

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject: In the matter of petition under Sections 62, 86(1)(a), 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 read with MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010.

Petition No. 23 of 2019

ORDER

(Date of order: 28th April, 2021)

M/s. Orchid Renewable Powertech Pvt. Ltd.

Fourth Floor, Caledon Square,
Avinashi Road, Peelamedu, Coimbatore - 641015

- **Petitioner**

Vs.

M.P. Power Management Co. Ltd.,

Shakti Bhawan, Rampur, Jabalpur – 482 008

- **Respondent**

Shri Kishore Shrivastava, Sr. Advocate, Shri Purushaindra Kaurav, Senior Advocate, Shri Ronak Arora, Advocate, Shri Shrey Raj Saxena, Advocate, Shri Mehul Bharadwaj, Shri Adarsh Chamoli, Advocate, Shri Shashank Verma, Advocate and Shri Rajeshwaran, Manager appeared on behalf of the petitioner.

Shri Aashish Bernard Advocate, Shri G. L. Pandey, DGM and Shri Sanjeev Khare DGM appeared on behalf of the Respondent.

2. The petitioner filed the subject petition for adjudication of dispute on the tariff for purchase of power from 11.2 MW and 6.4 MW power project situated at Ratedi Hills, Dewas under PPA dated 04/10/2018 and from 2.5 MW power project at Village Nagda, Dewas under PPA dated 05/10/2018. The petition is filed under Section 86(1)(f) along with Section 62, Section 86(1)(a) and 86(1)(b) of the Electricity Act, 2003 read with MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010.

3. By affidavit dated 15.05.2019, the petitioner broadly submitted the following in the subject petition:

- "i. The present petition is filed for adjudication of dispute on the tariff for the purchase of power from 11.2MW and 6.4MW power project situated at Ratedi Hills, Dewas, for which separate Power Purchase Agreements were entered into between the Petitioner and Madhya Pradesh Power Management Company Limited (hereinafter referred to as*

“Respondent” or “MPPMCL” or “Licensee”) on 04.10.2018, and 2.5MW power project situated at Village Nagada, Dewas, for which Power Purchase Agreement was entered into between the Petitioner and the Respondent on 05.10.2018 (the Power Purchase Agreements are hereinafter together referred to as “the PPAs” and individually referred to as “PPA”). The tariff stipulated in the above mentioned PPAs is Rs. 2.45/Kwh which is not in accordance with the tariff determined by the Hon’ble Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as “Commission”) in the respective applicable Tariff Orders. The Respondent company is a Licensee as per Section 2(38) of the Act. It is pertinent here to mention that the provisions of PPAs are exactly similar.

- ii. *It is further submitted that in accordance with the Clause 13.2.1 of the PPAs, a joint Dispute Notice dated 01.02.2019 was sent by the Petitioner to the Respondent citing the disparity in the tariff mentioned in the PPAs, i.e. Rs. 2.45/Kwh and the tariff stipulated by the respective applicable Tariff Orders. A revision of tariff from Rs. 2.45/Kwh to Rs. 3.36/Kwh (for 11.2MW and 6.4MW PPAs) and from Rs. 2.45/Kwh to Rs. 3.30/Kwh (for 2.5MW) was requested by the Petitioner, in accordance with the applicable Tariff Orders. However, the Licensee without going into the merits of the Generators case, declined to accept the prayer, hence the cause of action has arisen to adjudicate the said dispute. The Generator is therefore filing this petition for adjudication of the dispute between the Parties by this Hon’ble Commission.*
- iii. *The Generator is a company registered under the Companies Act, 1956, having its registered office at Fourth Floor, Caledon Square, Avinashi Road, Peelamedu, Coimbatore – 641015.*
- iv. *The Licensee is a government company registered under the Companies Act, 1956, having its registered office at Shakti Bhawan, Rampur, Jabalpur (M.P.) – 482008. It is an unbundled entity of the erstwhile Madhya Pradesh State Electricity Board. It is a trading licensee, entitled to undertake transaction of sale and purchase of electricity and vide notification dated 10.04.2012, the Licensee has been made the Holding Company of all Distribution Licensees within the state of Madhya Pradesh.*

JURISDICTION OF THE HON’BLE COMMISSION

- v. *The Generator is filing the present Petition under Section 86(1)(f) read with Section 62, 86(1)(a) and 86(1)(b) of the Act. The relevant excerpts of the abovementioned sections are reproduced below –*

“Section 86. (Functions of State Commission): ---

(1) The State Commission shall discharge the following functions, namely–

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

...

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

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”

“Section 62. (Determination of tariff): ---

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

...”

- vi. *It is submitted that the PPAs entered into between the Generator and the Licensee also contemplates resolution of any claim relating to tariff determination, to be adjudicated by this Hon'ble Commission. The relevant excerpt of the PPAs is reproduced herein below-*

“13.3.1 Dispute Resolution by MPERC

(a) Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or relates to any matter agreed to be referred to MPERC, such Dispute shall be submitted to adjudication by MPERC.”

- vii. *According to the Generator, the tariff has to be applicable as per the determination made by the Commission. However, in the present case there is an anomaly because of the lower tariff prescribed in the PPAs than the tariff so determined by the Commission by way of the respective Tariff Orders.*

- viii. *The lower tariff being paid to the Generator is **definitely as per the PPAs entered into between the parties**, but when the regulatory regime prescribes the high tariff in that case the same will prevail.*

- ix. *In the present case the Generator made the request to the Licensee to apply the tariff determined by the competitive bidding process for the PPA entered by the Licensee with SECI, due to the financial constraints the Generator was experiencing due to the termination of earlier PPAs under open access. The Generator has under taken to execute a Supplementary PPA but the Licensee have not accepted the request. This led to a dispute as the Generator is entitled to high tariff as prescribed in the respective Tariff Orders, or suffer a loss due to the lower tariff.*

- x. *It is further submitted that the Generator's Fundamental Right to business is being adversely effected. Being recognized as a Fundamental Right under Article 19(1)(g) of the Constitution of India, right to business cannot be waived, therefore even if the parties entered into the PPAs with a lower tariff than what is prescribed by the regulatory regime it would take precedence over the will of the parties. Once the law prescribes the regulatory mechanism contemplating determination of tariff by an independent authority consisting of the experts, like the Commission, in that case the consent of the parties will have to be ignored and the regulatory mechanism will have to be respected*

and honored.

- xi. *Under such circumstances it's not only the Generator's right under Article 19(1)(g) that is violated but the act of the Licensee is also in violation of Article 14 of the Constitution on the ground of it being arbitrary and unreasonable. There cannot be any agreement to the detriment of one party and benefit to the other when the entire regime is governed by the regulatory mechanism.*
- xii. *In view of the above mentioned provisions of the Electricity Act and the MPERC Regulations read with Clause 13.3.1 of the PPAs, it is humbly submitted that this Hon'ble Commission is the Appropriate Commission for considering the present Petition.*
- xiii. *A comprehensive List of Dates along with the overview of the relevant facts leading to the filing of the present Petition is set out herein below –*

List of Dates:

DATE	PARTICULARS
26.05.2003	<i>The Electricity Act, 2003, was notified.</i>
11.06.2004	<i>MPERC issued Tariff Order for Procurement of Power from Wind Electric Generators.</i>
01.03.2006	<i>Review Order issued by MPERC reviewing the Tariff Order dated 11.06.2004.</i>
10.03.2006	<i>First Amendment to Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulation, 2005 (AG-26 (i) of 2006)</i>
31.03.2006	<i>2.5 MW WEGs at location N13 and N16 were commissioned</i>
21.11.2007	<i>MPERC issued Tariff Order for Procurement of Power from Wind Electric Generators.</i>
20.03.2008 and 29.03.2008	<i>6.4 MW WEGs were commissioned. The WEGs located at location 9, 10, 14, 15, 16, 17, & 19 were commissioned on 20.03.2008 where as the WEGs located at location 18 was commissioned on 29.03.2008</i>
26.03.2009, 10.06.2009 and 29.06.2009	<i>11.2 MW WEGs were commissioned. The WEGs at location 45, 46 and 53 were commissioned on 26.03.2009. The WEGs at location 54, 55, 56, 63 and 64 were commissioned on 10.06.2009. The WEGs at location 90, 91, 92, 93 and 94 were commissioned on 29.06.2009.</i>
19.03.2015	<i>Sale Certificate was issued for the sale of movable assets (i.e. the WEGs) and the immovable property, in favour of the Petitioner by the lenders of M/s K.S. Oils Limited namely State Bank of India, Central Bank of India and Phoenix ARC Private Limited (in its Capacity as trustee of Phoenix Trust FY14-3) under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (54 of 2002).</i>
10.04.2015	<i>The Petitioner applied for permission under open access to sell power to third parties.</i>
12.05.2016	<i>The Petitioner obtained open access permission for 17.6 MW out of 20.1MW and the remaining 2.5MW was pending for want of approval from the Forest Department for transfer of lease hold rights.</i>
22.06.2016	<i>Power Purchase & Wheeling Agreement for 17.6 MW was executed between Petitioner, MPPMCL and M/s IPCA Laboratories Limited for sale of power under Open Access to IPCA and sale of excess power/ inadvertent flow of power, if any,</i>

	<i>to MPPMCL.</i>
13.12.2017	<i>MPERC introduced 7th Amendment to MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulation 2010 vide Circular, levying cross subsidy surcharge, additional surcharge and wheeling charges for open access customers all open access consumers at MP. The same resulted in selling power under open access becoming unviable in State of M.P.</i>
--	<i>The Petitioner challenged the Amendment dated 13.12.2017 before the Hon'ble High Court of M.P. but the said petition was dismissed with a direction to the company to approach MPERC which is the appropriate forum.</i>
19.04.2018	<i>The Petitioner requested MPPMCL to terminate the Power Purchase and Wheeling Agreement dated 22.06.2016 and to enter into new agreements at SECI tariff i.e. Rs. 2.52/Kwh (including trading margin).</i>
02.06.2018	<i>MPPMCL gave its consent to execute PP&WAs to purchase power at Rs. 2.45/Kwh (SECI tariff excluding trading margin)</i>
16.06.2018	<i>The Petitioner gave its consent to execute PP&WAs at Rs. 2.45/Kwh.</i>
26.07.2018	<i>Letter of Undertaking was provided by the Petitioner in terms of its Consent Letter dated 16.06.2018</i>
07.08.2018	<i>Examination of proposal of Petitioner for metering arrangement under PPAs for 11.2 MW, 6.4 MW and 2.5 MW, for accounting and billing of injected power at tariff of Rs. 2.45 Kwh by MPPMCL.</i>
04.10.2018	<i>The Petitioner signed two Power Purchase Agreements with the Madhya Pradesh Power Management Company Limited (hereinafter referred to as "MPPMCL") for 6.4 MW and 11.2 MW, respectively. It is pertinent to note that the PPAs dated 22.06.2016 were terminated with effect from the effective date of the new PPAs.</i>
05.10.2018	<i>The Petitioner signed a Power Purchase Agreement with MPPMCL for 2.5 MW.</i>
01.02.2019	<i>The Petitioner sent a joint Notice of Dispute to MPPMCL under the PPAs intimating that the tariff of Rs. 2.45/Kwh enshrined in the PPAs was not in accordance with the respective Tariff Order applicable to the WEGs based on their date of commissioning. The Petitioner vide its Notice requested the Respondent to revise the tariff from Rs. 2.45/Kwh to Rs. 3.36/Kwh (for the 11.2MW and 6.4MW PPAs dated 04.10.2018) and Rs. 3.30/Kwh (for the 2.5MW PPA dated 05.10.2018)</i>
27.03.2019	<i>After much delay, the reply of the Respondent dated 20.03.2019 to the Dispute Notice sent by the Petitioner was received.</i>
-	<i>As the Dispute was not settled, therefore the present petition.</i>

A. Factual Overview

- xiv. M/s K.S. Oils Limited, being the then actual owner of the Wind Electric Generators (WEGs) located in Village Dewas in Madhya Pradesh, applied for the commissioning of the WEGs. The said WEGs along with the land were secured by K.S. Oils Limited in favour of State Bank of India, Central Bank of India and Phoenix ARC Private Limited towards various financial/loan facilities. A tabular representation of the respective WEGs with their commissioning date is reproduced herein below –

S.No	Location	Total capacity (MW)	Location No.	Date of Commissioning	Date of PPA	Applicable Tariff Order	Prescribed tariff	Commissioning Certificate annexed as

1.	RatediHills, Dewas	14 * 0.8 =11.2	45, 46 and 53	26.03.2009	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure – 2
			54, 55, 56, 63, 64 and 65	10.06.2009	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure – 3
			90, 91, 92, 93 and 94	29.06.2009	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure – 4
2.	RatediHills, Dewas	8*0.8=6.4	9, 10, 14, 15, 16, 17, &19	20.03.2008	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure – 5
			18	29.03.2008	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure – 6
3.	Village Nagada, Dewas	2*1.25=2.5	N-13 &N-16	31.03.2006	05.10.2018	Order dated 11.06.2004 as reviewed on 01.03.2006	Rs. 3.30/kwh	Annexure – 7
Total = 20.1MW								

- xv. On 19.03.2015, the lenders of M/s K.S. Oils Limited i.e. State Bank of India, Central Bank of India and Phoenix ARC Private Limited (in its capacity as Trustee of Phoenix Trust FY14-3) sold the movable assets (i.e. the WEGs) and immovable assets of the above-mentioned locations along with assets located at other locations in favour of the Generator on “As Is Where Is Basis”, “As Is What Is Basis” and “Whatever There Is Basis”, under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).

A copy of the Sale Certificate dated 19.03.2015 issued in favour of the Petitioner for the movable assets is annexed herewith and marked as **Annexure – 8**.

A copy of the Sale Certificate issued in favour of the Petitioner for the immovable assets is annexed herewith and marked as **Annexure – 9**.

- xvi. The Generator had initially obtained permission to sell its energy to third party under open access and entered into Wind Energy Power Purchase and Wheeling Agreements for 17.6 MW (11.2 + 6.4) with Licensee for sale of power generated, to M/s IPCA Laboratories Limited with a provision of sale of excess power generated to Licensee. The said Wind Energy Power Purchase and Wheeling Agreements were entered on 22.06.2016.

- xvii. However, after the **introduction of the 7th Amendment** to the MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulations 2010, which provided for levying cross subsidy surcharge, additional surcharge and wheeling charges for open access customers, the sale of power under open access became

unviable for the Generator. As a result, the PPAs dated 22.06.2016 were terminated by mutual consent of the parties.

xviii. Generator, vide its letter dated 19.04.2018 addressed to the Licensee, **requested** the Licensee to enter into PPAs for the sale of power generated from the 20.1 MW WEGs at the tariff of Rs. 2.52/Kwh i.e. the **tariff determined by the competitive bidding process** (including trading margin) for the PPAs entered into by Licensee with **SECI**. The relevant excerpt of the letter is reproduced herein below –

- a. For the last 4 Months, after withdrawing its application for open access, ORPPL is making sincere efforts to get open access permission to 3rd parties but unfortunately due to the introduction of the 7th amendment to MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulation 2010 under circular dated 13.12.2017 and levy cross subsidy surcharge, additional surcharge and wheeling charges for open access customers, selling power to 3rd parties under **open access became unviable** to ORPPL.
- b. It has been learned that MPPMCL has signed PPA with SECI @ tariff of Rs. 2.52/Kwh through competitive bidding process (including trading margin). Further it has also been learned from **Wind Power Project developers in MP that they have approached MPPMCL for signing of PPA @ the SECI tariff of Rs. 2.52/Kwh.**
- c. In view of the above ORPPL also wants to sell power generated from its capacity of 20.1MW to MPPMCL @ SECI tariff i.e. Rs. 2.52/Kwh (including Trading margin) as under –
 - a. For 17.6MW Wind Project – From the date of issue of Consent for purchase/Singing of PPA with M/s. MPPMCL, Jabalpur.
 - b. For the 2.5MW Wind Project – From 01.01.2018 i.e. after expiry of the LOI No. 05-01/1543 dt. 20.12.2016.”

A copy of the letter dated 19.04.2018 is annexed herewith and marked as **Annexure – 10.**

xix. On 02.06.2018, Licensee gave its consent for entering into PPAs with the Generator at the tariff of Rs. 2.45/Kwh (SECI tariff excluding trading margin) for the remaining life of the WEGs i.e. upto 20 years from the date of commissioning of the respective WEGs. It is pertinent here to note that separate PPAs for 11.2 MW, 6.4 MW and 2.5MW were proposed by the Licensee. The relevant excerpt of the letter dated 02.06.2018 is reproduced herein below –

“In this regard this is to intimate you that, your request has been examined and considered after approval by the competent authority, **MPPMCL hereby conveys its consent** for purchase of power generated from your above said 20.1 MW capacity Wind Electric Generators (WEG) with effect from 00:00 Hrs. of date of execution of PPA with MPPMCL @ **Rs. 2.45/Kwh** (SECI tariff excluding trading margin), for the remaining life of WEGs i.e. up to 20 years from the date of commissioning of respective WEG, subject to following:-

The PPWAs for 11.2+6.4=17.6 MW capacity executed with M/s IPCA will be terminated with effect from the date of execution of PPA with MPPMCL. Two separate PPAs for 11.2 MW & 6.4 MW capacities will be executed by you, which

will be effective from date of execution of PPA with MPPMCL.”

