IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 271 OF 2019

Dated: 28th January 2021

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

In the matter of:

Haryana Power Purchase Centre
Sector 6, Shakti Bhawan,
Panchkula – 134 109
Haryana …. Appellant

Versus

1. **Haryana Electricity Regulatory Commission**
Through its Secretary
Bays No. 33-36, Sector 4
Panchkula – 134 112
Haryana

2. **IA Hydro Energy Private Ltd**
Through its Managing Director
D-17, Sector-1, New Shimla,
Shimla – 171 009
Himachal Pradesh … Respondents

Counsel for the Appellant (s): **Mr. M.G. Ramachandran, Sr. Adv**.
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya

Counsel for the Respondent (s): **Mr. Sandeep Kumar Mohapatra** for R-1

Mr. Sanjay Sen, Sr. Adv.
Mr. Ashish Anand Bernard
Ms. Ruth Elwin
Ms. Mandakini Ghosh
Mr. Paramhans Sahani for R-2

J U D G M E N T

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

1. The matter was taken up for final hearing by video conference, physical presence being not desirable in view of advisories issued by governmental authorities due to pandemic conditions prevailing on account of spread of corona virus (Covid-19).

2. The appellant Haryana Power Purchase Centre (hereinafter referred to as "HPPC" or "the appellant) is the designated nodal agency dealing with the procurement of power from generating companies and others on behalf of the two distribution licensees (*Uttar Haryana Bijli Vitran Nigam Limited* and *Dakshin Haryana Bijli Vitran Nigam Limited*) in the State of Haryana. The second respondent, IA Hydro Energy Private Limited (for short "*IA Energy*") is a generating company which has established a 36 MW Hydro Power Project at Chanju ("*Hydro Project*") in the State of Himachal Pradesh, the project having been allocated to it through MoU route Implementation Agreement dated 12.06.2009 by Himachal Pradesh, the commercial operation whereof commenced on 23.02.2017.

3. The appeal is directed against the Order dated 08.03.2019 passed by the first respondent Haryana Electricity Regulatory Commission (hereinafter referred to as "the State Commission" or "the Commission" or "HERC") in Case No. HERC/PRO-15 of 2016 (hereinafter referred to "the impugned Order**"**) whereby the State Commission considered the

Power Purchase Agreement (hereinafter referred to as “the PPA”) initialled by the appellant HPPC (also referred to as “the procurer”) and the second respondent, IA Energy (also referred to as “the generator”), directing that two stipulations - clause 3.3.2 providing for an exit option and clause 1.1 dealing with wheeling charges - be modified in terms of para 6(a) and para 6(b), the effect of the directions being that the exit option is to be done away with and the capping of wheeling charges is to be removed while retaining capping for wheeling losses. The prime contention of the appellant is that the Commission has exceeded its jurisdiction by issuing the impugned directions which have the effect of violating the freedom of contract available to the parties.

THE FACTUAL MATRIX

4. The appellant (procurer) admits that the second respondent (generator/seller) had earlier approached the distribution licensee (CSPDCL) in State of Chhattisgarh, it having submitted proposal for sale of Power from the Hydro Project to said Discom (CSPDCL) based on which CSPDCL had filed a petition, no. 39 of 2017 (M), before the Chhattisgarh State Electricity Regulatory Commission (CSERC) for approval of Power Purchase Agreement (PPA), after achieving COD (26.07.2017), the injection of power by the seller into CSPDCL grid having begun with effect from 08.07.2017.

5. It is undisputed that the procurer and generator had engaged each other in negotiations around the same period as above for procurement / sale of electricity from the Hydro Project and the parties finalised the terms and conditions, and the PPA, subject to approval by the State Commission for such procurement, the developer being free to sell the power to third party after discharging obligation towards the parent State

in terms of royalty (free power equal to 15% of the deliverable energy for first 12 years, 21% for next 18 years and 33% for the balance life of the project), it (developer) offering the total net saleable (approx. 30 MW) quantity of power post deduction of the said share and auxiliary consumption, having arranged a valid STU interconnection as per agreement (dated 08.10.2015) thereby having agreed to pay all charges levied by the STU in Himachal Pradesh, and the power evacuation from the project from 132KV substation. In pursuance thereof, on 08.04.2016, HPPC filed petition (case No. 15 of 2016) under Section 86(1)(b) of the Electricity Act, 2003 submitting therewith the then initialled PPA praying the State Commission to *"accept the proposal for procuring of power at regulated tariff by appropriate commission, from 36 MW (3X12 MW) Hydro Electricity Project stipulated at Chanju, District Chamba, Himachal Pradesh submitted by the generator*" and to "*approve the draft PPA*"*.*

6. It may be noted here that it was admitted case of the parties (including the appellant-procurer) before the Commission (as noted in order dated 10.04.2018) that the project of the second respondent "*has certain features which are beneficial for State of Haryana e.g. average year energy at 195.52 Million Units and out of this 62.59 MUs shall be generated in peak hours as the project has the barrage for supporting peaking hour generation as needed by the State of Haryana*". Further, it was pointed out to the Commission by the appellant at that stage that *"about 70% of the generation comes during the months of May to October every year and this period is peak demand period for the State being either peak summer or paddy sowing period*" the remaining 30% of generation to be "*during winter months where generation is primarily in morning and evening peak hours as demanded by State*". Pointing out reasons for shortage of power during certain peak-demand seasons/periods, the advisability to fill the gap and in order to meet the

obligation towards Renewable Energy (*RE*) targets, the appellant itself insisted on approval stating, *inter alia*, that "*efforts should be made to enter into long-term Hydro arrangements, which not only support peak demand of the State but also match load pattern of the State throughout the year*" inasmuch as this would help "*Haryana to reduce the backing down issue of the thermal projects and penalties being levied thereof*".

7. Initially, the tariff for generation and sale of electricity from the said Chanju-I Project was considered at estimated tariff of Rs. 5.50 per unit in addition to intra-state and inter-state transmission charges and losses. However, at the time of hearing before the State Commission, it was submitted that other hydro power projects are offering power at lower tariff and are under consideration and, therefore, there was a need to review the procurement of power from Chanju-I project. The second respondent then submitted a revised rate of Rs. 4.50 per unit which was agreed as the ceiling levelized tariff i.e. the tariff to be determined by the State Commission under Section 62 of the Electricity Act, 2003 with a ceiling or limit of Rs. 4.50 per unit, it being treated as the generation tariff *ex bus*, the project being in the State of Himachal Pradesh, the levy on account of wheeling/transmission charges to be concededly additional, the landed cost of power to Haryana being admittedly higher.

8. By Order dated 10.04.2018, the Commission "*approved*" the procurement of power by HPPC from IA Energy observing with reference to the data provided, *inter alia*, that "*it may not be appropriate, by considering the lean demand months, to construe that Haryana is having surplus power as the energy cannot be stored to meet the demand during the peak deficit periods*" and that "*with the increase in consumption the return drawl of banked power could not give the desired cushion for meeting the demand and the same can only be met by adding new capacity under long term from such generating sources*

whose generation matches with the State demand during peak season", finding merit in the contention of the appellant that "*the Hydro Generation Projects/Plants, with, reasonable tariff and especially those with some storage and capability to supply exclusively peaking power in the morning/evening in the winter when inflows are very less, are best suited for contracting additional power to meet the peak deficit*". The Commission also approved the procurement at the tariff to be determined on a separate petition to be filed by the generator with Rs. 4.50 per unit as the ceiling tariff. The draft PPA was, however, not approved. Instead, it was directed that the parties prepare another document suggesting its finalization in terms of the PPA approved earlier by the State Commission for another project (*Teesta Energy Limited*) in regard to which HPPC had already entered into a PPA. The Order dated 10.04.2018, *inter alia*, reads thus:

> *"It is evident from the energy availability in July comparison for year 2016-17 and 2017-18 as per comparative data filed by the HPPC, that the Hydro gives the maximum PLF (more than 100%) during the peak season without paying incentive for excess generation and in the lean period the majority of energy generated falls under Secondary energy, which also helps to manage the demand supply for peaking ours in efficient way using the same for peak period, without running the thermal unit for longer duration conditions and pay more charges as per CERC regulations.*
>
> *Additionally, the Commission observes that to achieve the ambitious target of providing 24 x 7 hrs. supply to all by FY 2021-22 in line with the vision of Central Govt. and if the industries in the Haryana is to be provided un-restricted quality power at a reasonable rate even during peak hours so as to increase their productivity and consequently the State GDP, the peak deficit situation would further have to be addressed.*

In view of the above, the Commission finds some merit in the contention of HPPC that the Hydro Generation Projects/ Plants, with, reasonable tariff and especially those with some storage and capability to supply exclusively peaking power in the morning/ evening in the winter when inflows are very less, are best suited for contracting additional power to meet the peak deficit.

The Commission however observes that the Discoms/ HPPC had worked out Hydro Power requirement of 500 MW. The same also had the approval by the SCPP in a meeting under the Chairmanship of the Additional Chief Secretary, Power, Government, Haryana. Given the fact that the Commission, in the recent past, has already approved a few sources of Hydro Power and the quantum of hydro power available from such approved sources shall almost meet the power requirement projected by the HPPC/ Discoms, hence, HPPC/ Discoms are directed to seek concurrence of the SCPP for additional quantum as a result of the present approval of 36 MW hydro power.

8. … The Commission observes that the offers could have been widened in case HPPC had invited expression of interest from the IPPs. However, it is difficult to say that given the power requirement the offer could have been better. For that matter there may not be any certainty that the bidding route could have yielded a better tariff as there are not many hydro projects commissioned / nearing completion. The maximum day ahead market rate in the Power Exchange during October, 2017 has been above Rs. 5.0 / kWh. Needless to add that given the volatility of the short term market including the quantum of power that may be available on a day ahead basis it cannot substitute long term requirement of power. HPPC has indicated that the Generator has submitted a revised rate of Rs. 4.50 per kWh for supply of power round the year. The Commission however observes that there would be additional costs on account of wheeling / Transmission charges to be paid to the State Utility of Himachal Pradesh. As such, in order to address the issue raised by the intervener, HPPC may ensure that the negotiated price is reasonable and that they would not be able to source power at a rate lower than that of the projects selected by them.

…

The Commission observes that the revised cost works out to Rs. 13.39 Crore / MW which is on the higher side compared to other Hydro projects recently cleared by the Commission. In respect of other Hydro projects recently cleared by the Commission the Developers had agreed to forego cost overrun arising out of such time overruns due to Force Majeure events. Hence, HPPC/Discoms may seek upfront commitment from the Generator to exclude the cost over runs on account of Force Majeure events.

HPPC may, however, negotiate with the IPP regarding any future contingency that may arise including flood/land slide etc and make suitable provision in the PPA.

The Commission further observes that a firm long term PPA would provide a lot of leverage to the IPP in taking a re-look at its capital structure and the terms and conditions of loans contracted. Hence, a savings on this account shall be passed on to the beneficiaries/HPPC by making a suitable provision in the letter of acceptance of the offer by the HPPC.

…

10. … Taking all the above discussions into consideration, the Commission approve procurement of power from the Chanju Hydro Electric Project, throughout the year, at the tariff to be determined by the Commission on separate petition to be filed by the generator with Rs. 4.50/ KWH being the ceiling tariff.

"11. The Commission has taken note of the fact that IA Energy, the Hydro Power generator in the present case, has also offered to sale of power from the same 36 MW Chanju Project located in Kullu District of Himachal Pradesh to Chhattisgarh Discoms. As per information available the Generator has submitted proposal for sale of Power to CSPDCL and based on above CSPDCL has filed Petition before Hon'ble CSERC and based on above CSPDCL has filed Petition before Hon'ble CSERC for

approval of Power Purchase Agreement (PPA) vide Petition No. 39 of 2017 (M). The unit – I & II of the project has been commissioned in February 2017, and final COD has been achieved on 26.07.2017. At present the power is being injected in CSPDCL grid w.e.f. 08th July 2017. The Generator, as communicated earlier, has submitted that the said proposal is still valid for selling of Power to HPPC. However, prior to the singing of the PPA the Discoms/HPPC, shall, get, on an Affidavit, an undertaking from the generator that they shall withdraw the proposal for sale of power from CSPDCL and will comments supply of power immediately after getting necessary NOC/permission from the concerned authorities of State/Central Transmission Utilities under STOA/LTOA.

12. Having approved the purchase of power from 36 MW(3x12MW) Chanju HEP, the Commission has perused the draft PPA attached with the present petition for approval of the commission and observed that the same does not incorporate a lot of details that a contract of such nature should necessarily have. HPPC may recast the PPA based on the format and other terms as in line with the PPA approved by the Commission of Teesta III, Sikkim.

13. The duration of the PPA may also be increased from 25 years as proposed to 35 years. The inititialled draft PPA by both the parties shall be submitted for approval of the Commission within one month from the date of the present order.

As tariff determination is a long exercise including public proceedings and the fact that the project has already attained CoD the Commission, as interim measure, approves that in case energy drawl is resorted to from this source prior to the determination of final tariff by the Commission the same may be paid for the APPC subject to adjustment vis a vis the final tariff as the case may be."

(emphasis supplied)

9. The Commission, by the above-said order dated 10.04.2018, approved the proposal of the appellant HPPC (procurer) for procurement of power for distribution licensees (Discoms) of State of Haryana from

the second respondent (generator) and, while noting that the generator had confirmed that (notwithstanding the arrangement with the Discom of Chhattisgarh) the proposal to sell power to the appellant was still valid, directed that "*prior to signing the PPA the Discoms / HPPC , shall, get, on an Affidavit, an undertaking from the generator that they shall withdraw the proposal for sale of Power from CSPDCL and will commence supply of Power immediately after getting necessary NOC/permission from the concerned authorities of State / Central Transmission Utilities under STOA/ LTOA*". It is clear from the order dated 10.04.2018 that the Commission, *inter alia*, ruled that (i) the approval of Steering Committee of Power Planning (SCPP) be taken; (ii) considering the additional costs of transmission/wheeling charges, the appellant was to ensure that the negotiated price is reasonable and there is no other source of cheaper power; (iii) the appellant may seek assurances from the generator to forego the cost overruns that usually occur due to delays in COD; and that (iv) the PPA be recast since the one initialed and submitted earlier would not incorporate a number of details. It is admitted case of the appellant that the generator (second respondent) abiding by the requirement withdrew from the arrangement with the Discom of State of Chhattisgarh and complied with other above-said conditions, discontinuing supply of electricity to grid of Chhattisgarh with effect from 01.06.2018.

10. In the wake of above order, the appellant addressed a Letter of Intent (LoI) dated 23.05.2018 (at page 27 of the reply filed by Respondent No. 2 in IA No. 958 of 2020 on 14.08.2020) to the second respondent, *inter alia*, stating:

> *"This has reference to the HERC order dated 10.04.2018 in PRO-15 of 2016 vide which Commission has approved the Procurement of Power under Long Term Arrangement from*

Chanju-I Hydro Electric Project. The draft PPA already initialed by both the parties stands submitted to HERC on 22.05.2018 for requisite approval as per section 86(1) of Electricity Act, 2003.

It is, therefore, requested that you may immediately start scheduling the power as per interim arrangement as mentioned in HERC order dated 10.04.2018 as per the terms and conditions of the draft PPA initiated by both the parties and submitted in HERC."

(emphasis supplied)

11. It is admitted that after signing of the PPA and filing the same before the Commission for approval, and in the wake of the LoI dated 23.05.2018, power flow from the second respondent to the appellant started from 1.6.2018. It is also not disputed that in terms of the PPA, the appellant accepted the invoices raised from time to time against the power sourced in terms of the PPA read with the Commission's order dated 10.4.2018, having agreed to the protocol for metering, making provisions for payment security, rebate for prompt payment etc. It may also be noted that in the impugned order the Commission has expressly recognised that date of scheduling of power is 1.6.2018 and as such the period / duration of the PPA has to be computed therefrom, there being no challenge to this finding of fact.

12. Pursuant to the above, there were further negotiations between the second respondent (IA Energy) and the appellant (HPPC). It is pointed out by the appellant that the Steering Committee of Power Planning (SCPP) in its 45th meeting held under the Chairmanship of ACS/Power, Government of Haryana decided, on 15.05.2018, to incorporate a time period of 30 days in the exit clause in Article 9.1.3(ii)(b) for the option of termination of the PPA after the tariff determination by the State Commission making it clear that the exercise of exit option cannot be done at any time during the contract period but has to be exercised

within 30 days from the first tariff order decided by the State Commission in the matter. This change was also brought to notice of the State Commission.

13. Eventually, a revised draft of the PPA was finalized, initialled and filed with the State Commission, vide letter dated 22.05.2018 by HPPC, this resulting in the initiation of proceedings (in case No. HERC/PRO-15 of 2016). It appears that the revised PPA also incorporated, in addition to the capped tariff of Rs. 4.50 per unit (Article 9.1.2), terms on (i) "*Exit option*" to either party to terminate the PPA in case the tariff determined by the State Commission was not acceptable (Article 3.3.2) and (ii) "*Wheeling charges*" for transmission of power from the delivery point to Sub-station of CTU at Himachal Pradesh State Periphery (i.e. wheeling charges for State Network) to be capped at 2% (Article 9.2.5) with stipulation that any increase beyond 2% would be borne by the second respondent (generator).

14. It is admitted fact that certain other similarly placed hydro power developers had entered into similar PPAs with the appellant such documents also carrying similar terms and having been submitted for approval to the State Commission. It may be noted here (for later discussion) that the said other Hydro Power developers included DANS Energy Limited (for short, "DANS") and Shiga Energy Private Limited (for short, "*SHIGA"*).

15. It is stated that, on 19.12.2018, the State Commission directed all the hydro power developers to submit acceptance of amendment of Article 9.1.3(ii)(b). It is not disputed that like certain others the second respondent (IA Energy) sent a communication on 15.02.2019 to HPPC in response to its letter dated 14.02.2019, conveying its consent for changes in clauses 3.3.2 and 9.1.3(ii)(b) of PPA. Thereafter, the parties appear to have entered into parleys and proceeded to resolve that

instead of amending the Article 9.1.3(ii)(b), it would be appropriate to amend the Article 3.3.2 providing for exit option to incorporate the time period of 30 days. The definition of wheeling charges was also modified statedly to align it with Electricity Act, 2003. The appellant filed submissions dated 18.02.2019 providing for such amendment along with consent dated 15.02.2019 of the second respondent, *inter alia*, proposing that "*the term of the PPA approved by the Commission is at levelised tariff for 35 years for the generators, whereas the projects have already commissioned before the start of power, hence the PPA duration cannot be for 35 years but for the residual life of the project from the date of start of scheduling the power* (though mentioning 35 years as duration for the PPA with the second respondent herein)"

16. Thus, the PPA which was submitted by the appellant and came up for consideration before the Commission contained, *inter alia*, the following clauses (quoted only to the extent relevant here):

> *"'Delivery Point' means generation switchyard of Chanju-I HEP;"*
> *Wheeling Charges: means the wheeling charges to be paid by the Generator/ Purchaser to STU / CTU as the case may be, for transmission of power from Delivery Point to the Purchaser's State periphery, and to be paid/reimbursed by Purchaser for the capacity of the plant after adjusting the normative auxiliary consumption, transformation loss & free power to the State.*
> *.....*
> *"2.1.1 This Agreement shall be considered operative on the day after the date when the Company has declared availability and starts scheduling power to the Purchaser at the Purchaser's State Periphery. The Agreement shall remain operative from such Commercial Operation Date of the Agreement until the Expiry Date ("Term of Agreement").*

Upon the concurrence of Expiry Date this Agreement shall automatically terminate without any notice unless mutually, extended by the Parties on mutually agreed terms and conditions and such an extension shall be affected at least One Hundred Eighty (180) days prior to the Expiry Date."

