IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL NO. 113 OF 2020 &
IA NOs. 817, 816, 983 & 984 OF 2020

APL NO. 117 OF 2020 &
IA NOs. 820 & 819 OF 2020

APL NO. 118 OF 2020 &
IA NOs. 840, 839 & 1090 OF 2020

APL NO. 123 OF 2020 &
IA NOs. 925 & 924 OF 2020

APL NO. 137 OF 2020 &
IA NOs. 1005 & 1004 OF 2020

AND

APL NO. 138 OF 2020 &
IA NOs. 961 & 960 OF 2020

Dated: **09th November 2021**

Present: **Hon'ble Mr. Justice R.K. Gauba, Judicial Member**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

APL NO. 113 OF 2020 &
IA NOs. 817, 816, 983 & 984 OF 2020

In the matter of:

INDIAN WIND POWER ASSOCIATION
(Northern Region Council)
GF 28, World Trade Centre,
Connaught Place,
New Delhi – 110001
ashish.npti@gmail.com … Appellant

VERSUS

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**
[Through Its Secretary]
3rd and4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001
info@cerc.gov.in

2. BHARAT ALUMINIUM COMPANY LIMITED
[Through Its Managing Director]
AluminiumSadan,
Core-6, Scope Office Complex,
7 Lodhi Road,
New Delhi – 110003

3. M/S. VEDANTA LIMITED
[Through Its Managing Director]
1st Floor, C Wing, Unit 103,
Corporate Avenue Atul Projects,
Chakala, Andheri (East), Mumbai,
Maharashtra – 400093

4. INDIAN CAPTIVE POWER PRODUCERS ASSOCIATION
[Through Its President]
309, Mansarovar Building,
90, Nehru Place,
New Delhi – 110019

5. CAPTIVE POWER PRODUCERS ASSOCIATION
[Through Its President]
Secretariat Office,
Technocraft Industries (India) Ltd.,
Opus Centre, MIDC, Marol Andheri-East,
Mumbai, Maharashtra – 400093

6. POWER EXCHANGE INDIA LIMITED
[Through Its Managing Director]
901, 9th Floor, Sumer Plaza,
Marol Maroshi Road,
Marol Andheri (East),
Mumbai, Maharashtra – 400059

7. INDIAN ENERGY EXCHANGE LIMITED
[Through Its Managing Director]
Unit No.3, 4, 5 and 6, 4th Floor,
TDI Centre, Plot No.-7,
Jasola, New Delhi – 110025 …. Respondents

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for R-2/BALCO

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Mr. Apoorva Misra for R-6/PEIL

Mr. Anand K. Ganesan for R-7/IEEL

APL NO. 117 OF 2020 &

IA NOs. 820 & 819 OF 2020

In the matter of:

TECHNO ELECTRIC & ENGINEERING COMPANY LIMITED
[Represented Through Its Company Secretary]
Corporate Office: 1B, Park Plaza,
South Block, 71, Park Street,
Kolkata- 700016. … Appellant

VERSUS

1 **CENTRAL ELECTRICITY REGULATORY COMMISSION**
[Through Its Secretary]
3rd and 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001
info@cerc.gov.in

2. **MINISTRY OF NEW AND RENEWABLE ENERGY**
Government Of India
Represented by its Secretary,
having office at:Block-14, CGO Complex, Lodhi Road,
New Delhi - 110003

secy-mnre@nic.dot.in … Respondents

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APL NO. 118 OF 2020 &

IA NOs. 840, 839 & 1090 OF 2020

In the matter of:

M/S GREEN ENERGY ASSOCIATION
Sargam, 143, Taqdir Terrace,
Near Shirodkar High School,
Dr. E. Borjes Road, Parel (E),
Mumbai - 400 012 ... Appellant

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
3rd and 4th Floor,
Chanderlok Building,
36, Janpath,
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info@cerc.gov.in … Respondent

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Mr. Mridul Chakravarty
Mr. Lakshyajit Singh Bagdwal
for BALCO/Caveator

APL NO. 123 OF 2020 &

IA NOs. 925 & 924 OF 2020

In the matter of:

U.P. SUGAR MILLS COGEN ASSOCIATION
4th Floor, Room No. 403,
Chintels House, Trade Centre,
16, Station Road, Lucknow – 226001 … Appellant

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
3rd and 4th Floor, Chanderlok Building,
36, Janpath,
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info@cerc.gov.in … Respondent

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Mr. Hemant Singh
Mr. Mridul Chakravarty
Mr. Lakshyajit Singh Bagdwal
for BALCO/Caveator

APL NO. 137 OF 2020 &

IA NOs. 1005 & 1004 OF 2020

In the matter of:

M/S INDIAN SUGAR MILLS ASSOCIATION
[Through its Authorized Representative]
having office of correspondence at:
Ansal Plaza, 'C' Block, 2nd Floor,
August Kranti Marg, Andrews Ganj,
New Delhi- 110049. … Appellant

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
3rd and 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001

info@cerc.gov.in … Respondent

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Mr. Mridul Chakravarty
Mr. Lakshyajit Singh Bagdwal
for BALCO/Caveator

APL NO. 138 OF 2020 &
IA NOs. 961 & 960 OF 2020

In the matter of:

ALL INDIA RENEWABLE ENERGY PROTECTION ASSOCIATION
[Through: Authorized Representative]
A Company Incorporated Under
The Companies Act, 2013 and
having its registered office at:3, Scindia House,
2nd Floor, Janpath, Connaught Place,
New Delhi-110001 … Appellant-1

BONAFIDE HIMACHALIES HYDRO POWER DEVELOPERS ASSOCIATION
[Through: Authorized Representative]
A Society Registered under
The H.P. Societies Registration Act, 2006 and
having its registered office t:Sai Bhawan,
Sector-IV, Phase-II
New Shimla-171009, Himachal Pradesh … Appellant-2

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
3rd and 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001
info@cerc.gov.in … Respondent