*A copy of the letter dated 02.06.2018 is annexed herewith and marked as **Annexure – 11.***

- xx. *On 04.10.2018, two PPAs were entered into between the Petitioner and the Respondent for sale of power generated from 11.2MW and 6.4 MW project WEGs respectively at a tariff of Rs. 2.45/Kwh (excluding trading margin).*

*A copy of the PPA for 6.4MW WEGs is annexed herewith and marked as **Annexure –12.**
A copy of the PPA for 11.2MW WEGs is annexed herewith and marked as **Annexure –13.***

- xxi. *Subsequently, another PPA was entered into between the Generator and the Licensee on 05.10.2018, for sale on power generated from 2.5 MW WEGs at the same tariff as the other PPAs i.e. Rs. 2.45/Kwh.*

*A copy of the PPA for 2.5MW dated 05.10.2018 is annexed herewith and marked as **Annexure – 14.***

- xxii. *It was however later noticed by the Generator, that the tariff offered by the Licensee for sale of power under all the three above mentioned PPAs which was **agreed upon by the Generator in the absence of any other choice** and under the looming **fear of suffering losses due to idling of the WEGs**, i.e. Rs. 2.45/Kwh (excluding trading margin), was neither approved by the Commission nor it is in accordance with the respective Tariff Order, issued by the Commission, so applicable on the WEGs.*

- xxiii. *Therefore, as all the three PPAs (for 6.4MW, 11.2W and 2.5MW) had the same terms and conditions enshrined, the Generator on 01.02.2019 sent a joint Dispute Notice to the Licensee in accordance with Clause 13.2.1 of the PPAs requesting a revision of tariff from the earlier determined tariff of Rs. 2.45/Kwh to Rs. 3.36/Kwh (for 6.4MW and 11.2MW) as per the applicable Tariff Order dated 21.11.2007, and Rs. 3.30/Kwh (for 2.5MW) as per the applicable Review Order dated 01.03.2006 passed by the Commission reviewing the Tariff Order dated 11.06.2004. The Clause 13.2.1 of the PPAs (exactly similar in all the PPAs) is reproduced herein below –*

“13.2.1 Amicable Settlement

- (a) Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement (“Dispute”) by giving a written notice (Dispute Notice) to the other Party, which shall contain:*
- i) A description of the Dispute;*
 - ii) the grounds for such Dispute; and*
 - iii) all written material in support of its claim.*
- (b) Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 13.2.1(a). Both parties shall endeavor and make all efforts to amicably settle the Dispute.*
- (c) If the Parties fail to resolve the Dispute amicably within thirty (30) days, the Dispute shall be referred for dispute resolution in accordance with Article 13.3.”*

*A copy of the Dispute Notice dated 01.02.2019, sent to the Licensee by the Generator is annexed herewith and marked as **Annexure – 15**.*

- xxiv. *After more than a month of wait, the Licensee finally responded to the Notice sent by the Generator vide its Reply dated 20.03.2019, which was received by the Generator through Speed Post on 27.03.2019.*

*A copy of the Reply of the Respondent dated 20.03.2019 to the Dispute Notice of the Petitioner is annexed herewith and marked as **Annexure – 16**.*

- xxv. *As the dispute on tariff made in the above-mentioned joint Notice was not considered by the Licensee, as a result of which no amicable settlement could be reached between the parties. The Generator is thus filing this present petition.*

Grounds for the Petition

- xxvi. *It is respectfully submitted that the Section 62 of the Act empowers the Commission to determine the tariff for the supply of electricity by a generating company to a distribution Licensee and Section 61 provides for the Commission to specify the terms and conditions for determination of such tariff under the guiding terms enshrined in Clause (a) to (i) of Section 61. The language of Section 61 of the Act is reproduced herein below –*

“Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- (e) the principles rewarding efficiency in performance;*
- (f) multi year tariff principles;*
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
- (i) the National Electricity Policy and tariff policy”*

- xxvii. *It is in furtherance of the powers vested in it under Section 86(1)(a), (b) and (c) read with (e), and Section 62(1) of the Act that the Commission, in order to determine the tariff for generation, supply, transmission and billing of electricity, the procurement*

process and related dispensation for the purchase of power by Licensees in the state of Madhya Pradesh from wind electric generators in the State, issues Tariff Orders.

- xxviii. *The Hon'ble Supreme Court in the case of PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603 while analyzing the scope of the Act, have also highlighted the power of tariff determination by the Electricity Commissions. The relevant excerpt of the judgment is reproduced herein below –*

"25. The 2003 Act contains separate provisions for the performance of the dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

*26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the **actual tariff** in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination."*

- xxix. *The said Tariff Orders have a Control Period which prescribes the period of applicability of the said Order. For a Tariff Order to be applicable to a WEG, the WEG has to be commissioned during the control period of that Tariff Order.*
- xxx. *It is pertinent here to mention that the MPERC Tariff Order dated 11.06.2004 as reviewed by the Review Order 01.03.2006, provide for a tariff of Rs. 3.30/Kwh for the WEGs commissioned in its control period i.e. a period of three years starting from the date of issuance of the Tariff Order till the end of FY 06-07. It is also imperative to mention that the Tariff Order clearly prescribes that the determined tariff shall remain in effect for the whole project life, assumed to be 20 years. The relevant excerpt of the Tariff Order is reproduced herein below –*

"3.51 In view of the above, the Commission considers that a review period of a longer duration (such as five years) might not be desirable as the interest costs, costs of

investment etc could change significantly in this period. On the other hand, a short review period of 1 year would cause high uncertainty for the investors with respect to the tariff rates. Accordingly, the Commission has decided that the control period shall be of three years. The first control period will start from the date of release of this Order and will close at the end of FY 06-07.

- 3.52 At the end of the control period the tariff determination process may be reviewed. Tariff decided in a particular control period shall apply to all projects that shall come up within that control period. The tariff determined for a project shall remain in effect for the whole project life, which is assumed to be 20 years.”

The relevant excerpt of the Review Order dated 01.03.2006, prescribing the tariff of Rs. 3.30/Kwh is reproduced herein below –

- “9. The Commission has considered various issues of all the petitioners and various options submitted by the stakeholders and directs as under :-
(iv) the tariff for new wind energy project for its project life of 20 years shall be in the following manner w.e.f. 11.6.04:

Year	1	2	3	4	5	6	7	8	9	10
Tariff (Rs./unit)	3.97	3.80	3.63	3.46	3.30	3.30	3.30	3.30	3.30	3.30
Year	11	12	13	14	15	16	17	18	19	20
Tariff (Rs./unit)	3.30	3.30	3.30	3.30	3.30	3.30	3.30	3.30	3.30	3.30

A copy of the Tariff Order dated 11.06.2004 is annexed herewith and marked as **Annexure –17**.

A copy of the Review Order dated 01.03.2006 is annexed herewith and marked as **Annexure –18**.

- xxxi. Similarly, the MPERC Tariff Order dated 21.11.2007 provides for a tariff of Rs. 3.36/Kwh for the WEGs commissioned in its control period i.e. from 21.11.2007 till 31.03.2012. The Tariff Order also prescribes for the application of the tariff so determined, for the whole project life of 20 years. The relevant excerpts of the Tariff Order dated 21.11.2007 is reproduced herein below –

“5. TARIFF REVIEW PERIOD/CONTROL PERIOD

5.1 The control period will start from the date of issue of this order and will close at the end of FY11-12 i.e. 31.3.2012. The tariff decided in a particular control period shall apply to all projects which come up within that control period and the tariff determined for a project shall remain in effect for the whole project life of 20 years from the date of grid connectivity.

...

10. COMMISSION’S ORDER: TARIFF RATE

Determination of Tariff

10.1 Considering the above parameters, the Commission sets the tariff for generation from 1 MW new wind energy project to be commissioned after issue of

this order for its project life of 20 years in the manner shown below :

Year	1	2	3	4	5	6	7	8	9	10
Tariff (Rs./unit)	4.03	3.86	3.69	3.52	3.36	3.36	3.36	3.36	3.36	3.36
Year	11	12	13	14	15	16	17	18	19	20
Tariff (Rs./unit)	3.36	3.36	3.36	3.36	3.36	3.36	3.36	3.36	3.36	3.36

*A copy of the Tariff Order dated 21.11.2007 is annexed herewith and marked as **Annexure -19**.*

xxxii. *In the present case, as per the respective date of commissioning of the WEG mentioned in para 16 above, the MPERC Tariff Order dated 11.06.2004 reviewed by the Review Order dated 01.03.2006 is applicable to the 2.5 MW WEGs and the MPERC Tariff Order dated 21.11.2007 is applicable to the 6.4MW and 11.2MW WEGs.*

xxxiii. *However, the tariff prescribed in all the three concerned PPAs entered into between the Generator and the Licensee, i.e. the two PPAs dated 04.10.2018 for 6.4MW & 11.2MW respectively and the PPA dated 05.10.2018 for 2.5MW, is Rs. 2.45/Kwh which is not in accordance with the respective applicable Tariff Orders.*

xxxiv. *Furthermore, the Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010, specifically provides for the Commission to determine the tariff for procurement of power from the generating companies and that too at the tariff determined by the Commission in its Tariff Orders. The said Regulations also stipulate seeking approval of the Commission. The relevant excerpt of the Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources Of Energy) (Revision-I) Regulations, 2010 reads as follows –*

“4.2 If the Distribution Licensees fulfill the minimum purchase requirements and still have offers from energy generators including Co-generators from Renewable Sources, then either the Distribution Licensee or the Investor/Developer can approach the Commission for approval of such additional procurement offers.

...

4.5 The energy from all the Renewable Sources of Energy and Co-generation units may be procured centrally by the M.P. Power Trading Co. Ltd. on behalf of the Distribution Licensees, at the tariff determined by the Commission from time to time in its Tariff orders....

5. Determination of Tariff of Electricity from Co-generation and Renewable Source

The Commission shall determine the Tariff from time to time for procurement of power from generation including Co-generation from Renewable Sources of Energy for specified control period.”

- xxxv. *It is pertinent here to note that the only exception to determination of tariff by the Commission is if the tariff is determined by a **transparent competitive bidding process as per Section 63 of the Act**. However, in the present case the tariff of Rs. 2.45/Kwh was not determined by a competitive bidding process specially conducted for the PPAs in question, rather it was the result of another competitive bidding process conducted for the PPAs between the Licensee and SECI. Neither the Act nor any Regulation provide for such a method for determination of tariff.*
- xxxvi. *It is most respectfully submitted to the Hon'ble Commission that the said tariff is in contravention of the applicable Tariff Orders as well as the Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010, and is thus bound to be revised by the Commission.*
- xxxvii. *It is submitted that the Respondent was under a statutory obligation to align the PPAs it entered with the regulatory framework in force. The present PPAs are in direct contravention of the Tariff Orders and ultimately the regulatory regime and are thus required to be revised by the Commission.*
- xxxviii. *The Hon'ble Supreme Court in the PTC India Limited v. CERC (2010) 4 SCC 603, while discussing the Regulations made by Central Commission under Section 178 of the Electricity Act has held that both existing and future contracts of the regulated entities must be in accordance with the Regulation and there cannot be any deviation from the same. It is pertinent here to note that Section 181 which provides for the power of State Commission is analogous to Section 178 of the Act. The relevant excerpt of the judgment is reproduced herein below –*
- “92. (i) *In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be **discharged by Orders** (decisions).*
- (ii) *A regulation under Section 178, as a part of regulatory framework, intervenes and even **overrides the existing contracts** between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.”*
- xxxix. *The exact question of whether in the matter of determination of tariff, the principles governing Section 61 and 86 should be overlooked if the parties enter into agreement by and between themselves with regard to purchase of price, was before the Hon'ble Appellate Tribunal for Electricity, in the case of Tarini Infrastructure Limited v. Gujarat Urja Vikas Nigam Limited MANU/ET/0106/2012. The Hon'ble Appellate Commission has categorically held that the Electricity Commission has the power to revisit the PPA and modify it in such cases. The relevant excerpt of the judgment is reproduced herein below –*

"27. Reading between the lines of Section 86 (1) (b), it appears that a **Power Purchase Agreement does not by itself, make it binding on parties unless it gets approved up examination by the Commission.** The Section 86 does not make a qualitative distinction between the determination of tariff by the Commission itself and determination through regulation of the price at which electricity should be procured from the generation companies through Power Purchase Agreement. Necessarily, the price agreed to by and between the parties must follow the principles and provisions of the law and where the price agreed to or arrived at the Power Purchase Agreement is not in consonance with the law but on the basis of some guidelines, the details of which are not known it is not too much to demand that the Power Purchase Agreement should be revisited within the terms of the principles laid down in the Act not in terms of the guidelines on the basis of which a general order was passed which again was not based on any State Regulation. What is more important is that the Power Purchase Agreement was not placed jointly by the parties for approval. In such circumstances, the fundamental principle that it is in the interest of encouragement and giving incentive to the co-generators that the Power Purchase Agreements could be modified upon revisit becomes of paramount importance.

...

28. ...The Power Purchase Agreement has to be subordinated to the Act, 2003. If the Power Purchase Agreement is not in conformity with the Act, 2003 then it loses its legal force. This is the broad principle which every statutory authority has to regard. The Commission has statutory power to examine, review and approve the Power Purchase Agreement. The Commission has itself noted in the impugned order that it did not examine the aspect of capital cost. What exactly were the MNRE guidelines are not known and in the impugned order the Commission does not explain it. The principles for determination of tariff as laid down in section 61 cannot be sacrificed even when parties go through Power Purchase Agreement. A Power Purchase Agreement based on MNRE guidelines, particularly in relation to generation through renewable sources of energy, and not after the principles laid down in the law are liable to be reopened and re-examined. The Power Purchase Agreement has not been approved upon examination earlier by the Commission. The provision of Section -86 (1) has not been complied with so far. In Rithwik Energy Systems case, which we have already noted, it has been held that it is the bounden duty of the Commission to incentivize the generation of energy through renewable sources of energy. Power Purchase Agreements' can be re-opened only for the purpose of giving thrust to nonconventional energy projects and not for curtailing the incentive."

xl. It is submitted that the PPAs with the tariff of Rs. 2.45/Kwh entered into between the parties were not approved by the Commission. The statute lays down very clearly that the tariff is to be determined by the Commission and any agreement for sale/purchase of generated power is supposed to be approved by the Commission. In the present case however, the PPAs were neither in consonance with the respective applicable Tariff Order nor were they approved by the Commission. Therefore, the PPAs are bound to be revisited and modified to bring it in consonance with the

respective applicable Tariff Orders and then subsequently approved by the Commission.

- xli. Article 7 of the PPAs which provides for the Tariff, Billing and Payment terms (the provision is similar in all the concerned PPAs) specifically mentions that the procurement of power from a generating company is governed by the Orders/Regulations of the Commission. However, the Article mentions that the tariff is firm is cannot be varied but the said bar is only in relation to variation on account of fluctuation of exchange rate or changes in tax or any other reason whatsoever. The relevant provision of the PPAs reads as follows –*

“7.1.2 The Procurer shall pay to the Seller at the above Tariff for the energy received at the Delivery Point under this Agreement. However, such procurement shall be governed by regulations/ orders of MPERC from time to time.

7.1.3 The Tariff rates shall be firm for the whole life of the project and will not vary with fluctuation in exchange rate or on account of changes in taxes, or any other reason whatsoever.”

- xlii. With respect to the above cited provisions of Article 7 of the PPAs, especially Article 7.1.3, it is respectfully submitted that Hon’ble Appellate Tribunal for Electricity in the case of Gujarat Urja Vikas Nigam Limited v. Green Infra Company 2015ELR(APTEL)1316, has held that the determination of tariff is a statutory function which is outside the purview of the contract and the Commission has the power to amend the tariff. The relevant excerpt of the judgment is reproduced herein below –*

“42. ...In this case, the Supreme Court held that if a contract incorporates certain terms and conditions which are statutory then to that extent it is statutory. The Supreme Court further held that PPAs can be regarded as statutory only to the extent they contain certain provisions regarding determination of tariff. Determination of tariff is a statutory function. In our opinion, therefore, the statutory Commission alone will have jurisdiction in relation to any alteration or amendment of tariff by resorting to statutory provisions namely Section 62(4) and 64(6). Such alteration or amendment cannot be done mutually by parties. The PPAs entered into between the Appellant and Respondent No. 1 cannot denude the State Commission of its power to exercise its statutory function to redetermine or amend the tariff. A contract adopting a tariff determined by a statutory regulatory provision cannot eclipse the powers vested in the State Commission under the statute to amend it. ...

...

45. We have already noted that no terms in the contract can override a statutory provision. If there is a power to amend tariff under Sections 62(4) and 64(6), the parties by contract cannot set it at naught. Parties cannot confer jurisdiction or oust jurisdiction by contract which is statutorily vested in an authority. This clause therefore refers to terms of the agreement which are contractual. Tariff stands outside the purview of contract. Determination of tariff is a statutory function.

Tariff is not determined by agreement. Therefore, the statutory Commission will have jurisdiction in relation to any alteration or amendment of tariff as per the provisions of the Electricity Act. We have dealt with this issue extensively. We have referred to all the relevant provisions. In our opinion, it cannot be inferred from this clause that it fetters the power of the Appropriate Commission to redetermine tariff."

- xliii. *In M/s Junagarh Power Projects Private Limited v. Gujarat Urja Vikas Nigam Limited & Ors. 2014 ELR (APTEL) 521, the Hon'ble Appellate Tribunal for Electricity has held as follows –*

"28. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act."

- xliv. *In Rithwik Energy Systems Limited vs. Transmission Corporation of Andhra Pradesh Ltd. and Others 2008 ELR (APTEL) 237, it has been held by this Tribunal as under:*

"35. The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that nonconventional sources of energy are environmentally benign and do not cause environmental degradation. Even the tariff regulations Under Section 61 are to be framed in such a manner that generation of electricity from renewable sources of energy receives a boost. Para 5.12 of the National Electricity Policy pertaining to non-conventional sources of energy provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the sources. Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives."