3.3.2 The Purchaser/ Company will have the right to terminate this Agreement within 30 days of the order regarding initial determination of tariff by HERC pursuant to the First Tariff Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1(ii) of the tariff so determined by the Commission is not acceptable.

3.3.3 Neither Party shall have any liability whatsoever to the other Party as a result of the termination of this Agreement pursuant to this Clause 3.3.1.

……

"4.1 Company's Obligation

… … … …

(iii) to pay on behalf of the Purchaser the Wheeling energy/ charges and losses, RLDC charges and any other charges payable to STU/ CTU for wheeling/ transmission of Purchaser Contracted Power and Purchaser Contracted Energy from the Delivery Point to the Purchaser's state periphery, after adjusting the auxiliary consumption, transformation losses and free power to the State in accordance with this PPA.

… … … …

4.2 Purchaser's Obligation

… … … …

(iii) to pay the amounts due against Monthly Bills and Supplementary Bills to Company by the respective Due Dates. Further, all charges related to sharing of interstate transmission & losses payable to CTU, wheeling charges payable to STU, RLDC/ SLDC charges etc. for wheeling & transmission of power from the delivery point to the Purchaser's State periphery shall be payable to Company

as per relevant regulations after receipt of invoice for the same from the Company. Rebate and surcharge for the invoices relating to the transmission, wheeling, SLDC/ RLDC charges etc. shall be governed as per the relevant HERC regulations to be calculated from the date of receipt of such invoices by the Purchaser through e-mail at billhppc@gmail.com or through facsimile form or through physical form duly acknowledged by the purchaser."

9.1 General

9.1.1 the Purchaser shall pay to Company, the payment comprising:

i. Tariff Payment as mentioned under clause 9.1.2 and

ii. Wheeling charges (subject to provision of Clause 9.2.5)/ transmission charges paid by Company to STU/CTU, RLDC/SLDC charges or other applicable charges that may be payable by the Company for use of transmission system from delivery point to drawl point of the Purchaser (i.e. CTU substation at Purchaser state periphery) for each month of every tariff Year, determined in accordance with this Clause-9. The actual payment shall be made against the Purchaser Monthly Bills issued by the Company for each Month.

9.1.2 Tariff:

i. The Purchaser shall pay to the Company for the energy supplied at the delivery point at a tariff as determined by the Commission from time to time as per the provisions of HERC Tariff Regulations subject to the ceiling tariff approved by the HERC in its Order dated 10.04.2018 in Petition no HERC/PRO-15 of 2016 i.e. Rs. 4.50 / kWh for the entire term of this Agreement. The petition for determination of tariff shall be filed by the Company before the Commission as and when required as per HERC Tariff Regulations.

ii. The tariff at any point of time during the tenure of this Agreement shall not exceed the ceiling tariff of Rs. 4.50 / kWh even as a consequences of any order / intervention of any statutory authority including HERC, CERC APTEL or Court of Law, except for any statutory levies / taxes that may subsequently imposed by the Government which would be reimbursed to the company. Any other increase beyond the ceiling tariff due to any reason including as a consequence of any order/ intervention of any statutory

authority including HERC, CERC, APTEL or Court of Law shall be absorbed by the Company.

9.1.3 Provisional Tariff:

i. Until, the initial tariff is determined by the Commission, the Company shall supply power to the purchaser at the Average Power Purchase Cost (APPC) per KWH (ex-bus) as determined by the HERC in the ARR/ Tariff Order for Discoms pertaining to the relevant year.

ii.

a. After the initial tariff for the period is determined by the Commission and the tariff so determined/ approved by the Commission is acceptable to the Purchaser, the Purchaser shall continue with the Agreement for the entire term of the PPA and will pay the differential rate (i.e. Tariff determined/ approved by the Commission minus the Average Power Purchase Cost) for the power already supplied.

b. If the initial tariff determined by the Commission is not acceptable to the Purchaser/ Company and this Agreement is terminated under Clause 3.3.2, no differential (i.e. Tariff determined/ approved by the Commission minus the Average Power Purchase Cost) shall be paid for the power already supplied."

……..

9.2.5 The wheeling charges payable from the delivery point to the Sub-Station of CTU at Himachal State Periphery at which power shall be injected, if applicable, shall be subject to a maximum of 2% of the energy transmitted as per the agreement signed by the Company with State Government of Himachal. Any increased in wheeling charges beyond 2% of the energy transmitted at any time during the tenure of this Agreement shall be borne by the Company."

17. It is noted in the impugned order (dated 08.03.2019) of the Commission, *inter alia*, that:

"*4. The representative of the generator M/s. IA Hydro Energy Private Ltd., present during the hearing, gave*

written submission vide letter no. IAHEPL/2018-19/0157 dated 20.02.2019. M/s. IA Hydro Energy Private Ltd., submitted as under:-

“

a) Regarding reimbursement of Transmission/ Distribution losses as per actual:-

As per IAHEPL offer dated 17" June, 2017, the Transmission/Distribution losses as per actual shall be reimbursed by HPPC and accordingly Levelised Tariff @ Rs. 4.50 per Unit ex-Generating Bus has also been approved by this Commission for sale of power.

While signing of PPA, the ceiling limit for Transmission/Distribution losses upto maximum @ 2% is imposed by HPPC whereas IAHEPL is incurring total Transmission/Distribution losses @ 4.75%, therefore, ceiling limit in Transmission/ Distribution losses of STU beyond 2% is not at all justified because Transmission/ Distribution losses to Himachal Pradesh being made as per prevailing regulations of HPERC which is beyond the control of IAHEPL. The reimbursement of Transmission/ Distribution losses as per actual i.e. @ 4.75% may be considered.

b) Regarding reimbursement of Wheeling charges as per actual:- At present, IAHEPL is paying wheeling charges to HPSEB @ 65 paise per unit for transmission of power from delivery point (Ex-Generating Bus) up to the sub-station of CTU at Himachal State periphery for injection of power into Grid.

Though while signing of PPA between HPPC & IAHEPL the ceiling limit for Wheeling/ Transmission losses at 2% has been imposed by HPPC, however, nothing is specified about payment of wheeling charges in cash. Moreover, the Commission has approved Levelised Tariff @ Rs. 4.50 per Unit Ex-Generating Bus for 35 years, therefore, the wheeling charges payable from the delivery point to the substation of CTU at Himachal State periphery to be paid / reimbursed by HPPC as per actuals in line with power transmission agreement signed by IAHEPL with Himachal State Government and wheeling charges approved by

HPERC from time to time. The reimbursement of wheeling charges @ 65 paise per Unit may be considered by HPPC to IAHEPL as per actual.

c) Provisional Tariff: (Clause No. 9.1.3(ii)(b)):-

If the initial tariff determined by the Commission is not acceptable to the Purchaser/ Company and this Agreement is terminated under Clause 3.3.2, no differential shall be paid (i.e. Tariff determined/approved by the Commission over and above the Average Power Purchase cost) for the power already supplied. This clause is not at all justified, since it is against natural justice. Therefore it needs to be amended suitably

d) Capital Cost for determination of tariff: (Clause No. 9.1.4):-

This clause is required to be substituted strictly as per order passed by this Commission. Moreover we never agreed to exclude any cost overrun arising out of flash flood, geological surprises etc encountered during the construction or on account of force majeure events from the capital cost to be considered tor tariff determination. However, in lieu of above, we have offered bare minimum levelised tariff @ Rs 4 50 per unit, hence there will be no impact on tariff due to the same."

18. The appellant resisted the objections raised by the generator at the hearing before the Commission, *inter alia*, arguing that the "Exit Clause" had been agreed by both the parties (HPPC and Generators) which was the sole basis of proceeding further in the matter "*for approval of PPA and start the supply of power*", the said clause, in its submission, providing the balance of convenience to both the parties to protect their respective interest also binding the generator "*to come with clean hands for tariff approval*".

19. The Commission, by the impugned order passed on 08.03.2019, has ruled as under (quoted to the extent relevant here):

"6. The Commission has considered the additional submissions made by HPPC and M/s. IA Hydro Energy Pvt. Ltd. vis-à-vis the signed draft PPA and Order of the Commission dated 10.04.2018, as under:-

a) Clause 3.3.2 & Clause 9.1.3 (ii)(b): The Commission considered the exit clause of 30 days sought in clause 3.3.2 of the PPA. The Commission also observed that the ceiling tariff has already been decided by the Commission in its Order dated 10.04.2018. The generator is already giving power supply at the average power purchase cost (APPC) to be adjusted against the final tariff determined by the Commission. Thus, both HPPC and generators have fair idea of the range within which the tariff shall be determined by the Commission. In case the tariff to be determined by the Commission exceeds the ceiling tariff agreed upon, the applicable tariff is to be capped at the ceiling tariff. Thus, retaining unprecedented exit clause is likely to put at risk both the parties i.e. the HPPC regarding quantum of power from the much needed Hydro sources as well as the generator for their such exit.

In view of the above, the Commission is of the considered view that the exit provision sought in clause 3.3.2 of the PPA is unprecedented. Accordingly, clause 3.3.2 and 9.1.3 (ii) (b) contained in the draft PPA shall be removed. Needless to point out that in case of any difficulty to either party arising from the tariff or for that matter any other dispute, mechanism for seeking relief is available under the relevant clause of the Electricity Act, 2003.

In terms of the above, the issue raised by the Generator at point no. 4.c above is also addressed.

b) Clause 1.1 regarding Wheeling Charges: The Commission considered changes sought by HPPC in clause 1.1 of the PPA, regarding wheeling charges. The Commission further observed that Clause 9.2.5 of the PPA specifies that "The wheeling charges payable from the delivery point to the Sub-station or CTU at Himachal State Periphery at which power shall be injected, if applicable, shall be subject to a maximum of 2% of the energy transmitted as per the agreement signed/ to be signed by

the Company with State Government of Himachal. Any increase in wheeling charges beyond 2% of the energy transmitted at any time during the tenure of this Agreement shall be borne by the Company."

The Commission has further considered the submissions of the generator at point no. 4.a & 4.b above, wherein it has been submitted that the Himachal Pradesh is already charging the Transmission/Distribution losses @ 4.75% and is already paying wheeling charges to HPSEB @ 65 paise per unit for transmission of power from delivery point (Ex-Generating Bus) up to the sub-station of CTU at Himachal State periphery for injection of power into Grid.

The Commission has examined both the clauses and observes that delivery point is the generator's switchyard. However, the Commission in its Order dated 10.04.2018 (HERC/PRO-15 of 2016), while granting the source approval, observed the following at para 8:-

> *"……The Commission however observes that there would be additional costs on account of wheeling/ Transmission charges to be paid to the State Utility of Himachal Pradesh. As such, in order to address the issue raised by the intervener, HPPC may ensure that the negotiated price is reasonable and that they would not be able to source power at a rate lower than that of the projects selected by them."*

Accordingly, in line with the ibid Order of the Commission, HPPC and the Generator agreed to cap the Wheeling charges & losses to 2% as per clause 9.2.5 of the signed draft PPA. The said acceptance having created a binding enforceable obligations interse between the parties, there can be no change in the agreed contractual terms at the later stage, which has the effect of increased financial burden on the consumers. The financial parameters are essential term of the contract and a contractual agreement can be novated only by consensus of the signatory parties of the contract. The Commission cannot elect to substitute the consensual acts of the contracting parties, when any such substitution has a far reaching financial implications and increased financial burden on the consumers.

Agreeing to any such demand would compromise larger public interest in order to secure windfall gain for the generator who had voluntarily, consciously and willingly agreed to a particular tariff.

The Commission observed that the definition of wheeling charges includes losses. Therefore, changing the definition of wheeling charges will result in the exclusion of losses from the capping of 2% of the energy transmitted. However, considering the submission of the generator that nothing has been specified about payment of wheeling charges in cash, the Commission directs that wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such. The Commission is of the considered view that granting relaxation in the provision already contained in the signed draft PPA is not justified. Accordingly, the following shall be added to Clause 9.2.5 of the PPA:-

"wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such."

(emphasis supplied)

20. Feeling aggrieved by the Order dated 08.03.2019 passed in Petition No. HERC/PRO-15 of 2016, the appellant had filed a Review Petition being HERC/RA-5 of 2019. The said Review Petition was dismissed by the Commission by Order dated 01.05.2019. The relevant part of the order in review may be extracted as under:

"*6…. The Commission has examined the submission of the petitioner on the anvil of the above statute for exercising review jurisdiction. It has been submitted by the petitioner that the Commission ordered for the removal of the exit clause no. 3.3.2 without any of the party concerned raising the issue. Further, it has been argued that the Commission after recording approval to the PPA including the said clause, is estopped from removing/altering the said clause.*

After anxious consideration, the Commission observes that the contention of the petitioner that the Commission had earlier approved the PPA along with clause 3.3.2 is not correct. The clause no. 3.3.2 of the initialled PPA submitted for the approval of the Commission is reproduced as under:-

> *"3.3.2 The Purchaser/Company will have the right to terminate this Agreement in case the tariff determined by the Commission initially pursuant to the Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1 (ii), is not acceptable."*

The petitioner also cannot argue that merits of the said clause was not considered, as the Commission after due deliberations and after recording the reason in writing, considered it appropriate to delete the said clause in the interest of both the parties.…

7. The Commission has examined the review sought by the petitioner including maintainability tested on the anvil of the aforesaid Regulations / Case Laws and observes as under:-

a) Clause 3.3.2 of the PPA i.e. Exit Clause

The HPPC has submitted that the impugned order of the Commission dated 08.03.2019 with respect to deletion of exit clause is against the law and the concern of the Commission in passing orders for deletion of exit clause is unjustified and unnecessary. HPPC further submitted that during the hearing none of the parties raised any objection with respect to amended clause 3.3.2. The Commission also did not put forth any query on the said clause and thus, HPPC had no occasion to explain the true import of said clause and prominence of its incorporation in the PPA. In this regard, the Commission observes that the direction for deletion of exit clause was given in the impugned order

dated 08.03.2019 after careful examination of all facts and circumstances of the case and justification for doing so was also explained in the impugned order. …

b) Clause 1.1 of the PPA i.e. Definition of wheeling charges
The HPPC has submitted that the impugned order of the Commission dated 08.03.2019 to the extent of the directions given that Wheeling Charges incurred in cash shall not be subject to the capping of 2% and shall be reimbursed as such, fails to take into account the interests of the consumers at the large and is therefore, contrary to the object of the Electricity Act, 2003.
In this regard, the Commission observes that the Commission in its Order dated 10.04.2018 in case no. HERC/PRO-15 of 2016 had approved the procurement of power from M/s. IAHEPL at Levelised Tariff @ Rs. 4.50 per Unit Ex-Generating Bus for 35 years. Therefore, wheeling charges for transmission of power from delivery point (Ex-Generating Bus) up to the substation of CTU at Himachal State periphery for injection of power into Grid, were required to be borne by HPPC. …

The Commission observes that negotiated price mentioned in the ibid order ought to have the agreement between both the parties. However, in the present case, the Generator has argued that wheeling charges payable in cash to HPSEB for transmission of power from delivery point to CTU was never agreed between the parties and also that nothing has been specified about payment of wheeling charges in cash. Accordingly, after careful examination of all facts and circumstances of the case, the Commission in the impugned order has retained the capping of wheeling charges and losses at 2% of the energy transmitted and directed that "wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such.".

> *8. In view of the above discussions, the Commission observes that all crucial facts and submission of the Petitioner was duly considered while passing the impugned Order dated 08.03.2019. Further, there is no error apparent on the fact of the Order warranting any Review. …*"

21. It is necessary to also note some connected events that occurred contemporaneous to the proceedings before the State Commission. As noted earlier, by order dated 10.04.2018, the Commission had accorded approval "*as an interim measure*" to the request that "*in case energy drawal is resorted to*" from the second respondent "*prior to determination of final tariff by the Commission*" the same shall be "*paid for*" in accordance with "*the APPC subject to adjustment vis a vis the final tariff as the case may be*", it being added as justification for such arrangement that "*tariff determination is a long exercise including public proceedings and the fact that the project has already attained COD the Commission*". As also noted earlier, it is admitted fact that at the instance of the appellant the second respondent started supplying power to the former in terms of this order with effect from June 2018.

22. The above interim arrangement was continuing when the orders dated 08.03.2019 and 01.05.2019 were challenged by the appeal at hand, the proceedings before the Commission for tariff determination being inchoate. More than one year thereafter and while the appeal was pending, the appellant served the second respondent with a communication dated 23.07.2020 informing it, *inter alia*, that in terms of the arrangements under order dated 10.04.2018 of the State Commission a discretion vested in it to resort to interim drawal of energy and the said arrangement being on temporary basis could be withdrawn at its discretion. It also stated in the said letter that a decision had been taken to discontinue the drawal of electricity from the hydro-electric

project with effect from 27.07.2020 considering the "*available basket of power and larger interests of (the) consumers*". The second respondent came with application (IA no. 865 of 2020) seeking interim relief submitting that the drawal was actually discontinued on 27.02.2020 suddenly and unfairly leaving the generator high and dry.

23. We considered the prayer in the said application and decided, by order dated 31.07.2020, as under:

> " *… direction relating to deletion of the 'exit clause' is under challenge, in addition to other issues, by the main appeal brought before us by the Procurer. Meanwhile, in terms of the liberty granted by the aforesaid interim order the Procurer started drawing electricity from the Applicant since June, 2018. The said arrangement, no doubt adhoc and temporary, has continued ever since.*
>
> *It may be noted here that similar directions vis-à-vis similar 'exit clause' by the same State Commission were challenged in another batch of appeals on which a decision has been rendered by a co-ordinate bench of which one of us (Mr. Ravindra Kumar Verma, Technical Member) has been a Member. The direction to the said effect passed by the State Commission has been found to be unwarranted in the said decision passed on 29.07.2020.*
>
> *The Procurer, meanwhile, by a communication dated 23.07.2020 informed the Applicant that in terms of the arrangements under order dated 10.04.2018 of the State Commission a discretion vested in it to resort to interim drawal of energy and the said arrangement being on temporary basis can be withdrawn at its discretion. It also stated in the said letter that a decision has been taken to discontinue the drawal of electricity from the hydro-electric project of the Applicant with effect from 27.07.2020 "considering our available basket of power and larger interests of our consumers".*
>
> *The Appellant/Procurer has gone ahead to discontinue the drawal of power with effect from 27.07.2020 abandoning the Applicant. Though the generation of electricity by the hydro-electric project has continued, the only Procurer*

utilizing the said power all along under above arrangement pending approval of PPA and tariff determination has decided all of sudden on its own to discontinue. Admittedly, while the main appeal has been pending, the Appellant did not approach for any such liberty for discontinuance of an interim arrangement which was under the cover of an interim order passed by the State Commission in the course of same proceedings in which the impugned order was rendered, some part (relating to tariff determination) being still pending before the State Commission.

We note that the communication dated 23.07.2020 is as vague as it could be with regard to the "available basket of power". It is not disclosed as to whether the Appellant has resorted to purchase from other sources while discontinuing the drawal of electricity from the Applicant as a result of the above-mentioned communication. We do accept the submissions that drawal of power in terms of order dated 10.04.2018 was an adhoc or temporary arrangement but the same has continued for over two years now at the instance and free volition of the Appellant. Without all relevant facts being shared, we have reasons to doubt as to the genuineness of the grounds on which this sudden communication was issued. There was undoubtedly a discretion vesting in the Procurer to resort to interim drawal of energy and this discretion was exercised favorably so as not to waste the electricity produced during the interregnum by the Applicant with whom a long-term contractual relationship for sale-purchase had been agreed to. But then, the order dated 10.04.2018 did not give – at least not expressly so – the liberty to suddenly discontinue. We are in serious doubt as to whether the equities can be changed or disturbed in such manner as is attempted to be done.

