 of the Electricity Act leads to the conclusion that, unless the provisions of the Electricity Act are in conflict with any other law when the Electricity Act will have over riding effect as per Section 174, the provisions of the Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in Section 175, the provisions of the Electricity Act will be additional provisions without adversely

affecting or subtracting anything from any other law which may be in force. Such provision cannot be stretched to infer adoption of the Limitation Act for the purpose of regulating the varied and numerous powers and functions of the authorities under the Electricity Act, 2003. The State Commission or the Central Commission have been entrusted with large number of diverse functions, many being administrative or regulatory and such powers do not invite the rigours of the Limitation Act. Only for controlling the quasi-judicial functions of the Commission under Section 86(1)(*f*), Section 175 of the Electricity Act, 2003 adopts the Limitation Act either explicitly or by necessary implication.

B. ANALYSIS:

158. In the light of the law declared by the Supreme Court, in **A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468,** unless the provisions of the Electricity Act are in conflict with any other law- when the Electricity Act will have over-riding effect as per Section 174, the provisions of the Electricity Act will not adversely affect any other law for the time being in force in view of Section 175 thereof. In other words, as stated in Section 175, the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force. In the light of the judgment of the Supreme Court, in ***Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.*, (2008) 4 SCC 755**, the Commission has been elevated to the status of a substitute for the civil court, and even claims or disputes arising purely out of contract have to be adjudicated by the Commission.

159. Thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(*f*), nor this adjudicatory power of the Commission has been enlarged to entertain even time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the

provisions of Section 174 of the Electricity Act. In the light of the nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of the law of limitation. A claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.

160. Section 175 of the Electricity Act should be read along with Section 174 and not in isolation. Section 174 of the Electricity Act, 2003 should be held to be the principal provision, and Section 175 accessory or subordinate thereto. Section 174 would prevail over Section 175 in matters where there is any conflict (but no further). (***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*, (2008) 4 SCC 755)**.

161. The expression "*any other law for the time being in force*" in Section 175 would cover laws which were in operation when the Electricity Act was enacted as well as laws made after the enforcement of Electricity Act **(Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416).** The term "*in derogation of*", used in Section 175, would mean "*in abrogation or repeal of*" (**KSL & Industries Ltd. v. Arihant Threads Ltd., (2015) 1 SCC 166**) ie the Electricity Act will not in any way nullify or annul or impair the effect of the provisions of the Limitation Act. The effect of Section 175 would be that in addition to the provisions of the ELECTRICITY ACT, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back on the provisions of, among others, the Limitation Act also **(Transcore v. Union of India, (2008) 1 SCC 125),** and the effect of Section 175 would ensure that the provisions of the Limitation Act are not ousted as a consequence of the operation of the Electricity Act. **(Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416).**

162. The legislative intent is for the Electricity Act to co-exist along with the Limitation Act and, save inconsistency, not to annul or detract from its provisions. **(KSL & Industries Ltd. v. Arihant Threads Ltd., (2015) 1 SCC 166).** As long as the provisions of the Limitation Act are not inconsistent with the provisions of the ELECTRICITY Act, both the Acts, namely, the ELECTRICITY Act and the Limitation Act, would complement each other. **(Mathew Varghese v. M. Amritha Kumar, (2014) 5 SCC 610).** It is only if there is an inconsistency between the Limitation Act with its provisions, that the Electricity Act will, in view of Section 174, prevail **(Forum for People's Collective Efforts v. State of W.B., (2021) 8 SCC 599**), and the Limitation Act would yield. Both Sections 174 and 175 can be read harmoniously holding that when there is any express or implied conflict, between the provisions of the Electricity Act, 2003 and the Limitation Act, the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts should be read together. (***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*****, (2008) 4 SCC 755).**

163. The order of remand, passed by this Tribunal on 04.02.2020, required the CERC to consider and assign reasons whether its order dated 04.05.2018 should be applied prospectively or retrospectively. While examining whether the order should be given retrospective application, the CERC is undoubtedly entitled to consider the extent to which the said order should be applied retrospectively. While orders of courts/tribunals would, ordinarily, apply from the very inception, such retrospective application is impermissible if it falls foul of the law of the limitation, since Section 175 of the Electricity Act makes the law of limitation applicable if its' provisions are not inconsistent with the provisions of the Electricity Act. The CERC was therefore required to consider the submission, urged on behalf of POSOCO, that a majority of the claims of the appellant was barred by limitation.