- xlvi. *As prescribed in the judgments cited above, it is under the ambit of the powers enshrined upon the Commission by the Act, to re-open a PPA and modify the tariff.*

- xlvii. *Furthermore, the Licensee vide its Reply dated 20.03.2019 (which was received by the Generator on 27.03.2019) to the Dispute Notice sent by the Generator, has failed to consider the fact that the tariff of Rs. 2.45/Kwh is not in consonance with the applicable Tariff Orders and therefore is in contravention with the established legal regime in place. It is imperative here to mention that the Licensee has only limited its reply to the fact that the Generator consented to the tariff, however it has not appreciated the fact that the said tariff, which was an outcome of a competitive bidding for the PPAs entered into by the Licensee with SECI, is totally unrelated to the PPAs in question. No such competitive bidding was conducted for the present case, in absence of which it was mandatory for the PPAs entered into to prescribe a tariff as decided by the Commission i.e. by way of Tariff Orders.*

- xlvi. *It is pertinent here to mention that the Licensee vide its letter dated 17.06.2015, have itself considered the applicability of the Tariff Order dated 21.11.2007 for the respective WEGs, for the purchase of total energy generated at a rate of Rs. 2.90/Kwh i.e. rate of purchase of inadvertent flow as per the Tariff Order dated 21.11.2007, till the execution of fresh PPWAs.*

*A copy of the letter dated 17. 06.2015 is annexed herewith and marked as **Annexure - 20**.*

- xlvi. *It is humbly submitted that the enforcement of the tariff prescribed in the PPAs would compel the Generator to shut down its projects. The tariff is so unfair that it would result in extinguishment of the power generating units from the State of Madhya Pradesh on the one hand, while on the other, it is bound to prejudicially affect the larger public interest. The Generator has invested large sums of money in developing these generating units and it will be unfair to compel their closure, particularly, when for all these years they have been generating renewable energy. It is pertinent here to mention that the Generator has taken loans for the required investment in the project, the interest payments of which have already started. At the present tariff of Rs. 2.45/Kwh, the Generator is making huge losses which is leading to a Debt Service Coverage Ratio ("DSCR") of 0.98, which means the Generator is not even earning enough to cover the interest payments and the operating expenses. Whereas, if the tariff prescribed by the Commission in its wisdom under the Tariff Orders is applied to the PPAs, the Generator would atleast be making enough to cover the interest payments on the loan and cover the operating and expenses, with a very narrow margin of profit.*

*A calculation sheet demonstrating the commercial workings at a tariff of Rs. 2.45/Kwh is annexed herewith and marked as **Annexure - 21**."*

4. With the above submissions, the petitioner prayed for the following:
 - (a) Adjudicate the dispute between the Generator and the Licensee;
 - (b) Revise the tariff from Rs. 2.45/Kwh to Rs. 3.36/Kwh in the PPAs dated 04.10.2018 for 6.4MW and 11.2MW;
 - (c) Revise the tariff from Rs. 2.45/Kwh to Rs. 3.30/Kwh in the PPAs dated 05.10.2018 for 2.5MW;
 - (d) Permit the Petitioner to add/alter this petition and make further submissions as may be required by the Hon'ble Commission;
5. The petition was admitted on 11.06.2019. The petitioner was directed to serve a copy of the petition to the Respondent at the earliest and the Respondent was directed to file its reply by 05.07.2019. The Respondent was also directed to serve copy of reply to the petitioner

simultaneously. At the hearing held on 16.07.2019, Ld. Counsels on behalf of the parties could not appear due to Advocates' strike.

6. At the hearing held on 3rd September' 2019, it was observed that the Respondent did not file its reply to the subject petition and Ld. Counsel of Respondent No. 1 i.e. M.P. Power Management Co. Ltd., Jabalpur sought adjournment due to personal reasons. Therefore, the case was fixed for hearing on 17th September' 2019.

7. At the hearing held on 17th September' 2019, the Commission observed that by affidavit dated 09th September'2019 (received on 12.09.2019), the Respondent filed its reply to the subject petition. The petitioner sought two weeks' time to file its rejoinder on the aforesaid reply filed by Respondent. The case was fixed for hearing on 15th October'2019.

8. At the hearing held on 5th November' 2019, the Commission observed the following:

- (i) The petitioner by affidavit dated 10.10.2019 filed its rejoinder on the reply filed by the Respondent.
- (ii) Ld. Counsel of the petitioner concluded his arguments in the subject matter. Due to paucity of time and other part-heard matters, the argument by Ld. Counsel of Respondent could not be started.

9. At the hearing held on 03.01.2020, it was mentioned by the Ld. Counsels of both the parties that the case be heard afresh due to change in composition of the Members of the Commission after 10th January'2020. Accordingly, the case was fixed for hearing afresh on 11th February' 2020. However, afresh hearing in this matter could not be held in the month of February and March'2020 due to certain reasons. Thereafter, the hearing in this matter along with all other matters were postponed due to outbreak of COVID-19 followed by Nation-wide lockdown.

10. At the hearing held on 07.08.2020, Counsel who appeared for the petitioner sought adjournment in this matter mentioning that the Senior Advocate representing the petitioner was unable to appear due to some unavoidable circumstances and requested the Commission to list this matter preferably through physical hearing in the month of October'2020.

2. At the hearing held on 15th September' 2020, Ld. Senior Advocate who appeared for the petitioner while mentioning that the physical hearing is not possible due to COVID situation requested for a separate date for virtual hearing in this matter only, since the arguments by both the parties may take longer time. Considering the request of the petitioner, the case was fixed for arguments on 23rd September' 2020. At the hearing held on 23.09.2020, Ld. Senior Counsel for the petitioner and Ld. Counsel for the Respondent concluded their arguments and sought two weeks' time for filing their written submissions. They were allowed

to file their respective written submissions by the 8th October' 2020. The case was reserved for order on filing of written submissions by both the parties within the above stipulated date.

11. The Respondent MPPMCL by affidavit dated 11.07.2019 submitted the following in its reply to the petition:

- i. *The instant petition is completely mischievous a ruse on the part of the petitioner to repudiate/ renounce/ challenge the most sacrosanct terms and conditions of the Power Purchase Agreement dated 04.10.2018 and 05.10.2018 executed between the petitioner and the respondent.*
- ii. *In this light, it is pertinent to reproduce the brief background of the matter to demonstrate before this Hon'ble Commission the free, express and voluntary offers and consents given by the petitioner for executing Power Purchase Agreements at the rate of Rs. 2.45 per unit (excluding trading margin) and it is submitted that it was on this basis at which power was being offered to the respondent that the answering respondent accepted the offer for sale of power from the petitioner and entered into Power Purchase Agreements.*
- iii. *It is submitted herein at the outset that the rate which the petition is demanding today of Rs. 3.36/3.30 per unit for the sale of power was never mentioned by it in its several offers and correspondences submitted to the answering respondent before execution of the Power Purchase Agreements.*
- iv. *It is submitted without prejudice and at the outset that if the rate now being sought by the petitioner (Rs. 3.36/3.30 per unit) was offered or submitted to the answering respondent by the Petitioner, before the execution of the Power Purchase Agreement then the answering **respondent in all certainty would not have accepted/ consented to purchase of power at that rate** as is being now sought by the petitioner.*
- v. *It is submitted without prejudice, that the instant act on the part of the petitioner to first offer power at Rs. 2.45 per unit and get that offer accepted by the answering respondent and thereby entered into a binding Power Purchase Agreement and then at a later date make a complete "u-turn" and submit that the rate of Rs. 2.45 per unit was inadvertently offered is nothing but a fraud and a mischievous act on the part of petitioner committed on the answering respondent and the **Power Purchase Agreements are voidable at the option of the answering respondent.***
- vi. *It is at this stage pertinent to highlight before this Hon'ble Commission the several letters and correspondences freely, expressly and voluntarily issued by the petitioner to the answering respondent requesting for sale and purchase of power at the rate of Rs. 2.45 per unit.*
- vii. *In this regard, attention of this Hon'ble Commission is invited to the letter dated 19.04.2018 (annexure A-10 @page No. 60 of the petition) wherein the petitioner after giving a brief background of its project in para 7 and 8 of the said letter dated 19.04.2018 offers to sell power generated from its capacity of 20.1 MW WEG to MPPMCL (respondent) at SECL tariff i.e. Rs. 2.52 per unit including trading margin.*
- viii. *This is **clear, free, voluntary and express offer of the petitioner to sell power at Rs. 2.52 was accepted by the answering respondent** vide its letter dated 02.06.2018 where the answering respondent conveyed its consent for purchase of*

power w.e.f. the date of execution of PPA at Rs. 2.45 per unit (excluding trading margin) for the remaining life of the wind energy generators i.e. up to 20 years from the date of commissioning. This letter dated 02.06.2018 is mentioned in the petition as Annexure A-11 at page No. 63 of the petition.

- ix. It is, therefore, most pertinent to mention that the offer dated 19.04.2018 of the petitioner was free, voluntary and express to sell power at Rs. 2.52 paisa per unit (including trading margin) and this express, free and voluntary offer was accepted by the answering respondent vide its letter dated 02.06.2018 at Rs. 2.45 per unit (excluding trading margin) and it was through this offer and acceptance that valid and binding contracts came into existence from the date of execution of the Power Purchase Agreements.
- x. Thereafter, two Power Purchase Agreements dated 04.10.2018 and another dated 05.10.2018 were entered into between the petitioner and the answering respondent and in Article 7.1 of the Power Purchase Agreements @ page 84 (6.4 MW PPA), 141 (11.2 MW PPA) and 200 (2.5 MW PPA) of the petition, it has been clearly mentioned that the tariff for sale of power under this agreement is Rs. 2.45 per unit from effective date till the expiry date of the agreement.
- xi. It is also pertinent to mention that the **recitals of the Power Purchase Agreement more particularly recital E specifically mentions the letter dated 19.04.2018 (offer letter) and 02.06.2018 (acceptance letter) which led to the creation of contract between the parties.**
- xii. It is pertinent to mention herein that at no stage till the signing of the Power Purchase Agreements and even in the Power Purchase Agreements did the petitioner state that the rate of Rs. 2.45 per unit is not agreeable to it or that the rate at which power is being offered is conditional.
- xiii. It is submitted most vehemently that the petitioner accepted to sell power at the rate of Rs. 2.45 per unit and entered into power purchase agreements with the respondent of its own free-will and with open eyes and if today the petitioner is seeking to repudiate or to dispute the most sacrosanct terms of the contract (rate of power) then it is nothing but a fraud which has been committed on the answering respondent by the petitioner, as it has through its offer letters dated 19.04.2018 lured the respondent (MPPMCL) into accepting the offer for purchase of power at a particular rate and entered into a contract of the same and after a binding contract has come into effect, it is seeking to dispute and change the most sacrosanct term of the contract.
- xiv. It is submitted that the same cannot be countenanced and if the petitioner is seeking to change/ revise the rate at which the power is to be sold then the instant PPAs are voidable at the option of the answering respondent. It is pertinent to mention that **Article 7 of the Power Purchase Agreements is explicit and clear that the rate of Rs. 2.45 per unit from the effective date till the expiry and no change is permissible.**
- xv. At this stage it is also pertinent to mention to the other correspondences exchanged between the parties i.e. letter dated 16.06.2018 issued by the petitioner (@page No. 110 of the petition) whereby the petitioner states that it is now not going to supply power to one of its consumers (IPCA Laboratory) and shall sell the power to MPPMCL at the rate of Rs. 2.45 per unit as mentioned in the letters dated 19.04.2018 and 02.06.2018. Subsequently, vide letter dated 26.07.2018 (@ page 112 of petition), the

petitioner gives a letter of undertaking for the execution of PPA wherein in interalia submits that it is requesting to sell power and seeking consent of the answering respondent for execution of the PPA for 20.1 MW at the rate of 2.45 per unit. It is submitted that the act of the petitioner of issuing such specific letters of offer and undertaking for sale of power to MPPMCL and thereby entering into binding contract and then seeking to revise the rate of sale of power is nothing but an act of fraud and deceit committed on the Respondent by the Petitioner and the said act makes the Power Purchase Agreement voidable under Section 19 of the Indian Contract Act.

- xvi. *It is submitted that once the such offer has been accepted by the answering respondent vide its letter dated 02.06.2018 and Power Purchase Agreements dated 04.10.2018 and 05.10.2018 for purchase of power at Rs. 2.45 per unit had been executed, it is fraudulent and deceitful for the petitioner to turn around and submit that the rate of power which it is now seeking it is Rs. 3.36 per unit. It is reiterated that in such a scenario the Power Purchase Agreements are voidable at the instance of MPPMCL.*
- xvii. *It is submitted that the petitioner had also submitted a dispute notice vide letter dated 01.02.2019 (Annexure A-15 @ page 250) wherein in para 2 of the letter it had submitted that it has submitted that it had inadvertently signed the power purchase Agreements. It is submitted that the said letter dated 01.02.2019 was suitably answered by the answering respondent vide its letter dated 20.03.2019 (Annexure A-16 @page 261) and it was inter-alia pointed out that the parties have entered into a binding contract based on the representation and offer issued by the petitioner and to now change terms of the contract is a mischievous and a fraudulent act on the part of the petitioner and a ruse on the part of petitioner to repudiate the instant power purchase agreement.*
- xviii. *It is submitted that the instant submission is without prejudice to the submissions made by the answering respondent hereinabove wherein it has been submitted by the answering respondent that the offer to sell power was clear and express at the rate of Rs. 2.45 per unit.*
- xix. *In the light of the above the instant petition lacks merit and this Hon'ble Commission may be pleased to hold that the **PPA is voidable at the option of MPPMCL** and also dismiss the instant petition."*

12. By affidavit dated 10.10.2019, the petitioner broadly submitted the following in its rejoinder:

- "i. *At the outset, the Petitioner denies in full the contents of the Reply and for the sake of good order (and lest any arguments are sought to be advanced on the basis of non-denials) denies all and singular statement, allegations and contentions contained in the Reply which are in any manner contrary to or inconsistent with what has been stated herein, as if the same were set out and traversed seriatim. Nothing contained in the Reply is or should be deemed to have been admitted by the Petitioner, unless it has been specifically admitted herein.*
- ii. *The Petitioner hereby rejects in totality the averments put forth by the*

Respondent in its Reply as the same are perverse and devoid of any merit whatsoever. Respondent, in its Reply, has tried to evade the pertinent issue on which the petition is based that the MPERC has the power to determine the tariff for sale of power, and rather has made repetitive averments revolving only around the alleged offer and acceptance of the terms of the agreement.

- iii. *Respondent has conveniently dodged the issue raised by the Petitioner in its petition and considered it right not to address the same. Petitioner had filed its petition under Section 86(1)(f) of the Electricity Act, 2003 ('the Act'), along with Section 62, 86(1)(a) and 86(1)(b) of the Act for revision/modification of the tariff prescribed in the Power Purchase Agreements (11.2MW and 6.4MW) dated 04.10.2018 and Power Purchase Agreement dated 05.10.2018 (2.5 MW) from Rs. 2.45/Kw to Rs. 3.36/Kwh and Rs. 3.30/Kwh respectively, on the ground that the Act empowers the MPERC to determine the tariff for sale of power generated by power generating companies to Licensees as well as to revisit and suitably modify a Power Purchase Agreement ('PPA') to bring it in accordance with the regulatory regime.*
- iv. *The Act has been enacted to consolidate and upgrade the existing laws relating to generation, transmission, distribution, trade and use of electricity; for taking measures conducive to development of electricity as an industry; to promote competition therein and to protect the interest of consumers; rationalize tariff and promote efficient and environment friendly policies besides creating different regulatory and appellate bodies to deal with highly complex technical issues with regard to production, distribution and sale of electricity including fixation of tariff. A reading of the provisions of the Act would go to show that apart from fixation of tariff in a "situation of open access" or in a situation of competitive bidding covered by Section 63 of the Act, determination and fixation of tariff is a statutory function to be performed by the State Electricity Commissions, and exercising powers in consonance with the principles enunciated by the Act.*
- v. *Petitioner submits that under Section 62 of the Act empowers MPERC to determine the tariff for the supply of electricity by a generating company to a distribution Licensee and Section 61 provides for the Commission to specify the terms and conditions for determination of such tariff under the guiding terms enshrined in Clause (a) to (i) of Section 61.*
- vi. *Furthermore, it is pertinent here to mention that Section 86(1)(a) of the Act underlines the power of the State Electricity Commission to determine tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, within the State. Additionally, Section 86(1)(b) of the Act underlines the power of State Electricity Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. Section 86(1)(a) and 86(1)(b) reads as follows –*

“Section 86. (Functions of State Commission): ---

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

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

- vii. *Petitioner submits that it is clear from the language of Section 86(1)(a) of the Act that it is MPERC which has the power to determine the tariff for sale of power within the state of Madhya Pradesh. It is only in case of tariff determined by competitive bidding process that the Hon’ble Commission have to adopt the tariff so determined by the bidding process. Apart from that, in every other case it is the prerogative of the Hon’ble Commission to determine tariff for sale of power in the state of Madhya Pradesh.*
- viii. *The Apex Court in catena of judgments has held that fixation of tariff is a statutory function to be performed by the Electricity Commission subject to the determination of tariff for sale of power under open access (Section 42 of the Act) and in the case of competitive bidding (Section 63 of the Act). The said power is a statutory power vested upon the Electricity Commission and the parties to a Power Purchase Agreement has nothing to do with it. The Supreme Court in the case of **Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited & Ors. (2016) 8 SCC 743**, has held as follows –*
“10. ...A reading of the provisions of the 2003 Act would go to show that apart from fixation of tariff in a “situation of open access” or in a situation of competitive bidding covered by Section 63 of the Act, determination and fixation of tariff is a statutory function to be performed by the State Regulatory Commissions constituted under the Electricity Regulatory Commissions Act, 1988 and exercising powers in consonance with the principles enunciated by the Electricity Act, 2003. Insofar as fixation of tariff is concerned, Part VII of the Act read with the functions of the State Commission contained in Section 86 thereof are relevant and would require to be specifically noticed.”
- ix. *It is further submitted by the Petitioner that Section 86(1)(b) of the Act uses the term ‘regulate’, indicating that the Hon’ble Commission has the power and it is the primary function of a State Electricity Commission to regulate the procurement and purchase of power. The term ‘regulate’ has been given a very wide connotation in a catena of judgments of the Apex Court as well as the Appellate Tribunal for Electricity (‘APTEL’). Petitioner hereby submits that it is the Hon’ble Commission which has to regulate the procurement of power and*

its well within the ambit of its power to reopen a PPA and revise the tariff to bring it in consonance with the respective applicable Tariff Orders.