While we are inclined to grant non-Applicant/Appellant an opportunity to make its case good in above regard by submitting a reply to the applications, the electricity generated by the second Respondent cannot be allowed to be wasted or frittered away since that would not be in larger public or national interest.

In the above facts and circumstances, as an ad interim arrangement we direct the non-Applicant/Appellant to forthwith undo the discontinuance of the drawal of power in terms of order dated 10.04.2018 under the cover of communication dated 23.07.2020. For clarity, we add that continuance of such drawal of power would be on some terms as were directed by the State Commission by its order dated 10.04.2018.

The above direction shall be scrupulously abided by and an affidavit in compliance will be filed by the Appellant within two days with the Registry.

The reply to the Application may be filed within two weeks. Rejoinder, if any, thereafter within four weeks. We are informed that the main appeal is listed on 18.08.2020. This application will also be listed on the same date."

24. The appellant did abide by the above order but while filing reply also moved application (IA no. 958 of 2020) seeking vacation of the interim order. On 12.10.2020, both the said applications came up for consideration and were heard for some time. Midway the hearing, however, it was submitted that it would be desirable that both the applications and the main appeal be heard and disposed of simultaneously, the issues in the main appeal being such as have to be borne in mind for considering the two applications as well. Thus, upon request and with the consent of all sides, we decided to take up the main appeal and the pending applications for final hearing for disposal.

25. We have heard learned counsel on both sides and have given anxious consideration to the contentions raised.

THE ISSUES

26. The State Commission by the impugned order approved the PPA but "*subject to the amendment*" thereby directed. Thus, it has not

accepted the above two clauses of the PPA. The Appellant is aggrieved by the direction of the Commission to delete the “Exit Clause” as contained in clause 3.3.2 (read with clause 9.1.3) of the PPA. It contends that the view taken by the Commission holding the exit option to be unprecedented and directing its removal is uncalled for. It is also aggrieved by the Commission’s direction for reimbursement of actual Wheeling Charges paid by the second respondent (generating company) to the utility in Himachal Pradesh. It alleges that this is contrary to the capped Wheeling Charge of 2% agreed by the parties in the PPA (i.e. clause 9.1.1 and 9.2.5). It is contended that on the subject of wheeling charges, the Commission has mixed up the issue by distinguishing wheeling charges and wheeling losses and holding that wheeling charges would not be subject to capping of 2% despite the observation that it could not substitute the term in deviation to what has been agreed between the parties, when the same adds to the financial burden on the appellant and thereby the consumers in the State.

27. It is stated by the appellant that during the hearing on the matter by the State Commission, no issue was raised by any one on the terms relating to exit option and capping of wheeling charges/losses. Though the representative of the second respondent sought to present Written Submission but the same was objected to by the appellant, its copy not having been given to the appellant and no opportunity being afforded to address the issues raised in representation of the second respondent, this being in violation of principles of natural justice. It may be observed here itself that this line of objections was not pursued at the hearing on appeal, it being even otherwise clear that after the second respondent had protested the matter was heard on merits with both sides having been afforded full opportunity by the Commission.

28. It is the grievance of the appellant that the second respondent despite agreeing to the terms and signing the PPA and further signifying its consent before the State Commission, had for the first time raised issues about the terms of the PPA in the said submissions, there being no rationale or reasoning for such deviation. It is contended that after granting its written consent to the PPA and the amendments, it was not open to the respondent to change its mind.

29. It is the contention of the appellant that the terms of exit clause and cap on wheeling charges were added in order to address the issues of reasonableness of power procurement cost and ensure that the appellant gets the most economical tariff in the interest of the consumers. It is added that the intent was to allow the appellant to terminate the power procurement in case the tariff determined by the State Commission is higher as compared to other power projects which may be available at the relevant time after determination of final tariff by the State Commission and similarly an option is also given for convenience to the Generator, if the tariff so discovered by the State Commission is not acceptable so as to avoid litigation in the matter or any claims of unviability etc. and further so that the overall cost (i.e. inclusive of wheeling charges and losses) is not higher than the overall cost of other power projects, this being also consistent with the Generator agreeing to lower norms to be more economical than other projects.

30. It is argued that there is no PPA executed and implemented by the generator (IA Energy) and the procurer (HPPC) for the sale and purchase of electricity from the Hydro Project of IA Energy in terms of the PPA to be executed as per the decision dated 08.03.2019. In the Order dated 08.03.2019, there was no determination of tariff. The State

Commission was to undertake determination of tariff under Section 62 of the Electricity Act, 2003, upon the IA Energy and HPPC filing a duly executed and concluded PPA. However, during the period till 27.07.2020, IA Energy was supplying electricity from the Project and HPPC was purchasing electricity from the Project under an *ad hoc* arrangement and the price payable for purchase was agreed to between the parties as the APPC. This was consistent with the APPC that was made applicable by the State Commission for purchase of power during the period from the date of the execution of the PPA till the determination of tariff.

31. It is pointed out that respondent IA Energy had agreed to the exit clause and the wheeling charges capping, when the draft of the PPA was finalised and was initialled on 21.05.2018 and filed with the State Commission on 22.05.2018 which was again confirmed on 15.02.2019 by a formal letter. It is stated that it was only during the hearing on 20.02.2019 that IA Energy sought to raise issues on various stipulations including the above two stipulations.

32. It is further pointed out by the appellant that in its reply to the present appeal filed on 30.07.2019, the respondent IA Energy has confirmed that the document filed for approval with the Commission is only a draft PPA, as against a concluded PPA, the relevant pleadings reading, *inter alia*, thus:

> *"20. It is submitted herein that the order of the Learned Commission dated 10.04.2018 is extremely clear as it provides that the tariff is to be paid as per the APPC rate subject to adjustment to be made on final determination of the tariff for 35 years and based on this HPCC issued the LOI for purchase of power. It is submitted herein that therefore HPPC is barred from making the instant averment / submission stating that it shall purchase the power only if the generator agrees to the rate currently prevalent in the power exchange. As submitted*

hereinabove the contract terms have been acted upon between parties and the rate to be paid is an APPC rate and this rate is derived on the basis of long term contractual rates and therefore even on this ground the arguments of HPPC is flawed and incorrect, as even the HERC gave a average power purchase cost to be paid as the interim tariff till the time of final tariff determination.

……..

23. It is reiterated that the appellant compelled the respondent No. 2 to initial a draft PPA which was submitted for approval to the Hon'ble Commission vide letter dated 22.05.2018. It is extremely important to mention that therein in this regard the letter dated 22.05.2018 (@page 86) it is specifically mentioned by the appellant that it is substituting a draft power purchase agreement for approval by the Hon'ble Commission.

24. Therefore admittedly it was never a final signed PPA between the parties and was only a draft proposal to be discussed and deliberated at the stage of hearing the finalization. It is submitted that in this draft PPA the tariff to be determined by the State Commission was for the energy supplied at the delivery point (Ex Generating bus) and the ceiling tariff of Rs. 4.50 per unit was mentioned and it was also mentioned that the wheeling charges shall be capped at 2%.

26. However, it is submitted that the respondent No.2 being aware of the fact that it is only a draft PPA and not the final PPA and that the approval of the Hon'ble Commission is to be taken on the said clauses, therefore, the respondent No. 2 initialed the said draft PPA and during the hearing for approval of the petition held on 20.02.2019 made its objections and submissions with respect to the terms and conditions of the PPA and the learned State Commission after due consideration in exercise of its power under Section 86(1)(b), was pleased to pass the Impugned Order wherein it held that the amendment to the PPA as proposed by the appellant vide its letter 18.02.2019 with reference to exit clause (clause 3.3.2) was unprecedented

and it is in the interest of all parties that the same be deleted and the same is duly recorded in para 6-A of the impugned order."

33. It is the submission of the appellant that the purchase of electricity by the appellant from the second respondent is not on the basis of a validly finalized and executed PPA that may be enforceable in law as envisaged by the parties under the initialed draft PPA but on the basis of an *ad hoc* arrangement based on exigencies of requirement of the power at the price offered by the second respondent and as decided by the Commission by order dated 10.04.2018. It is the case of the appellant that there was no commitment on its part to purchase power from the second respondent till the PPA is finally executed with due approval of the Commission, it being also pointed out that this is also the understanding of the latter (generator) which has been supplying power under interim arrangement through Short Term Open Access (STOA) rather than Long Term Open Access (LTOA) as would be necessary after PPA has the sanction of the regulatory authority (the Commission).

34. *Per contra*, the second respondent contends that the pleas raised by appellant are wrong stemming from erroneous understanding of law. It is argued that under the general principles of law, a contract need not be in writing. In the present case, it has in fact been reduced to a written form, placed for approval (in terms of the statute) and actually acted upon and, therefore, the parties to the contract, including the second respondent, are to that extent bound by such contract. It is submitted that the material question that arises is as to whether (after signing / initialing the contract) it is open to the parties to ask the State Commission to modify certain terms when the State Commission is exercising its statutory powers as contained in Section 86(1)(b) of the Electricity Act, 2003. It is argued that, when the State Commission is

considering approval of the PPA under Section 86(1)(b), it does possess the jurisdiction to direct modification / alteration of terms of the PPA (unilaterally or at the instance of a party). It is emphasized that this is not a case where post-approval of PPA - i.e. after exhausting its jurisdiction under Section 86(1)(b) of the Electricity Act, 2003 - the Commission has used its inherent power to modify the terms of the PPA.

35. Arguing that the Commission does not have the jurisdiction to modify / amend the PPA and / or insist on clauses different from what is "*mutually agreed*" between the parties, the appellant raises the following issues:

(i.) Whether the directions given in regard to the removal of exit option and removal of capping of wheeling charges, which were duly agreed to between IA Energy and HPPC, are valid and justified?

(ii.) Whether the State Commission is empowered to direct and compel HPPC (or IA Energy) to implement the PPA with the modifications decided by the State Commission in the order dated 08.03.2019?

(iii.) Whether the order dated 10.04.2018 passed by the State Commission in Case no. 15 of 2016 brought about a binding, concluded and enforceable contract between IA Energy and HPPC for sale and purchase of electricity from Chanju Project, without further negotiation, finalisation, execution, etc. of the PPA between the parties?

(iv.) Whether the HPPC is legally bound to procure power from IA Energy at the APPC rate for the period prior to the execution of the PPA? And

(v.) What is the entitlement, if any, of HPPC for adjustment in equity for the price paid/payable at the APPC rate for the period from 03.08.2020 in terms of the interim order dated 31.07.2020 passed by this Tribunal in IA No. 865 of 2020?

36. The examination of the matter requires a foray into fundamentals of the law of contract in context of regulated regime.

THE NUANCES

37. It is more appropriate to deconstruct the arguments of both the contenders and examine the nuances in light of position of law of contract, in the particular context of such regulated sector as that of Electricity.

Consensus ad idem

38. Section 2(h) of the Indian Contract Act, 1872, defines a contract as under:

"*An agreement enforceable by law is a contract*"

39. Section 10 explains the pre-requisite for an enforceable Contract to come into being thus:

> "*10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any*

contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

(emphasis supplied)

40. The expression "free consent' is explained by the Contract Act as under:

"*14. "Free consent" defined.—Consent is said to be free when it is not caused by—*
(1) coercion, as defined in section 15, or
(2) undue influence, as defined in section 16, or
(3) fraud, as defined in section 17, or
(4) misrepresentation, as defined in section 18, or
(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

41. The authoritative commentary by *Pollock and Mulla, The Indian Contract Act & Specific Relief Acts, Volume 1, Edition 16, Page* 248 expounds on the subject of "*Freedom of Contract*" as under:

"[s 10.2] Freedom of Contract

A Contract is a consensual act and the parties are free to settle any terms as they please. This Freedom has been evident in the reluctance of the courts to strike down contracts only on the ground of inequality of bargaining power, in the refusal to imply a term into a contract because it would be reasonable to do so, or in the rules of construction for giving effect to the express terms provided by the parties. This freedom lies in choosing the party with whom to contract, in the freedom to fix the terms of the contract, in excluding or limiting the liability for damages or limiting the remedies available for the breach. The concept of freedom of contract has two meanings. The first is the freedom of a party to enter into a contract on whatever terms it may consider advantageous to its interests, or to choose not to. But it also refers to the idea that as a

general rule there should be no liability without consent embodies in a valid contract."

(emphasis supplied)

42. It is well settled that the parties have to reach a *consensus ad idem* – when the parties to the agreement (or contract) have the same understanding of the terms thereof, such mutual comprehension being essential to the existence of a valid contract. It is also well settled that even an oral agreement can be a contract that is enforceable by law under the law and that a contract may also come into existence by exchange of communications. In *Aloka Bose v. Parmatma Devi and Others*, reported in (2009) 2 SCC 582 the Supreme Court clarified that:

> "16. … *An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it.*
>
> *17. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. ..."*
>
> (emphasis supplied)

Power Purchase contracts under Electricity Act

43. Electricity is a commodity that is capable of being sold and purchased. Generally speaking, an agreement to sell or purchase electricity is also a contract enforceable in law if it fulfils all the above-

mentioned pre-requisites. Therefore, there can be no quarrel with the general proposition that such a contract – commonly known and described in context of electricity law as "*the Power Purchase Agreement*" (or, in short, as "the PPA"), must also subscribe to the above-mentioned requirements, the prime and foremost being "*free consent of the parties*".

44. But, it needs to be borne in mind that Electricity Act, 2003 ushered in reforms in the electricity regime, the generation of electricity having been freed from licencing and the activities such as transmission, distribution and trading, in particular, being placed under regulatory control of the Electricity Regulatory Commissions, all entities concerned with such activities expected to bear in mind the aims set out in the Objects & Reasons ("… *encouraging private sector participation… distancing the regulatory responsibilities from the Government to the Regulatory Commissions …*") and the preamble of the statute as indeed the National Electricity Policy, Tariff Policy and Plan to be framed by the Central Government (under section 3), the power sector to be guided and controlled by Regulations the power to frame which is conferred on the concerned Commission (Central or State), this being a legislative function distinct from the administrative and adjudicatory functions also vested in same set of statutory bodies. The preamble of the enactment reads thus:

> "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and*

establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

(emphasis supplied)

45. Some of the relevant parts of the legislation may be quoted as under:

"*7. Generating company and requirement for setting up of generating station.–Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.*

12. Authorised persons to transmit, supply, etc., electricity.–No person shall– (a) transmit electricity; or (b) distribute electricity; or (c) undertake trading in electricity, unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.

14. Grant of licence.–The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person– (a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:

Xxxx

42. Duties of distribution licensee and open access.–(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

Xxxx

43. Duty to supply on request.–(1) Save as otherwise provided in this Act, every distribution] licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:

Xxxx

49. Agreements with respect to supply or purchase of electricity.–Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.

57. Standards of performance of licensee.–(1) The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees.

xxx

60. Market domination.–The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry."

(emphasis supplied)

46. In *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, (2009) 16 SCC 659, the Supreme Court examined the scheme of Electricity Act, 2003 to consider the core question as to whether despite the parliamentary intent of giving a go-bye to its licensing policy to generating companies the same purpose should be allowed to be achieved through imposing stringent regulatory measures. It was observed thus:

> "***77.*** *The generating companies, however, despite delicensing, do not enjoy the monopoly status. They are subject to rationalisation of electricity tariff. The Preamble envisages ensuring transparent policies, policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.*

78. *Electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 or any other statute. It is, however, in short supply. As the number of consumers as also the nature of consumption have increased manyfold, the necessity of more and more generation of electrical energy must be given due importance. The Preamble of the 2003 Act, although speaks of development of electricity industry and promotion of competition, it does not speak of equitable distribution of electrical energy. The statutes governing essential and other commodities in respect whereof the State intends to exercise complete control, provide for equitable distribution thereof amongst the consumers.*

83. *The primary object, therefore, was to free the generating companies from the shackles of licensing regime. The 2003 Act encourages free generation and more and more competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.*

84. *If delicensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side-door of regulations.*"

(emphasis supplied)

47. It is vivid from the above that a generator of electricity is free to generate and sell electricity and similarly a procurer of such electricity is free to purchase for own consumption but the distribution licensee is wholly under the regulatory control. It is under a duty to maintain performance standards, supply on demand to consumers in his area (subject to exceptions) and not to abuse its dominant position. It exists to sub-serve public interest and is to abide by directions of the regulatory

authority in all matters connected with, or incidental to, its activities including the tariff it charges for sale of electricity as indeed, what we shall hereafter see the price at which it procures electricity for such distribution from source which also must be approved. Barring certain situations (e.g. *public interest* element under Sections 11, 107 and 108), and generally speaking, it is when a generator has opted to have a tie-up for sale of electricity to a distribution licensee (a regulated entity) that it comes under regulatory control primarily on the subject of tariff and discipline in abiding by contractual obligations.

48. The case at hand concerns the jurisdiction and powers of a State Electricity Regulatory Commission and, therefore, we may remain focussed on the law from such perspective. The provision contained in Section 86 gives a broad overview of the different roles performed by the State Commission, they including the jurisdiction to: (a) *"determine the tariff for generation, supply, transmission and wheeling of electricity";* (b) *"regulate electricity purchase and procurement process of distribution licensees";* (c) *"facilitate intra-State transmission and wheeling of electricity";* (d) *"issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders";* (e) *"promote co-generation and generation of electricity from renewable sources of energy";* (f) *"adjudicate upon the disputes between the licensees and generating companies"* etc. Sub-section (4), however, mandates that in discharge of its functions the State Commission "shall *be guided by the National Electricity Policy, National Electricity Plan and tariff policy*".

49. The power to regulate or determine tariff are two different things. The Commission discharges its responsibility by availing of its legislative role by framing regulations which being in the nature of subordinate legislation have the force of law. It determines tariff (administrative function) in myriad ways by passing generic tariff orders or in *inter-*

partes situations wherein a distribution licensee is procuring electricity from a generator (after or while securing approval) for supply (sale) to consumers at large within the license area.

50. The tariff regulations are framed bearing in mind the following provision (quoted to the extent relevant):

> *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: …"*
>
> (emphasis supplied)

51. The tariff determination, thus, must balance consumer interest and reasonable expectation of returns for investors keeping in mind the larger objective of optimum growth of electricity industry which rewards good efficient performance, encourages competition and makes economic use of resources, so essential for economic well-being of the country. The actual tariff determination, on the other hand, is an administrative exercise and is either generic or qua specific transactions

– generally under Section 62 but in case of procurement process through bidding under Section 63. We may note here only the following part of Section 62:

> *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:*
>
> *Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*
> *(b) transmission of electricity;*
> *(c) wheeling of electricity;*
> *(d) retail sale of electricity:.*
> *…"*
>
> (emphasis supplied)

52. The procurement of electricity by a distribution licensee is with approval of the Commission as indeed the "*price*" at which it is procured and this is an essential term that would find its incorporation in the PPA. Noticeably, the stipulation as to "*price*" in PPA is determined by the Commission which is a function akin to the determination of "*tariff*" under Section 62. The following clause of Section 86(1) is crucial:

> *86. Functions of State Commission.–(1) The State Commission shall discharge the following functions, namely:–*
> *…*
> *(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State; …*
>
> (emphasis supplied)

53. Thus, the State Commission is entrusted with the power and jurisdiction "*to regulate*" not only "*the procurement*" but also "*price*" or the "*tariff*" at which such procurement is to take place, as indeed, where so relevant, the terms on which "*wheeling of electricity*" is to be facilitated, all such determinations forming eventually the financial terms of the power purchase agreement (PPA) that may be or have been entered upon by the generator (approved by the Commission at the instance of the procurer) and the distribution licensee under its regulatory control. These are what, as we shall see over this discourse, provide the statutory flavour to the contract of purchase of electricity, the other terms whereof are undoubtedly within the domain of free will and consent of the parties.