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for BALCO/Caveator

J U D G M E N T

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

1. The Electricity Act, 2003 brought in various reforms for the electricity industry, the prime objective being inclusive of creating environment conducive to its development, promoting competition therein, protecting interest of consumers in supply of electricity to all areas, rationalization of electricity tariff and ensuring transparent policies regarding subsidies, and adoption of efficient and environmentally benign policies. There is a special emphasis by this legislative measure on promotion of *Renewable Sources of Energy* in contrast of electricity generation by resources such as coal, natural gas, nuclear substances or material, and hydro power. The endeavor of promotion by generation of electricity from renewable sources of energy, expressly provided in various provisions of the statute, has been governed for more than a decade now by regulatory framework promulgated by Central Electricity Regulatory Commission (hereinafter referred to variously as, "*the Central Commission*" or "*CERC*" or "*the Commission*") through *Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010* (in short, "*REC Regulations*"). The renewable sources of energy are broadly

classified into two categories *viz. solar* and *non-solar*. The Central Commission by its Orders, issued from time to time, has been fixing *floor price* and *forbearance price* for sale of *Renewable Energy Certificates* ("*RECs*") in exercise of its powers under the REC Regulations. By Order dated 17.06.2020 passed in Petition no. 05/SM/2020, the Central Commission revised the floor and forbearance price of solar and non-solar RECs at Rs. 0/MWh and Rs. 1000/MWh respectively. The renewable energy generators have felt aggrieved by the said decision and have brought in a challenge under Section 111 of Electricity Act, 2003 before this Tribunal assailing the Order dated 17.06.2020 raising questions of law *vis-à-vis* substantive issues and alleging procedural infractions.

COMPETING PARTIES

2. It may be mentioned at the outset that *Indian Wind Power Association*, the appellant in first captioned appeal (no. 113 of 2020), describes itself as a non-profit organization, registered in 1996 under the Tamil Nadu Societies Registration Act, 1975. The appellant in second captioned appeal (no. 117 of 2020), *Techno Electric & Engineering Company*, is a generating company in terms of Section 2(28) of the Electricity Act engaged in operating and maintaining electricity generating units based on renewable sources of energy. *Green Energy Association*,

the appellant in third captioned appeal (no. 118 of 2020), similarly is a registered association of companies and entities engaged in the business of renewable energy under the Renewable Energy Certificate (REC) mechanism. *U.P. Sugar Mills Co-Gen Association*, the appellant in fourth captioned appeal (no. 123 of 2020), claims to be a body representative of the sugar mills operating in the State of Uttar Pradesh which are engaged in power generation through co-generation power plants using bagasse fuel. The fifth appellant, *Indian Sugar Mills Association* (in Appeal no.137 of 2020) is described as the apex body of all-India associations of Sugar Mills (including public and private sector), associated in promoting primarily bagasse based co-generation of power. *All India Renewable Energy Production Association*, the appellant in last captioned appeal (no. 138 of 2020) is described as a combination of two separate and distinct associations having power projects registered under REC mechanism, mainly located in the State of Himachal Pradesh. The appellants, thus, broadly represent both interest groups on one side of the divide i. e. *solar* power generators and power generators using *non-solar* resources of energy.

3. Aside from the Central Commission, the array on the other side includes the captive power producers or consumers who have been at the forefront to seek changes in the regime on the subject of REC pricing.

RENEWABLE ENERGY CERTIFICATES & PRICING

4. The Electricity Act has established Electricity Regulatory Commissions as the statutory authorities on which the responsibility to take requisite measures for achieving the objectives of the law is placed, they inclusive of the *Central Commission*, on one hand, and the *State Electricity Regulatory Commissions* (*"SERCs*"), on the other. The functions of the Central Commission are set out in Section 79 and include the power to regulate the tariff of generating companies owned or controlled by the Central Government or of such generating companies as enter into or otherwise having composite scheme of generation and sale of electricity in more than one State. The functions of the SERCs, on the other hand, are provided by Section 86 vesting in the said authorities the responsibility of determining tariff for generation, supply, transmission, etc. of electricity within the State and promotion of "*generation of electricity from renewable sources of energy*".

5. Section 86(1)(e) of the Electricity Act needs to be quoted for present purposes. It reads thus:

> ***"****Section 86. (Functions of State Commission): (1) The State Commission shall discharge the following functions, namely:–*
> *…*
> *(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity*

to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;
…"

6. It is clear from plain reading of the above clause of Section 86 that for purposes of promotion, *inter-alia*, of generation of electricity from renewable sources of energy, it is permissible for the Commission to adopt suitable measures which may include "*a percentage of total consumption of electricity in the area of a distribution licensee*" to be specified, as a mandate, for purchase of electricity from such resources.

7. The sale and purchase of electricity generated by the renewable energy generators is also subjected to *Tariff Regulations* by the statutory authorities i.e. the *appropriate commission*. Section 61 guides the process of Tariff Regulations and, by clause (h), expressly requires the regulatory authority to bear in mind the need for promotion of generation of electricity from renewable sources of energy while specifying the terms and conditions for the determination of tariff. It is trite that tariff is determined either under Section 62 of the Electricity Act where it is generally known as "*cost plus*" tariff or under Section 63 wherein the tariff *discovered* by a transparent process of *bidding* undertaken in accordance with the guidelines issued by the Central Government is adopted by the Regulatory Commission. That the cost of generation of electricity through renewable

sources of energy, in contradistinction of the generation of electricity by other modes – say, use of fossil fuel – has been comparatively higher is a matter of common knowledge. At the same time, however, the policy makers have been alive to the fact that dependance on the fossil fuel-based generation of electricity which adds to the environmental pollution and being dependent on natural resources which are depleting must be gradually reduced. The renewable sources of energy, also described as non-conventional sources, have, thus, come to be promoted as the possible future mainstay notwithstanding the fact that the technology involved in the establishment, operations and maintenance of such generating units has generally been costlier. At the same time, it must be acknowledged that, given the impetus this stream has received from the policy-makers, the renewable energy (RE) generators have benefitted over the period from focused research and development, and improvements in the technology and witnessed, importantly from the standpoint of the consumers' interest, reduction of the costs involved.