- x. Supreme court in **V. S. Rice Oil Mills & Ors. v. State of Andhra Pradesh AIR 1964 SC 1781** has held as follows –

*“20. Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being **what is it that is necessary or expedient to be done to maintain, increase, or secure supply** of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. That is why we do not think Mr Setalvad is right in contending that even though the respondent may have the power to regulate the price to which electrical energy should be supplied by it to the appellants, it had no power to enhance the said price. We must, therefore, hold that the challenge to the validity of the impugned notified orders on the ground that they are outside the purview of Section 3(1) cannot be sustained.”*

- xi. The Hon’ble Supreme Court has dealt with the term ‘regulate’ and discussed it in detail in **K. Ramanathan v. State of Tamil Nadu & Anr. (1985) 2 SCC 116** and has held as follows –

“18. The word “regulation” cannot have any rigid or inflexible meaning as to exclude “prohibition”. The word “regulate” is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p. 611:

“ ‘Regulate’ is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.

'Regulate' is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict."

See also: Webster's Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784.

19. *It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."*
- xii. *It is evident from the above-mentioned judgments of the Apex Court that the ambit of power/function of the State Electricity Commission is wide enough to consider the revision/modification of tariff prescribed in the PPAs.*
- xiii. *It is submitted that the Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited &Ors. (2016) 8 SCC 743**, upheld the decision of the Hon'ble APTEL in **Tarini Infrastructure Limited v. Gujarat Urja Vikas Nigam Ltd. 2012 SCC OnLine APTEL 119** wherein it was held that the commission has the power to **reopen a PPA and tariff be determined as per the applicable regulatory mechanism**. The relevant excerpt of the judgment of the Apex Court is as follows –*

"18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898."
- xiv. *Petitioner submits that a PPA is always subordinate to the Act. The provisions of a PPA cannot take precedence over the regulatory regime prescribed by the Act. It is the Act which confers the power of determination of tariff onto the*

State Commission, therefore, the tariff in a PPA have to be in accordance with the tariff so determined by the State Commission, which in the present case is the tariff prescribed in the respective applicable Tariff Orders issued by the Hon'ble MPERC.

- xv. *It is submitted that the Respondent was very well aware of the respective Tariff Order applicable to the PPAs. The said applicable Tariff Orders even find a mention in the recitals of the PPAs. It is known that the MPERC issues such Tariff Orders in accordance with the powers vested in it by under Section 86(1)(a), (b) and (c) read with (e), and Section 62(1) of the Act, in order to determine the tariff for generation, supply, transmission and billing of electricity, the procurement process and related dispensation for the purchase of power by Licensees in the state of Madhya Pradesh from wind electric generators in the State. Therefore, the tariff prescribed by the said Tariff Orders was in due knowledge of Respondent.*
- xvi. *It is further submitted that even the PPAs entered into between the parties provide for the jurisdiction of MPERC in case of any claim for any change or determination of tariff by any of the parties. The reason behind the presence of the said clause in the PPA is that the parties to the agreement foresighted such a scenario thereby making the intention of the parties very much clear that the terms pertaining to the tariff are not impenetrable and so to say 'sacrosanct', and that the same can be disputed by any party to be finally adjudicated upon by the Hon'ble Commission. The relevant clause of the PPA reads as follows –
 "13.3.1 Dispute Resolution by MPERC
 (a) Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or relates to any matter agreed to be referred to MPERC, such Dispute shall be submitted to adjudication by MPERC."*

Fraud

- xvii. *Respondent has accused the Petitioner of fraud and 'mischief' on account of filing the said petition for revision/modification of tariff in the PPAs, which seems to be a hopeless attempt devoid of any merit whatsoever, to **abruptly end the said PPAs**. Section 17 of the Indian Contract Act, 1872 ('Contract Act'), defines fraud. It is trite law that the onus of proof is on the party alleging fraud. Respondent have not proved beyond reasonable doubt before the Hon'ble Commission that Petitioner committed any fraud or 'mischief' (not a ground prescribed in the Contract Act) whatsoever. Also, a perusal of the language of Section 17 makes it clear that the present case does not fall under the category of fraud. Section 17 of the Contract Act reads as follows –
 "17. "Fraud" defined.—
 "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—*

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
- (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;*
- (4) any other act fitted to deceive;*
- (5) any such act or omission as the law specially declares to be fraudulent.”*

xviii. *It is submitted that the Petitioner - (a) never suggested any fact which was untrue, (b) never concealed any material fact - the tariff prescribed in the applicable respective Tariff Orders was in due knowledge of the Respondent, (c) never promised anything without the intention of performing it – it has never been the case of the Petitioner to back out of the PPAs, (d) never have done any act to deceive the Respondent, and (e) never committed any act or omission which is declared fraudulent by law. It is pertinent here to mention that the Respondent has failed to showcase as to how the act of the Petitioner falls into the definition of ‘fraud’ under Section 17 of the Contract Act.*

xix. *The petitioner submits that Respondent is trying to term the act of filing of the said petition by the Petitioner as a fraud being committed upon the Respondent, which baffles logic and are bereft of any merit. Just by alleging fraud, the Respondent cannot make the PPAs voidable as the burden of proving fact is on the one who asserts it. It is submitted that the Respondent is bound to prove the assertion of any alleged fraud so committed by the Petitioner as the settled legal principle of affirmati non neganti incumbit probatio is based on Section 101 of the Indian Evidence Act 1872. Hon’ble Supreme Court while discussing the provisions of the Indian Evidence Act 1872, in the matter of **Rangammal v. Kuppuswami and Anr. 2011 12 SCC 220**, has held as follows:*

“21. Section 101 of the Evidence Act, 1872 defines “burden of proof” which clearly lays down that:

“101. Burden of proof.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

*Thus, the **Evidence Act** has clearly laid down that the **burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case.** The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.”*

xx. *That there is no act of concealment on the part of the Petitioner. It is submitted that the Respondent was very well aware of the applicable respective Tariff Orders while entering in to the PPAs with the Petitioner. Such fact is clear from the Recitals of the PPAs wherein the Respondent has acknowledged the existence of the applicable respective Tariff Orders. It is further stated in*

*arguendo that the applicable respective Tariff Orders, being a public document were very well within the reach of the Respondent so as to perform any due-diligence on its part to check the veracity of the representations made by the Petitioner with respect to the electricity tariff. The Respondent now, cannot take the plead of being defrauded by the Petitioner. In the matter of **Krishnan Vs. The Kurukshetra University, Kurukshetra (1976) 1 SCC 311**, it has been held as follows:*

"7 ...It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, was fraud is not proved"

xxi. Similarly, it has been stated in the matter of **Kamal Kant Paliwal Vs. Smt. Prakash Devi Paliwal and Ors. AIR 1976 Raj 79** as follows:

"7 ...The effect of fraud on an agreement so far as consent to it is procured by it may be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. But if the other party has the facts before it or has the means to know cannot be said to have been defrauded even if a false statement has been made."

xxii. It is submitted by the Petitioner that the onus of proof is on the party that alleges fraud, which in the present case is the Respondent

xxiii. Thus, it is submitted that the Petitioner has not committed any fraud on the Respondent and therefore, such ground being taken by the Respondent is only a malafide one.

xxiv. It is further submitted that the Hon'ble Appellate Tribunal for Electricity ('APTEL') in **Gujarat Urja Vikas Nigam Limited & Ors. v. Renew Wind Energy (Rajkot) Private Limited & Ors. 2018 SCC OnLine APTEL 144**, while upholding the decision of the Electricity Commission that there cannot be a tariff in a PPA which is not in accordance with the Regulations, also threw light on the aspect as to when can an agreement considered to be done in **undue influence**. The relevant portion of the judgment is reproduced herein below –
*"9.14 Per contra, learned counsel for the Respondents submitted that while going through various provisions of the PPA, it becomes crystal clear that such a one sided agreement cannot be signed by a party who is going to be affected throughout the life span of the project; will sign the agreement under normal circumstances. In other words, the **PPA with so many discriminatory clauses and can be executed under coercion and duress only**. He was quick to submit that the Appellant has relied upon the judgment of Hon'ble Supreme Court on the issue of duress and coercion in the case of Transmission Corporation of Andhra Pradesh Limited v. Sai Renewables Power Private Limited It is the submission of the Appellant that there had to be definite pleadings which have to be substantiated conclusively by cogent and proper evidence.*

9.15 The learned counsel further submitted that the parties cannot be permitted to deny the facts as they existed at relevant time just because it may

not be convenient to adhere to those terms. Admittedly, the impugned order of the State Commission is not on the issue of duress or coercion alone nor is it on account of parties wishing to avoid contract that they have executed. The core issue in the present appeal is whether can there be a tariff between a generating company and distribution licensee in a PPA which is not in accordance with the Regulations and Orders passed by the State Commission. He pointed out that the State Commission all that has done is only to align the tariff with its Regulations and its Orders.

...

9.19 We have carefully considered the rival contentions of both the parties on this issue and also took note of the cited decisions/judgments of the Hon'ble Supreme Court and this Tribunal. Based on our critical analysis of the material placed before us, we note that the core issue in the present appeal is not only limited to the coercion or duress but to whether there can be a tariff between a generating company and a distribution licensee in a PPA which is not in accordance with the Regulations and Tariff Orders issued by the State Commission. The State Commission after careful consideration of the submissions made by both the parties and after due analysis of the available material on record has recorded its findings in the impugned order that the conditions envisaged in the PPA relating to the tariff and other associated conditions appeared to be one sided in favour of the Appellants and accordingly concluded the case of coercion or duress and unequal bargaining power between the parties being responsible for executing an Agreement full of unjustness and perversity. In view of these facts, we hold that the State Commission has analysed this issue rightly in accordance with law and passed the order assigning cogent reasoning. Thus, we do not find any material case or ground for our interference in the matter.

SUMMARY OF OUR FINDINGS:

9. Having regard to the careful consideration and critical analysis of the facts and submissions of the learned counsel for the Appellants as well as the Respondents, we hold that the findings of the State Commission are just and right in accordance with law. Accordingly, the impugned order of the State Commission deserves to be upheld and the appeal filed by the Appellants is liable to be dismissed."

xxv. *It is clear, that in the present case too, the conditions/terms prescribed in the PPAs were **one-sided** favouring the Respondent and were conceded to by the Petitioner only because of the **financially compelling circumstances**.*

Business efficacy

xxvi. *Hon'ble APTEL in the matter of **M/s Junagarh Power Projects Private Limited v. Gujarat Urja Vikas Nigam Limited &Ors. 2013 SCC OnLine APTEL 146**, addressing the issue of the ambit of power of the Electricity Commission relied on a catena on judgments to come to the conclusion that such commissions are vested upon with a wide ambit of power which includes varying a contract so as to bring it in accordance with the regulatory mechanism. APTEL also held that it was the duty/function of the State*

Electricity Commission to incentivise power generation from renewable sources (Section 86(1)(e) of the Act) and appropriately consider the interests of the generating company too. The relevant excerpt of the judgment is as follows –

*“29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the **State Commission has powers to revise the tariff in a concluded PPA** keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the **objective of the Electricity Act**. The State Commission has the duty to incentivise the generation of electricity from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company. In fact the State Commission has itself in the case of Abellon Clean Energy by order dated 7.2.2011 modified the tariff determined earlier in the generic tariff order dated 17.5.2010. In the order dated 17.5.2010, there was no separate tariff for biomass projects with air-cooled condensers and a common tariff was decided irrespective of the type of cooling used. However, the State Commission re-determined the tariff decided in order dated 17.5.2010 and allowed increase in tariff for biomass plants with air cooled condenser.”*

xxvii. *It is thus also submitted that the Hon’ble Commission should also take into consideration the business efficacy and the interests of the generating company as one of the factors for revisiting a PPA.*

xxviii. *It is further submitted that a PPA is a business contract in the end, and same should be construed in such a way so as to provide business efficacy. The tariff of Rs. 2.45/Kwh would not provide any business efficacy to the transaction as the project would be rendered inviable if the lower tariff of Rs. 2.45/Kwh is maintained. The Petitioner places reliance on **Pawwan Alloys v UP State Electricity Board (1997) 7 SCC 251**, wherein the Supreme Court quoted a passage from Chitty on Contracts, as follows:*

“45. Mercantile contracts – Although it has been stated that there is no in law any difference of construction between mercantile contracts and other instruments, commercial documents ‘must be construed in a business fashion,’ and ‘there must be ascribed to the words a meaning that would make good commercial sense’. Indeed, in The Antaios Lord Diplock said that ‘if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense’.....” (emphasis added)

xxix. *Further reliance is also placed on the judgment in **Nabha Power Ltd v Punjab SPCL (2018) 11 SCC 825**, wherein the Hon’ble Supreme Court propounded that reasonableness and business efficacy of a contract has to be*

looked into while interpreting a contract. It is submitted that the PPAs should not be interpreted in such a way that they lose their business efficacy. The relevant excerpt of the judgment is as follows –

“44. The next development was in Investors Compensation Scheme Ltd. v West Bromwich Building Society. Lord Hoffman, in his majority opinion, prefaced his explanation of reasons with some general remarks about the principles which contractual documents are nowadays construed – common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of “legal” interpretation was observed to have been discarded, and the principles summarised as follows: (WLR pp. 912 H-913 F).

‘(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd.

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Copmania Naviera S.A. v. Salen Rederierna A.B.: (AC p.201)

‘...if detailed semantic and syntactical analysis of words in a commercial

contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

And

“46. There were, once again, parallel developments in India during this period in various High Courts but the views of this Court can be found expression in Dhanrajamal Gobindram v. Shamji Kalidas and co. (AIR pp. 1291-92, para 19) '19.... Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of courts is to give a meaning, if possible. This was laid down by the House of Lords in Hillas & Co. v Arcos Ltd., and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is Adamastos Shipping Co. Ltd. v Anglo-Saxon Petroleum Co. Ltd. There, the clause was “This bill of lading”, whereas the document to which it referred was a charter-party. Viscount Simonds summarised at AC p.158 all the rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.”

xxx. *It is submitted that the Petitioner, in its petition has already highlighted the fact that the tariff of Rs. 2.45/Kwh is highly unviable for the project of the Petitioner and if the same were to continue it could result into heavy losses and subsequent unfeasibility of running the project. It is submitted that the said lower tariff of Rs. 2.45/Kwh has resulted in a Debt Service Coverage Ratio ('DSCR') lower than 1, which has become a major concern for the lenders of the Petitioner company. It is humbly submitted that if the Hon'ble Commission revises the tariffs of the PPAs as per their respective applicable Tariff Orders, there is a possibility of improving the DSCR to a respectable figure of 1.19.*

xxxi. *It is submitted that although the Contract Act provides for 'freedom of contract', but the same does not extend to permit an agreement which is violative of law or public policy or is injurious to the other party or is violative of Section 23 of the Contract Act.*

xxxii. *Parties are free to enter into a contract for supply of power defining quantity, quality and the manner in which the supply can be made, however, the price fixation for the sale is vested on the Hon'ble Commission by the statute itself i.e. the Act. The Act in utmost clear terms prescribes the fixation of tariff by the Commission i.e. by way of Tariff Orders except in cases of competitive bidding (Section 63 of the Act). It is submitted that the price is fixed by the Commission, the same would be considered as the price fixed under the statute (therefore law). Therefore, no other price could be agreed upon except that provided under the law fixed by the Commission. It is further submitted that if the lower tariff of Rs. 2.45/Kwh, which is the tariff not fixed by the Commission, is given effect to then the entire purpose/regulatory function of the Commission prescribed by the Act would be rendered futile and redundant.*

xxxiii. *Petitioner submits that the fixation of tariff lower than the tariff prescribed by the Commission causes injury to the Petitioner resulting in the whole project becoming financially unviable and is opposed to the regulatory regime i.e. the relevant law/statute or public policy, and is immoral.*

xxxiv. *It is therefore submitted that the contentions and arguments put forth by the Respondent are meritless and baseless and should be rejected outrightly and the prayers of the Petitioner should be granted by the Hon'ble Commission.*

PARAWISE REPLY

xxxv. *Before dealing with the contents of the Reply, the Petitioner most respectfully submits that the contents of the paragraphs below should be read without prejudice to the contents of the foregoing sections of this Rejoinder as well as the Petition filed.*

xxxvi. *Respondent's Reply to the extent to which it could be understood at all is characterized by a sparse description and lack of necessary particulars and frequent repetition of baseless contentions. The subsequent paragraphs can only consist of succinct comments on the Reply to the extent to which the Petitioner was able to decipher them in order to point out the essential deficiencies.*

xxxvii. *The contents of the introductory paragraph 1 are denied save and except for whatever is a matter of record.*

xxxviii. *The contents of paragraph 2 are denied in entirety. It is submitted that the petition is filed for the revision of tariff, prescribed in the PPAs, by the Hon'ble Commission under its power of determination of tariff. It is denied that the said petition has been filed to challenge the most sacrosanct terms of the PPAs rather it is the case of the Petitioner that the PPAs have to be in accordance with the regulatory regime in place, more specifically the respective applicable Tariff Orders.*

xxxix. *The contents of paragraph 3 are denied in entirety. It is submitted that the Respondent is trying to portray a portion of the facts that occurred so as to concoct a self-serving narrative. It is imperative to bring to light the facts which led to the said PPAs –*

a. *The Petitioner had initially entered into Power Purchase Agreements for 17.6 MW (11.2 + 6.4) with MPPMCL for sale of power generated, to M/s IPCA Laboratories Limited with a provision of sale of excess power generated to MPPMCL. The said Power Purchase Agreements were entered on 22.06.2016.*

b. *However, after the introduction of the 7th Amendment to the MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulations 2010, which provided for levying cross subsidy surcharge,*

additional surcharge and wheeling charges for open access customers, the sale of power under open access became unviable for the Petitioner. As a result, the PPAs dated 22.06.2016 were terminated by mutual consent of the parties.