"To regulate"

54. The above discussion makes it clear that the conduct of a distribution licensee is subject to regulatory control. But the crucial question is as to whether the power and jurisdiction given to the regulatory authority "*to regulate*" makes the regulated entity totally subservient to its dicta or whether it retains within its prerogative in matters of contractual arrangement for carrying out its responsibilities the right to exercise free will and consent.

55. This requires first a brief visit to the jurisprudence that has evolved in the context of regulatory regime.

56. In *V.S. Rice & Oil Mills* v. *State of A.P.*, AIR 1964 SC 1781 : (1964) 7 SCR 456, the Supreme Court observed thus:

> "*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."

57. In *State of T.N.* v. *Hind Stone* (1981) 2 SCC 205 , the word "regulate" was interpreted to include "prohibition" within its fold, the Supreme Court observing thus:

"*10. … We do not think that 'regulation' has that rigidity of meaning as never to take in 'prohibition'. Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation. It was observed by Mathew, J. in G.K. Krishnan v. State of T.N. [(1975) 1 SCC 375] : (SCC p. 381, para 14) 'The word "regulation" has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied.' In modern statutes concerned as they are with economic and social activities, 'regulation' must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in Commonwealth of Australia v. Bank of New South Wales [1950 AC 235 : (1949) 2 All ER 755 (PC)] — and we agree with what was stated therein—that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The statute with which we are concerned, the*

Mines and Minerals (Development and Regulation) Act, is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."

58. In *K. Ramanathan* v. *State of T.N.*, (1985) 2 SCC 116 : 1985 SCC (Cri) 162, the word "regulate" was expounded as under:

> *"'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."*
>
> (emphasis supplied)

59. It is also of advantage to refer to the ruling in *D.K. Trivedi & Sons* v. *State of Gujarat*, 1986 Supp SCC 20 wherein the Supreme Court held:

> "*30. Bearing this in mind, we now turn to examine the nature of the rule-making power conferred upon the State Governments by Section 15(1). Although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in pari materia with the language of Section 15(1). Each of these provisions confers the power to make rules for "regulating". The Shorter Oxford English Dictionary, 3rd Edn., defines the word "regulate" as meaning "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings". Thus, the power to regulate by rules given by Sections 13(1) and 15(1) is a power to control, govern and direct by rules the grant of prospecting licences and mining leases in*

respect of minerals other than minor minerals and for purposes connected therewith in the case of Section 13(1) and the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith in the case of Section 15(1) and to subject such grant to restrictions and to adapt them to the circumstances of the case and the surroundings with reference to which such power is exercised. It is pertinent to bear in mind that the power to regulate conferred by Sections 13(1) and 15(1) is not only with respect to the grant of licences and leases mentioned in those sub-sections but is also with respect to "purposes connected therewith", that is, purposes connected with such grant."

(emphasis supplied)

60. In *Deepak Theatre, Dhuri v. State of Punjab and Others*, 1992 Supp. (1) SCC 684, it was held by Supreme Court that:

"3. It is settled law that the rules validly made under the Act, for all intents and purposes, be deemed to be part of the statute. The conditions of the licence issued under the rules form an integral part of the statute. The question emerges whether the word regulation would encompass the power to fix rates of admission and classification of the seats. The power to regulate may include the power to license or to refuse the licence or to require taking out a licence and may also include the power to tax or exempt from taxation, but not the power to impose a tax for the revenue in rule making power unless there is a valid legislation in that behalf. Therefore, the power to regulate a particular business or calling implies the power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or conducted. A conjoint reading of Section 5, Section 9, Rule 4 and condition 4-A gives, therefore, the power to the licensing authority to classify seats and prescribe rates of admission into the cinema theatre."

(emphasis supplied)

61. In *Cellular Operators Association of India and Others v. Union of India and Others*, (2003) 3 SCC 186 it was, *inter alia*, held that:

> "*33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.*
>
> *…*
>
> *34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise Parliament thought of creating an independent expert tribunal which, if an occasion arises therefor, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the authority. Succinctly stated, the jurisdiction of the Tribunal is not circumscribed in any manner whatsoever.*
>
> *…*
>
> *38. Similarly, the civil court's jurisdiction in service matters is circumscribed by the provisions of the Special Relief Act, 1963.*"
>
> (emphasis supplied)

62. The term "regulation" was also interpreted in *Quarry Owners' Assn.* v. *State of Bihar* (2000) 8 SCC 655 in the context of the provisions contained in the Mines and Minerals (Development and Regulation) Act, 1957 and it was held:

> *"31. Returning to the present case we find that the words 'regulation of mines and mineral development' are incorporated both in the Preamble and the Statement of Objects and Reasons of this Act. Before that we find that*

the Preamble of our Constitution in unequivocal words expresses to secure for our citizens social, economic and political justice. It is in this background and in the context of the provisions of the Act, we have to give the meaning of the word 'regulation'. The word 'regulation' may have a different meaning in a different context but considering it in relation to the economic and social activities including the development and excavation of mines, ecological and environmental factors including States' contribution in developing, manning and controlling such activities, including parting with its wealth viz. the minerals, the fixation of the rate of royalties would also be included within its meaning."

63. Reference in this connection can also be made to the judgment in *U.P. Coop. Cane Unions Federations* v. *West U.P. Sugar Mills Assn.* [(2004) 5 SCC 430]. In that case, the Court interpreted the word "regulation" appearing in the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and observed:

"20. … 'Regulate' means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute."

64. In *Bharat Sanchar Nigam Limited v. Telecom Regulatory Authority of India*, (2014) 3 SCC 222, the width and scope of the regulatory jurisdiction exercised by Telecom Regulatory Authority of India (TRAI) was considered. Taking note of the various functions (recommendatory, regulatory, adjudicatory etc.) entrusted to TRAI by the statute, and the jurisprudence developed over the years as to the regulatory regime, the Supreme Court observed thus:

> "88. It is thus evident that the term "regulate" is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (*vii*) and (*viii*) of Section 11(1)(*b*) has not been used in other clauses of that sub-section does not mean that the regulations cannot be framed under Section 36(1) on the subjects specified in sub-clauses (*i*) to (*vi*) of Section 11(1)(*b*). In fact, by framing regulations under Section 36, TRAI can facilitate the exercise of functions under various clauses of Section 11(1)(*b*) including sub-clauses (*i*) to (*vi*)."

65. It is amply clear from the above that the power "*to regulate*" has been construed, across the board in various branches of economic activity, as very wide jurisdiction covering not only the tariff issues but also so as to discipline and control the conduct of the players; if so required by issuing enforceable directives, couched even in prohibitory terms, requiring them to adjust, restrict, manage or modify, the overall objectives to be sub-served by such regulation as defined in the law on the subject being the prime considerations, the element of "*public interest*" being the foremost in context of Welfare State model that India has adopted.

Contours of the power "to regulate" under Section 86(1)(b)

66. The prime issue that needs to be addressed is about the circumspection of the power and jurisdiction of the Regulatory Commission "*to regulate*" in the matter of guiding the formulation of PPA, having approved the source of procurement of power with which the distribution licensee has agreed to tie-up. The provision contained in Section 86(1)(b) of Electricity Act has already been seen. At the cost of repetition we may note again that the jurisdiction thereby conferred on

the State Commission gives it power to "*regulate*" the "*electricity purchase and procurement process*" undertaken by the "*distribution licensees*" for distribution and supply within the State and approvals to be taken also covers matters "*including the price at which electricity shall be procured*" by the regulated entity from "*the generating companies*" such procurement being invariably "*through agreements for purchase of power*" which consequently are also subject to regulation.

67. The statutory provision requires regulation of electricity purchase and procurement process by the distribution licensee, from the generating companies through agreements for purchase of power. The regulatory powers vested therein are in relation to "electricity purchase" and "procurement process" of a distribution licensee, which (unlike a generator of electricity) is regulated entity. It also comes into play when there is an agreement reached between the generator and the distribution licensee. While the power to regulate the purchase of electricity could be in terms of quantum and source (mix), "*procurement process*" does involve contract of purchase part depending on the mode of contract (bid or negotiation). The law prescribes regulations over the business of a distribution company, which is a licensed entity in terms of Section 12. A generating company, as said before, is not a "*licensed entity*". The Regulatory Commissions have always been regulating by approving from time to time not only the power procurement plan but also the business plan of the distribution licensee.

68. The Commission regulates the electricity purchase based on the agreement that may be reached between the generator and the distribution licensee, irrespective of the mode of tariff determination, i.e. whether under Section 62 or Section 63 of the Electricity Act, 2003, or by way of generic tariff as aforesaid and further notwithstanding the detail as to whether the purchase by the distribution licensee is long term,

medium-term or short-term. There are other provisions of the Electricity Act, 2003 – for example, Section 28(3)(a) and Section 32(3)(a) dealing with scheduling and dispatch – which depend on the contract between the generating company and distribution licensee but do not require any separate order to be passed by the regulatory Commission.

69. The crucial statutory clause contained in Section 86(1)(b) defines the jurisdiction of the Commission to "*regulate*" electricity purchase and procurement process of distribution licensees by clarifying that it covers various aspects "*including the price at which electricity shall be procured from the generating companies or licensees or from other sources*". The word '*including*' in the said provisions undoubtedly expands the jurisdiction of the State Commission.

70. In above context, it is useful to refer to the principle of interpretation of the word "including" as explained in *CIT, Andhra Pradesh v. Taj Mahal Hotel, Secunderabad*, (1971) 3 SCC 550:

> *"6. Now it is well settled that where the definition of a word has not been given, it must be construed in its popular sense if it is a word of every day use. Popular sense means "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". In the present case, Section 10(5) enlarges the definition of the word "plant" by including in it the words which have already been mentioned before. The very fact that even books have been included shows that the meaning intended to be given to "plant" is wide. The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, those words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. The word "include" is also susceptible of other constructions which it is unnecessary to go into."*
>
> (emphasis supplied)

71. It is the argument of the appellant that the terms of the contract/agreement/PPA can be modified, or made inroad into, only by a statute or a subordinate legislation duly made under the Statute but this cannot be done by an order passed by the statutory functionaries such as the regulatory Commission under the Electricity Act, 2003. It relies on the ruling of Supreme Court in *PTC India Limited v. The Central Electricity Regulatory Commission* (2010) 4 SCC 603, rendered against the backdrop of issues relating to fixation of trading margin by the Central Commission under Section 79(1)(k) of the Electricity Act, 2003 by Regulations. It was held:

> "*58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j).*
>
> *…*
>
> *Summary of our Findings*
>
> *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 regulation."

(emphasis supplied)

72. The provision of Section 86(1)(b) was also at the core of consideration in *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, (supra) and this is what the Supreme Court said:

"*108. A generating company, if the liberalisation and privatisation policy is to be given effect to, must be held to be free to enter into an agreement and in particular long-term agreement with the distribution agency; terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted.*

109. A generating company has to make a huge investment and assurances given to it that subject to the provisions of the Act it would be free to generate electricity and supply the same to those who intend to enter into an agreement with it. Only in terms of the said statutory policy, it makes huge investment. If all its activities are subject to regulatory regime, it may not be interested in making investment. The business in regard to allocation of electricity at the hands of the generating company was the subject-matter of the licensing regime. While interpreting the statute it must be borne in mind that such a mechanism should not come back.

110. That, however, would not mean that the generating company is absolutely free from all regulations. Such regulations are permissible under the 2003 Act; one of them being fair dealing with the distributor. Thus, other

types of regulations should not be brought in which were not contemplated under the statutory scheme. If it is exercising its dominant position, Section 60 would come into play. It is only in a situation where a generator may abuse or misuse its position the Commission would be entitled to issue a direction. The regulatory regime of the Commission, thus, can be enforced against a generating company if the condition precedent therefor becomes applicable."

(emphasis supplied)

73. In the decision reported as *Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd. and Others*, (2016) 8 SCC 743, taking note of rulings in *V.S. Rice & Oil Mills* (supra)*, K. Ramanathan v. State of T. N.* (supra) and *D.K. Trivedi & Sons v. State of Gujarat* (supra)*,* the Supreme Court held as under:

"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). In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the

parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

13. The principles on which tariff is to be determined by the Commission as set out in Section 61 have already been noticed. Generation, transmission, distribution and supply of electricity is required to be conducted on commercial principles; while the consumers' interest is to be safeguarded, recovery of cost of electricity in a reasonable manner has also to be ensured. Under Section 64(6) a tariff order continues to remain in force for such period as may be specified. In the State of Gujarat, currently, the Gujarat Electricity Regulatory Commission (Multi-Year Tariff) Regulations, 2016 govern the fixation of tariff by the State Commission. As per Regulation 31 the Commission is required to determine the tariff of a generating company, transmission licensee, SLDC and distribution licensee for each financial year during the control period (control period is 5 years) (financial year 2016 to financial year 2021) having regard to the following factors:

> *'(a) The approved forecast of aggregate revenue requirement and expected revenue from tariff and charges of the generating company, transmission licensee, SLDC and distribution licensee for such financial year, including modification approved at the time of mid-term review, if any; and*
>
> *(b) Approved gains and losses, including the incentive available to be passed through in tariffs, following the truing up of previous year.'"*

…

17. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. …"

(emphasis supplied)

74. It is submitted by the appellant that the ruling of *Tarini Infrastructure* Limited is no authority to support the view that the regulatory commission has the jurisdiction and power to compel contractual terms to be varied. It is argued that the said decision refers to the regulatory power for tariff determination and fixation and it was held that since the tariff fixed by the State Commission was incorporated in the PPA, it was not possible to hold that the tariff agreed is an act of volition of the parties (Para 12) and the State Commission can re-determine the tariff. The contention is that this cannot mean that the State Commission is empowered to vary all terms of the PPA even when parties do not consent to such amended terms.

75. The appellant points out that the decision in *Tarini Infrastructure Limited* was referred to in the *Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd* (2017) 16 SCC 498 wherein the Supreme Court held (that the parties cannot be compelled to accept the varied terms) (extract from concurring judgment):

> *"60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15/- per unit for twelve years, the first respondent should commission the Solar PV Power project before 31.12.2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.*

…

64. As pointed out earlier, the State Commission has determined tariff for solar power producers vide order dated 29.01.2010 and tariff for next control period vide order dated 27.01.2012. The order dated 29.01.2010 is applicable for projects commissioned from 29.01.2010 to 28.01.2012 and the order dated 27.01.2012 is applicable for projects commissioned from 29.01.2012 to 31.03.2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it 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 inherent jurisdiction."

…

68. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word "tariff" has not been defined in the Act. Tariff means a schedule of standard/prices or charges provided to the category or categories for procurement by the licensee from the generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Sections 61(a) to (i), the State Commission determined the tariff rate for various categories including solar power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order, 2010 is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, Respondent 1 is bound by the terms and conditions of PPA entered into between Respondent 1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting

its view in the PPA, which is essentially a matter of contract between the parties."

(emphasis supplied)

76. The appellant also relies upon the following passage from the decision of Supreme Court in *Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another (2016) 11 SCC 182*:

> *"29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into."*
>
> (emphasis supplied)

77. The judgment in *Solar Semiconductor* (supra) deals with exercise of inherent powers. In *EMCO* (supra) the Supreme Court was concerned with the right of a power producer to seek a separate tariff other than what is provided under the PPA. Neither *Solar Semiconductor* nor *EMCO* deal with the proposition that at the time of exercise of jurisdiction under section 86(1)(b), the Commission cannot direct the distribution licensee to modify or amend the terms and conditions of procurement of power. We agree with the submission that the exercise of jurisdiction at the time of regulating electricity purchase and procurement process of the distribution licensee through agreements is different from modification of contract post such regulatory approval, by using inherent powers. In *Solar Semiconductor*, both the tariff and the PPA had been approved earlier. Based on such approved tariff and PPA, the parties had executed the PPA. Subsequent to such execution of PPA, the generating company had sought relief in the nature of departure from the approved terms of the PPA and tariff order seeking to invoke the

inherent powers of the Commission which power was held to be not available. In *EMCO*, the Petitioner therein had sought to claim tariff that was not applicable to it in terms of the PPA. As in *Solar Semiconductor*, the Petitioner in EMCO had executed an approved PPA based on a tariff order that was applicable on that date. Subsequently, it had pleaded to seek a tariff that was not in accordance with the PPA. The issue addressed by Supreme Court was to determine the point of time at which the power producer could exercise such right to seek the determination of a separate tariff. The jurisdiction of the Commission to determine tariff was up held. The second respondent in matter at hand is right in submitting that the distinction between existence of jurisdiction and exercise of jurisdiction is material. A party may or may not get relief "on a consideration of all relevant facts". This is different from saying that the Commission does not have the jurisdiction to grant relief. The decision in EMCO was noticed and distinguished in *Tarini* (supra) as under:

> "20. Before parting, a word about the recent pronouncements of this Court in Gujarat Urja Vikas Nigam Limited Vs. EMCO Ltd. & Anr. (supra) and Bangalore Electricity Supply Co. Vs. Konark Power Projects Ltd. (supra), relied upon by the appellant. All that would be necessary to note in this regard is the context in which the bar of a review of the terms of a PPA was found by this Court in the above cases.
>
> *21. In Gujarat Urja Vikas Nigam Limited Vs. EMCO Ltd. & Anr. (supra) the power purchaser sought the benefit of a second tariff order made effective to projects commissioned after 29.01.2012 (the power purchaser had commissioned its project on 02.03.2012) though under the PPA it was to be*

governed by the first tariff order of January, 2010. Under the first tariff order for such projects which were not commissioned on or before the date fixed under the said order, namely, 31.11.2011 the tariff payable was to be determined by the Gujarat Electricity Regulatory Commission. The power producer in the above case did not seek determination of a separate tariff but what was sought was a declaration that the second tariff order dated 27.01.2012 applicable to PPA(s) after 29.01.2012 would be applicable. It is in this context that this Court had taken the view that the power producer would not be relieved of its contractual obligations under the PPA."

78. From the above, there is no room for doubt that the terms of a PPA as to tariff are subject to regulatory control, there being no space for negotiation for the parties in wake of such determination, it being the jurisdiction of the Commission to oversee that in settling the terms of the contract the parties do no not abuse their position and that they engage in a manner which subscribes to traits of fair dealing, and in such scrutiny such stipulations as are found by the regulatory authority to be unreasonable being subject to suitable modification so that they are aligned with law and regulations having the force of law. Any attempt by the licensee in particular to circumvent such determination having the potential to bring back for the generator the ills of the license regime being impermissible. As held authoritatively in *Tarini* (supra), "*the tariff agreed by and between the parties, though finds mention in a contractual context*" is not "*the result of an act of volition of the parties*", but rather "*is a determination made in the exercise of statutory powers*" which gets "*incorporated in a mutual agreement between the two parties involved*".