8. As mentioned at the outset, the legislation lays a great emphasis on environmentally benign policies *vis-à-vis* the electricity generation, by expecting promotion, *inter-alia*, of renewable sources of energy. The *National Electricity Policy*, framed by the Central Government, in exercise of its power under Section 3 guides the action of the authorities towards

this end. We may quote, with advantage, the following part of the National Electricity Policy ("*NEP*") as notified on 12.02.2005, it being relevant for the present discussion: -

> *"1.2 Electricity is an essential requirement for all facets of our life. It has been recognized as a basic human need. It is a critical infrastructure on which the socio-economic development of the country depends. Supply of electricity at reasonable rate to rural India is essential for its overall development. Equally important is availability of reliable and quality power at competitive rates to Indian industry to make it globally competitive and to enable it to exploit the tremendous potential of employment generation. Services sector has made significant contribution to the growth of our economy. Availability of quality supply of electricity is very crucial to sustained growth of this segment.*
>
> *1.3 Recognizing that electricity is one of the key drivers for rapid economic growth and poverty alleviation, the nation has set itself the target of providing access to all households in next five years. As per Census 2001, about 44% of the households do not have access to electricity. Hence meeting the target of providing universal access is a daunting task requiring significant addition to generation capacity and expansion of the transmission and distribution network.*
>
> *1.4 Indian Power sector is witnessing major changes. Growth of Power Sector in India since its Independence has been noteworthy. However, the demand for power has been outstripping the growth of availability. Substantial peak and energy shortages prevail in the country. This is due to inadequacies in generation, transmission & distribution as well as inefficient use of electricity. Very high level of technical and commercial losses and lack of commercial approach in management of utilities has led to unsustainable financial operations. Cross-subsidies have risen to unsustainable levels. Inadequacies in distribution networks has been one of the major reasons for poor quality of supply.*

1.5 <u>Electricity industry is capital-intensive having long gestation period. Resources of power generation are unevenly dispersed across the country</u>. Electricity is a commodity that cannot be stored in the grid where demand and supply have to be continuously balanced. The widely distributed and rapidly increasing demand requirements of the country need to be met in an optimum manner.

…

1.8 <u>The National Electricity Policy aims at laying guidelines for accelerated development of the power sector</u>, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view <u>availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues</u>.

…

Non-conventional Energy Sources

5.2.20 <u>Feasible potential of non-conventional energy resources, mainly small hydro, wind and biomass would also need to be exploited fully to create additional power generation capacity</u>. With a view to increase the overall share of non-conventional energy sources in the electricity mix, efforts will be made to <u>encourage private sector participation through suitable promotional measures</u>.

…

5.12 COGENERATION AND NON-CONVENTIONAL ENERGY SOURCES

5.12.1 Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. For this purpose, <u>efforts need to be made to reduce the capital cost of projects based on non-conventional and renewable sources of energy</u>. <u>Cost of energy can also be reduced by promoting competition within such projects</u>. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

5.12.2 The Electricity Act 2003 provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of

electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by the SERCs at the earliest. Progressively the share of electricity from non-conventional sources would need to be increased as prescribed by State Electricity Regulatory Commissions. Such purchase by distribution companies shall be through competitive bidding process. Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential in prices to promote these technologies.

5.12.3 Industries in which both process heat and electricity are needed are well suited for cogeneration of electricity. A significant potential for cogeneration exists in the country, particularly in the sugar industry. SERCs may promote arrangements between the co-generator and the concerned distribution licensee for purchase of surplus power from such plants. Cogeneration system also needs to be encouraged in the overall interest of energy efficiency and also grid stability.".
…"

(Emphasis supplied)

9. Section 3 of the Electricity Act also enjoins upon the Central Government the responsibility to publish *National Tariff Policy* ("NTP") from time to time. It is relevant to note that the NTP notified in January 2006 by the Central Government in 2005, in continuation of the NEP published on 12.02.2005, also focused on the subject of promotion of renewable sources of energy, the relevant part reading thus:-

"6.4 Non-conventional sources of energy generation including Co-generation:

(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage for purchase of energy from such sources taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006.

It will take some time before non-conventional technologies can compete with conventional sources in terms of cost of electricity. Therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission.

(2) Such procurement by Distribution Licensees for future requirements shall be done, as far as possible, through competitive bidding process under Section 63 of the Act within suppliers offering energy from same type of non-conventional sources. In the long-term, these technologies would need to compete with other sources in terms of full costs.

(3) The Central Commission should lay down guidelines within three months for pricing non-firm power, especially from non–conventional sources, to be followed in cases where such procurement is not through competitive bidding."

(Emphasis supplied)

10. It may be added here that policy framework *vis-à-vis* renewable sources of energy, as indicated above, has continued to be adopted ever since, particularly for the period to which the present controversy relates. The NEP or NTP have yet to evolve to the stage when it can be said that the technology for RE or non-conventional energy has attained such levels wherein they can compete with other sources in terms of costs such that

there is no further need or justification to adopt promotional measures in their respect.

11. Before proceeding further, it is also essential to take note of the following provision of the Electricity Act, 2003:

> *Section 66. (Development of market):*
> *The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.*

12. As indicated at the outset, the protection of the interest of the consumer at large is the prime objective of the legislative measure, the rationalization of the electricity tariff sought to be achieved, *inter-alia*, by promoting competition in the electricity industry, towards which end the trading in electricity undertaken within the regulatory framework by the licensed entities is one of the modes invigorated. The above-quoted provision, contained in Section 66, is in furtherance of the said objective. The Central Commission has been conferred with the requisite power by Section 178(2)(y) to frame regulations on the specific subject of the manner in which the *market* for *power trading* is to be developed, in terms of Section 66.

13. In exercise of powers conferred under sub-section (1) of Section 178 and Section 66 read with clause (y) of sub-section (2) of Section 178 of the Electricity Act, 2003, and all other powers enabling it in this behalf, and after previous publication, the Central Commission has framed the regulations for the development of market in power from Non-Conventional Energy Sources by issuance of transferable and saleable credit certificates, they being known as *Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010* (in short, "*REC Regulations*").

14. While framing the REC Regulations, the CERC noted NEP and NTP as indeed the *National Action Plan of Climate Change* ("NAPCC") which had set the target of 5% renewable energy purchase for FY 2009-10 which is expected to increase by 1% for next 10 years, NAPCC further recommending strong regulatory measures to fulfil these targets. In the *Statement of Objects & Reasons* ("SOR") for promulgation of REC Regulations, it was noted as under:

> "…
> 1.6 While the Electricity Act, 2003, the policies framed under the Act, as also the NAPCC provide for a roadmap for increasing the share of renewable in the total generation capacity in the country, there are constraints in terms of availability of RE sources evenly across different parts of the country. This inhibits the state commissions, especially in those states where the potential of RE

sources is not that significant, from specifying higher renewable purchase obligation. For example, given the fact that Delhi does not have sufficient renewable energy potential, the State Commission of Delhi has specified RPO of 1% for the distribution licensees in the State. There are states like Madhya Pradesh where the SERC has fixed the RPO of 10% but actual achievement of RPO is less than 1%. On the other hand, we also have states like Rajasthan and Tamil Nadu where there is very high potential of RE sources and the State Commissions have specified higher RPO. In fact, in such states there are avenues for harnessing the potential beyond the RPO level fixed by the State Commissions. However, the fact that the cost of generation from RE sources is high, discourages the local distribution licensees from purchasing RE generation beyond the RPO level mandated by the State Commission.