164. As already held hereinabove, both the earlier order of the CERC dated 04.05.2018, and the impugned order dated 30.07.2022, were passed in exercise of its adjudicatory powers and not its regulatory powers. It is unnecessary for us therefore to again examine the submissions of the Learned Senior Counsel under this head that the said orders were passed by the CERC in the exercise of its regulatory powers. We shall, therefore, confine our examination under this head only to the submission that a majority of the appellant's claims are barred by limitation.

165. It is true that the CERC has, in the impugned order dated 30.07.2022, rejected the objections raised by Respondents 2 and 3 that a majority of the appellant's claims were barred by limitation. The CERC was of the view that the power exercised by it, while passing the earlier order dated 04.05.2018, was regulatory in character, and not adjudicatory in nature; and the provisions of the Limitation Act were inapplicable to regulatory orders passed by the CERC. This finding of the CERC has been rejected by us, and we have held, earlier in this order, that the order dated 04.05.2018 was passed by the CERC in the exercise of its adjudicatory powers, and not its regulatory powers.

166. It is also true that Respondents 2 and 3 have chosen not to prefer an appeal against the order of the CERC dated 30.07.2022, and it is only the appellant which has preferred the present appeal. However, as held by the Supreme Court, in **Ravindra Kumar Sharma vs. State of Assam and Ors.**, **(1999) 7 SCC 435,** the respondent-defendant in an appeal can attack an adverse finding upon which a decree in part had been passed against the respondent, for the purpose of sustaining the decree to the extent the lower court had dismissed the suit against the defendant-respondent. Consequently, even in the present appeal filed by the appellant against the Order of the CERC dated 30.07.2022, it is open to Respondents 2 and 3 to sustain the impugned order of the CERC on the ground of limitation, though

such a contention had been rejected by the CERC while passing the impugned order dated 30.07.2022.

167. As observed earlier in this order, the order of the CERC dated 04.05.2018 was not passed in the exercise of its regulatory powers, but was an adjudicatory order. Consequently, the provisions of the Limitation Act would apply to such proceedings. Even if the provisions of the Limitation Act are applied, the subject petition was initially filed by the appellant before the CERC on 02.06.2017, and claims falling within three years prior thereto (which would be the period for which a suit could have been filed), ie. from 03.06.2014, would undoubtedly fall within limitation, and not be barred under the law of limitation. It is only the appellant's claim for the period from July 2011 to 02.06.2014 which can be said to be barred by limitation. The CERC has erred in not considering the appellant's claim, for refund of the amounts illegally collected from them by Respondents 2 and 3, for the period from 03.06.2014 till 04.05.2018, when the earlier order was passed by the CERC.

XIV. UNJUST ENRICHMENT:

168. Mrs. Suparna Srivastava, Learne Counsel for the 3rd Respondent CTUIL, would submit that, in the present case, the ISTS charges paid by the Appellants, for the period since July, 2011 till the passing of the Order dated 4.5.2018, have been disbursed by Respondent No.3 in the PoC pool, and have also been recovered by the Appellants from their consumers as power purchase cost under their approved ARRs; applying the law laid down by the Supreme Court, in ***Mafatlal Industries Ltd. & Ors. Vs. Uion of India and Ors. (1997) 5 SCC 536***, the claim of refund of the said duty is not sustainable; and, therefore, the question of recovery from other ISTS users in the present case for passing the benefit to the consumers does not arise.

169. On the other hand, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, would submit that the

contention of CTU that giving retrospective effect would lead to substantial adjustments, and re-opening of already settled POC accounts, cannot be a ground for denying the Appellant their legitimate dues; the settled principle, as expressed in the legal maxim - *Ubi jus ibi remedium'*, is where there is a right, there is a remedy; where it has been expressly held in favour of the Appellant that the said STU Line was not an ISTS Line, there should not be any POC Charges levied from 01.07.2011 to 04.05.2018; and, since the Appellant has paid POC charges for the STU Lines, it is entitled to refund in respect thereof.