79. In *GVK Govindval Sahib Limited v. Punjab State Electricity Regulatory Commission* (Appeal No. 70 of 2009) decided on

13.01.2011, a co-ordinate bench of this tribunal was dealing with the following issues concerning contention that the State Commission has the power under Section 86 (1)(b) of the Electricity Act to reject, modify or vary the terms of the Agreement for purchase of power and to direct the distribution licensee to revise the terms of the PPA:

> "9. …
>
> *I. Whether in the facts and circumstances of the case, the State Commission was right in directing the Appellant and the Electricity Board to modify the amended and re-stated PPA agreed to and initialed between the parties to be in line with the Standard Bidding Documents issued by the government of India, when the process for International Competitive Bidding was formulated and concluded much prior to the issue of the Standard Bidding Documents by the Government of India?*
>
> *II. Whether the State Commission in exercise of its powers under Section 86(i)(b) of the Act, 2003 can mechanically direct the Electricity Board to modify the amended and re-stated PPA concluded between the parties to be in line with the Standard Bidding Documents, instead of examining the proposal contained in the amended and re-stated PPA on merits?"*
>
> (emphasis supplied)

80. It was held in *GVK Govindval Sahib Limited* as under:

> *"14. Section 86(4) of the Act provides that the State Commission shall be guided by the Tariff Policy in discharge of its functions under the Act. Section 86(1)(b) of the Act entrusts the State Commission with the power to regulate electricity purchase and procurement process of the Distribution Licensees including the price at which electricity shall be procured from Generating Companies. The power to regulate procurement process of a Distribution Licensee is wide ranging power. There is no provision in the Act which overrides the said powers of the State Commission.*

15. The word "regulate" has wide import. It carries with it the powers to reject, modify, alter or vary the terms of the Agreement. The scope and ambit of the word "regulate" has found conclusive interpretation by the Hon'ble Supreme Court. In the case of Cellular Operators Association Vs. Union of India – AIR 2003 SC 899, the Hon'ble Supreme Court has held as follows:

'The regulatory bodies exercises wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.'

16. From the above observations, it is clear that the scope of approval under Section 86(1)(b) of the Act includes the power to reject, modify, alter or vary the terms of the agreements for purchase of power and to further direct the distribution licensee to re-write the terms found reasonable by the State Commission.

17. In view of the above, the powers of the State Commission under the Act to take measures conducive to the development of the electricity industry, promoting competition, protecting the interest of the consumers and the supply of electricity to all areas cannot be questioned."
(emphasis supplied)

81. The conclusions in above case were summarized thus:

"29. Summary of findings:

(i) Amended and restated PPA in line with standard PPA issued by the Government of India:

The first issue is regarding direction of the State Commission to modify the amended and restated PPA agreed and initialed between the Appellant and Respondent No. 2 to be in line with the standard PPA issued by the Government of India. Section 86(1)(b) of the Act entrusts the State Commission with the power to regulate electricity purchase and procurement process of the distribution licensee including the price at which

electricity shall be procured from the generating companies. The power to regulate procurement process of a distribution licensee is wide ranging power. The approval under Section 86(1)(b) of the Act includes the power to reject, modify or vary the terms of agreement for purchase of power and to direct the distribution licensee to revise the terms of PPA. In the present case, the memorandum of understanding entered between the parties on 8.8.2006 expressly provided for amended and restated PPA in line with the draft PPA of the Ministry of Power to the extent applicable. Admittedly, the standard bidding documents and PPA of the Government of India are for procurement of power through tariff based competitive bidding in terms of Section 63 of the 2003 Act. However, both the parties in this case mutually agreed to follow the standard PPA to the extent applicable. The Appellant having agreed to enter into an amended and restated PPA in line with the draft PPA of Ministry of Power can not retract and state that standard PPA is not applicable in their case."

(emphasis supplied)

82. It is the argument of the appellant that the above-said decision in *GVK Govindval sahib Limited* does not provide for the legal consequence that the State Commission can proceed to mandate the implementation of the PPA with modifications or variation or compel parties to accept such terms are in question here. It is argued that the scope of the regulatory power was considered in *GVK Govindval sahib Limited* in a different context. It is submitted that in that case the State Commission, in the course of proceedings for approval to be granted to the proposed PPA, had asked for variation of the terms but had not compelled the Punjab State Electricity Board (PSEB) to implement the PPA with the modified terms. After the order dated 06.03.2009 was passed by the State Commission, neither the procurer (PSEB) nor the State Commission had directed the generator (GVK Power) to implement the PPA but the latter (generator), on its own, wanted (as noted in para 5 of the decision) to implement the project by executing

the PPA as per the order of the State Commission without prejudice to its (GVK's) right in appeal.

83. In *GVK Govindval Sahib* Limited, the generator had contended that there was no justification for the Commission to revise the PPA. The objection, however, was repelled for the reason that the generator (GVK) had agreed to the amended and reinstated PPA in line with the standard PPA published by the Central Government and, therefore, it having been concluded that it was not open to it to object to the variation proposed by the State Commission in terms of the standard PPA

84. The appellant argues that the Power Purchase Agreement (PPA) between a generator and the distribution Licensee is primarily a contract, as in the case of any other contract/agreement governed by the Indian Contract Act, 1872. The essence of an agreement is the meeting of the minds of the parties in full and final agreement and there must be *consensus ad idem*. The "agreement" is essentially and exclusively consensual in nature. Thus, to bring about a contract or enforceable agreement, the parties to the agreement must have agreed about the subject-matter of the agreement in the same sense, and at the same time. Unless there is *consensus ad idem*, there can be no contract. The agreement gets initiated and finalised by volition of contracting parties by an offer made by one and unconditional acceptance of the offer by the other. There can be no mandate in law that the parties must enter into a contract with another party. It is trite that the courts do not create or write or rewrite contracts between the parties.

85. There can be no quarrel with above-stated broad principles of law governing contracts, as settled by various authoritative pronouncements [see *Shin Satellite Public Co. Ltd.v. Jain Studios Ltd.* (2006) 2 SCC 628 and *Shree Ambica Medical Stores v. Surat People's Cooperative Bank Limited* 2020 SCC OnLine SC 92]. There can also be no argument about

the fact that above settled principles of contract law also apply to a PPA under the Electricity Act, 2003 since statutory requirements thereby imposed do not make such a contract entirely statutory. The appellant rightly refers in this context to the decisions of Supreme Court in *India Thermal Power Limited v. State of M.P.*, (2000) 3 SCC 379 and *BSS Projects Private Limited v. Government of India* (2011) SCC OnLine AP 826.

86. In *India Thermal Power Limited* (supra), it was held thus:

> "*11. ... Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff*

> *and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.*"
>
> (emphasis supplied)

87. Though the above decision was rendered in the context of Electricity (Supply) Act, 1948 which has been repealed and replaced by Electricity Act, 2003, the principle thereby settled continues to hold good and notwithstanding the mandatory terms made applicable or required to be incorporated in a PPA, the contract remains an outcome of contractual negotiation and consensual in nature. Pertinent to note, however, that this ruling only underscores that a PPA is to be regarded as statutory to the extent it contains provisions regarding determination of tariff and this is not a matter left to the volition of the parties but is subject to regulatory control.

88. It is thus clear that this tribunal dealing with the scope of jurisdiction under Section 86 (1)(b) in *GVK Govindval Sahib Limited* (supra) held that the power to regulate carries with it the power to "*reject, modify, or vary*" the terms of the agreement, the question as to whether the modification is to align it with PPA under the standard bidding document or otherwise, being inconsequential. It has been ruled that under section 86(1)(b) the Commission has the power to direct the distribution licensee to rewrite the terms of the agreement on terms found by it to be reasonable. Therefore, the submission that the Commission does not at all have the power to direct modification of terms of the PPA is contrary to the clear enumeration of law in the *GVK (Goindwal Sahib) Ltd.* Case. In our considered opinion, the power to regulate covers terms of the contract / power purchase agreement that the distribution licensee wishes to enter and it is not correct to contend

that such a contract is to be left wholly for the parties to negotiate in all respects.

89. Under the Electricity Act, 2003, the Appropriate Commission has been vested with the jurisdiction to determine tariff and of regulatory oversight, to ensure that the power purchase agreement (PPA) concluded between the parties is not against consumer interest. The Commission may exercise the tariff determination power under Section 62 of the Electricity Act, 2003, or adopt the tariff where it has been discovered through a competitive bid process under Section 63 (provided the process followed is transparent and in accord with prescribed guidelines), or determine generic tariff for such purchases as of electricity from renewable sources of energy. The law mandates that the PPA between the generator and the distribution licensee, including the tariff terms and conditions, be approved by the Commission. Generally put, before such approval, the PPA as negotiated and agreed to between the parties is not a concluded and enforceable PPA and cannot create any right or obligation thereunder. The appellant concedes that at such stage the parties, having arrived at the agreement, are obliged to proceed with the act of seeking the approval of the PPA as envisaged under section 86(1)(b) of the Electricity Act, 2003. As noted earlier, at the stage of according approval to the PPA, and determining the price of such procurement which would get incorporated in the PPA, the Commission is within its power and jurisdiction to examine if the contract terms settled represent fair dealing, and are not in nature of abuse of dominant position, and are reasonable subscribing to the objectives of the law including on the benchmark of consumers' interest and balancing the interest of the generator affording legitimate returns on its investment in the larger interest of growth of electricity sector and

if the findings on these touchstones be in the negative to bring about corrections.

THE DISPUTE IN PRESENT CASE

The grievance

90. The primary submission of the appellant is that it is not obliged to agree to the modifications to the terms of PPA finalised by both parties as are evident from the initial draft PPA filed with the State Commission on 22.05.2018. It argues that by asking the parties to delete the exit clause and modify the stipulation as to liability towards wheeling charges, the Commission has entered territory which was taboo, it having violated the autonomy of the parties to contract.

91. The appellant heavily relies upon a recent ruling of this tribunal which we must note at this stage.

The Case of DANS & SHIGA

92. As mentioned in the narrative of facts, two other Hydro Power developers namely DANS Energy Limited (for short, "DANS") and Shiga Energy Private Limited (for short, "*SHIGA"*) were also approached by the appellant for procurement of electricity for distribution by the licensee in State of Haryana. In the PPAs settled with said generators also exit clauses similar to the one in the impugned document were incorporated. The Commission had rejected the said clauses more or less on similar reasoning. The dispute with the Commission was brought as challenge before this tribunal, both parties to the respective PPAs submitting their consent with the inclusion of exit clauses. The matter relating to DANS and SHIGA, subject matter of Appeal nos. 363-364 of 2019 (hereinafter

referred to as "*the case of DANS & SHIGA*", was decided by the co-ordinate bench of the tribunal by judgment dated 29.07.2020 authored by one of us (Mr. RK Verma, Technical Member).

93. The decision in *DANS & SHIGA* (supra) takes note, *inter alia*, of rulings in *Gujarat Urja Vikas Nigam Limited v. EMCO Limited* (supra), *Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co.* (supra) and the general principles governing law of contract and held thus:

> "…
> *8.9 The learned counsel representing the State Commission has submitted that the Electricity Act, 2003 has conferred power on the State Commission for the determination of tariff. Further, the learned counsel submitted that the Distribution company has to take approval of the State Commission in regard to power procurement.*
>
> *8.10 While there are no disputes about the powers of the State Commission as provided in the Electricity Act, 2003 and instant regulations on the subject, however, while exercising its powers the State Commission has to examine the PPA submitted to it from all angles of law. While examining the PPA, the State Commission has to not only ensure that the PPA is as per the Electricity Act and Regulations but also to ensure that it is by free will or consent of the parties. On the contrary, the State Commission by giving the direction to delete the 'Exit Option', mutually agreed between the parties, has conveyed that irrespective of the fact whether the parties are satisfied or not satisfied with the tariff determined by the State Commission, they will have to continue with the PPA.*
>
> *8.11 No doubt that the tariff will be determined by the State Commission only but, the final decision regarding signing of Power Purchase Agreement on the basis of tariff determined by the State Commission lies with the parties only. It is a commercial decision and the parties will take an independent decision taking into consideration their*

commercial interest in the long term during the tenure of the PPA without any influence form third party. This is an utmost important aspect. As such though the State Commission in exercise of its power under Section 62 of the Electricity Act, 2003 may determine the tariff but it cannot force either the generating company or the licensee to enter into a contract based on such tariff against their will/ consent and cannot give direction to change the terms of the contract invoking inherent jurisdiction.

8.12 The Appellant have also submitted that exist option will avoid unnecessary litigation which is likely to arise if the parties are not satisfied with the tariff determined by the State Commission as it is essential, for the continuation of the PPA, that it should be consented by both the parties of the PPA. For the sake of arguments, we may also visualise scenario, that suppose the tariff so determined by the State Commission is not acceptable to either of the party, in that event, can the State Commission force the parties to keep the PPA continuing, against the will of the parties to the contract. Such continuation of the PPA will be wrong and against the concept of the contract. One may argue that if such 'exit' clause exists, there is no certainty so far as procurement of power. Uncertainty cannot be the problem for the simple reason that the 'exit' clause in question gives power to either of the parties to go back on the contract only within a period of 30 days that too if they are not satisfied with the tariff fixed by the concerned Commission. Therefore, we are of the opinion that the 'exit' clause in question do not affect the contract throughout the term of the contract.

8.13 We find that the State Commission while exercising its powers conferred to it under law has not examined the PPA submitted by the parties from all angles of law. In this case, the State Commission was fully aware that the parties have mutually agreed to include "Exit clause" but it has ignored this important aspect and directed to amend the PPA by deleting the "Exit clause". Accordingly, we are of the considered opinion that the direction passed by the State Commission in the impugned order regarding the deletion of exit option is bad in law and thus is wrong. …"

(emphasis supplied)

94. The appellant argues that the ruling in *DANS & SHIGA*, as quoted above is the complete answer and the impugned order of State Commission on exit clause and wheeling charges being against the principles settled by the said precedent deserves to be set aside. The second respondent, on the other hand, contends that the case at hand is founded on factual matrix materially distinct from that in *DANS & SHIGA* and, therefore, the said ruling cannot apply here exceptions to the general principle as to autonomy of parties to negotiate terms of the contract followed therein coming into play here justifying different approach particularly bearing in mind the role of the regulatory authority vis-à-vis the procurement of electricity by a distribution licensee.

95. We find the facts of the cases of *DANS* and *SHIGA* were materially different from the case at hand. The generators in that set of cases had supported the procurer (appellant) and as noted in the judgment itself argued thus:

> "*5.5 It is submitted that there are no set formats for PPAs to be executed. A particular clause cannot be rejected merely because other precedents are not available for such clauses. Further there is no ideal PPA and it is based on the commercial arrangements agreed to between the parties. Therefore, the decision to approve the PPA with the Clause 3.3.2 may not be treated as a precedent for all cases or applicable to parties who do not agree to such terms.*
>
> *5.6 It is submitted that in the present case, the Clause 3.3.2 was agreed between the parties. While the answering Respondent was and is fine with the PPA either with or without the said clause (as was also the position of the answering respondent before the State Commission), since the Appellant is insisting on the clause to be included in the PPA, there is no difficulty in the PPA being approved and executed by the parties with the Clause 3.3.2.*"
>
> (emphasis supplied)

96. It is on the basis of the aforesaid submission that the tribunal framed the issue to be addressed as "*(w)hether the State Commission can issue directions to amend the PPA which have been mutually agreed to by the parties and force the parties to sign the PPA without their consent*".

97. There is material difference in the present case where the second respondent (generator) has opposed insertion of the exit clause which is recorded in its letter/ submissions dated 20.02.2019 filed before the State Commission stating thus:

> "*2. Regarding reimbursement of Wheeling charges as per actuals*
>
> *At present IAHEPL is paying wheeling charges to HPSEB @ 65 paise per Unit for transmission of power from delivery point (Ex-Generating Bus) upto the sub-station of CTU at Himachal State periphery for injection of power into Grid.*
>
> *Though while signing of PPA between HPPC & IAHEPL the ceiling limit for Wheeling/ Transmission losses of STU beyond 2% has been imposed by HPPC however, nothing is specified about payment of Wheeling Charges in cash. Moreover, the Hon'ble Commission has approved Levelised Tariff @ Rs. 4.50 per Unit Ex-Generating Bust for 35 years, therefore, the wheeling charges payable from the delivery point to the substation of CTU at Himachal State periphery to be paid/ reimbursed by HPPC as per actuals in line with power transmission agreement signed by IAHEPL with Himachal State Government and wheeling charges approved by HPERC time to time. The reimbursement of wheeling charges @ 65 paise per Unit may be considered by HPPC to IAHEPL as per actual.*
>
> *3.Provisional Tariff: (Clause 9.1.3(ii)(b))*
>
> *If the initial tariff determined by the Commission is not acceptable to the Purchaser/ Company and this Agreement is terminated under Clause 3.3.2 no differential shall be*

paid (i.e. Tariff determined/ approved by the Commission over and above the Average Power Purchase cost) for the power already supplied.

This clause is not at all justified, since it is against natural justice. Therefore, it is to be amended suitably."

98. Unlike the case of *DANS & SHIGA*, wherein the parties had accepted the exit clause and proceeded on the basis that it would reduce possible litigation and provide certainty, it being essentially a consent order, no submissions on merits having been advanced by the parties to the PPAs, the matter at hand stands at altogether different footing wherein the generator (second respondent) has cried foul when the fresh PPA with impugned modifications from the previous one was brought for approval before the Commission contending, among other things, that the said document with changes to the questioned effect was initialed under duress and that there was no free consent to such clauses. We agree with the second respondent that the order passed with consent of the two parties to such PPAs cannot become a precedent to be applied unexceptionally [see *Municipal Corporation of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101].

99. We note here the settled principle that a judgment is a precedent only on identical set of facts. In *State of Orissa v. Mohd. Illiyas*, (2006) 1 SCC 275, this principle was reiterated thus:

> **"***12. … A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge*

draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See State of Orissa v. Sudhansu Sekhar Misra [(1968) 2 SCR 154 : AIR 1968 SC 647] and Union of India v. Dhanwanti Devi [(1996) 6 SCC 44] .) A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinn v. Leathem [1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL)] the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

100. In the case at hand, the generator not being agreeable cannot be said to have consented rendering the decision in *DANS & SHIGA* distinguishable, particularly when the case at hand also involves the issues of abuse of dominant position, the doctrine of promissory estoppel and the principles governing the conduct expected of public authorities which we shall discuss a little later.

Promissory Estoppel and legitimate expectation

101. This case necessitates the invocation of the doctrine of estoppel by conduct against the appellant. This tribunal had the occasion to examine the said canon in a recent judgment in the matter of *Power*

Company of Karnataka Limited and ors, v. Udupi Power Corporation Ltd. And ors. (Appeal nos. 10-13 and 80 of 2020) decided on 02.11.2020. The law was traced thus:

> *"195. … In Sunderabai v. Devaji, AIR 1954 SC 82, the doctrine as enshrined in law of evidence was explained thus:*
>
> > *"14. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Evidence Act which lays down that when one person has by his declaration act or omission caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. This is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of res judicata."*
>
> *…*
>
> *197. Referring to the third proposition, the Supreme Court in R.S. Maddanappa ((1965) 3 SCR 283 : AIR 1965 SC 1812 observed:*
>
> > *"the person claiming benefit of the doctrine must show that he has acted to his detriment on the faith of the representation made to him".*
>
> *198. In TISCO Ltd. v. Union of India [(2001) 2 SCC 41], the Supreme Court expounded the law on doctrine of estoppel by conduct by following observations:*
>
> > *"… 22. A bare perusal of the same would go to show that the issue of an estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status. …:*

200. In Supdt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766 : 1976 SCC (Tax) 73, explained the principle thus:

> *"'23. … The doctrine of estoppel by conduct means that where one by words or conduct wilfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promiser has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. ..."*
>
> *(emphasis supplied)"*

102. More recently, the Supreme Court in judgment dated 01.12.2020 in matter of *State of Jharkhand and Others v. Brahmputra Metallics Ltd., Ranchi and Another* 2020 SCC OnLine SC 968 has expounded yet again on the doctrine of promissory estoppel but also noting the conflation with doctrine of legitimate expectation holding it out as one additional way to guarantee non-arbitrariness. The following discussion is of import to present case:

> *"40. Under Indian Law, there is often a conflation between the doctrines of promissory estoppel and legitimate expectation. This has been described in Jain and Jain's well known treatise, Principles of Administrative Law (7th Edition, EBC 2013):*

"At times, the expressions 'legitimate expectation' and 'promissory estoppel' are used interchangeably, but that is not a correct usage because 'legitimate expectation' is a concept much broader in scope than 'promissory estoppel'.