Due to the abrupt termination of the PPAs and under the fear of facing losses due to wastage of generated power due to idling of the WEGs, the present PPAs were entered into by the Petitioner under these compelling circumstances.

- xl. *The contents of paragraph 4 are denied in entirety except what is a matter of record. As submitted above, the correspondences made were a desperate attempt to safeguard itself from the hovering losses which the Petitioner would have suffered due to the idling of WEGs.*
- xli. *The contents of paragraph 5 are denied and objected to in entirety. Respondent is basing its arguments on baseless surmises and conjectures and deviates from the actual issue in question which is that the PPAs ought to be in accordance with the respective applicable Tariff Orders and whether the Hon'ble Commission is empowered to grant the relief prayed by the Petitioner.*
- xl.ii. *The contents of paragraph 6 are denied and objected to in entirety save to the extent that is a matter of record. Petitioner submits that the Respondent is trying to portray a twisted version of the facts and placing a completely false, baseless and absurd allegation on the Petitioner to escape from its obligations. It is submitted that the Petitioner never intended to make a 'u-turn' from its obligations under the PPAs rather the present petition is filed only for determination of tariff by the Hon'ble Commission, which is a statutory function of the Commission so as to regulate the sale of power generated by generating companies to Distribution Licensees in the state of Madhya Pradesh. Petitioner reiterates that the tariff prescribed in the PPAs in question is not in accordance with the respective applicable Tariff Orders. It is further submitted that the Respondent is seeking to get the PPAs declared voidable at its instance on a flawed basis. First, the allegation made by Respondent that the act of Petitioner is 'mischievous' is baseless as 'mischief' is not a ground to make a contract voidable under the Contract Act, rather it does not even find a mention in the Contract Act. Secondly, Respondent has alleged fraud on the Petitioner without meeting the requirements of fraud prescribed in Section 17 of the Contract Act. It is also submitted that the onus of proving fraud is on the party which alleges it and the Respondent, being put to strict proof, has not proved fraud beyond reasonable doubt.*
- xl.iii. *The contents of paragraph 7 are denied in entirety save as to what is a matter of record. The Petitioner submits that after the termination of the earlier PPAs, it was in a dire and helpless situation with the fear of power being generated getting wasted due to the idling of the WEGs. In such a situation, in order to save the power from getting wasted and suffering huge losses, the Petitioner took steps to secure the future of the power generated from its WEGs.*

xliv. *The contents of paragraph 8 are denied and objected to in entirety save as to what is a matter of record. As stated earlier, after the termination of the earlier PPAs the Petitioner was forced to take drastic steps to safeguard the power generated from its WEGs even if it meant to accept one-sided, completely unfavourable terms of Respondent. It is pertinent here to mention that the Petitioner was initially offered the tariff of Rs. 2.52/Kwh by Respondent, who clearly knew the impaling and helpless situation Petitioner was in, thus compelling the Petitioner to concede.*

xlv. *The contents of paragraph 9 are denied and objected to in entirety save as to what is a matter of record. The Petitioner again reiterates that actions were taken by it to safeguard itself from the losses of idling of WEGs and wastage of green energy generated, as it had no other choice.*

xlvi. *The contents of paragraph 10 are denied and objected to in entirety save as to what is a matter of record. It is submitted that the case of the Petitioner herein is the revision of power prescribed in the PPAs by the Hon'ble Commission to bring it in consonance with the regulatory regime, i.e. the respective applicable Tariff Orders.*

xlvii. *The contents of paragraph 11 are denied and objected to in entirety save as to what is a matter of record. It is submitted that the Petitioner is partly citing the provision of the PPAs (similar provision in all the PPAs) to serve its purpose. Respondent cites Article 7.1 more specifically Article 7.1.1 to argue that the tariff prescribed by the PPA is Rs. 2.45/Kwh. But it failed to mention that the subsequent clause i.e. Article 7.1.2 prescribes that the procurement of power shall be governed by the MPERC Regulations and Orders. It is also pertinent to mention that the PPAs under Article 7.1.3 bar a change in the tariff only in the cases of fluctuation in exchange rate or on account of changes in taxes etc. Thus, the intention of the parties was clear to bar a change of tariff only in certain cases and as the parties cannot overcome the statutory function of the Hon'ble Commission, they specifically prescribed that the tariff/procurement of power would be governed by the Regulations/Orders of Hon'ble MPERC. Article 7.1.2 and 7.1.3 read as follows –*

“7.1.2 The Procurer shall pay to the Seller at the above Tariff for the energy received at the Delivery Point under this Agreement. However, such procurement shall be governed by regulations/ orders of MPERC from time to time.

7.1.3 The Tariff rates shall be firm for the whole life of the project and will not vary with fluctuation in exchange rate or on account of changes in taxes, or any other reason whatsoever.”

xlviii. *The contents of paragraph 12 are denied and objected to in entirety save as to what is a matter of record. It is submitted that the Respondent is trying to*

portray the present matter as a general contractual dispute, whereas both, the PPAs and the present dispute falls under the regulatory mechanism established by the Act and has to be in accordance with the same.

- xlix. The contents of paragraph 13 are denied and objected to in entirety save as to what is a matter of record. The Petitioner submits that the compelling situations it was in has not been brought up by the Respondent an instead only the letters are being cited. Respondent is deviating from the issue that is the determination of tariff by the Hon'ble MPERC and the subsequent revision in the PPAs, which has to be in consonance with the respective applicable Tariff Orders.*
- i. The contents of paragraph 14 are denied and objected to in entirety save as to what is a matter of record. It is submitted that the Respondent is depicting the sincere and legal prayer of the Petitioner to bring the PPAs in consonance with the applicable regulatory regime i.e. the applicable respective Tariff Orders, into an act of fraud being committed by the Petitioner. The said act of the Petitioner does not and cannot fall into the definition of 'fraud' enshrined in Section 17 of the Contract Act. Respondent has failed to demonstrate how the said act, even if it was a fraud (Petitioner states that it is not a case of fraud), falls under the requisites of Section 17 of the Contract Act. It is trite law that the onus of proving fraud is on the party alleging fraud, and Respondent in the present case, have failed in it miserably. Respondent cannot flee from its obligations just by alleging fraud. It is submitted that the present case cannot be understood as a luring in of the Respondent to enter the contract as the Petitioner has never denied the sale of power to Respondent at any instance. Petitioner is only praying for the determination of the tariff of the said PPAs by the Hon'ble MPERC under the Act. Paragraph 18 to 26 should be read as a part and parcel to this paragraph.*
 - ii. The contents of paragraph 15 are denied and objected to in entirety save as to what is a matter of record. The argument of Respondent that the act of Petitioner praying for revision/determination of tariff would render the agreements voidable at the instance of Respondent are meritless and is a legal profanity. The contents of paragraph 43 should be read as a part and parcel to this paragraph.*
 - iii. The contents of paragraph 16 are denied and objected to in entirety save as to what is a matter of record. Respondent had cited the letter dated 16.06.2018 wherein it was mentioned that the Petitioner will not be selling power to IPCA Laboratories. it is pertinent here to mention that the reason behind the said action was the coming in force of the 7th Amendment to the MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulation 2010, levying cross subsidy surcharge, additional surcharge and wheeling charges for open access customers in Madhya Pradesh, resulting in the sale of power being unviable ensuing the termination of the agreement for sale of power with IPCA Laboratories. It is this situation which compelled the*

Petitioner to take further steps to prevent huge losses. It is again reiterated that the act of Petitioner seeking revision/determination of tariff by the Hon'ble Commission is a valid and completely legal action under the statutory regime and in no reasonable way can be taken as an act of fraud. The earlier paragraphs dealing with the issue of fraud should be read as a part and parcel to this paragraph.

liii. The contents of paragraph 17 are denied and objected to in entirety save as to what is a matter of record. It is again submitted that seeking revision/determination of tariff by the Hon'ble Commission cannot be termed as an act of fraud. The PPAs survive under a regulatory mechanism in place and are bound to be in accordance with the same. The contention of the Respondent that the PPAs are voidable at its instance is meritless and should be rejected.

liv. The contents of paragraph 18 are denied and objected to in entirety save as to what is a matter of record. It is submitted that Respondent has cited a part of the Dispute Notice dated 01.02.2019 sent by the Petitioner to misdirect the Hon'ble Commission. A complete reading of paragraph 2 of the Dispute Notice makes it crystal clear that the PPAs were signed due to compelling financial reasons and lack of any choice. The relevant paragraph is reproduced herein below –

“2. We are addressing this Dispute Notice to you in accordance with the Clause 13.2.1 of the PPAs and hereby claiming a revision of the tariff from Rs. 2.45/Kwh i.e. the tariff on which the PPAs were inadvertently signed due to financial compelling reasons, to Rs. 3.36/Kwh (for 17.6MW) which is provided in the MPERC Tariff Order for Procurement of Power from Wind Electric Generators dated 21.11.2007 (attached herewith and annexed hereto as Annexure - 4), and Rs. 3.30/Kwh (for 2.5MW) in accordance with the Review Order dated 01.03.2006 (attached herewith and annexed hereto as Annexure - 5) passed by the MPERC reviewing the Tariff Order dated 11.06.2004 (attached herewith and annexed here to as Annexure-6), being the applicable tariff orders as per the date of commissioning of the WEGs.”

lv. The contents of paragraph 19 are denied and objected to in entirety.

lvi. The contents of paragraph 20 are denied and objected to in entirety.”

13. At the hearing held on 23.09.2020, Ld. Senior Counsel for the petitioner and Ld. Counsel for the Respondent concluded their arguments and sought two weeks' time for filing their written submissions. They were allowed to file their respective written submissions by the 8th October' 2020.

Final written submission on Arguments by the parties:

14. The Respondent, MPPMCL vide its letter dated 05.10.2020 submitted the following its written submission on arguments:

- “i. *It is most respectfully submitted that as clearly demonstrated by the facts, as mentioned hereinabove, the petitioner who entered into a contract with open eyes has now sought to dispute those very terms by pleading that it was “forced to enter into a contract” and that it “was later noticed by it” that the terms of the contract (tariff) is not as per its liking. In this regard, it is most respectfully submitted that the **letters dated 19.04.2018** and subsequent letters issued by the petitioner (offer and acceptance) are part and parcel of the Power Purchase Agreement and, therefore, have to be read along with the Power Purchase Agreement as being a part of the contract. A perusal of the letters and the discussions between the parties are taken in April, 2018 and ended with the execution of the contract in October, 2018, do not at any place signify that the respondent has forced the petitioner to enter into a contract. It is submitted that the respondents and the petitioner are commercial organizations and it was on the basis of mutually acceptable terms that the contract was entered and it is most pertinent to mention here that it is the petitioner who in its correspondences has clearly mentioned the rate of power at which it wants to sell the electricity to the respondent, therefore, to today **make a complete “u-turn”** and submit that the same is not agreeable is nothing but a **fraud** on the respondent as it clearly highlights that the petitioner had never any intention of performing the contract and the promise to sell power at Rs.2.45 per unit (excluding trading margin) was only a ruse to somehow induce the Respondent to enter into a contract and thereafter dispute the admitted terms before the judicial forums by citing that the Power Purchase Agreement is not executed in accordance with law and thus try to get a higher rate. It is submitted that such fraudulent conduct on the part of the Petitioner cannot be countenanced.*
- ii. *In this regard, it is most respectfully submitted that a perusal of recital B of Power Purchase Agreement clearly highlights that the parties agree that with respect to issues mentioned in the PPA the terms and conditions of the **PPA shall apply**. However, the **terms not covered under the PPA shall be governed as per the tariff order dated 21.11.2007**. It is, therefore, incorrect on the part of the petitioner to aver or allege that the Power Purchase Agreement is not in accordance with law. In this regard, it is also submitted that the petitioner was always aware of the tariff order dated 21.11.2007 and, therefore, it is **estopped from changing its position** as it has now entered into a contract with open eyes. It is further most respectfully submitted that the petitioner has committed a fraud under Section 17 of the Contract Act as it never had any intention to perform the contract and it has only used its promises to **induce the respondent to enter into a contract** and then seek a higher rate than what was agreed.*
- iii. *Without prejudice to the above it is submitted that the petitioner and the*

respondent being commercial organizations took a **commercial decision** and entered into a contract which gave a lower rate for power purchase than the rate mentioned in the Tariff Order 2007.

- iv. It is submitted that as per the law laid down by the Hon'ble Apex Court in **2006 (13) SCC 599, "Reliance Salt Limited vs. COSMOS Enterprises"** it has been held by the Hon'ble Supreme Court that the act of inducing a party to enter into a contract is also a fraud under Section 17 of the Contract Act and the respondent submits that a fraud has been committed on the respondent by the petitioner as the Petitioner induced the Respondent to enter into a contract at a particular tariff of which it never had any intention to perform. A copy of the Judgement 2006 (13) SCC 599, "Reliance Salt Limited vs. COSMOS Enterprises is attached as **Annexure-R-1**.
- v. Further, with respect to the contention of the petitioner that this Hon'ble Commission may revise the tariff mentioned in the contract. In this regard, it is most respectfully submitted that as per the decision of the Hon'ble Supreme Court in "Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company" reported in **2017 (16) SCC 498 (para 60 to 68)** and also in the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No.363/2019 dated 29.07.2020 it has been clearly held that the tariff can be determined by the State Commission under Section 62, however, the **choice or freedom of entering into a contract/PPA based on such tariff is only with the power producer (generator) and the distribution licensee** and the State Commission cannot force either the generating company or the licensee to enter into a contract based on such tariff **nor can it vary the terms of the contract** invoking its inherent or statutory jurisdiction. It has been clearly held by the Hon'ble Apex Court and the Appellate Tribunal for Electricity that the sanctity of the power purchase agreement entered into between the parties by mutual consent cannot be permitted to be breached by a decision of the State Commission and the terms of the PPA are binding on both the parties. It is submitted that the Hon'ble APTEL has clearly held in its judgment passed in Appeal No.363/2019 that the fundamental thing in a contract is the freewill and the consent of the parties and the Hon'ble Appellate Tribunal for Electricity has clearly held that while the tariff will be determined by the State Commission only but the State Commission in exercise of its power under the Electricity Act cannot force either the generating company or the licensee to enter into a contract based on such tariff against their will and consent and cannot give direction to change the terms of contract by invoking its jurisdiction. Copy of the judgment of the Apex Court in the case of Gujarat Urja Vikas Nigam Limited is filed as **Annexure-R-2** while a copy of the judgment of Appellate Tribunal for Electricity in Appeal No.363/2019 is filed herewith as **Annexure -R-3**.
- vi. It is submitted that the Hon'ble Appellate Tribunal for Electricity has relied on the judgment of the Hon'ble Apex Court as referred to hereinabove in the case of "Solar Semiconductor Power" (**supra**) and has quoted para 64 of the concurring judgment to give its judgement that the Freedom to Contract on mutual consent

*is paramount and there is no jurisdiction with the State Commission to vary or alter the terms of the contract. It is further submitted that the Hon'ble APTEL has also while passing the said judgment relied on another decision reported in **2016 (11) SCC 182 ("Emco Case")** and has held that while there is freedom of contract between the parties to either accept the price offered or not before the PPA is entered, however, such freedom is extinguished after the PPA is entered into. In other words once the PPA was executed all rights of the Petitioner to agitate against the terms ceased and extinguished and now it is bound by the terms of the contract.*

- vii. It is, therefore, submitted that the decision of the Hon'ble Apex Court and the Hon'ble APTEL clearly highlight that while State Commission can determine the tariff, however, it cannot direct either of the parties (petitioner or the respondent) to perform the contract by changing its terms and conditions by invoking its jurisdiction. Briefly, it is submitted that the petition is completely not maintainable as there is no jurisdiction with this Hon'ble Commission to direct that the contract be performed by the respondent or Petitioner by changing the terms of the tariff as the choice to enter into a contract at the particular terms and conditions is only with the Parties. It is lastly submitted that even on the basis of public interest no such direction ought to be given by this Hon'ble Commission as a change in tariff as has been sought by the petitioner shall have a financial impact of about 31.8 crores on the respondent, the cost of which shall be recovered from the people at large. It is submitted that without prejudice to the above the respondent is not agreeable to purchase electricity from the petitioner at the rate mentioned in the tariff order of 2007 and the only reason that it entered into contract with the petitioner was **because the power was being offered at a rate of Rs.2.45 per unit which is as per the prevailing market price.***
- viii. Without prejudice to the submissions made hereinabove it is also most respectfully submitted that even on **the principles of promissory estoppel the relief sought by the petitioner is not maintainable.***
- ix. In the light of the submission made hereinabove, the instant petition is devoid of merit and deserves to be dismissed."*

15. On 22.10.2020, the petitioner submitted the following in its written submission on arguments:

"i. The commissioning of the WEGs is an important aspect because the applicability of the Tariff Orders is incumbent on the date of commissioning of the WEGs. A tabular representation of the respective WEGs with their commissioning date is reproduced herein below for reference –

S.No	Location	Total capacity (MW)	Location No.	Date of Commissioning	Date of PPA	Applicable Tariff Order	Prescribed tariff	Commissioning Certificate annexed as (in the Petition)
1.	Ratedi Hills, Dewas	14 * 0.8 = 11.2	45, 46 and 53	26.03.2009	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure - 2
			54, 55, 56, 63, 64 and 65	10.06.2009	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure - 3
			90, 91, 92, 93 and 94	29.06.2009	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure - 4
2.	Ratedi Hills, Dewas	8*0.8=6.4	9, 10, 14, 15, 16, 17, & 19	20.03.2008	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure - 5
			18	29.03.2008	04.10.2018	Order dated 21.11.2007	Rs. 3.36/kwh	Annexure - 6
3.	Village Nagada, Dewas	2*1.25=2.5	N-13 & N-16	31.03.2006	05.10.2018	Order dated 11.06.2004 as reviewed on 01.03.2006	Rs. 3.30/kwh	Annexure - 7
Total = 20.1 MW								

- ii. The abovementioned chart makes its aptly clear the applicability of the respective Tariff Order on the subject WEGs. The chart also depicts the tariff prescribed by the respective Tariff Order. The applicability of the Tariff Order is based on the commissioning of a WEG within the prescribed control period mentioned in the respective Tariff Order. It is also pertinent here to mention that Respondent has not challenged or disputed the applicability of the respective Tariff Order as mentioned in detail in the chart above.
- iii. The Petitioner was initially selling the generated energy to M/s IPCA Laboratories Limited under open access vide Wind Energy Power Purchase and Wheeling Agreements for 17.6 MW (11.2 + 6.4) with a provision of sale of excess power generated to Licensee. The said Wind Energy Power Purchase and Wheeling Agreements were entered on 22.06.2016. However, **after the introduction of the 7th Amendment** to the MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulations 2010, which provided for **levying cross subsidy surcharge, additional surcharge and wheeling charges for open access** customers, the **sale of power under open access became unviable** for the Petitioner. As a result, the PPAs dated 22.06.2016 were terminated by mutual consent of the parties.
- iv. Under the looming **fear** of the green energy generated being wasted and **heavy financial losses with no return** whatsoever, the Petitioner was compelled to get in touch with the Respondent vide its letter dated 19.04.2018, after getting the information that the Respondent was entering into a PPA with SECI at a tariff of Rs. 2.52/Kwh (**which was a result of an independent competitive bidding process**). With a view to put a stop on the incumbent losses and wastage of renewable energy and without any **other viable option** left with it, Petitioner

requested the Respondent to enter into a PPA for the energy generated by the 20.1 MW WEGs of Petitioner at the same tariff as that of SECI i.e. Rs. 2.52/Kwh.