A. JUDGEMENT RELIED ON BEHALF OF CTUIL:

170. In ***Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536,** on which reliance is placed on behalf of the 3rd Respondent, the Supreme Court held that a claim for refund, whether made under the provisions of an enactment or in a suit or writ petition can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons; his refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be; whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation, but is subject to the above requirement; where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice; the real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden, and it is only that person who can legitimately claim its refund; but where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people; there is no immorality or impropriety involved in such a proposition; the doctrine of unjust enrichment is a just and

salutary doctrine; no person can seek to collect the duty from both ends; the power of the Court is not meant to be exercised for unjustly enriching a person; the doctrine of unjust enrichment is, however, inapplicable to the State; the State represents the people of the country', and no one can speak of the people being unjustly enriched.

B. JUDGEMENT RELIED ON BEHALF OF THE APPELLANT:

171. In **Kerala High Tension and Extra High Tension Industrial Electricity Consumer's Association v. KERC (Order in Appeal No. 247 of 2014 Dated: 18 November, 2015),** on which reliance is placed on behalf of the appellant, the Appeal was preferred against the order passed by the Kerala State Electricity Regulatory Commission ("State Commission") refusing to issue directions for refund of Service Connection Charges which were unauthorisedly levied and collected by the Kerala State Electricity Board.

172. This Tribunal noted that the counsel for the Electricity Board had referred to the judgment of the Supreme Court, in **Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors: 1997(5) SCC 536,** wherein it was held that a claim for refund, whether made under the provisions of the Act or in a suit or writ petition, could succeed only if the petitioner/plaintiff alleged and established that he had not passed on the burden of duty to another person or other persons, and his refund claim could be allowed to be decreed only when he established that he had not passed on the burden of duty or to the extent he had not passed on as the case may be.

173. This Tribunal then observed that, in its opinion, the above case was not relevant to the present Appeal; in the referred case the Appellant was claiming refund of excise duty and it was held that where the burden of duty has been passed on to buyers, the claimant cannot say that he has suffered

any loss or prejudice; in the present case, there was no issue of any refund of duty or tax which had been passed on by the Appellant to the purchaser of goods or services from them; in the present case, no hardship would be caused to the Electricity Board in payment of dues to the Appellant as the same would be allowed as a pass through in the ARR and retail supply tariff; and, ultimately, the burden of refund of erroneous recovery of service connection charges would be borne by all the consumers, as the consumers were the beneficiaries of the same in the previous tariff years when such charges were included in the income of the Electricity Board while deciding the ARR and tariff.

174. Notwithstanding the distinction sought to be made by this Tribunal in **Kerala High Tension and Extra High Tension Industrial Electricity Consumer's Association,** between tax and duty on the one hand and electricity tariff on the other, the law declared by the Supreme Court, in **Mafatlal Industries Ltd**, is binding on all courts and tribunals in the country in view of Article 141 of the Constitution of India. Therefore the Appellant's claim for refund, of the bills paid by them from to 04.05.2018, can only be considered in case they had not passed on the financial burden to their customers. In case they have so passed it on, then directing the Respondents to grant them refund would undoubtedly confer on the appellant a double benefit which they may not be entitled to. Even if the appellants are found to have passed on such financial burden, the customers of the Appellant, to whom the said illegal imposition was passed on, would undoubtedly be entitled to be repaid the amount which they were called upon to pay earlier, albeit illegally.

XV. CONCLUSION:

175. We consider it appropriate, in such circumstances, to set aside the impugned order passed by the CERC, and to remand the matter again to the

CERC to enable it to ascertain whether the Appellant had passed on the financial liability imposed on it, in terms of the bills raised by POSOCO/CTUIL on them from 03.06.2014 till 04.05.2018. In case the CERC finds that they have not passed on the liability, representing the amount paid by them in terms of the bills raised, it should have the dues quantified, and then direct refund thereof to the appellants. In case the appellants are found to have passed on the financial burden to their customers, the CERC shall then undertake the exercise of identifying the customers to whom the financial burden was passed on by the appellant, and ensure that the Respondents pay the amounts, illegally collected by them from the appellant during the period 03.06.2014 to 04.05.2018, to such customers. The appeal stands disposed of accordingly.

Pronounced in the open court on this the **2nd** day of **February 2024.**

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~