…

41. While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates.

…

42. We shall therefore attempt to provide a cogent basis for the doctrine of legitimate expectation, which is not merely grounded on analogy with the doctrine of promissory estoppel. The need for this doctrine to have an independent existence was articulated by Justice Frankfurter of the United State Supreme Court in Vitarelli v. Seton(359 US 535):

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that

takes the procedural sword shall perish with the sword."

…

45. In a concurring opinion in Monnet Ispat and Energy Ltd. v. Union of India (1998) 7 SCC 66 ("Monnet Ispat"), Justice H.L. Gokhale highlighted the different considerations that underlie the doctrines of promissory estoppel and legitimate expectation. The learned judge held that for the application of the doctrine of promissory estoppel, there has to be a promise, based on which the promisee has acted to its prejudice. In contrast, while applying the doctrine of legitimate expectation, the primary considerations are reasonableness and fairness of the State action. …

46. In Union of India v. Lt. Col. P.K. Choudhary (2016) 4 SCC 236, speaking through Chief Justice T.S. Thakur, the Court discussed the decision in Monnet Ispat (supra) and noted its reliance on the judgment in Attorney General for New South Wales v. Quinn (1990) 64 Aust LJR 327. It then observed:

"This Court went on to hold that if denial of legitimate expectation in a given case amounts to denial of a right that is guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or in violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

47. Thus, the Court held that the doctrine of legitimate expectation cannot be claimed as a right in itself, but can be used only when the denial of a legitimate expectation leads to the violation of Article 14 of the Constitution.

48. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three judge Bench in Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71, speaking through Justice J.S. Verma, held thus:

> *"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.*
>
> *8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor*

requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

(emphasis supplied)

49. More recently, in NOIDA Entrepreneurs Assn. v. NOIDA (2011) 6 SCC 508, a two-judge bench of this Court, speaking through Justice B.S. Chauhan, elaborated on this relationship in the following terms:

"39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

…

41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other...]"

(emphasis supplied)

50. As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression."

(emphasis supplied)

103. We proceed to examine the justification offered by the appellant (procurer) for its insistence on inclusion of exit clause in PPA and modification of the stipulation as to wheeling charges notwithstanding the earlier decision of the Commission by order dated 10.04.2018.

Justification for Exit Clause and modified terms for Wheeling Charges

104. It is submitted by the appellant that the PPA, as a contract/agreement, is to be negotiated and agreed to between the two contracting parties. The contract/agreement is not concluded between the generator and the Distribution Licensee based on command of the Appropriate Commission, but of their volition based on consensual terms. The Appropriate Commission does not negotiate the agreement to be reached. The PPA terms are to be proposed and negotiated

between the two contracting parties. It argues that the Exit Clause was an agreed stipulation and, therefore, it was not open to the Commission to take a contrary view asking it to be deleted. It also pleads that the change in terms regarding burden of wheeling charges were changed with consent and thus the modified stipulation binds, it not being within the domain of the Commission to tinker. It insists that since it is not agreeable to the suggested modifications, the PPA can be executed and enforced only in the event of this tribunal setting aside the impugned order to the extent of the modifications challenged in the appeal and that it is only after the execution of PPA that the proceedings for determination of tariff can take place. It is argued that in such circumstances wherein the appellant HPPC has not executed the PPA based on the modifications directed by the Commission by its order dated 08.03.2019, and particularly in the context of the stand taken by IA Energy, there is no *consensus ad idem* between the parties in regard to the terms and conditions of the PPA and, therefore, there is no valid or conclusive or binding PPA that can be given effect to.

105. Placing reliance on the ruling of Supreme Court in *Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co.* (supra), it is the contention of the appellant that the second respondent is not right in claiming that the Regulatory Commission can incorporate terms and conditions in the PPA and mandatorily require and compel the parties to implement the said terms and conditions as a part of the PPA, even though one of the parties to the PPA is not willing to accept the said terms. It is argued that in such an event the contract cannot become enforceable and would need to be abandoned for the reason that there can be no terms enforceable as a part of the PPA, even under Section 86(1)(b), if one or both parties do(es) not agree to the terms proposed by the Commission.

106. The appellant also refers to the decisions in *Central Bank of India v. Hartford Fire Insurance Co. Ltd* AIR 1965 SC 1288 and *Her Highness Maharani Shantidevi P Gaikwad v. Savjibai Haribai Patel and Ors* (2001) 5 SCC 101.

107. In *Central Bank of India v. Hartford Fire Insurance* (supra), the Supreme Court had held:

> *"12. We are besides of opinion that there is nothing capricious or unreasonable in Clause 10. The insurer was free at the beginning to decide whether he would agree to indemnify the assured against the risk or not, and if he decided to indemnify, for how long he would indemnify. If the assured cannot compel an insurer to take up a risk, he cannot complain of unreasonableness, caprice or even abuse of power if the insurer is prepared to take it up only on a condition that he would be free at any time to change his mind as to the future. Furthermore, Clause 10 gives the assured the same liberty to terminate the policy. Besides a term in the form contained in Clause 10 is a common term in policies and must, therefore, have been accepted as reasonable: see MacGillivray on Insurance Law, 5th edition, volume 2, page 963. The Privy Council in Sun Fire Office v. Hart, (1889) 14 App. Cas. 98. held of a clause similar to Clause 10 in the present case that it gave an insurer the right to terminate the contract at will and that there was nothing absurd in such a term. Learned counsel for the appellant sought to distinguish this case from the present on the ground that their previous fires had occurred and anonymous letters had been written threatening continuance of the incendiarism and this made it reasonable for the insurer to terminate the policy. This attempted distinction however is wholly beside the point. The question before the Judicial Committee was not whether a particular termination of a policy was reasonable but of the interpretation of a clause in it. For that question only we have referred to that decision and on it we find that the view taken by us receives full support from the decision of the Judicial Committee. In that respect the two cases are indistinguishable.*
>
> *...*

17. The next argument was that Clause 10 was bad as it gave more option to the insurer than to the assured. We express no opinion as to whether the clause would be bad if it did so, for we are clear in our minds that it did not. The argument that it did was based on the use of the word "request" in the case of a termination by the assured and "option" in the case of a termination by the insurer. It was said that the word "request" implied that the request had to be accepted by the insurer before there was a termination whereas the word "option" indicated that the termination would be by an act of the insurer alone. We are unable to agree that such is the meaning of the word "request". In our view, the clause means that the intimation by the assured to terminate the policy would bring it to an end without more, for the clause does not say that the termination shall take effect only when the assured's request has been accepted by the insurer."

(emphasis supplied)

108. The judgment in *Her Highness Maharani Shantidevi P Gaikwad v. Savjibai Haribai Patel* (supra) referred to above-quoted decision in *Central Bank of India v. Hartford Fire Insurance* and it was held:

"56. From the aforesaid, it is clear that this court did not accept the contention that the clause in the insurance policy which gave absolute right to the insurance company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted."

(emphasis supplied)

109. The question that begs for an answer, however, would be as to whether an insurance contract may be equated with a power purchase agreement between a generator and distribution licensee governed and regulated by the regime under Electricity Act. We, as the further discussion would amplify, answer this in negative.

110. The appellant also refers to the judgment dated 17.05.2018 of this tribunal passed in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited* (Appeal No. 283 of 2015), *inter alia*, holding as under:

> *"9.14 … the PPA entered into by the parties is a statutory and binding instrument which crystallises the rights and obligations of the involved parties. Accordingly, the same would need to be interpreted in the spirit of agreed terms and cannot be defined or derived in its "implied term". The Hon'ble Supreme Court in GUVNL case (2017) has also held that PPAs are binding and cannot be varied by the Regulatory Commission. Thus, it is clear that the State Commission by the exercise of its regulatory powers cannot fashion a relief for the Appellant (NPL) which is not stipulated in the concluded PPA between the parties."*
>
> (emphasis supplied)

111. The core argument of the appellant, thus, is that it is wholly impermissible for the regulatory commission to fiddle with the terms of the contract negotiated by the parties. It is submitted that the regulatory oversight by the Commission exercising jurisdiction under section 86(1)(b) begins when the generator and the distribution licensee reach an agreement, on the terms and conditions of the generation and sale of electricity by the generator to the distribution licensee. Such an agreement is to be in accordance with law and, therefore, it should comply with the provisions of the Electricity Act, 2003, the rules and regulations framed thereunder and also the provisions of any other law for the time being in force (as clarified by Section 175 of the Electricity

Act, 2003). Subject to the same, the generator and distribution company negotiate and finalize the PPA, whereupon the proceedings under Section 86(1)(b) are initiated on the proposed PPA and its terms and conditions. It is contended that the exercise of regulatory power in the case of PPA proposed between the generator and the distribution licensee involves the following aspects only to be considered by the Regulatory Commission:

i. *Whether there is a need for the quantum of power proposed to be purchased by the distribution licensee?*

ii. *Whether the price at which the quantum of power proposed to be purchased is conducive to the interest of the consumer in the State, and whether the same quantum of power is available from other sources, at a more economical price?*

iii. *Whether there has been a transparent process adopted by the Distribution Licensee in reaching the agreement with the generator for the procurement of power?*

112. It is submitted by the appellant that the first above-mentioned aspect is covered by the opening part of Section 86(1)(b) of the Electricity Act, 2003, namely, to regulate the purchase and procurement process and if in the opinion of the Commission there is no such necessity it would not approve such procurement of power. It is argued with reference to the second above-mentioned aspect that the considerations applied in price fixation are flexible and not absolute so as to choose the lowest price, the relevant factors being proper thermal hydro mix, promotion of renewable and non-conventional energy and providing promotional tariff etc. the consideration of consumer interest being paramount. Reliance is placed on observations to this effect by Supreme Court in *Solar Semi Conductor Power* (supra):

> "*37. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interests*

of consumers is at stake. The interest of consumers, as an objective, can be fairly ascertained from the Act. The Preamble of the Act mentions "protecting interest of consumers" and Section 61(d) requires that the interests of the consumers are to be safeguarded when the appropriate commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers."

(emphasis supplied)

113. It is submitted that the balancing of the right of generator has to be restricted to its legitimate claims under the contract entered into and not that it can be given tariff or beneficial terms more than what has been agreed to by it voluntarily by signing the PPA.

114. It is argued by the appellant that the regulatory authority under Electricity Act, 2003 is authorized in law to consider the proposed PPA and may either approve it or, if not satisfied, may reject it but if it is of the opinion that PPA terms need to be modified or varied, it may only propose such modification or variation leaving the parties free to consider and incorporate such changes by mutual agreement but if the parties (the generator and the distribution licensee) fail to reach consensus, the PPA does not come into effect. It is submitted by the appellant that while the PPA cannot be effective without the approval of the Commission, the decision of the Commission on modification or changes cannot also be given effect to unilaterally by either of the parties to the contract or compulsorily implemented or forced by the Commission. An agreement settled between the parties as a result of

consensus ad idem can be amended, varied, modified etc., only by *consensus ad idem* and not otherwise.

115. The appellant concedes that for consideration of a case like the one at hand, the first aspect is the need for procurement of power. The Distribution Licensee is required to satisfy the Regulatory Commission on the need for the quantum of power and the period (long-term, medium-term or short-term) for which it is to be procured. The approval for the quantum of power to be procured is considered and decided upon by the Commission generally in two stages, namely; (a) in the prospective planning applicable over a period of time, namely, overall power procurement plan given by the Distribution Licensee from time to time, on the total quantum of power required over the years based on load forecast and demand requirement; and (b) when a specific procurement is proposed by the distribution licensee. In the case of specific procurement mentioned above, the same is considered as the first aspect while considering the approval under section 86(1)(b) of the Electricity Act, 2003**.** Once the specific procurement is considered necessary to be allowed, the next step is to consider the approval to the PPA terms and conditions proposed by the generator and the distribution licensee. The draft of such PPA mutually agreed to between the Generator and the Distribution Licensee is filed with the Commission.

116. It is submitted by the appellant that the PPA negotiated and finalized by the parties (generator and distribution licensee) may be presented for approval in two ways – either as initialed record of the agreement reached or as a PPA which is duly executed to become effective after approval by the Commission. It is the contention of the appellant that a PPA presented as an initialed draft is not a concluded or enforceable contract because it is in the nature of an agreement to

execute the PPA upon all its terms and conditions being approved by the Commission. In that sense it is a contingent contract since PPA would be executed on the happening of the contingency of approval by the Commission. In the latter case it is only an agreement to execute the PPA, as per the draft, if the State Commission approves the draft as such, and not that there is binding and enforceable PPA. The appellant gives the analogy of an agreement to sell a property (with draft sale deed attached) which may be subject to the approval of a competent authority and sale deed as per the draft sale deed to be executed at a later stage when approval is given. In such a case if the competent authority imposes a condition in deviation from what the parties had agreed, both parties will have to mutually agree to the deviation. The appellant refers to the Order dated 10.04.2018 whereby the Commission had specifically asked for the initialled draft PPA to be submitted by both parties while suggesting that the "*duration of the PPA may also be increased from 25 years as proposed to 35 years*". It argues that if either of the parties decide not to agree, the agreement to sell will have to be abandoned as not enforceable.

117. The appellant relies upon the ruling of Supreme Court in *Dresser Rand S.A. v. Bindal Agro Chem Ltd and Another* (2006) 1 SCC 751 and of Karnataka High Court reported as *State of Karnataka v. Nagarjuna Power Corporation Limited and Others* ILR 2002 Kar 3475 : 2002 SCC Online Karnataka 229.

118. In *Dresser Rand* (supra), the Supreme Court held:

> *"28…… As contrasted from sale of ready goods sold off the shelf across the counter, sale/purchase of complex machinery/equipment made to order, to suit particular requirements of the purchaser have several facets relating to pricing, period of delivery, mode of delivery, period and nature of warranty, suitability for the intended purpose, patent rights, packing, insurance, incidental services,*

consequences of delay and breach, rejection/replacement, force majeure etc. Agreeing upon the terms subject to which offer is to be made and accepted, is itself a complicated and time consuming process. But reaching an agreement as to the terms subject to which a purchase will be made, is not entering into an agreement to purchase.

…

32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed, is not the same as placing a purchase order. A prelude to contract should not be confused with the contract itself. The purpose of Revision 4 dated 10-6-1991 was that if and when a purchase order was placed by BINDAL, that would be governed by the "General Conditions of Purchase" of BIONDAL, as modified by Revision 4. But when no purchase order was placed, neither the "General Conditions of Purchase" became effective or enforceable". *Therefore initialling of "Revision 4" by DR and BINDAL on 10-6-1991 containing the modifications to the General Conditions of purchase, did not bring into existence any arbitration agreement to settle the disputes between the parties."*

(emphasis supplied)

119. In the case of *Nagarjuna Power Corporation Limited* (supra), the High Court ruled:

"in view of the above, we have no hesitation to hold that the parties have proceeded on the basis that the document initialed/signed on 23.7.1999 is only a finalised draft agreed to between KEB and the Company and it not intended to be acted upon as a concluded agreement, until it was approved by the State Government. In fact event the company's stand, as evident from the petition averments and prayer in the Writ Petition is that without the approval of the State Government, the PPA agreement cannot be acted upon and that the Agreement will not come into effect until the State Government approves it and executes the State support agreement. Be that as it may."

(emphasis supplied)

120. The appellant, thus, submits that a PPA executed subject to approval will be a contingent contract, the contingency being the approval of the State Commission. It argues that the contingency is not only that the approval is given to a PPA, but to all the terms and conditions of the PPA as proposed, without any variation or modification. If the State Commission makes the modification, then the contingency as intended by the parties in the PPA cannot be said to have occurred and, therefore, the parties are not bound to give effect to the PPA with the above variation or modification made by the Regulator. The parties may, however, mutually agree to the variation or modification suggested by the Commission and then give effect to the PPA. Thus, there has to be a *consensus ad idem* on the acceptance of the modification or variation before a concluded PPA can be given effect to.

121. The appellant concedes that in the case of a regulated entity under Electricity Act, the tariff is in the domain of the Commission. Yet, the parties can agree to a ceiling tariff and that shall be binding. Reliance is placed on the decision of this tribunal in *M/s. Dans Energy Private Limited v. Uttarakhand Electricity Regulatory Commission & Others* 2017 SCC OnLine APTEL 72. The appellant points out that the State Commission (HERC) by its MYT Tariff Regulations, 2019 has provided for the ceiling on capital cost. The prime submission is that if the generator has agreed to the ceiling on capital cost/tariff, the same being in the interest of the consumer at large, there is no reason that the same should not be allowed to be implemented.

122. *Per contra*, it is the case of the second respondent (generator) that the changes in the PPA were unilateral and forced upon it by the appellant (procurer) at the time of resubmission of the PPA in the wake of order approving the request of the latter (appellant HPPC) for procurement of electricity from the former and that objection was raised

to such changes as soon as the hearing commenced before the Commission.

123. As already noted, the Supreme Court in *Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd. and Others* (supra) had ruled that "*Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity*". The appellant fairly concedes that contractual arrangement in the nature of PPA is regulated by the Appropriate Regulatory Commission under the Electricity Act, 2003 and the Regulations notified thereunder but insists that such regulation of the PPA is only to the extent of the regulatory aspects provided in the law.

124. It is clear from the discourse on the jurisprudence in specific context of Electricity sector that the freedom of choice to execute contract for purchase of electricity is not absolute and is subject to regulation in terms provided in the Statute. The regulation is qua not only the power / ability / need of the distribution licensee to purchase electricity but also the price or tariff at which it is to be procured by it. The distinction between a licensed entity and de-licensed entity (such as a generating company) in this respect is material.

125. Our view is that there is no parity with insurance contracts. Reference to the rulings in *Central Bank of India v. Hartford Fire Insurance Co. Ltd* (supra) and *Her Highness Maharani Shantidevi P Gaikwad* (supra) is, thus, misplaced. The power purchase agreement is a matter of free consent and will for both the seller and procurer but in case the procurer is a distribution licensee, its autonomy lies in choosing the source of supply and the quantum and negotiate the price to the extent it may – as done in present case wherein both sides settled on a cap on the maximum tariff that could be charged – and broad terms like those of periodicity, dispatch, demand, commitments as to availability,

payment security mechanism, consequences flowing from defaults etc. But these are terms which are not regulated in strict sense though the reasonableness of such terms and adherence to the objects and reasons of the law remain the concerns of the regularity authority while granting approval. The terms of tariff – price of procurement – and this includes add-ons like wheeling charges – are within the domain of regulation and, therefore, the determination by the regularity authority thereupon is not subject to consent of the parties for having binding effect. The observations in rulings of *Nabha Power Limited v. Punjab State Power Corporation Limited* (supra) and *Solar Semi Conductor Power* (supra), as quoted earlier, are to be understood and applied in the context of facts of those cases.

126. It is pointed out by the second respondent (generator) that when the appeal was filed (on 24.05.2019), the appellant (procurer) had already acted upon and implemented the terms of the contract / PPA read with the earlier order dated 10.04.2018 passed earlier by the Commission by drawing power in terms of the contract / PPA and LoI dated 23.5.2018 which was issued in terms of the said order. The generator quotes the order to the effect that the Commission had expressly approved "*procurement of power from the Chanju Hydro Electric Project, throughout the year, at the tariff to be determined by the Commission on separate petition to be filed by the generator with Rs. 4.50/ KWH being the ceiling tariff*" and had further directed that "*prior to signing the PPA the Discoms/ HPPC, shall, get, on an Affidavit, an undertaking from the generator that they shall withdraw the proposal for sale of Power from CSPDCL and will commence supply of Power immediately after getting necessary NOC/ permission from the concerned authorities of State/ Central Transmission Utilities under STOA/ LTOA*", the only deficiency being in the detailed framing of the

PPA it being directed that "*HPPC may recast the PPA based on the format and other terms as in line with the PPA approved by the Commission for Teesta III, Sikkim*" and having regard to the emergent requirement of the procurer approving "*as an interim measure*", to have resort to "*energy drawl*" from the second respondent even prior to the "*determination of final tariff by the Commission the same be paid for the APPC subject to adjustments vis-à-vis the final tariff as the case may be*". It needs to be highlighted that clause 9.1.3 (i) and (ii) of the PPA (Provisional Tariff) read with Clause 2.1.1 (Effective Date and Term of Agreement) confirms that the appellant had clearly and unequivocally expressed its intent to execute a contract and on that basis drawn power at a provisional tariff in terms thereof and not *dehors* the PPA. It is submitted that the PPA becomes effective when the second respondent generating company declares availability and starts scheduling power to the procurer.