- v. *It is the case of the Petitioner that the tariff for sale of power generated has to be determined by the Commission and the tariff so determined/fixed by the Commission under the powers vested upon it by the Act, is applicable and binding. In the present case however, there is an anomaly because a lower tariff is prescribed in the PPAs than what has been determined and fixed by the Commission vide its Tariff Orders so applicable.*
- vi. *Petitioner states that the tariff prescribed by the respective applicable Tariff Order is the tariff which is determined by the Commission as a statutory power and under a statute, thus making it mandatory and binding. Petitioner also states that the Commission also has the power to re-open/revisit a concluded Power Purchase Agreement and revise the tariff to bring it in consonance with the regulatory regime.*
- A. ***Fixation of tariff is a statutory function and the tariff fixed by the Tariff Order is binding***
- vii. *The Act has been enacted to consolidate and upgrade the existing laws relating to generation, transmission, distribution, trade and use of electricity; for taking measures conducive to development of electricity as an industry; to promote competition therein and to protect the interest of consumers; rationalize tariff and promote efficient and environment friendly policies besides creating different regulatory and appellate bodies to deal with highly complex technical issues with regard to production, distribution and sale of electricity including fixation of tariff. A reading of the provisions of the Act would go to show that apart from fixation of tariff in a "situation of open access" or in a situation of competitive bidding covered by Section 63 of the Act, determination and fixation of tariff is a statutory function to be performed by the State Electricity Commissions, and exercising powers in consonance with the principles enunciated by the Act.*
- viii. *In the case of **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603** while analyzing the scope of the Act, the Supreme Court highlighted the power of tariff determination by the Electricity Commission and also specified that tariff determination is a statutory function and is legislative in character.*
- ix. *It is clear from the cited paragraphs that the power of regulating by way of determining and fixing the tariff for sale of generated power is statutory in nature and has been delegated upon the Commission under the provisions of the Act. Due to the legislative nature of the Tariff Order, the tariff prescribed therein is binding and is to be adhered to. The said power of determining & fixing of tariff is exercised by the Commission under the aegis of delegated legislation and is thus legislative in nature and therefore binding. It is submitted that no party can deviate from the provisions of the respective applicable Tariff Order as such a liberty is not granted*

to the parties.

x. *It is also a finding given by the Supreme Court in the above cited judgment that a delegated legislation by the Commission issued as a part of the regulatory framework can intervene and even override concluded contracts to align them with the regulatory regime. This aspect is being dealt in much detail in the next leg of the submissions.*

xi. *In the matter of **Tarini Infrastructure Limited v. Gujarat Urja Vikas Nigam Ltd., 2012 SCC OnLine APTEL 119**, the Appellate Tribunal for Electricity also held that the tariff determined/fixed by the Commission under its statutory function is sacrosanct and is binding on the parties. The relevant excerpt is reproduced herein below –*

“16. It is trite law that under the Electricity Act 2003 the jurisdiction vests with the Commission for determination of tariff. A contract entered into between the parties is definitely binding on the parties but only in so far as the conditions contained in a contract are not repugnant and do correspond to the provisions of law. If the contract is the outcome of duress or coercion or where the contract does not conform to the law it is the latter that prevails over the former.

...

17. Thus, under the Act, 2003 mandate has been given upon the Commission, inter alia to (a) determine the tariff for generation, supply, transmission and wheeling of electricity, (b) to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies, (c) to promote co-generation and generation of electricity from renewable sources of energy by providing adequate measures for connectivity with grid (d) to promote competition, efficiency, and economy in the activities of the electricity industry and promotion of investment in electricity industry. These functions together with the other functions of the State Commission as laid down in section 86 of the Act make it clear that so far as determination of tariff is concerned a power purchase agreement if to be concluded by and between a developer and a distribution licensee cannot be the final say in the matter. A power purchase agreement is always subordinate to the provisions of the Act which empowers the State Commission to determine tariff, to promote generation from renewable sources of energy, to promote competition, efficiency and economy and to ensure transparency while exercising its functions.

...

35. Reading between the lines of Section 86(1)(b), it appears that a Power Purchase Agreement does not by itself, make it binding on parties unless it gets approved up examination by the Commission. The Section 86 does not make a qualitative distinction between the determination of tariff by the Commission itself and determination through regulation of the price at which electricity should be procured from the generation companies through Power Purchase Agreement. Necessarily, the price agreed to by and between the parties must follow the principles and provisions of the law and where the price agreed or to arrived at the Power Purchase Agreement is not in consonance with the law but

on the basis of some guidelines, the details of which are not known it is not too much to demand that the Power Purchase Agreement should be revisited within the terms of the principles laid down in the Act not in terms of the guidelines on the basis of which a general order was passed which again was not based on any State Regulation. What is more important is that the Power Purchase Agreement was not placed jointly by the parties for approval. In such circumstances, the fundamental principle that it is in the interest of encouragement and giving incentive to the co-generators that the Power Purchase Agreements could be modified upon revisit becomes of paramount importance.

36. ... The principles for determination of tariff as laid down in section 61 cannot be sacrificed even when parties go through Power Purchase Agreement. A Power Purchase Agreement based on MNRE guidelines, particularly in relation to generation through renewable sources of energy, and not after the principles laid down in the law are liable to be reopened and re-examined. The Power Purchase Agreement has not been approved upon examination earlier by the Commission. The provision of Section-86 (1) has not been complied with so far. In Rithwik Energy Systems case, which we have already noted, it has been held that it is the bounden duty of the Commission to incentivize the generation of energy through renewable sources of energy. Power Purchase Agreements' can be reopened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentive."

- xii. *Moreover, it is submitted by the Petitioner that a Tariff Order or a Notification has statutory force and is binding. Neither the Commission nor the parties have any right or authority to deviate from the same. A similar view was taken by the Hon'ble APTEL in **North-Eastern Electric Power Corpn. Ltd. v. Tripura State Electricity Corporation Ltd., [2006] APTEL 148**. The relevant excerpt of the judgment is reproduced herein below –*

"18. It is well settled law that a statutory notification as well as regulations cannot be deviated nor the field covered by the statutory regulations and notification can be deviated at the discretion of the CERC merely because in its view hardship is caused to the beneficiaries. Statutory Regulations framed by CERC is not an executive instruction but it is a law by the legislature and it derives sanction from the legislative power vested in the legislature. CERC, a statutory authority having framed regulations and issued notification shall not refuse to follow the regulations or notification or it can adopt a new formula not provided nor contemplated by Regulations in its application to any given situation or case. A Statutory Rule or Regulation or notification shall be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act. The Statutory Rules made pursuant to the power entrusted by Parliament are law made by Parliament as has been held by the Supreme Court in State of Tamil Nadu v. Hind Stone reported in 1981 (2) SCC 205.

19. By an ad-hoc approach the statutory rule and tariff notification cannot be

whittled down nor by such an approach, right which has crystallized in favour of appellant, could be defeated or taken away. When once Notification and regulations have prescribed the tariff, which rate of tariff the CERC is bound to implement and it has no authority or discretion to deviate and resort to any other ad-hoc procedure not found in the regulations."

- xiii. *In the said case, the tariff was determined by Regulation passed by CERC, which is also an act of delegated legislation under the powers enshrined upon the Commission by the Act. Similar analogy can be drawn with the present case wherein the tariff is determined by the MPERC vide the respective Tariff Orders which are issued as a delegated legislation under the power to regulate the procurement of generated power and determine the tariff for such procurement.*
- xiv. *The statutory force and binding nature of a Tariff Order was also acknowledged by the Apex Court in **Jharkhand SEB v. Laxmi Business & Cement Co. (P) Ltd., (2014) 5 SCC 236**. The relevant excerpt of the judgment reads as follows –*
"25. It is also to be borne in mind that the tariff in force during the period was Tariff Order dated 27-12-2003 for the period 2003-2004 which was having force of law under the Electricity Act, 2003. Thus, what follows from the above is that even if we proceed on the basis that the statutory agreements entered into earlier were saved, the agreement in question stands replaced by the 2004 Tariff Schedule."
- xv. *It is also pertinent here mention that the Tariff Orders which have been annexed with the petition clearly mention that the Respondent was a party to the Tariff Orders (See page 299 of the Petition). Thus, it is submitted that Respondent is also bound by res judicataas it was a party to the said Tariff Orders and is thus bound by the same.*
- xvi. *Petitioner further submits that the tariff so prescribed by the respective applicable Tariff Order (refer chart above) is sacrosanct and binding because the Tariff Order is issued in the form of delegated legislation and thus have statutory force. The parties to a Power Purchase Agreement have no right or authority to deviate from the tariff prescribed by the Commission vide its Tariff Orders and set a different tariff in a Power Purchase Agreement.*
- xvii. *Petitioner submitted that Respondent was fully aware of the respective applicable Tariff Orders and was also a party to the said Tariff Orders. It is submitted that the sole purpose of issuance of a Tariff Order is to determine tariff for the sale & purchase of power and the Respondent's act of defending the lower tariff of Rs. 2.45/Kwh i.e. in deviation from the prescribed applicable tariff is nothing but sheer disrespect and utter disregard to the Commission and its regulatory powers.*
- xviii. *In light of the above submissions, it is thus submitted by the Petitioner that the power to regulate the purchase and procurement of generated power has been enshrined upon the Electricity Commission by virtue of express provisions of the Act. The Commission by way of Tariff Orders exercises the power under the aegis*

of delegated legislation and thus the said Tariff Orders fixing/determining the tariff for procurement of power (i.e. the Tariff Order dated 21.11.2007 and Tariff Order dated 11.06.2004 as reviewed on 01.03.2006) are mandatory and binding upon the parties and cannot be deviated from. It is further submitted that the case of Respondent that a lower tariff is commercially viable for it, is nothing but an utter disrespect and a total disregard towards the Commission and its regulatory function.

B. Commission has the power to revisit a PPA and revise the tariff

xix. *It is submitted by the Petitioner that the tariff prescribed by the Commission is statutory and binding and a Power Purchase Agreement not in consonance with the prescribed tariff can be reopened and amended accordingly by the Commission under its powers to 'regulate' the electricity purchase and procurement.*

xx. *It is further submitted by the Petitioner that Section 86(1)(b) of the Act uses the term 'regulate', indicating that the Hon'ble Commission has the power and it is the primary function of a State Electricity Commission to regulate the procurement and purchase of power. The term 'regulate' has been given a very wide connotation in a catena of judgments of the Apex Court as well as the Appellate Tribunal for Electricity. Petitioner hereby submits that it is the Hon'ble Commission which has to regulate the procurement of power and its well within the ambit of its power to reopen a Power Purchase Agreement and revise the tariff to bring it in consonance with the respective applicable Tariff Orders.*

xxi. *Supreme court in **V.S. Rice Oil Mills & Ors. v. State of Andhra Pradesh AIR 1964 SC 1781** has held as follows –*

"20. Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. That is why we do not think Mr Setalvad is right in contending that even though the respondent may have the power to regulate the price to which electrical energy should be supplied by it to the appellants, it had no power to enhance the said price. We must, therefore, hold that the challenge to the validity of the

impugned notified orders on the ground that they are outside the purview of Section 3(1) cannot be sustained."

- xxii. *It is evident from the above-mentioned judgments of the Apex Court that the ambit of the regulatory power/function of the State Electricity Commission is wide enough to consider the revision/modification of tariff prescribed in the PPAs.*
- xxiii. *It is the case of the Petitioner that the present PPAs i.e. all the three PPAs in the matter, prescribe a tariff of Rs. 2.45/Kwh which is in contravention to the applicable tariff prescribed by the Hon'ble Commission vide the respective applicable Tariff Orders issued under the Electricity Act. It is trite law that an Electricity Commission has the power to revisit and amend a Power Purchase Agreement, even a concluded one, to bring it in terms with the regulatory regime in place.*
- xxiv. *It is submitted that the Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited & Ors. (2016) 8 SCC 743**, upheld the decision of the Hon'ble APTEL in **Tarini Infrastructure Limited v. Gujarat Urja Vikas Nigam Ltd. 2012 SCC OnLine APTEL 119** wherein it was held that the commission has the power to reopen a PPA and tariff be determined as per the applicable regulatory mechanism. The relevant excerpt of the judgment of the Apex Court is as follows –*
 - "10. ...A reading of the provisions of the 2003 Act would go to show that apart from fixation of tariff in a "situation of open access" or in a situation of competitive bidding covered by Section 63 of the Act, determination and fixation of tariff is a statutory function to be performed by the State Regulatory Commissions constituted under the Electricity Regulatory Commissions Act, 1988 and exercising powers in consonance with the principles enunciated by the Electricity Act, 2003.*
 - ...*
 - 12. While Section 61 of the Act lays down the principles for determination of tariff, Section 62 of the Act deals with different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paras 36 and 64 of A.P. Transco v. Sai Renewable Power (P) Ltd. [A.P. Transco v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34] This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open bidding (Section 63).*
 - ...*
 - 18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It*

would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898.”

xxv. *Hon’ble APTEL in Gujarat Urja Vikas Nigam Limited v. Green Infra Corporate Wind Power Limited, 2015 SCC OnLine APTEL 15* has categorically held that the determination of tariff is a statutory function which is outside the purview of the contract and the Commission has the power to amend the tariff. The relevant excerpt of the judgment is reproduced herein below –

“46. ... In this case, the Supreme Court held that if a contract incorporates certain terms and conditions which are statutory then to that extent it is statutory. The Supreme Court further held that PPAs can be regarded as statutory only to the extent they contain certain provisions regarding determination of tariff. Determination of tariff is a statutory function. In our opinion, therefore, the statutory Commission alone will have jurisdiction in relation to any alteration or amendment of tariff by resorting to statutory provisions namely Section 62(4) and 64(6). Such alteration or amendment cannot be done mutually by parties. The PPAs entered into between the Appellant and Respondent Rs. 1 cannot denude the State Commission of its power to exercise its statutory function to redetermine or amend the tariff. A contract adopting a tariff determined by a statutory regulatory provision cannot eclipse the powers vested in the State Commission under the statute to amend it.

...
49. We have already noted that no terms in the contract can override a statutory provision. If there is a power to amend tariff under Sections 62(4) and 64(6), the parties by contract cannot set it at naught. Parties cannot confer jurisdiction or oust jurisdiction by contract which is statutorily vested in an authority. This clause therefore refers to terms of the agreement which are contractual. Tariff stands outside the purview of contract. Determination of tariff is a statutory function. Tariff is not determined by agreement. Therefore, the statutory Commission will have jurisdiction in relation to any alteration or amendment of tariff as per the provisions of the Electricity Act. We have dealt with this issue extensively. We have referred to all the relevant provisions. In our opinion, it cannot be inferred from this clause that it fetters the power of the Appropriate Commission to redetermine tariff.

...
73. These statutory provisions have a purpose. They are meant to give certain amount of flexibility to the Appropriate Commissions. They have been empowered to amend or revoke the tariff because exigencies of a situation may demand such an exercise. In the circumstances, we hold that there is no bar on the Appropriate Commission preventing it from entertaining a petition for modification of tariff after execution of a PPA. In other words, the Appropriate Commission has the power to reopen a PPA and modify the tariff by an order.”

[there is a para numbering repetition in the judgment, please see page 161 of the Judgement compilation to refer to the cited paragraph]

- xxvi. Further, in **M/s Junagarh Power Projects Private Limited v. Gujarat Urja Vikas Nigam Limited & Ors. 2013 SCC OnLine APTEL 146**, the Hon'ble Appellate Tribunal for Electricity has held as follows –

"29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act."