1.7 It is in this context that the concept of Renewable Energy Certificate (REC) assumes significance. This concept seeks to address the mismatch between availability of RE sources and the requirement of the obligated entities to meet their renewable purchase obligation. The Forum of Regulators deliberated on this concept in detail and evolved a framework for implementation of this mechanism. It was also felt that it would be necessary for both the CERC and the SERCs to frame suitable regulations for giving effect to the REC framework…."

(Emphasis supplied)

15. The salient features of the REC framework were set out in *Annexure-I* to the *SOR*, some of the parts whereof are crucial for present discussion. The same may be extracted as under:

Salient Features of REC framework

• Renewable Energy Certificate (REC) mechanism is a market based instrument to promote renewable energy and facilitate renewable purchase obligations (RPO)

• REC mechanism is aimed at addressing the mismatch between availability of RE resources in state and the requirement of the obligated entities to meet the renewable purchase obligation (RPO).
• Cost of electricity generation from renewable energy sources is classified as cost of electricity generation equivalent to conventional energy sources and the cost for environmental attributes.
• RE generators will have two options i) either to sell the renewable energy at preferential tariff or ii) to sell electricity generation and environmental attributes associated with RE generations separately.
…
• The environmental attributes can be exchanged in the form of Renewable Energy Certificates (REC).
…
• REC could be purchased by the obligated entities to meet their RPO under section 86 (1) (e) of the Act. Purchase of REC would be deemed as purchase of RE for RPO compliance.
…
• CERC to designate Central Agency for registration, repository, and other functions for implementation of REC framework at national level.
• Only accredited project can register for REC at Central Agency.
• Central Agency would issue REC to RE generators for specified quantity of electricity injected into the grid.
• REC would be exchanged only in the CERC approved power exchanges. Price of electricity component of RE generation would be equivalent to the weighted average power purchase cost of the discom including short term power purchase but excluding renewable power purchase.
• REC would be exchanged within the forbearance price and floor price. This forbearance and floor price would be determined by CERC in consultation with Central agency and FOR from time to time.
• In case of default SERC may direct obligated entity to deposit into a
separate fund to purchase the shortfall of REC at forbearance price.
…"

(Emphasis supplied)

16. The abbreviation "FOR" is used in the SOR quoted above for the "*Forum of Regulators*", provided for under Section 166 of Electricity Act, to which we shall revert a little later.

17. The REC Regulations defined the expression "*Renewable Energy Sources"* by Regulation 2(1)(l) as under: -

> *"2. Definitions and Interpretation:*
> *(1) In these regulations, unless the context otherwise requires,*
> *…*
> *l) 'renewable energy sources' means renewable sources such as small hydro, wind, solar including its integration with combined cycle, biomass, bio fuel cogeneration, urban or municipal waste and such other sources as recognized or approved by MNRE ;*
> *…"*

18. The expression "*MNRE"* appearing in the above definition means the Ministry of New and Renewable Energy *[per regulation 2(1)(h)]*. These regulations develop the idea of "Renewable Purchase Obligation" ("RPO") as envisaged in Section 86(1)(e) to mean "*requirement specified …… for the obligated entity to purchase electricity from renewable energy sources*". The *obligated entity* under Section 86(1)(e), generally speaking, refers to the distribution licensee responsible for distribution of electricity in the area under its license (and some others). The REC Regulations confer certain benefits and privileges on the obligated entities which comply with the mandate under Section 86(1)(e) in terms of the REC mechanism promulgated and enforced by the Commission. The Regulation 5 sets out

the eligibility conditions, making it mandatory for the concerned entities to be registered by providing as under:

> *"5. Eligibility and Registration for Certificates:*
>
> *(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills the following conditions:*
>
> *a. it has obtained accreditation from the State Agency;*
>
> *b. it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission; and*
>
> *c. it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price*
>
> > *Explanation.- for the purpose of these regulations 'Pooled Cost of Purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.*
>
> *(2) The generating company after fulfilling the eligibility criteria as provided in clause (1) of this regulation may apply for registration with the Central Agency in such manner as may be provided in the detailed procedure:*
>
> *(3)The Central Agency shall accord registration to such applicant within fifteen days from the date of application for such registration. Provided that an applicant shall be given a*

reasonable opportunity of being heard before his application is rejected with reasons to be recorded in writing.

(4) A person aggrieved by the order of the Central Agency under proviso to clause (3) of this regulation may appeal before the Commission within fifteen days from the date of such order, and the Commission may pass order, as deemed appropriate on such appeal."

19. The REC Regulations make a distinction between *solar energy* and *non-solar energy* and conceive of *Renewable Energy Certificates* ("RECs") to be issued by the specified central agency, designated in terms of Regulation 3(1), in accordance with the procedure laid down by the regulatory frame work. The RECs, defined by the Regulations simply as "*certificate"*, are categorized as under: -

> *"4. Categories of Certificates:*
>
> *(1) There shall be two categories of certificates, viz., solar certificates issued to eligible entities for generation of electricity based on solar as renewable energy source, and non-solar certificates issued to eligible entities for generation of electricity based on renewable energy sources other than solar:*
>
> *(2) The solar certificate shall be sold to the obligated entities to enable them to meet their renewable purchase obligation for solar, and non-solar certificate shall be sold to the obligated entities to enable them to meet their obligation for purchase from renewable energy sources other than solar."*
>
> (Emphasis supplied)

20. The RECs are issued by the specified central agency to the eligible entity in terms of the periodicity and denomination specified in Regulation 7 providing thus: -

“7. Denomination and issuance of Certificates

(1) The eligible entities shall apply to the Central Agency for Certificates within three months after corresponding generation from eligible renewable energy projects:

> *Provided that the application for issuance of certificates may be made on fortnightly basis, that is, on the first day of the month or on the fifteenth day of the month.*

(2) The Certificates shall be issued to the eligible entity after the Central Agency duly satisfies itself that all the conditions for issuance of Certificate, as may be stipulated in the detailed procedure, are complied with by the eligible entity:

(3) The Certificates shall be issued by the Central Agency within fifteen days from the date of application by the eligible entities.