127. The generator correctly points out that it is the procurer on whose petition the Order dated 10.04.2018 was granted by the HERC, it having been satisfied by the procurer (the appellant) itself that long term purchase of power from the second respondent was necessary and justified, *inter alia*, on the grounds (a) of the demand-supply scenario up to 2022-23 based on peak demand; (b) taking into account average maximum peak demand and shortage of power during peak months from 2018-19 onwards and (c) the provisions of the National Tariff Policy whereby exemption is granted to hydro projects from competitive bidding and tariff determination is made under section 62(1)(a) of the Electricity Act, 2003. The said order of the Commission shows that it was the appellant (procurer) which had made disclosures confirming its intent to execute the long term PPA sourcing the supply accordingly from the second respondent (generator), the need for incorporating an Exit

Clause in the PPA not having been contemplated or discussed or even remotely suggested.

128. From the above discussion, the following facts emerge:

(i) It was a specific contract negotiated and agreed to by the parties that was placed for initial approval leading to Order dated 10.04.2018;

(ii) The Commission issued its order on 10.4.2018 by which it approved the purchase of power from the second respondent and directed the appellant to *"recast the PPA based on the format and other terms in line with the PPA approved by the Commission for Teesta III, Sikkim"*;

(iii) The above-said directions under section 86(1)(b) given to the appellant (licensee) were accepted and partly implemented;

(iv) While recasting the PPA in terms of the directions contained in the order dated 10.4.2018 was being done by the appellant, it insisted on inserting an Exit Clause and modifying wheeling charge liability;

(v) The Exit Clause as insisted was not a part of the PPA earlier presented or the *Teesta III* power purchase agreement;

(vi) In the meantime, the second respondent in compliance with directions issued by the appellant in terms of the order dated 10.4.2018 withdrew its offer for sale to Chhattisgarh;

(vii) The parties signed the PPA with all clauses (including the ones that were not in line with the order dated 10.4.2018), which was then placed for approval before the

Commission and at that stage, the second respondent informed the Commission of its protest / objection to the impugned clauses both in the oral hearing as well in its written representation dated 20.2.2019;

(viii) The Commission after hearing parties passed the impugned order rejecting the inclusions that were not in line with Teesta III and held that the same is unprecedented.

129. In our considered view, there was neither an occasion, nor any justification nor it being open for the appellant to suggest or insist upon the inclusion of the exit clause or modification of the condition about liability towards wheeling charges after the dispensation by order dated 10.04.2018 passed by the Commission. The proceedings leading to the impugned order being passed on 08.03.2019 are in continuation of the proceedings that had resulted in the order dated 10.04.2018. It has to be borne in mind that the need for quantum of power, its nature and the period for which the present projections guide were considered at the said first stage. That was also the stage when the appellant had satisfied the judicial conscience of the Commission as to the propriety of the source (second respondent) chosen by the appellant on its own volition. Surely, the Commission cannot raise the issue of transparency of the process leading to approval of procurement, the quantum and period of such need etc. settled with the second respondent on its own initiative. Though under the law the price of procurement is the domain of the regulator, the parties herein had negotiated and agreed upon the cap – ceiling – on the price to be paid under long term PPA. This is a stipulation which would bind the parties and would undoubtedly be kept in mind by the Commission when it embarks upon the second stage

exercise of tariff determination under section 86(1)(b). There are no reasons to doubt that the Commission would follow the law and its own binding regulations at the stage of tariff determination. The considerations at that stage would include not only consumers' interest but also all relevant factors set out in law (section 61) including the need to promote renewable energy, the proper thermal hydro mix, the legitimate expectation of reasonable returns for the generator, capital expenditure, additional cost such as wheeling charges, transmission or operational losses etc. and, of course, the National Tariff Policy. We do not have the least doubt that in tariff determination, the Commission would afford due respect to such ceiling on tariff as has been agreed upon by the parties, particularly because its own Regulations provide (as in case at hand) for such agreement. The stage to examine as to what will be the appropriate price of procurement has not even been reached.

130. The grounds on which the appellant insists on exit option seem to be unfounded paranoid assumption that the tariff determination by the Commission may be unduly beneficial to the generator or not be conducive or in accord with law and, therefore, it's consumers might get burdened with undue liability to bear. The appellant seems to be forgetting that the tariff determination is an open exercise wherein all stakeholders will have the opportunity to participate and that the decision rendered by the Commission is also subject to correction in statutory appeal before this tribunal and finally before the Supreme Court.

131. As already noted, the free will and consent to contract or the general principle of *consensus ad idem* is available to and exercisable by the parties, just as in any commercial contract, to the PPA as to all other terms of the PPA but the stipulations relating to tariff payable by the distribution licensee to the generator - the price of procurement under section 86(1)(b) – is a matter outside that discretion but wholly

within the statutory role of the regulating authority whose decision (subject to correction in statutory appeals) is binding and, therefore, bound to be included in the contract (PPA).

132. It cannot be accepted as an unexceptional rule that the Commission can only suggest modification of terms relating to tariff but the parties are free to accept or reject the same. If that were to be laid down as the norm, it would render regulatory authority under Section 86(1)(b) nugatory which cannot be the result.

133. The other terms having been agreed upon, and even broadly approved by order dated 10.04.2018, the contract of procurement of electricity from the second respondent came into existence, it having even been acted upon, the only formality being to bring it in line on template of *Teesta* PPA. The PPA as agreed upon by the parties, prior to tariff determination, is a contingent contract subject to approval by the Commission. But once all its terms (other than tariff payable thereunder) have been approved under section 86(1)(b), it becomes a binding contract in which the tariff as determined would get incorporated.

134. The unreasonable terms insisted upon by the appellant seeking exit option and reduction of wheeling charges liability from actuals, particularly against the consent of the other contracting party, are designed to wriggle out of regulatory control over tariff and, therefore, unacceptable. After approval of procurement and all other terms connected thereto, except for tariff determination exercise to be undergone, there is no choice left for the parties, the contract thus evolved being the product of their *consensus ad idem*. We reject the argument that the parties are free to accept or have the liberty not to act upon the dispensation by the Commission on such clauses as have bearing on tariff payable for procurement of electricity by the licensee.

Abuse of Dominant Position

135. The present challenge of the appellant is in relation to the exercise of jurisdiction by the Commission to modify the terms of the PPA. It is the mainstay of its submissions that the parties have agreed to the PPA but then it is subject to any modifications that may be made by the Commission in exercise of statutory jurisdiction. The Commission resists the challenge to its authority, and rightly so, because its endeavour through the impugned order in facts and circumstances of this case has been also to align the PPA to the terms of Section 61, National Electricity policy and the Tariff Policy as indeed adherence to its order dated 10.4.2018. It was precisely for these purposes and for the wholesomeness and reasonableness of the terms and conditions to be examined that the PPA was placed for approval before the Commission.

136. It may be argued, and the submission is attractive on first blush, that the signature of the second respondent on the PPA dated 21.5.2018 binds it but it can definitely not be the consequence if a case of abuse of dominant position under Section 60 of Electricity Act is made out. This is where the statutory jurisdiction of the Commission to examine the arrangement and bring about corrections comes in.

137. As noted earlier, the provision contained in Section 60 of Electricity Act provides the safety net, *inter alia*, for a generating company against anti-competitive conduct on the part of the procurer (licensee) by abusing its dominant position. It cannot be ignored that the appellant is essentially an arm of the State Government, having the mandate of engaging the power producers in negotiations to procure power for and on behalf of the distribution licensees within the State of Haryana. As seen from its submissions, the appellant receives executive instructions

from the authorities that be in the State Government and such instructions are followed as policy directives in matter of procurement of electricity with which the distribution licensees seem to be feeling bound. Technically speaking, and this tribunal only hopes that this was not the true intent, such role as above of the appellant seeking prerogative to ignore the dicta of the regulatory Commission may be in teeth of the legislative scheme of the Electricity Act, 2003 since, as noted earlier, the reform agenda sought to be fulfilled by this legislation as reflected in the Statement of Objects and Reasons was also for "*distancing the regulatory responsibilities from the Government to the Regulatory Commissions*".

138. Coming back to the authority given by Section 60 to issue such directions as are considered appropriate to an entity – here, the procurer on behalf of distribution licensee – in the event of terms of an agreement entered into by it with the generator being in the nature of abuse of its dominant position, there can be no doubt that such jurisdiction to correct the course of "*market domination*" is available even while considering approval of a PPA under Section 86(1)(b). Such directions are also part of the jurisdiction of the Commission "*to regulate*" and, given the conjoint effect of Section 86(1)(b) and Section 60, are binding on the parties. It is not difficult to comprehend that a liberty to "exit" if allowed against such backdrop would render the Commission a toothless tiger, a view that cannot be taken since that would result in freeing the distribution licensees from the regulatory control which is an illicit scenario and, therefore, a route that is prohibited.

139. The second respondent at the first possible occasion objected to the impugned clauses of the PPA and sought the intervention of the Commission when it was exercising jurisdiction under Section 86(1)(b) of the Act. The jurisdiction to entertain such pleas is available to the

Commission if a particular clause is capable of causing mischief or creating uncertainty. The objections were made before the Commission on 20.2.2019, as has been recorded in the impugned order. It is not correct on the part of the appellant to state that the PPA was mutually agreed (ignoring the objections taken). The only reason that the power tariff that might be fixed by the Commission may not be in consumers' interest put forward to insist on inclusion of an "exit clause" is not acceptable because we have full trust and confidence that the Commission will render only such order as takes care of all concerns including consumers' interest. Given the responsible position in which the Commission is placed, and given the statutory corrective mechanism in form of appeal first before this tribunal and then to the Supreme Court, there is no reason for doubt that the tariff which shall be determined shall be in accord with law and regulations.

140. There is, thus, no plausible explanation as to why the appellant wants an exit clause, the parties having agreed to a ceiling of levelized tariff of Rs. 4.50 per / kwh particularly when the Commission will determine tariff in terms of the tariff regulations also taking care of not only consumers' interest but also of other relevant considerations including reasonable expectation of returns for investors keeping in mind the larger objective of optimum growth of electricity industry which rewards good efficient performance, encourages competition and makes economic use of resources, etc.

141. Given the role entrusted to the appellant, a wing of the State Government, vis-à-vis the power procurement needs of distribution licensees operating in the State of Haryana, it enjoys a very dominant position. As is discernible from the Order dated 10.04.2018, it is the appellant which gathered all relevant material and presented it before the Commission to convince it about the power requirements of the

State, future projections, the renewable energy obligations, the possible sources for procurement, the benefits to be gained from contractual arrangements for such procurement from such identified sources (which included the second respondent), the persuasion given to the second respondent to have such tie-up with Haryana encouraging it in the bargain to abandon the agreement with corresponding procurers in State of Chhattisgarh, also persuading it to start the supply of electricity to satisfy its dire urgent needs under provisional supply clause of the PPA then settled, both parties having agreed on cap to the price of sale of electricity under the long-term contract though subject to final determination of tariff by the Commission and on actual wheeling charges payable by the generator to the utilities of the State (of Himachal Pradesh) where the power project is located. Having taken approval of the Commission by order dated 10.04.2018, its insistence on insertion of exit clause in the PPA, against the free will and consent of the other party, is clearly gross abuse of its dominant position vis-à-vis the generator. The Commission, thus, is within its power and jurisdiction, also under Section 60, to take appropriate measures and issue necessary directions to remove such clauses from the agreement as render it unwholesome on such muster. Such directions are binding and cannot be allowed to be assailed.

142. It is argued by the second respondent that the government companies in the area of distribution and transmission enjoy monopoly and, as such, dominate the market in which they operate and, therefore, the Commission must exercise jurisdiction to ensure that there is no abuse of the dominant position. Whilst this may not be put as a general rule, a scrutiny of the manner in which the appellant has conducted itself demonstrates that possibility of abuse of dominant position has to be plugged. After going through a detailed regulatory process for approval

wherein the appellant itself justified the purchase and sought immediate supply, when it reached the stage of execution of the PPA it has insisted on inserting clauses which were detrimental to the interest of the generator. To note yet again, the generator had withdrawn its offer to sell power to Chhattisgarh at the instance of the appellant. Put in such situation, the generator was probably left with no other option but to sign the PPA and then raise its objections before the Commission to resolve its legitimate commercial interests in line with the principles enumerated Section 61 and the earlier order dated 10.4.2018. The withdrawal of offer to sell power to Chhattisgarh was confirmed in writing before execution of PPA with the appellant.

143. By order dated 10.04.2018, there was a specific direction issued by the Commission to recast the PPA in terms of the earlier approved PPA in *Teesta III*. This direction was not complied with. The appellant did not challenge the said directions and instead suffered the same to attain finality and have binding effect. On the contrary, it availed benefit therefrom. Subsequently, on unilateral change of heart and using the window available, it chose to impose terms that were never envisaged previously – rather such terms being contrary to the earlier approved PPA. There is no explanation offered by the appellant, a State entity and representative of licensees, as to why the binding directions in Order dated 10.04.2018 have not been complied with.

144. The chronology of events and the documents forming the backdrop show that the parties had clearly agreed that the delivery point for supply of power is the generation switch yard at Chanju-I. It was, without doubt, the understanding of the parties that all costs/ charges post the delivery point will be to the account of the appellant Procurer). In fact, clause 4.2(ii) and (iii) of the PPA recorded such understanding. The capping of 2% in Clause 9.2.5 was in relation to one component of

the wheeling which is calculated in energy terms. In this context, the definition of wheeling charges in the PPA is relevant. It shows that there are two components to wheeling charges viz. actual charges paid in cash and losses, which is computed in energy terms. What was agreed to be capped was only the losses and not the actual cash pay-out. When this aspect was explained to the Commission, it clarified by the impugned order the effect by referring to the delivery point and its earlier order dated 10.04.2018 which, as noted earlier, had attained finality there being no challenge thereto. The reimbursement of wheeling charges is a component of tariff both in the hands of the distribution licensee as well as the generating company. It is recovered from the consumer and, therefore, the Commission alone has the jurisdiction to determine that issue, it not being open to the parties to negotiate contrary to such determination, the imposition of terms violative of the same being impermissible.

145. From the aforesaid legal and factual matrix, it is quite clear that the parties have brought about a binding contractual arrangement, which arrangement was implemented pending final approval of the State Commission and determination of tariff. Pending such approval, the parties have implemented the terms of the contract with the clear understanding that the generator will be paid for supply of power at APPC pending determination of final tariff by the Commission in exercise of the statutory provisions of the Electricity Act, 2003 and the applicable regulations. The aforesaid facts will demonstrate that there is indeed a contractual arrangement in existence, which gives rise to binding obligations subject to any changes / modification suggested by the State Commission exercising jurisdiction under Section 86 (1) (b).

Conduct of Public Authorities

146. It is argued by the appellant that the second respondent is not justified in criticizing it for being unfair in imposing the changes in PPA by including Exit clause and by modifying the terms of liability towards wheeling charges. It is urged that the plea of unreasonableness of a contractual term is untenable.

147. The appellant seeks rejection of the contention of the generator (second respondent) as to unfairness or unjust conduct on the part of the former (procurer - HPPC) arguing that it is factually wrong and totally irrelevant in the face of the contract/PPA finalized between the parties. It relies upon two rulings of Supreme Court reported as *Excise Commissioner v. Issac Peter* (1994) 4 SCC 104 and *Puravankara Projects Ltd. V. Hotel Venus International*, (2007) 10 SCC 33 besides two judgments of High Courts reported as *Baij Nath v. Ansal & Saigal Properties Pvt. Ltd.*, 1992 SCC OnLine Del 221 and *Abhilash Singh v. State of U.P.*, 2003 SCC OnLine All 1301.

148. In *Excise Commissioner v. Issac Peter* (supra) the Supreme Court held as under:

> *"26…… In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract*

between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract -- or rather more so. It is one thing to say that a contract -- every contract -- must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State…….. "

(emphasis supplied)

149. The case of *Puravankara Projects Ltd. V. Hotel Venus International* had given rise to similar issues and the Supreme Court held thus:

"27. In Directorate of Education v. Educomp Datamatics Ltd. [(2004) 4 SCC 19] it was observed as follows: (SCC pp. 23-24, paras 9-11)

...

10. In Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617] this Court observed: (SCC p. 623, para 7)

'The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found

vitiated by mala fides, unreasonableness and arbitrariness.'

11. This principle was again restated by this Court in Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn. [(2000) 5 SCC 287] It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations."

28. In Har Shankar v. Dy. Excise & Taxation Commr. [(1975) 1 SCC 737] the case of a bid with full knowledge was considered. It was observed as follows: (SCC pp. 745-46, paras 15-16)

...……..

"16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of the auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of

judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

29. The difference between administrative law and contractual law was succinctly stated in Indian Oil Corpn. Ltd. v. Amritsar Gas Service [(1991) 1 SCC 533] . It was noted in paras 9, 10 and 11 as follows: (SCC pp. 540-42)

"9. The arguments advanced by Shri Harish Salve on behalf of the appellant Corporation to the validity of the award are these. The first contention is that the validity of the award has to be tested on the principles of private law and the law of contracts and not on the touchstone of constitutional limitations to which the Indian Oil Corporation Ltd., as an instrumentality of the State may be subject since the suit was based on breach of contract alone and the arbitrator also proceeded only on that basis to grant the reliefs. It is urged that for this reason the further questions of public law do not arise on the facts of the present case. The next contention is that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in Sections 14 and 16 of the Specific Relief Act. It is urged that the contract being admittedly revokable at the instance of either party in accordance with Clause 28 of the agreement, the only relief which can be granted on the finding of breach of contract by the appellant Corporation is damages for the notice period of 30 days and no more. It was then urged that the reasons given in the award for granting the relief of

restoration of the distributorship are untenable, being contrary to law. Shri Salve contended that the propositions of law indicated in the award and applied for granting the reliefs disclose an error of law apparent on the face of the award. It was also urged that the onus of proving valid termination of the contract was wrongly placed by the arbitrator on the appellant Corporation instead of requiring the plaintiff-Respondent 1 to prove that the termination was invalid. It was also contended that the failure of the arbitrator to consider and decide the appellant Corporation's counterclaim when the whole suit was referred for decision constitute legal misconduct.

10. In reply, Shri Sehgal on behalf of Respondent 1 contended that there is a presumption of validity of award and the objections not taken specifically must be ignored. This argument of Shri Sehgal relates to the grievance of the appellant relating to placing the onus on the appellant Corporation of proving validity of the termination. This contention of Shri Sehgal must be upheld since no such specific ground is taken in the objections of the appellant. Moreover, there being a clear finding by the arbitrator of breach of contract by invalid termination, the question of onus is really of no significance. The other arguments of Shri Sehgal are that the termination of distributorship casts stigma on the partners of the firm; counterclaim of the appellant Corporation was rightly not considered since it was not made before the order of the reference; the reference made being of all disputes in the suit, the nature of relief to be granted was also within the arbitrator's jurisdiction; and interest also must be awarded to the respondent.