- xxvii. *In light of the above cited judgments, it is clear that the Hon'ble Commission has the power to revisit a concluded Power Purchase Agreement and revise/amend it accordingly to bring it in terms of the regulatory regime. In the present case, the tariff prescribed in the PPAs is in complete deviation from the tariff determined by the Commission under its regulatory powers given by the statute, therefore, it is incumbent on the Commission to revise the tariff in all the three PPAs and amend it from Rs. 2.45/Kwh to the respective applicable tariffs as per the respective applicable Tariff Order (please refer the chart above).*

C. No fraud

- xxviii. *It is the primary case of Respondent that the Petitioner has defrauded it into entering in the PPAs. It is pertinent here to note that apart from making its case on fraud, the Respondent in its Reply never specifically denied any of the claims mentioned by the Petitioner in the petition, i.e. the Tariff Order being statutory and binding and that the Commission does have the power to reopen a concluded Power Purchase Agreement and amend it accordingly to bring it in consonance with the regulatory regime in place.*

- xxix. *Respondent has accused the Petitioner of fraud and 'mischief' on account of filing the said petition for revision/modification of tariff in the PPAs, which seems to be a hopeless attempt devoid of any merit whatsoever, to abruptly end the said PPAs. Section 17 of the Indian Contract Act, 1872 ('Contract Act'), defines fraud. It is trite law that the onus of proof is on the party alleging fraud. Respondent have not proved beyond reasonable doubt before the Hon'ble Commission that Petitioner committed any fraud or 'mischief' (not a ground prescribed in the Contract Act) whatsoever. Also, a perusal of the language of Section 17 makes it clear that the present case does not fall under the category of fraud. Section 17 of the Contract Act reads as follows –*

"17. "Fraud" defined.—

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

- (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent."

xxx. It is submitted that the Petitioner - (a) never suggested any fact which was untrue, (b) never concealed any material fact - the tariff prescribed in the applicable respective Tariff Orders was in due knowledge of the Respondent, (c) never promised anything without the intention of performing it - it has never been the case of the Petitioner to back out of the PPAs, (d) never have done any act to deceive the Respondent, and (e) never committed any act or omission which is declared fraudulent by law. It is pertinent here to mention that the Respondent has failed to showcase as to how the act of the Petitioner falls into the definition of 'fraud' under Section 17 of the Contract Act.

xxxi. The petitioner submits that Respondent is trying to term the act of filing of the said petition by the Petitioner as a fraud being committed upon the Respondent, which baffles logic and are bereft of any merit. Just by alleging fraud, the Respondent cannot make the PPAs voidable as the burden of proving fact is on the one who asserts it. It is submitted that the Respondent is bound to prove the assertion of any alleged fraud so committed by the Petitioner as the settled legal principle of *affirmati non neganti incumbit probatio* is based on Section 101 of the Indian Evidence Act 1872. Hon'ble Supreme Court while discussing the provisions of the Indian Evidence Act 1872, in the matter of **Rangammal v. Kuppuswami and Anr. 2011 12 SCC 220**, has held as follows:

"21. Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

"101. Burden of proof.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

xxxii. It is further submitted that there is no act of concealment on the part of the Petitioner. It is submitted that the Respondent was very well aware of the applicable respective Tariff Orders while entering in to the PPAs with the Petitioner. Such fact is clear from the Recitals of the PPAs wherein the Respondent has acknowledged the existence of the applicable respective Tariff Orders. It is further stated in *arguendo* that the applicable respective Tariff Orders, being a

public document were very well within the reach of the Respondent so as to perform any due-diligence on its part to check the veracity of the representations made by the Petitioner with respect to the electricity tariff. The Respondent now, cannot take the plea of being defrauded by the Petitioner. In the matter of **Krishnan Vs. The Kurukshetra University, Kurukshetra (1976) 1 SCC 311**, it has been held as follows:

"7 ...It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, was fraud is not proved"

xxxiii. Similarly, it has been stated in the matter of **Kamal Kant Paliwal Vs. Smt. Prakash Devi Paliwal and Ors. AIR 1976 Raj 79** as follows:

"7 ...The effect of fraud on an agreement so far as consent to it is procured by it may be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. But if the other party has the facts before it or has the means to know cannot be said to have been defrauded even if a false statement has been made."

xxxiv. It is submitted by the Petitioner that the onus of proof is on the party that alleges fraud, which in the present case is the Respondent, thus, it is submitted that the Petitioner has not committed any fraud on the Respondent and therefore, such ground being taken by the Respondent is only a malafide one.

xxxv. It is further submitted that for fraud, a necessary element is that the defrauded party has been deprived of something. In the present case however, Respondent is not the party which has been deprived of anything, rather it is the one who is benefitting from such an ordeal, which is totally in contravention to the regulatory regime and the tariff determined by the Commission. It is the Petitioner, which is in effect being deprived from the right tariff which has been fixed by the Commission and this is something which the Commission ought to redress.

xxxvi. The Respondent during the course of its arguments, however, heavily relied upon the principle of offer and acceptance to state that it was the Petitioner that infactgave an offer for procurement of generated power and the same was accepted by Petitioner. and that the Petitioner cannot turn around from that. With respect to the same, it is humbly submitted that the argument of Respodent citing the negotiations will not be applicable in the present case as what Respondent is trying to achieve i.e. a lower tariff of Rs. 2.45/Kwh is not valid and is in complete contravention to the respective applicable Tariff Order which has a statutory force and is binding. The principles of offer & acceptance cannot be given primacy in this case as party autonomy or freedom of contract cannot supersede a statutory provision and a regulatory direction. The tariff determined by the Commission vide the Tariff Orders is regulatory in nature and is under a statute, therefore binding. Any attempt to circumvent the regulatory directions should be considered seriously by the Commissions and such contraventions should not be allowed, as if it is allowed then the whole purpose of the Act is defeated..

xxxvii. *In the present case, it was clearly mentioned in the Petition that the Petitioner had to enter into the PPAs with a tariff which was lower than the tariff prescribed by the Commission, because of looming fear of losses and idling of power generated resulting in wastage of green energy. The said fact has not been denied by the Respondent in its Reply filed. Order VIII Rule V of the Code of Civil Procedure, 1908, provides for specific denial. It reads as follows –*

“5. Specific denial:- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:”

xxxviii. *It is further submitted that the Hon’ble Appellate Tribunal for Electricity (‘APTEL’) in **Gujarat Urja Vikas Nigam Limited & Ors. v. Renew Wind Energy (Rajkot) Private Limited & Ors. 2018 SCC OnLine APTEL 144**, while upholding the decision of the Electricity Commission that there cannot be a tariff in a Power Purchase Agreement which is not in accordance with the Regulations, also threw light on the aspect as to when can an agreement considered to be done in undue influence. The relevant portion of the judgment is reproduced herein below –*

“9.14 Per contra, learned counsel for the Respondents submitted that while going through various provisions of the PPA, it becomes crystal clear that such a one sided agreement cannot be signed by a party who is going to be affected throughout the life span of the project; will sign the agreement under normal circumstances. In other words, the PPA with so many discriminatory clauses and can be executed under coercion and duress only. He was quick to submit that the Appellant has relied upon the judgment of Hon’ble Supreme Court on the issue of duress and coercion in the case of Transmission Corporation of Andhra Pradesh Limited v. Sai Renewables Power Private Limited It is the submission of the Appellant that there had to be definite pleadings which have to be substantiated conclusively by cogent and proper evidence.

9.15 The learned counsel further submitted that the parties cannot be permitted to deny the facts as they existed at relevant time just because it may not be convenient to adhere to those terms. Admittedly, the impugned order of the State Commission is not on the issue of duress or coercion alone nor is it on account of parties wishing to avoid contract that they have executed. The core issue in the present appeal is whether can there be a tariff between a generating company and distribution licensee in a PPA which is not in accordance with the Regulations and Orders passed by the State Commission. He pointed out that the State Commission all that has done is only to align the tariff with its Regulations and its Orders.

...

9.19 We have carefully considered the rival contentions of both the parties on this issue and also took note of the cited decisions/judgments of the Hon’ble Supreme Court and this Tribunal. Based on our critical analysis of the material placed before us, we note that the core issue in the present appeal is not only

limited to the coercion or duress but to whether there can be a tariff between a generating company and a distribution licensee in a PPA which is not in accordance with the Regulations and Tariff Orders issued by the State Commission. The State Commission after careful consideration of the submissions made by both the parties and after due analysis of the available material on record has recorded its findings in the impugned order that the conditions envisaged in the PPA relating to the tariff and other associated conditions appeared to be one sided in favour of the Appellants and accordingly concluded the case of coercion or duress and unequal bargaining power between the parties being responsible for executing an Agreement full of unjustness and perversity. In view of these facts, we hold that the State Commission has analysed this issue rightly in accordance with law and passed the order assigning cogent reasoning. Thus, we do not find any material case or ground for our interference in the matter.

SUMMARY OF OUR FINDINGS:

9. Having regard to the careful consideration and critical analysis of the facts and submissions of the learned counsel for the Appellants as well as the Respondents, we hold that the findings of the State Commission are just and right in accordance with law. Accordingly, the impugned order of the State Commission deserves to be upheld and the appeal filed by the Appellants is liable to be dismissed."

xxxix. *It is clear, that in the present case too, the conditions/terms prescribed in the PPAs were one-sided favouring the Respondent and were conceded to by the Petitioner only because of the financially compelling circumstances.*

D. Differentiating Gujarat UrjaVikas Nigam Ltd. v. Solar Semiconductor Power Company (India) Pvt. Limited &Anr.

xl. *The case of Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) Pvt. Ltd., (2017) 16 SCC 498("Semiconductor case") was heavily relied upon by the Respondent during its course of arguments. However, it is pertinent here to mention that neither the caselaw nor the findings relied upon were mentioned or rather hinted upon by Respondent in its Reply. The case of Respondent as mentioned in the Reply filed is solely on the aspect of alleged fraud being committed by the Petitioner relying on the alleged offer and acceptance involved. There is not even a denial of the case made by the Petitioner in the petition as to the Tariff Order being statutory & binding and that the Commission has the power to revisit a Power Purchase Agreement & revise the tariff. It is trite law that if a contention has not been pleaded or specifically denied (Order VIII Rule 5 of the Code of Civil Procedure, 1908; refer paragraph 48 above), the same cannot be relied upon by a party. Thus, it is submitted by the Petitioner that the reliance of Respondent on the said case and its findings (even though misplaced) by which Respondent has countered the Petitioner's arguments is wrong in law and cannot be considered by the Commission.*

xli. *It is trite law that an adjudicatory body cannot make out a case not pleaded.*

*Respondent in its Reply never pleaded that the Commission cannot intervene with the tariff prescribed by the Power Purchase Agreement and that the tariff prescribed by the PPA is inviolable and beyond review and correction by the Commission. Therefore, it cannot now at the last moment, i.e. during oral arguments at the Final hearing make up a case out of thin air, which was not at all pleaded either specifically or in substance. Reliance is placed on the Supreme Court judgment in **Ram Sarup Gupta v. Bishun Narain Inter College, (1987) 2 SCC 555**, relevant paragraph of which is reproduced herein below –*

“6. ...It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise.”

xlii. That being said, in arguendo, the Petitioner hereby submits that the reliance placed on the said judgment by Respondent is misplaced and erroneous and is nothing but a sly attempt by the Respondent to mislead and distract the Commission. It is submitted that the portions cited by Respondent during its course of arguments are a classic example of selective reading done to misdirect the Commission and is not even the part of the ratio of the judgment. As was clarified during the course of arguments by the Petitioner, the relied portion does not come to any aid of the Respondent as the same is not the part of the concurrent judgment of the two judges, rather is the part wherein one of judge i.e. Hon’ble Justice Banumathi have given her own explanation. Justice Bhanumati has concurred with the entire Judgment of Justice Joseph which is evident from the fact that the concurrent judgment of both judges runs from paragraph 1 till paragraph 41. Subsequent part of the judgment i.e. from paragraph 42 till paragraph 73. It is clear that the paragraphs quoted by Respondent are from the supplementing opinion of Justice Banumathi only which is the minority view and thus not binding, therefore the reliance on same is flawed. Whereas the clarificatory argument put forth by Petitioner cites paragraphs from the concurrent findings which is the majority view in the judgment and has the precedent value.

xliii. It is imperative here to cite the relevant paragraphs of the judgment which were conveniently ignored (and not read) by the Respondent during the course of arguments. The relevant paragraphs of the judgment from the concurrent findings part are reproduced herein below –

26. The question before us is whether the Commission has the power to extend the control period provided under the tariff order. That question is no more res integra. There are two recent judgments of this Court which are relevant in this context. In Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd. [Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., (2016) 11 SCC 182 : (2016) 4 SCC (Civ) 624], this Court

at paras 39 and 40, has specifically held as follows: (SCC pp. 199-200)

“39. Apart from that both Respondent 2 and the Appellate Tribunal failed to notice and the first respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of Para 5.2 of the PPA:

‘In case, commissioning of solar power project is delayed beyond 31-12-2011, Guvnl shall pay the tariff as determined by the Hon’ble GERC for solar projects effective on the date of commissioning of solar power project or abovementioned tariff, [Ed.: The matter between two asterisks has been emphasised in EMCO case, (2016) 11 SCC 182.] whichever is lower [Ed.: The matter between two asterisks has been emphasised in EMCO case, (2016) 11 SCC 182.].’

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the “control period” stipulated in the First Tariff Order. It also visualised that for the subsequent control period, the tariffs payable to a Projects/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the first respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is totally overlooked by the second respondent and the Appellate Tribunal. There is no whisper about the said stipulation in either of the orders.

40. The first respondent has created enough confusion. While on one hand the first respondent asserted a right to seek determination of a separate tariff independent of the tariff fixed under the First Tariff Order in view of the stipulation contained in the First Tariff Order that “for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts” did not seek a relief before the second respondent to determine a separate tariff but claimed the benefit of the Second Tariff Order. Assuming for the sake of argument that the petition filed by the first respondent (1270 of 2012) is to be treated as an application for determination of separate tariff which would be identical with the tariff fixed under the Second Tariff Order, whether the first respondent would be entitled for such a relief depends, if at all he is entitled to seek such a determination, on a consideration of “all the relevant facts” but not by virtue of the operation of the Second Tariff Order.” (emphasis supplied)”

...

28. However, while addressing another grey area as to whether the Commission has the power to amend tariff despite the terms of the PPA, this Court in Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd. [Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743 : (2016) 4 SCC (Civ) 284] , after analysing the scheme of the Act, has answered the question in the affirmative.

...

31. Having referred to the above decisions, we shall now make an independent endeavour to analyse the present case in the context of factual matrix and the

relevant statutory provisions. An amendment to tariff by the Regulatory Commission is permitted under Section 62(4) read with Section 64(6) of the Act. Section 86(1)(a) clothes the Commission with the power to determine the tariff and under Section 86(1)(b), it is for the Commission to regulate the price at which electricity is to be procured from the generating companies. Section 86(1)(e) deals with promoting co-generation and generation of electricity from renewable sources of energy. Therefore, there cannot be any quarrel with regard to the power conferred on the Commission with regard to fixation of tariff for the electricity procured from the generating companies or amendment thereof in the given circumstances.

...

33. Section 94 provides that the appropriate Commission shall be vested with certain powers as are vested in a civil court, only in six specified areas. Under Section 94(1)(g), the Commission has the powers of a civil court in respect of “any other matter which may be prescribed”. Under Section 2(52) “prescribed means prescribed by rules made by the appropriate Government under this Act”.

34. Regulations 80 to 82 are instances of such powers specified by the Commission. Regulation 80 has provided for the inherent power of the Commission to the extent of making such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Commission. It has to be borne in mind that such inherent powers are to be exercised notwithstanding only the restrictions on the Commission under the Conduct of Business Regulations, meaning thereby that there cannot be any restrictions in the Conduct of Business Regulations on exercise of inherent powers by the Commission. But the specified inherent powers are not as pervasive a power as available to a court under Section 151 of the Code of Civil Procedure, 1908:

“151. Saving of inherent powers of court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court.”

However, the Commission is enjoined with powers to issue appropriate orders in the interest of justice and for preventing abuse of process of the Commission, to the extent not otherwise provided for under the Act or Rules. In other words, the inherent power of the Commission is available to it for exercise only in those areas where the Act or Rules are silent.”

xliv. Paragraph 26 of the Semiconductor case is cited herein because it clarifies the judgment of **Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., (2016) 11 SCC 182** (“Emco case”), which was also relied upon by Respondent while arguing that the sanctity of the Power Purchase Agreement has to be maintained. As it is clear from the above cited paragraph, the factual situation in the Emco case is totally different from the present matter. The Emco case does not relate to a dispute between the tariff stipulated by the Commission and the one prescribed in a Power Purchase Agreement. In the Emco case the applicability of the Tariff Order was based on the commencement of the project under the respective control period. The dispute was on the applicability of the a certain tariff order

as per the provisions of the Power Purchase Agreement. It was nowhere contented or argued in the case that the tariff mentioned in a specific tariff order would not be applicable. However, in the present case, the dispute is on the point of revision of tariff prescribed in the PPAs in accordance with the respective applicable Tariff Order which has statutory force and is binding.