(4) The Certificates shall be issued to the eligible entity on the basis of the units of electricity generated from renewable energy sources and injected into the Grid, and duly accounted in the Energy Accounting System as per the Indian Electricity Grid Code or the State Grid Code as the case may be, and the directions of the authorities constituted under the Act to oversee scheduling and dispatch and energy accounting, or based on written communication of distribution licensee to the concerned State Load Dispatch Centre with regard to the energy input by renewable energy generators which are not covered under the existing scheduling and dispatch procedures.

(5) The process of certifying the energy injection shall be as stipulated in the detailed procedures to be issued by the Central agency.

(6) Each Certificate issued shall represent one Megawatt hour of electricity generated from renewable energy source and injected into the grid.”

21. Clause (3) of Regulation 8 permits an eligible renewable energy developer (including eligible captive generating plant) "*to retain the certificates for offsetting its renewable energy obligation as a consumer subject to certification and verification by the concerned State Agency*". Other than this exception, the general mandate by clause (1) of Regulation 8 is that the certificate shall be dealt "*only through power exchange"*. To put it simply, the RECs are tradable commodities which can be sold or purchased in the power exchange.

22. The REC Regulations have specified, by Regulation 10, the period of validity of RECs to be ordinarily 1095 days which is equivalent to three years from the date of issuance (as per amendment carried out in 2014).

23. The provision contained in Regulation 9 on the subject of "*Pricing of Certificate"* is at the heart of the controversy at hand and the same (last amended with effect from 11.07.2013, by virtue of *Second Amendment Regulations, 2013*) reads as under:

> *"9. Pricing of Certificate:*
>
> *(1) The price of Certificate shall be as discovered in the Power Exchange:*
>
> > *Provided that the Commission may, in consultation with the Central Agency and Forum of Regulators from time to time provide for the floor price and*

forbearance price separately for solar and non-solar Certificates.

(2) The Commission while determining the floor price and forbearance price, shall be guided inter alia by the following principles:
(a) Variation in cost of generation of different renewable energy technologies falling under solar and non-solar category, across States in the country:

(b) Variation in the Pooled Cost of Purchase across States in the country;

(c) Expected electricity generation from renewable energy sources including: -

(i) expected renewable energy capacity under tariff, for sale of electricity to an obligated entity for the purpose of meeting its renewable purchase obligations, determined under Section 62 or adopted under Section 63 of the Act by the Appropriate Commission.

(ii) expected renewable energy capacity under mechanism of certificates;

(d) Renewable purchase obligation targets set by various State Commissions."

(Emphasis supplied)

24. It may be noted here that prior to its amendment by *Second Amendment Regulations, 2013*, Clause (c)(i) of Regulation 9(2) read as under:

"*expected renewable energy capacity under preferential tariff*"

25. There is no quarrel with the proposition that RECs being tradable commodity the price at which they may be sold is generally expected to be

"*discovered*", by negotiation, and quite obviously depends on principles of demand and supply, at the time of tender for sale and offer to purchase in the power exchange. The proviso to clause (1) of Regulation 9 is enabling provision which permits the Central Commission to specify the "*floor price and forbearance price*" separately for solar or non-solar certificates.

26. There was general consensus among the learned counsel for the parties as to the fact that since the proviso uses the expression "*may*", it naturally follows that the Commission "may" or "may not" choose to provide for the floor price and forbearance price. For clarity, it may be added here that unlike the tariff order generally issued from year to year (called *control period*), the orders that may be issued by the Central Commission under the proviso to Regulation 9(1) need not necessarily be for every financial year. The order once issued would continue to regulate the floor and forbearance price unless it is varied or modified by a subsequent order, the need for which to be issued is to be considered by the Commission "*from time to time*".

27. It was highlighted during the hearing, and we find merit in the submission, that there is neglect of proper punctuation in the proviso to Regulation 9(1) wherein the use of comma (,)" after the words "*provided that the Commission may*" is not followed by use of another comma (,) in the rest of the sentence. In our view, another comma (,) should have been

added after the words "*from time to time*" so as to make the thought incorporated therein clearer. Reading the proviso to Regulation 9(1) thus, we conclude, and there is no argument contrary to this conclusion, that the consultation expected to be indulged in by the Commission prior to issuance of order providing for the floor price and forbearance price is in relation to the "*Central Agency*" and "*Forum of Regulators*" (for short, "FOR").

28. The "*Central Agency*" as referred to in the above quoted proviso to Regulation 9(1) is to be designated by the Central Commission in terms of Regulation 3. It was explained at the hearing that the *Power System Operation Corporation Limited* (for short, "POSOCO") is the Central Agency designated for such purposes by the Central Commission. There is no dispute that POSOCO, the Central Agency mentioned in the above provision, was in the loop and duly consulted by the Central Commission in the run up to the impugned order being passed.

29. The *Forum of Regulators* mentioned in the statutory provision quoted above as the other agency required to be consulted by the Central Government (also mentioned as a consultee in the *SOR* to the REC Regulations extracted earlier) is a statutory body constituted by the Central

Commission, in terms of Section 166 of the Electricity Act. The said provision reads thus: -

> *"Section 166. (Coordination Forum): --- (1) The Central Government shall constitute a coordination forum consisting of the Chairperson of the Central Commission and Members thereof, the Chairperson of the Authority, representatives of generating companies and transmission licensees engaged in inter-State transmission of electricity for smooth and coordinated development of the power system in the country.*
>
> *(2) The Central Government shall also constitute a forum of regulators consisting of the Chairperson of the Central Commission and Chairpersons of the State Commissions.*
> *(3) The Chairperson of the Central Commission shall be the Chairperson of the Forum of regulators referred to in sub-section (2).*
>
> *(4) The State Government shall constitute a Coordination Forum consisting of the Chairperson of the State Commission and Members thereof representatives of the generating companies, transmission licensee and distribution licensees engaged in generation, transmission and distribution of electricity in that State for smooth and coordinated development of the power system in the State.*
>
> *(5) There shall be a committee in each district to be constituted by the Appropriate Government –*
>
> *(a) to coordinate and review the extension of electrification in each district;*
>
> *(b) to review the quality of power supply and consumer satisfaction;*
>
> *(c) to promote energy efficiency and its conservation."*

30. The marginal heading - "*Coordination Forum*" – of Section 166 is deficient, not fully reflective of the entire provision contained therein. The

Coordination Forum is constituted under sub-section (1) while *Forum of Regulators* is constituted under sub-section (2). Unlike the *Coordination Forum*, the various clauses of Section 166 do not specify the role expected to be performed to the *Forum of Regulators* (or FOR). What stands out, however, is the fact that FOR is a statutory body distinct from the Central Commission and the State Commissions, the only link being that the chairperson of the Central Commission is also *ex officio* chairperson of FOR, the chairpersons of the State Commissions being its *ex officio* members.