11. We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant Corporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay[(1989) 3 SCC 293], Mahabir Auto Stores v. Indian Oil Corpn. [(1990) 3 SCC 752] and Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC

212 : 1991 SCC (L&S) 742] This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is, therefore, right in contending that the further questions of public law based on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us."

In essence, it was held that tender terms are contractual and it is the privilege of the Government which invites its tenders and courts did not have jurisdiction to judge as to how the tender terms would have to be framed.

30. By observing that there was implied term which is not there in the tender, and postponing the time by which the bank guarantee has to be furnished, in essence the High Court directed modification of a vital term of the contract.

31. In New Bihar Biri Leaves Co. v. State of Bihar [(1981) 1 SCC 537] it was observed at para 48 as follows: (SCC p. 558)

"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though originally borrowed from Scots law, is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (per Scrutton, L.J., Verschures Creameries Ltd. v. Hull &

Netherlands Steamship Co. [(1921) 2 KB 608 (CA)] ; see Douglas Menzies v. Umphelby [1908 AC 224] , AC at p. 232; see also Stroud's Judicial Dictionary, Vol. I, p. 169, 3rd Edn.).”

32. In Asstt. Excise Commr. v. Isaac Peter [(1994) 4 SCC 104] this Court highlighted that the concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract. It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature.

33. Just as the principles of natural justice ensure fair decision where function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties.”

(emphasis supplied)

150. In *Baij Nath v. Ansal & Saigal Properties Pvt. Ltd.* (supra), the High Court of Delhi considered the contract being enforced with variation in terms and held:

“6. By reference to the above correspondence it seems clear that the initial booking of flats 3 and 4 by the plaintiff in favour of the defendant was only provisional, meaning thereby that in case additional FAR was sanctioned by the appropriate authorities the plaintiff would be offered the agreed two flats. It is also proved on record that no point of time additional FAR was sanctioned and, therefore, it is natural to infer that the defendant was never in a position to offer any constructed area to the plaintiff on the 13th floor. Section 14 of the Specific Relief Act describes contracts which are not specifically enforceable. The relevant portion

of this section says that a contract, which from its nature is such that the court cannot enforce specific performance of its material terms is determinable and not capable of specific enforcement. First of all, it has not been shown as to at what rate the plaintiff agreed to purchase the flats from the defendant. There are varying versions by both sides in the witness box. Secondly, since additional FAR was not sanctioned in favour of the defendant, it can be said that the nature of the contract was such that in the absence of sanction of additional FAR the contract could not be specifically enforced and it was in a way determinable on that account. The contract between the parties was in the nature of a contingent contract which was dependant on the sanction of additional FAR in favour of the defendant by the appropriate authorities. Unless that contingency was fulfilled the contract was not capable of specific enforcement as stated in Section 31 of the Indian Contract Act, 1872.

7. *So far as the submission that at least the contract may be specifically enforced qua 192 sq. ft. of space on the 13th floor, it is repeated simply to be specifically rejected for various reasons. (1) The contract regarding rate of purchase is not certain. (2) It is not constructed against any additional FAR. (3) It is not in the shape of a separate covered area, but forms part of a bigger hall/restaurant measuring about 1400 sq. ft. Specific performance of part of a contract is otherwise barred under Section 12 of the Specific Relief Act unless the part to be performed bears a substantial proportion in value and the unperformed portion admits of compensation in money. (4) Part performance in the circumstances of this case, even otherwise, would involve hardship on the defendant, whereas the non-performance thereof would involve no hardship on the appellant."*

[emphasis supplied]

151. In the case of *Abhilash Singh v. State of U.P.* (supra), the Allahabad High Court held:

"6. Undoubtedly, the provisions of Rule 27(e)(i) of the Rules, 1963 provide that bid shall not be treated as

accepted unless the State Government or the District Collector, as the case may be, accepts it.

7. It means that unless the bid is approved by the State Government or the District Collector as required under the aforesaid Rule the contract shall not stand concluded.

8. There can be no quarrel to the settled legal proposition that if statute provides for approval of the higher authority, the order cannot be given effect to unless it is approved and the same remains inconsequential and unenforceable.

...

12. A Constitution Bench of the Hon'ble Supreme Court in Union of India v. Bhimsen Walaiti Ram, [AIR 1971 SC 2295.] considered the similar provision requiring approval by the authority concerned and the Court held as under:—

> *"It is, therefore, clear that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation, the person, whose bid has been provisionally accepted, is entitled to withdraw his bid. When the bid is so withdrawn and before the confirmation of the Chief Commissioner the bidder will not be liable for damages on account of any breach of contact or for the short-fall of the re-sale. An acceptance of an offer may be either absolute or conditional. If the acceptance is conditional, the offer can be withdrawn at any moment until absolute acceptance has taken place.*

While deciding the said case, the Hon'ble Supreme Court placed reliance upon the judgment of the Court of Appeal in Hussey v. Hornepayne, [1878 (8) Ch. D. 670.] where offer was accepted subject to the title being approved by the solicitor."

13. In that case, it was held that the contract become conclusive only on being approved by the solicitor and prior

to the that it was merely a conditional acceptance and contract did not stand concluded.

14. In State of Orissa v. Harinarayan Jaiswal, [AIR 1972 SC 1816.] the Hon'ble supreme Court held that where the statutory provision provides for approval or acceptance by an authority the State reserves for itself the right to accept or reject even the highest bid and in such an eventuality the auction bidder cannot enforce the contract prior to approval as required under the provisions. In that case, the Hon'ble Apex Court examined a case where an auction for country-liquor contract was to be accepted by the Collector subject to the confirmation of the State Government.

…

17. While dealing with the approval of the award under the Land Acquisition Act, the Hon'ble Supreme Court in Vijayadevi Navalkishore Bhartia v. Land Acquisition Officer, [2003 (51) ALR 91 (SC) : 2003 (5) AIC 379 (SC) : 2003 (5) SCC 83.] held that the authority granting approval does not act as an Appellate Authority. The Court observed as under:—

> *"In the context of an administrative act, the word 'approval' does not mean anything more than either confirming, rectifying, assenting, sanctioning or consenting. This is only an administrative power which limits the jurisdiction of the authority to apply its mind to see whether the proposed award is acceptable to the Government or not."*

18. The settled legal proposition, referred to above, makes it clear that where any statutory provisions provides for approval by the authority, acceptance of the bid remains conditional and contract is concluded only after accord of the approval. The acceptance of the bid by the authority remains provisional as he has no competence to accept it finally, and therefore, in such a case Court is required to examine the issue of jurisdiction/competence of the authority to accept a contract as per the statutory provisions dealing with the particular case.

19. Thus, in view of the above, as in the instant case the bid has not been accepted by the District Collector/State, we are of the considered opinion that no contract stood concluded between the parties, and the petitioner has no cause of action to approach this Court."

(emphasis supplied)

152. We find that the factual matrix at hand is distinct. It is the appellant which has attempted to introduce unreasonable clauses into the negotiated contract which was principally approved by the Commission by its earlier order dated 10.04.2018.

153. Though the judgment in *Brahmputra Metallics* case (supra) quoted earlier also makes comment on the subject, it is apt to refer to another recent decision of Supreme Court reported as *Chief Executive Officer and Vice Chairman Gujarat Maritime Board v. Asiatic Steel Industries Ltd*. 2020 SCC OnLine SC 949. The following observations are apt to be quoted here:

"37. In this court's considered view, the Board's action is entirely unacceptable. As a public body charged to uphold the rule of law, its conduct had to be fair and not arbitrary. If it had any meaningful justification for withholding the amount received from Asiatic Steel, such justification has not been highlighted ever. On the other hand, its conduct reveals that it wished that the parties should approach the court, before it took a decision. This behavior of deliberate inaction to force a citizen or a commercial concern to approach the court, rather than take a decision, justified on the anvil of reason (in the present case, a decision to refund) means that the Board acted in a discriminatory manner.

38. Long ago, in *Dilbagh Rai Jarry* v. *Union of India* (1974 3 SCC 554) this court had quoted from a decision of the Kerala High Court, approvingly (*PP Abubacker v. UOI* AIR 1972 Ker 103):

"25. … But it must be remembered that the State is no ordinary party trying to win a case against one of its

> *own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, Government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The layout on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic showdowns where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of Government some initiative and authority in this behalf."*
>
> (emphasis supplied)

154. As held in *Brahmputra Metallics Ltd* (supra), the public authorities are expected to act fairly in commercial dealings. As the agency of the State entrusted with responsibility of procuring electricity on behalf of distribution licensees operating in the State it is expected to bear in mind the public policy enshrined in the law and let the writ of regulatory authority in tariff determination for procurement rule instead of creating escape routes so that it may dictate its own terms to the suppliers.

155. The second respondent is right in arguing that in the teeth of the submissions made by the appellant before the Commission and at its instance the second respondent having been approved as the source of supply of electricity with ceiling on price by the Commission by its order dated 10.4.2018 unilateral insistence of the appellant thereafter on an exit clause and changing the terms of wheeling charges amounts to overreaching the jurisdiction of the regulatory authority seeking to

wriggle out of its order which has attained finality and even substantially acted upon.

156. We record disapproval over the conduct of the appellant in insisting on such changes in PPA as have been not approved by the Commission by the impugned decision, they clearly being an attempt to abuse the dominant position and bring in "*through the side-door*" virtual governmental control over de-licensed generator, a scenario to be guarded against as expressed by Supreme Court in *Tata Power Co. Ltd. V. Reliance Energy Ltd.* (supra).

Obligations in re provisional supply

157. It is the argument of the appellant that in the facts and circumstances noted above the transaction of sale and purchase of electricity between the generator (IA Energy) and the procurer (HPPC) relates to the period prior to the execution of the PPA and has been only under an *ad hoc* arrangement and not as per the terms and conditions of a concluded PPA as per the draft initialed on 22.05.2018. It is submitted that the Order dated 10.04.2018 passed by the State Commission did not mandate any such sale or purchase of electricity as per the draft terms and conditions of the PPA at the APPC rates. The said Order had only stated that the Commission "*as an interim measure approves that in case energy drawal is resorted to from this source prior to the determination of final tariff by the Commission the same maybe paid for the APPC subject to adjustment vis-à-vis the final tariff as the case maybe."* This order, it is urged, does not provide for a binding obligation on HPPC to continue to purchase the electricity under an *ad hoc* arrangement till the PPA is executed or till the tariff is determined. The plea is that, for these reasons, the appellant HPPC was right in

terminating the *ad hoc* arrangement by giving five days' notice by letter dated 23.07.2020 and giving effect to the termination on 27.07.2020.

158. It is the grievance of the appellant that the sale and purchase of electricity at the APPC rate has continued from 03rd August, 2020, under the interim directions passed by this tribunal, and has resulted in HPPC paying much higher price to IA Energy than the price at which power was available to HPPC from Power Exchanges, namely, the landed cost of Rs. 2.95/ kWh or 2.92/kwh (during month of August 2020), as against Rs. 4.55/ kWh payable, for the landed cost of purchase, from IA Energy at APPC rate, the difference being around Rs. 39.31 lakhs per day. On basis of such submissions, the appellant urges that the equities be adjusted in favour of HPPC, for the difference in price, by holding that HPPC shall be required to pay only the price equivalent to the Power Exchange to IA Energy, as against the claim of IA Energy for APPC, for power supply from 03.08.2020.

159. *Per contra*, the generator (second respondent) points out that in the pleadings and submissions, the appellant itself proceeds on the assumption that there is an existing PPA and as such, directions have been issued by the State Commission to amend the PPA, which directions are contrary to the terms and conditions *"mutually agreed between the appellant and the Respondent No. 2"*. It argues that the question of "amendment" at the instance of the Commission will not arise unless there is a contract. It is submitted that the appellant has accepted that there is a contract / PPA mutually agreed between the appellant and the second respondent the grievance of the appellant being on the issue as to whether the Commission has the power to *"amend the PPA contrary to the terms and conditions mutually agreed"* which is materially distinct from arguing a proposition that there is no PPA in existence. It is urged that the appellant having expressly

admitted that there is a PPA, which is mutually agreed to by the parties, be not allowed to argue that there is no PPA at all. Such an extreme argument cannot be taken by either of the two parties, who have signed the PPA and acted upon it. It is clarified that neither of the parties are questioning the validity of the contract, the issue or controversy being limited primarily to the jurisdiction of the Commission to modify a contract when it comes for approval under Section 86(1) (b), and not so much on the objection of the second respondent to the Exist Clause.

160. As already noted, the appellant (procurer) opted to act upon and implement the terms of the PPA in the wake of the earlier order dated 10.04.2018 passed earlier by the Commission by drawing power in terms of the contract / PPA and LoI dated 23.5.2018 which was issued after approval by the said order, the Commission have noted that under the agreed terms "*Rs. 4.50/ KWH*" would be the "*ceiling tariff*". The supply of electricity had commenced at the instance of the appellant after compliance with directions of the Commisson as to submission of "*undertaking from the generator*; about withdrawal of the "*the proposal for sale of Power*" to Chhattisgarh Discom and to "*commence supply of Power immediately*" to the appellant. All that remained to be done was reframe the PPA on the template used for another set of parties (*Teesta*) which had the approval of the Commission. Though the supply of electricity commenced before formal signing of PPA – which formality had to await determination of tariff – "*as an interim measure*", reference was also made to certain stipulations in the PPA - clause 9.1.3 (i) and (ii) of the PPA (Provisional Tariff) read with Clause 2.1.1 (Effective Date and Term of Agreement) – permitting such arrangement. These facts confirm that the appellant had chosen to commence drawal of power from the second respondent on basis of PPA and not otherwise. Under the terms of the said PPA, it became effective the day the second respondent

generating company declared availability and started scheduling power to the procurer on demand of the latter.

161. At the cost of repetition, it may be noted again that it is the appellant at whose instance the Order dated 10.04.2018 was granted by the HERC. It is the appellant which convinced the Commission that long term purchase of power from the second respondent was necessary and justified having regard to such factors as the demand-supply scenario up to 2022-23 based on peak demand, the average maximum peak demand and shortage of power during peak months from 2018-19 onwards etc. It was solemn submission of the appellant before the Commission that it intended to execute a long term PPA to source the supply from the second respondent (generator). The supply of electricity was stared provisionally against such mutual understanding, there being no indication given that the procurer was retaining the right to stop at any stage.

162. Reference may be made to a decision of this tribunal in the matter of *Lanco Kondapalli Power Pvt. Ltd. & Anr. vs. Haryana Electricity Regulatory Commission & Anr*, (Appeal no. 156 of 2009) decided on 20.01.2010. In the said case, it was held that acceptance of a Letter of Intent (LoI) was adequate for creating a jural / contractual relationship and that execution of a power purchase agreement was only a ministerial act, the relevant observations being:

> "*32. The guidelines which could be culled out by the Supreme Court and other courts in regard to this issue are summarised as follows:*
>
> *(I) It is the duty of the court to study the entire correspondence exchanged between the parties, with a view to arrive at a conclusion whether there was any meeting of the minds between the parties which could create a binding contract between them.*

(II) The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it show there had been meeting of minds between the parties and they had acted to reach an agreement upon all material terms then it can be said that a binding contract was capable of being spelt out from the correspondence.

(III) The contract is a bilateral transaction between the two parties. Every contract has to pass through several stages beginning with the stage of negotiation resulting finally in the acceptance of the proposal. The proposal, when accepted, gives rise to an agreement. It is at this stage that the agreement is reduced in writing and formal document is executed.

(IV) It is true that a LOI may be construed as a letter of acceptance. It is common in contracts involving detailed procedure in order to save time, LOI is issued communicating the acceptance of the offer and asking the contractor to start the work. If such a letter had been issued to the contractor, it may amount to acceptance of the offer resulting in a concluded contract between the parties. The question as to whether the LOI is merely an expression of intention to place order in future or whether it is a final acceptance of the offer leading to a contract is a matter which has to be decided with reference to the terms of the said letter.

(V) The proposal must be sufficiently defined to promote the conclusion of a contract by mere acceptance. Similarly, the acceptance should be final and unqualified expression of assent to the terms of the offer. An unqualified, unconditional acceptance of the offer creates a contract.

…

34. In this case, as indicated above, it is the Appellant who approached the civil court requesting for extension of

time to execute the PPA. It never sought a relief to the effect that they are not agreeable for the contract and, therefore, they cannot be compelled to sign the PPA. On the other hand, the details of the various documents referred to above, pursuant to the LOI, and various steps which have been taken by the Appellant to start the power project by approaching the Orissa Government requesting for necessary sanctions would clearly indicate that there were meeting of the minds between the parties in regard to the contract. Therefore, it cannot be said that the contract has not been concluded. As indicated above, the contents of the LOI and its subsequent developments taken place in pursuance of the LOI would clearly show that contract had already been concluded and whatever else was required to be done thereafter was a mere signing of the PPA which is only a ministerial and formal act."

(emphasis supplied)

163. The letter of discontinuance of power supply dated 23.07.2020 attempted to take a completely different view of the arrangement that was executed and acted upon by the parties, it being based on a wrong premise contrary to the letter and spirit of the LoI read with the PPA, including the Effective Date clause, the justifications given therein being specious. The said letter is, in fact, contrary to the settled legal position that execution of a PPA is a ministerial act and as such, the formation of contract is not entirely dependent on execution of such PPA (see *Lanco*).

164. The material on record clearly demonstrates that the decision to enter into contract with the second respondent was on an urgent basis, it having been selected from amongst existing / commissioned power projects so that the procurement of power could start immediately, and such that the demand of the summer months could be met, the Commission having been persuaded by none else than the appellant (procurer) itself that the second respondent (generator) had the ability to activate (make effective) the PPA, pending tariff determination, for which

enabling provisions were incorporated in PPA and approval given by order dated 10.4.2018 of the Commission.

165. The record vividly shows that the entire basis of the arrangement for immediate commencement of supply was that while there is a long term requirement of hydro power (with peaking facility) keeping in view the shortage of power during peak months from 2018-19 onwards such supply should start immediately, the order dated 10.4.2018 revealing that HPPC was not willing to wait for any competitive bidding process for procurement of power and instead had insisted that the same should be done under section 62 of the Electricity Act, 2003, it being acceptable to it that power be supplied throughout the year at a revised levelized tariff of Rs. 4.50 per KWH for a period of 30 years as suggested by the Commission. The appellant (HPPC) indicated to the Commission projection of maximum peak based on actual CAGR and consequent shortages of power during FY 2017-18, 2018-19, 2019-20, 2020-21, 2021-22, 2022-23, also indicating steps being taken for surrendering costly thermal power.

166. The interim arrangement of supply of electricity taken by the appellant from the second respondent was pending finalization of tariff and execution of PPA in terms of decision already rendered by the Commission. Since both events are still to be concluded, such interim arrangement cannot be abandoned so as to unfairly leave the generator stranded. Having regard to the stage at which the matter presently stands, it being unfair on the part of the procurer to seek to do so, we reiterate our order dated 31.07.2020 and decline the request for said order to be vacated, making it clear that the terms of such interim supply/procurement would continue to be what was stipulated at the instance of the appellant by the Commission in its order dated

10.04.2018. The IAs (nos. 865 and 958 of 2020) are disposed of with these observations.

TO CONCLUDE

167. We conclude that the directions given in regard to the removal of exit option and removal of capping of wheeling charges are valid and justified, within the jurisdictional competence of the State Commission, the contours of the power purchase agreement between the parties, other than those concerning tariff having crystalised by earlier order dated 10.04.2018 that has attained finality it having resulted in mutually enforceable obligations.

168. On the facts thus found, in the circumstances, and for the foregoing reasons, the impugned order dated 08.03.2019 of the State Commission is upheld and, in the consequence, the appeal is dismissed.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 28th DAY OF January, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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