- xlvi. *Further, paragraph 28 of the Semiconductor case cited above, makes it crystal clear that the correct legal position, which is also acknowledged in the judgment, is that Commission does have the power to amend the tariff despite the terms of the Power Purchase Agreement to bring it in consonance with the regulatory regime. Thus, there remains no doubt that the Commission has the power, rather it is duty bound to revisit such Power Purchase Agreements which are not inconsonance with the Tariff Orders and amend the tariff accordingly so as to bring them in consonance with the regulatory regime in place.*
- xlvi. *Further, it is imperative here to also point out that in the Semiconductors case, the tariff mentioned in the Power Purchase Agreement was exactly the same as what was prescribed in the Tariff Order and the issue before the court was only of whether the extension of control period of Tariff Order by the Electricity Commission under its inherent powers was valid. Thus, the reliance of this case by the Respondent is entirely flawed and an attempt to misdirect the Commission by reading parts of the judgment which are neither binding (as are a minority view and not the concurring judgment) nor applicable to the facts of the present case. The issue as to whether the tariff can be amended in a concluded Power Purchase Agreement was not the substantial question of law before the Apex Court in this judgment as the said question has already been decided in **Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743**, as is mentioned in paragraph 28 of the judgment.*

E. Promissory estoppel & waiver

- xlvi. *The application of promissory estoppel and waiver was neither pleaded by the Respondent in its Reply nor was argued during the course of the hearing. As it has already been submitted above that something which is not pleaded by a party cannot be considered by an adjudicatory body and no case can be made out of it (refer paragraph 52 above). However, without prejudice, the said issue is being discussed here and submissions being made on it, because of explicit directions of the Commission.*
- xlvi. *It is submitted by the Petitioner that the principle of promissory estoppel will not be applicable in the present case because this equitable principle cannot be used by a party to compel the other party to do an act prohibited in law. In the present case, the tariff of Rs. 2.45/Kwh is in direct contravention to the tariff determined by the Commission vide the respective applicable Tariff Order which is a delegated legislation. Thus, the principle of estoppel cannot be applied in the present case to compel the Petitioner to sell the generated power at the tariff prescribed in the PPA. Reliance is placed on the landmark judgment of **Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409**,*

on the aspect of application of principle of promissory estoppel. In the said case, the Apex Court categorically held that a party cannot be estopped to do an act which is against the law or is prohibited by law. The relevant excerpt of the judgment is reproduced herein below –

“28. The House of Lords did not in Howell case negative the applicability of the doctrine of promissory estoppel against the Government. What it laid down was merely this, namely, that no representation or promise made by an officer can preclude the Government from enforcing a statutory prohibition. The doctrine of promissory estoppel cannot be availed to permit or condone a breach of the law. The ratio of the decision was succinctly put by Lord Normand when he said neither a minister nor any subordinate officer of the Crown “can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it”. It may also be noted that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power. The Legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel. Vide State of Kerala v. Gwalior Rayon Silk Manufacturing Co. Ltd. [(1973) 2 SCC 713, 730 (para 39) : (1974) 1 SCR 671, 688]”

xlix. It is thus submitted by the Petitioner that the principle of promissory estoppel will have no application in the present case as the execution of the prescribed tariff of Rs. 2.45/Kwh is itself in direct contravention to the respective applicable Tariff Order which, as has already been discussed earlier, is a delegated legislation under the provisions of the Act and thus have statutory force and is binding. It is the solemn duty of the Commission to ensure strict adherence to the same.

*l. With respect to the issue of waiver of rights of Petitioner, it is submitted that even this issue was not pleaded, neither specifically nor vaguely, by the Respondent in its Reply and the same is only being discussed here, without prejudice, on the directions of the Commission. It is trite law that waiver has to be specifically pleaded by a party. The Supreme Court in **Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409**, has categorically held that in order to take a plea of waiver the same has to be specifically pleaded and be clearly laid down in the pleadings. As in the present case neither was the plea of waiver pleaded by Respondent in its Reply nor was it argued during the course of hearings, therefore the principle of waiver cannot be applied in the present case. The relevant excerpt of the judgment on which reliance is placed, is reproduced herein below –*

“5. ...In the first place, it is elementary that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings. Here it was common ground that the plea of waiver was not taken by the State Government in the affidavit filed on its behalf in reply to the writ petition, nor was it indicated even vaguely in such affidavit. It was raised for the first time at

the hearing of the writ petition. That was clearly impermissible without an amendment of the affidavit in reply or a supplementary affidavit raising such plea. If waiver were properly pleaded in the affidavit in reply, the appellant would have had an opportunity of placing on record facts showing why and in what circumstances the appellant came to address the letter dated June 25, 1970 and establishing that on these facts there was no waiver by the appellant of its right to exemption under the assurance given by Respondent 4. But in the absence of such pleading in the affidavit in reply, this opportunity was denied to the appellant. It was, therefore, not right for the High Court to have allowed the plea of waiver to be raised against the appellant and that plea should have been rejected in limine."

F. Incentivization of Renewable energy

- li. *It is the case of the Petitioner that one of the primary intent of the Act was to promote generation of electricity from renewable sources. It is also the duty of the Hon'ble Commission to promote generation of electricity from renewable source and to ensure that generators of renewable energy are not discouraged from such generation.*
- lii. *It is humbly submitted that the enforcement of the tariff prescribed in the PPAs would compel the Generator i.e. the Petitioner to shut down its projects. The tariff is so unfair that it would result in extinguishment of the power generating units from the State of Madhya Pradesh on the one hand, while on the other, it is bound to prejudicially affect the larger public interest. The Generator has invested large sums of money in developing these generating units and it will be unfair to compel their closure, particularly, when for all these years they have been generating renewable energy. It is pertinent here to mention that the Generator has taken loans for the required investment in the project, the interest payments of which have already started. At the present tariff of Rs. 2.45/Kwh, the Generator is making huge losses which is leading to a Debt Service Coverage Ratio ("DSCR") of 0.98, which means the Generator is not even earning enough to cover the interest payments and the operating expenses (refer Annexure – 21 of the Petition). Whereas, if the tariff prescribed by the Commission in its wisdom under the Tariff Orders is applied to the PPAs, the Generator would at least be making enough to cover the interest payments on the loan and cover the operating and expenses, with a very narrow margin of profit.*
- liii. *Hon'ble Appellate Tribunal for Electricity in **Rithwik Energy Systems Limited v. Transmission Corporation of Andhra Pradesh Ltd., 2006 SCC OnLine APTEL 99**, in clear words laid down that generation of electricity from renewable energy is of primary importance and has to be promoted at all costs to ensure its sustained growth. The relevant excerpt is reproduced herein –*

"35. The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that non-conventional sources of energy are environmentally benign and do not cause

environmental degradation. Even the tariff regulations u/s 61 are to be framed in such a manner that generation of electricity from renewable sources of energy receives a boost. Para 5.12 of the National Electricity Policy pertaining to non-conventional sources of energy provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the sources. Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives."

G. Compliance with law and severability

liv. As it has already been submitted by the Petitioner that the Tariff Orders issued by the Commission under the aegis of delegated legislation have statutory force and are binding. Therefore, the PPAs should be revisited by the Commission and amended accordingly so as to revise the tariff in accordance with the tariff prescribed by the respective applicable Tariff Order. It has already been discussed in detail above that Commission does have the power to reopen and amend a concluded Power Purchase Agreement to bring it in consonance with the regulatory regime.

lv. It is the case of the Respondent however, that the PPAs are sacrosanct and cannot be amended and if done so then it will be voidable at the instance of Respondent. It is submitted by the Petitioner even if the Commission considers the tariff part voidable, the whole PPA cannot be termed as void because of express provision of 'Severability' and 'Compliance with law' enshrined in the PPAs.

lvi. Clause 14.5 in all the three PPAs provide for 'Severability'. As per the said clause, the invalidity or unenforceability of any part of the agreement would not render the whole agreement unenforceable or invalid and that part can be severed from the agreement. The clause is reproduced herein for reference –

"14.5 Severability

The invalidity or unenforceability, for any reason, of any part of this Agreement shall not prejudice or affect the validity or enforceability of the remainder of this Agreement, unless the part held invalid or unenforceable is fundamental to this Agreement."

lvii. Further, all the three PPAs also have a 'Compliance with law' clause. The 11.2MW PPA dated 04.10.2018 (Annexure – 13 of the Petition) and 2.5MW PPA dated 05.10.2018 (Annexure – 14 of the Petition) have it as Clause 14.11, whereas the 6.4MW PPA dated 04.10.2018 (Annexure – 12 of the Petition) have it as Clause 14.12. The text of the clause in all three PPAs is exactly the same which provides for deemed amendment of any provision of the agreement in deviation of any provision of the Act or any Rules or Regulations made there under, to bring it in compliance with the said provision. The language of the clause is reproduced herein –

"14.12 Compliance with law

Despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003, or any rules and regulations made there under, such provision of this Agreement shall be deemed to be amended to the extent required to bring it into compliance with the aforesaid relevant provisions as amended from time to time."

- lviii. It is thus submitted by the Petitioner that as the tariff prescribed in the PPAs is not as per the respective applicable Tariff Orders issued under the provisions of the Act, therefore, as per the Compliance with law clause of the PPAs, the tariff part of the PPAs is deemed to be amended i.e. the tariff being amended from Rs. 2.45/Kwh to Rs. 3.36/Kwh in 6.4MW and 11.2MW PPAs dated 04.10.2018 and Rs. 3.30/Kwh in 2.5MW PPA dated 05.10.2018, so as to bring it in compliance with the same.*

Commission's observations & findings:

18. A. The Commission observed as under:

- i. The subject petition has been filed for adjudication of dispute on the tariff for purchase of power from the following wind power projects:
 - a. 11.2 MW and 6.4 MW power project situated at Ratedi Hills, Dewas under PPA dated 04/10/2018 and
 - b. 2.5 MW power project at Village Nagda, Dewas under PPA dated 05/10/2018.

B. The petitioner in the subject petition, additional submissions while citing several Judgments in support of its case has broadly stated the following:

- i. In accordance with the Clause 13.2.1 of the PPAs, a joint Dispute Notice dated 01.02.2019 was sent by the Petitioner to the Respondent citing disparity in the tariff mentioned in the PPAs, i.e. Rs. 2.45/Kwh and the tariff stipulated by the respective applicable Tariff Orders issued by the Commission. A revision of tariff from Rs. 2.45/Kwh to Rs. 3.36/Kwh (for 11.2MW power projects and 6.4MW power projects) and from Rs. 2.45/Kwh to Rs. 3.30/Kwh (for 2.5MW power project) was requested by the Petitioner in accordance with the applicable Tariff Orders. However, the Licensee without going into the merits of the Generator's case, declined to accept the prayer, hence the cause of action has arisen to adjudicate the said dispute. The petitioner has therefore, filed this petition for adjudication of the dispute between the parties.
- ii. M/s K. S. Oils Limited, being the then actual owner of the Wind Electric Generators (WEGs) located in Village Dewas in Madhya Pradesh, applied for the commissioning

of the WEGs. The said WEGs along with the land were secured by K. S. Oils Limited in favour of State Bank of India, Central Bank of India and Phoenix ARC Private Limited towards various financial/loan facilities.

- iii. On 19.03.2015, the lenders of M/s K. S. Oils Limited i.e. State Bank of India, Central Bank of India and Phoenix ARC Private Limited (in its capacity as Trustee of Phoenix Trust FY14-3) sold the movable assets (i.e. the WEGs) and immovable assets of the above-mentioned locations along with assets located at other locations in favour of the Generator on "As Is Where Is Basis", "As Is What Is Basis" and "Whatever There Is Basis", under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
- iv. The Generator had initially obtained permission to sell its energy to third party under open access and entered into Wind Energy Power Purchase and Wheeling Agreements (PPWA) for 17.6 MW (11.2 + 6.4) with Licensee for sale of power generated, to M/s IPCA Laboratories Limited with a provision of sale of excess power generated to Licensee. The said Wind Energy Power Purchase and Wheeling Agreements were entered on 22.06.2016.
- v. However, after the notification of the 7th Amendment to the MPERC (Cogeneration and generation of Electricity from Renewable Sources of Energy) Regulations 2010, which provided for levying cross subsidy surcharge, additional surcharge and wheeling charges for open access customers, the sale of power under open access became unviable for the Generator. As a result, the PPWAs dated 22.06.2016 were terminated by mutual consent of the parties including the Respondent MPPMCL.
- vi. The petitioner, vide its letter dated 19.04.2018 addressed to the Licensee/Respondent, requested the Respondent to enter into PPAs for sale of power generated from the 20.1 MW WEGs at the tariff of Rs. 2.52/Kwh i.e. the tariff determined by the competitive bidding process (including trading margin) for the PPAs entered into by Licensee with SECI.
- vii. On 04.10.2018, two PPAs were entered into between the Petitioner and the Respondent for sale of power generated from 11.2MW and 6.4 MW project WEGs respectively at a tariff of Rs. 2.45/Kwh (excluding trading margin).
- viii. Subsequently, another PPA was entered into between the Generator and the Licensee on 05.10.2018, for sale on power generated from 2.5 MW WEGs at the same tariff as the other PPAs i.e. Rs. 2.45/Kwh.
- ix. After execution of above PPAs, it was however later noticed by the Generator, that the tariff offered by the Licensee for sale of power under all the three above mentioned PPAs which was **agreed upon by the Generator in the absence of any other choice** and under the looming **fear of suffering losses due to idling**

of the WEGs, i.e. Rs. 2.45/Kwh (excluding trading margin), was neither approved by the Commission nor it is in accordance with the respective Tariff Order, issued by the Commission, so applicable on the WEGs.

- x. The lower tariff being paid to the Generator is definitely as per the PPAs entered into between the parties but when the regulatory regime prescribes the high tariff in that case the same will prevail.
- xi. Therefore, as all the three PPAs (for 6.4MW, 11.2W and 2.5MW) had the same terms and conditions enshrined, the Generator on 01.02.2019 sent a joint Dispute Notice to the Licensee in accordance with Clause 13.2.1 of the PPAs requesting a revision of tariff from the earlier determined tariff of Rs. 2.45/Kwh to Rs. 3.36/Kwh (for 6.4MW and 11.2MW) as per the applicable Tariff Order dated 21.11.2007, and Rs. 3.30/Kwh (for 2.5MW) as per the applicable Review Order dated 01.03.2006 passed by the Commission reviewing the Tariff Order dated 11.06.2004.

C. The Respondent has submitted that the instant petition is completely mischievous and has been filed to repudiate/ renounce/ challenge the most sacrosanct terms and conditions of the Power Purchase Agreement dated 04.10.2018 and 05.10.2018 executed between the petitioner and the respondent. In its submissions, the Respondent has broadly placed the following arguments:

- i. The free, express and voluntary offers and consents were given by the petitioner for executing Power Purchase Agreements at the rate of Rs. 2.45 per unit (excluding trading margin). The respondent accepted the offer for sale of power from the petitioner and entered into Power Purchase Agreements.
- ii. The rate which the petition is demanding today of Rs. 3.36/3.30 per unit for the sale of power was never mentioned by it in its several offers and correspondences submitted to the Respondent before execution of the Power Purchase Agreements.
- iii. If the rate now being sought by the petitioner (Rs. 3.36/3.30 per unit) was offered or submitted to the Respondent by the Petitioner before execution of the Power Purchase Agreement then the **Respondent in all certainty would not have accepted/ consented to purchase of power at that rate.**
- iv. The instant act on the part of the petitioner to first offer power at Rs. 2.45 per unit and get that offer accepted by the answering respondent and thereby entered into a binding Power Purchase Agreement and then at a later date make a complete “u-turn” and submit that the rate of Rs. 2.45 per unit was inadvertently offered is nothing but a fraud and a mischievous act

on the part of petitioner committed on the Respondent and the **Power Purchase Agreements are voidable at the option of the Respondent.**

- v. The Respondent has submitted that even on the basis of public interest no such direction ought to be given by the Commission as a change in tariff as has been sought by the petitioner shall have a financial impact of about 31.8 crores on the Respondent, the cost of which shall be recovered from the people at large. It is submitted that without prejudice to the above the respondent is not agreeable to purchase electricity from the petitioner at the rate mentioned in the tariff order of 2007 and the only reason that it entered into contract with the petitioner was because the power was being offered at a rate of Rs.2.45 per unit which is as per the prevailing market price.

- D. The Respondent MPPMCL is a State Government owned holding Company of the three Distribution Companies of the State of Madhya Pradesh. It purchases power on behalf of the Discoms. The amount paid by MPPMCL to the Generators is ultimately borne by the electricity consumers of the State by way of pass through in the Retail Supply Tariff Order.

- E. On perusal of the material on record, the Commission has observed the following:
 - (i) Since Madhya Pradesh is a Power Surplus state, the Respondent's submission is **very significant that the Respondent may not have consented to sign PPAs if the petitioner had asked for the rates which are now being sought in the subject petition.** The PPAs have been signed by the Respondent on the **request & proposal of the petitioner** at the **rate** equivalent to the tariff determined by the competitive bidding process (including trading margin) for the **PPAs entered into by the Respondent with SECI.**

 - (ii) The Commission has determined generic Tariff under Section 62 of the Electricity Act'2003 through Tariff Orders as mentioned by the petitioner for purchase of power by the Discoms / MPPMCL from such power plants for which specific tariff has not been discovered or adopted by the procurer through competitive bidding under Section 63 of the Electricity Act'2003. It is an undisputed fact that the aforesaid tariff orders based on which the petitioner is now seeking revision in tariff were in existence when the PPAs were signed by the petitioner with the Respondent at the rate discovered through competitive bidding process. The petitioner issued several letters to the Respondent requesting for sale and purchase of power at the rate mentioned in PPAs executed between the parties. This was free, voluntary and express offer of the Petitioner to sell power at Rs.2.52 which was accepted by the respondent vide its letter dated 02.06.2018 and the

respondent conveyed its consent for purchase of power w.e.f. the date of execution of PPA for the remaining life of the wind energy generators i.e. up to 20 years from the date of commissioning.

- (iii) In Recital B of Power Purchase Agreement, it is clearly articulated that the parties agree that with respect to issues mentioned in the PPA, the terms and conditions of the PPA shall apply. However, the terms not covered under the PPA shall be governed as per the tariff order dated 21.11.2007. The tariff rate is specifically covered in Article 7.1 of PPA.
- (iv) In this matter, the petitioner had initially signed PPWA dated 22/06/2016 to sell its energy to third party M/s IPCA Laboratories Ltd. under Open Access and had subsequently preferred to terminate this PPWA and opted to sign the PPAs dated 04/10/2018 & 05/10/2018 to sell its energy to the Respondent through correspondences which are on record and mentioned in PPAs also.
- (v) The power purchase management is a function performed by MPPMCL / Discoms in accordance with the applicable Rules / Regulations for fulfilling its requirements. The rate affects the commercial interests of both parties.

In view of the above, the Commission does not find any merit in interfering with the subject PPAs signed between the petitioner and the respondent.

With the aforesaid observations and findings, the subject petition is disposed of.

-sd-

(Shashi Bhushan Pathak)
Member

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(Mukul Dhariwal)
Member

-sd-

(S. P. S. Parihar)
Chairman