31. The expression "floor price" is defined by Regulation 2(1)(f) to mean "*the minimum price as determined by the Commission in accordance with these regulations at and above which the certificate can be dealt in the power exchange*"**.** Similarly, the expression "forbearance price" is defined by Regulation 2(1)(g) to mean "*the ceiling price as determined by the Commission in accordance with these regulations within which only the certificates can be dealt in the power exchange*" (emphasis added).

32. The factors which are to be taken into consideration and guide the determination of floor price and forbearance price are provided by clause (2) of Regulation 9. To put it simply, they broadly include the *variation* in the "*cost of generation*" of different renewable energy technologies "*across*

States in the country"; *variation* in the "*pooled cost of purchase*", again "*across States in the country*"; the "*expected electricity generation*" from renewable energy sources, particular focus being on "*expected renewable energy capacity*" for purposes of allowing obligated entities to meet RPOs as well as "*under mechanism of certificates*; as indeed the RPO "*targets set by various State Commissions*".

33. The "*Pooled Cost of Purchase*" referred to above, is also known as *average power purchase cost* (for short "APPC"), as determined by the respective State Commissions from time to time. As noted earlier, prior to the Second Amendment Regulations being brought into effect from 11.07.2013, the element of "*expected renewable energy capacity"* was to be computed to the extent it was governed by "*preferential tariff*". However, post the said amendment, which would apply to the period under consideration here, the determination of the "*expected*" renewable energy "*capacity*" under tariff for sale to obligated entities is based on tariff determination exercises both under *cost-plus* regime (Section 62) and by *bid-discovered price* (under Section 63).

34. From the law and regulations governing the field, it emerges that RE power mechanism has two components, 'Brown' and 'Green'. Under 'Brown' component, RE generators earn by 'Sale of RE Power' to (i) Distribution Licensee at APPC rate and/or (ii) Third party ('Open Access

Consumer' or 'Captive Consumer') at a negotiated price. Under 'Green' component, RE generator earns by selling REC in the power exchange. The Distribution Licensees can buy RE Power either at 'APPC rate' or at 'SERC determined tariff.' If Distribution Licensee buys RE Power at SERC determined tariff, it is not required to buy any Green component. RE generator selling power at SERC determined tariff in this case, will also not be entitled to issue of REC (Green component). If Distribution Licensee buys RE Power at APPC rate, it will have to buy REC (Green component), which will, generally speaking, be equal to the difference between SERC determined tariff and APPC rate. The *Open Access* ("OA") *Consumer* or the *Captive Consumer* ("CPP"), also covered in the category of Obligated Entity, can negotiate with the RE generator for the procurement of RE power and enter into contract with RE generator either to buy only the 'Brown component' or 'Brown + Green component', the price being generally negotiated on such basis. If they (OA consumer or CPP) contract to buy only the Brown component, they are obliged to buy the 'Green' component i.e. RECs from exchange to fulfill their RPO and in case of such PPA (and not otherwise), the RE generator shall be entitled for issuance of REC. Based on the quantum of power generated by RE generators, they get equivalent quantity of REC from National Regional Load Despatch Centre ("NRLDC"). Thus, REC (green component) is provided as a promotional measure since RE Generators were not able to recover their

cost of generation, as market was not able to procure the RE power at such high price.

35. It is not correct to say that the "*Forbearance Price"* is based on the concept that RE generator should not get more than its cost of generation or that it represents the difference between 'cost of generation' and 'APPC'". The argument is perverse and misconceived since it is based on premise that RE Generator under the REC Mechanism is entitled to receive only the "Cost of Generation" and no further returns. This would not only create an imbalance between RE generators under REC Mechanism and RE generators under the Preferential Tariff Mechanism but also be in the teeth of law mandating promotion of RE as a whole. The plea ignores the SOR (Para 3.8.2) for the RE Mechanism declaring "*revenue certainty*" to be one of the objectives.

DETERMINATION BY CERC IN THE PAST

36. It is essential to go into history of the regime *vis-à-vis* floor price and forbearance price put in position, from time to time, by the Central Commission in exercise of its enabling power under the proviso to Regulation 9(1) of RE Regulations, *albeit* in brief.

37. By Order dated 01.06.2010, passed in *Suo-motu* Petition no. 99/2010 under the heading *determination of forbearance and floor price REC*

framework, having consulted, *inter-alia*, the Forum of Regulators and invited comments from various stakeholders, the Commission had proceeded to determine the same based on following principles: -

> "*(a) RE target: The target for RE generation (year 2010-11) has been taken as 6% of the total projected energy requirement (National Action plan on Climate Change Target).*
>
> *(b) Additional RE capacity addition: To develop scenarios for future state level RE technology specific supply, for each RE technology across select states, the growth in capacity has been projected based on the Cumulative Aggregate Growth Rate (CAGR) for that RE technology in the states based on the past 5 years performance, current achievement, MNRE/ GoI's 11thPlan Targets for Capacity Addition in RE and the remaining potential available in the state. Year 2009 has been taken as a base year for projection of capacity addition from RE.*
>
> *(c) To estimate additional generation at the state level in year 2010-11, the capacity added under a specific RE technology has been multiplied by the Capacity Utilization Factor of the RE technology, as per the CERC RE Tariff Regulations 2009, for the sake of uniformity.*
>
> *(d) Cost of Generation/RE tariff: Costs of Generation/ RE Tariff for different technologies for FY 2009-10 have been assumed as per the CERC RE Tariff Regulations 2009, for the sake of uniformity.*
>
> *(e) Average Power Purchase Cost (APPC): The APPC for a state represents the weighted average pooled power purchase by distribution licensees (without transmission charges) in the state during the last financial year (2009-10).*
>
> *(f) Forbearance Price: The forbearance price has been derived based on the highest difference between cost of generation of RE technologies / RE tariff and the average power purchase cost of 2009-10 for the respective states.*

(g) Floor Price: The floor price has been determined keeping in view the basic minimum requirements for ensuring the viability of RE projects set up to meet the RE targets. This viability requirement shall cover loan repayment & interest charges, O&M expenses and fuel expenses in case of Biomass and Cogeneration."

(Emphasis supplied)

38. By the said Order dated 01.06.2010, the CERC prescribed the forbearance price and floor price for RECs, valid up to 31.03.2012, as under:

	Non Solar (Rs/Mwh)	Solar
Forbearance Price	3900	17000
Floor Price	1500	12000

39. On 23.08.2011, the Central Commission revised the forbearance price and floor price for period from 01.04.2012 to 31.03.2017, in *Suo-motu* Petition no. 142/2011, as under:

	Non Solar (Rs/Mwh)	Solar
Forbearance Price	3300	13400
Floor Price	1500	9300

40. The above regime underwent a further change, upon redetermination of forbearance price and floor price for solar RECs for the period 31.12.2014 to 31.03.2017 as under:

	Solar
Forbearance Price	5800
Floor Price	3500

41. It may be mentioned here that the methodology adopted by the Central Commission for determination of the forbearance and floor price in the first order of its kind continued till the last such order issued on 30.12.2014.

42. On 30.03.2017, however, while determining the floor price and forbearance price afresh, in *Suo-motu* Petition no. 02/SM/2017, the Central Commission modified the methodology, and made the fresh determined price applicable to all RECs (pending or new) to be traded in REC market from 01.04.2017 as under:

	Non Solar (Rs/Mwh)	Solar
Forbearance Price	2400	3000
Floor Price	1000	1000

43. The Order dated 30.03.2017 was challenged by some renewable energy generators (including two appellants herein – *Indian Wind Power Association* and *Green Energy Association*), by appeal nos. 105 and 95 of 2017, which were decided by this tribunal eventually by Judgment dated 12.04.2018. Prior to the said final order, this tribunal had declined to stay the decision dated 30.03.2017 of the Central Commission, the order to

which effect was challenged by Civil Appeal nos. 6083/2017 and 633/2017. Hon'ble Supreme Court, by its Order dated 08.05.2017, was pleased to stay the Order dated 30.03.2017 of the Central Commission but later, by Order dated 14.07.2017, modified it and directed as under:

> *"…any obligated entity purchasing RECs at the floor price determined vide the order dated 30.03.2017 shall deposit the difference between the earlier floor price and the present Floor Price with the Respondent No.1, Central Commission during the pendency of the Appeal No. 105 of 2017 before the Appellate Tribunal."*

44. The appeals of the RE generators against the Order dated 30.03.2017 of the Central Commission bringing about a material change of methodology for determination of forbearance and floor prices were dismissed by this tribunal by Judgment dated 12.04.2018. Since arguments based on the doctrine of *res judicata* have been pressed in aid, it would be essential to take note of the relevant portions of the Judgment dated 12.04.2018. We propose to do so in the context of the contentions urged by the appellants assailing the impugned order.

45. The Judgment dated 12.04.2018 of this tribunal dismissing the challenge to the methodology adopted by the Central Commission by Order dated 30.03.2017 was assailed before the Supreme Court by Civil Appeal no. 4801/2018. By Order dated 14.05.2018, the Hon'ble Court admitted the said appeal and directed as under:

"…Interim orders dated 08.05.2017 and 14.07.2017 to continue. However, we clarify that this interim order will not apply to RECs issued on or after 01.04.2017."

46. The Civil appeal no. 4801/2018 brought before the Supreme Court assailing the decision of this tribunal by judgment dated 12.04.2018 repelling the challenge to the Order dated 30.3.2017 of CERC is pending, awaiting final hearing and disposal.

47. After interim Order dated 14.05.2018 of the Hon'ble Supreme Court in Civil Appeal no. 4801/2018, the CERC by a letter issued on 28.05.2018 issued following directions:

"…Non-Solar RECs issued on or after 1.4.2017 shall continue to be traded in accordance with the floor price (i.e. Rs.1000/MWh) determined in the order dated 30.3.2017 in 2/SM/2017."

THE IMPUGNED ORDER

48. On 31.03.2020, the Central Commission initiated fresh process by Petition no. 05/SM/2020 for redetermining the forbearance and floor price for RECs inviting comments/suggestions from the stakeholders by 20.04.2020, proposing as under:

	Non Solar (Rs/Mwh)	Solar
Forbearance	1000	1000

Price		
Floor Price	0	0

49. Some of these appellants are stated to have participated in the exercise by submitting objections/suggestions. Though request was made for the time-lines for the purpose to be extended, *inter-alia,* with reference to the ongoing Covid-19 pandemic conditions, and for public hearing to be conducted, the Central Commission having extended the period for suggestions / comments till 30.04.2020, proceeded to pass the order on 17.06.2020 adopting the forbearance and floor price, as proposed on 31.03.2020, making it effective from 01.04.2017.

50. It is essential to extract certain relevant parts of the said order dated 17.06.2020, impugned by these appeals, as under:

> *"33. The Commission has decided that the revised floor price and forbearance price would be applicable to non-solar RECs issued on or after 01.04.2017, in compliance to the Order dated 14.05.2018 passed by the Hon'ble Supreme Court. There is, however, no interim direction with regard to the floor and forbearance price of solar RECs. Accordingly, the Commission does not find any legal infirmity in determining floor price and forbearance price of RECs."*
> …
> *"35. Several stakeholders have suggested that the regulator determined tariff should be considered instead of the tariff discovered through competitive bidding. Some stakeholders have argued that competitive bidding projects are generally large in size and as such should not be considered as reference for determination of floor price and forbearance price for REC projects which are small in size. A few*

stakeholders have also highlighted the concessions that the RE projects commissioned through competitive bidding mechanism get, e.g. waiver of transmission charges and losses, land allocation etc. Some stakeholders have suggested that the 'Minimum Guaranteed Tariff' approach should be adopted, instead of APPC approach. Other suggestions include consideration of additional parameters such as availability of RECs, Day Ahead Market price, project viability at 80% instead of 70% etc. Several stakeholders have objected to fixing the floor price at zero and expressed concerns that REC traded at floor price of zero would not allow the generators to recover even the charges and fees for participation in REC mechanism. On the APPC figures for States, some stakeholders suggested to use APPC rates for FY 2019-20 instead of FY 2018-19. Some raised concerns around viability of REC projects which are often forced to sell electricity component below APPC rates.

36. The Commission observes that competitive bidding for RE especially for wind and solar technologies has resulted in significant reduction in the cost of RE power. Many State Electricity Regulatory Commissions (SERCs) have done away with the practice of issuing generic tariff for solar and wind including this Commission. Many SERCs have adopted tariff discovered through competitive bidding for RE instead of determining generic tariff especially for wind and solar technologies. Further, the Commission also agrees with the argument that if the RECs are unreasonably priced, the obligated entities would get further disinterested from REC markets. Hence, it is necessary that the floor price and forbearance price of RECs reflect the market realities and must move with the market price of renewable power. Accordingly, the Commission has decided to align the REC floor price and forbearance price with the prevailing market conditions in terms of tariffs, APPC, etc. The Commission believes that proposed floor price and forbearance price balances and safeguards the interest of consumers and investors."

…

40. The Commission would like to reiterate that the methodology of computation of prices of bids have been explained in a footnote to the relevant tables in Annexures 1 & 2 of the order dated 31.03.2020 in this suo-motu Petition.

In the aforesaid Annexures, the range of successful bids for the relevant year have been provided and weighted average winning price of each bid in a particular year has been computed. Thereafter, the weighted averages of all the bids in that year have been taken and a simple average of these bids have been taken as a reference for the particular year. The same principle was used in the 2017 REC Price Order while computing the bid prices of solar bids"

…

61. Thus, the Commission cannot provide for separate floor price and forbearance price for REC projects commissioned after 01.04.2020. Same treatment has to be accorded to all RECs issued after 01.04.2017 and the revised forbearance price and floor price would be applicable to all RECs issued after 01.04.2017."

…

"70. The Commission has taken note of the aforesaid submissions by the stakeholders. It is to reiterate that the present exercise is for the determination of forbearance price and floor price only. Considering above comments is beyond the scope of this Order. However, the Commission would like to reiterate that the staff has been directed to carry out review of the REC mechanism and suggest way forward.

71. Summary of Decisions

71.1. Floor and Forbearance price for Non-Solar RECs shall be as follows:

	Non Solar REC (Rs/Mwh)
Forbearance Price	1000
Floor Price	0

71.2. Floor and Forbearance price for Solar RECs shall be as follows:

	Solar REC (Rs/Mwh)
Forbearance Price	1000
Floor Price	0

71.3. The forbearance price and floor price as above <u>shall be effective from 01.07.2020 and shall remain in force till 30.06.2021 or until further orders of the Commission</u>.

71.4. The Commission <u>directs the Staff to undertake review of REC mechanism in the light of the prevailing market developments, including inter alia review the need for floor and forbearance price for REC mechanism and vintage or technology multiplier</u>.

72. The forbearance price and floor price decided in this order for Non-solar RECs shall be applicable to Non-solar RECs issued on or after 01.04.2017. For Non-solar RECs issued prior to 01.04.2017, the trading shall take place in accordance with Commission's letter dated 28.05.2018 and shall be subject to the final decision of the Hon'ble Supreme Court in Civil Appeal No. 4801/2018.
…"

(Emphasis supplied)

THE CHALLENGE

51. The floor price and the forbearance price, as determined by CERC, from time to time, may be tabulated for *at a glance* scrutiny as under:

	Non-Solar RECs (Rs. / MwH)		Solar RECs (Rs. / MwH)	
Date of the Order	Floor Price	Forbearance price	Floor Price	Forbearance price
01.06.2010	1500	3900	12000	17000
23.08.2011	1500	3300	9300	13400
30.12.2014	1500	3300	3500	5800
30.03.2017	1000	3000	1000	2400
17.06.2020	0	1000	0	1000

52. These appeals challenge the Order dated 17.06.2020 passed by CERC on the grounds that the retrospective revision of the floor and

forbearance price even for RECs issued between 01.04.2017 and 17.06.2020 in a manner contrary to the entire scheme, import and purport of the Electricity Act of 2003, the policies framed there under and the Regulations framed by the Central Commission is unjust, illegal and result of a vitiated process. It is submitted that the Impugned Order is erroneous and has been passed without conducting a prior public hearing, violating the principles of natural justice and without appreciating the facts of the case, in correct perspective.

53. It is the contention that the REC Mechanism envisages for the generators recovery of their cost with sufficient returns by bifurcating the tariff receivable into two components, one being the tariff equivalent to the tariff of conserving electricity sources for the *brown component* of the electricity sold to the distributing licensee of the State, which is equivalent to APPC of such distribution licensee and the second part being the price at which the RECs are to be sold by the generator to the Obligatory Entity of other States, it representing the *green component*. The appellants, *inter alia*, submit that CERC, while determining the floor and forbearance price, relied upon the principles provided under Regulation 9(2) of the REC Regulations and admitted that applying any other methodology would violate the provisions of the REC Regulations and yet by "Scenario 2", in its draft Order dated 31.03.2020, based its computation on tariff adopted through competitive bids which do not fall within any of the criteria

mentioned under said Regulation 9(2) of the REC Regulations. It is submitted that the Commission has failed to duly appreciate that tariff adopted under Section 63 by way of competitive bidding is based on very different methodology and premise as compared to determination of APPC or Preferential Tariff under Section 62 of the Act, the tariff under Section 63 being an unregulated tariff (as the respective Commissions only adopts the same through a competitive bidding process) and so, as per the argument, purposefully left outside the scope and methodologies provided under Regulation 9(2) of the REC Regulations. The appellants also contend that restrictive reliance by CERC upon the tariff adopted by various State Commissions through competitive bidding while determining the Forbearance and Floor Price of the RECs is arbitrary, contrary to and outside the scope of the extant Regulations, the Commission having also failed to consider the actual compliance of the RPO targets set by various State Commissions as was necessary under Regulation 9(2)(d) of the REC Regulations.

54. It is the case of the appellants that the fundamental problem in REC segment of RE is the continuous defiance of the Obligated Entities who are not abiding by the mandate of law towards specified RPO targets some State Commissions not even verifying RPO compliance by the non-DISCOM obligated entities. It is contended that, in such a scenario, by reducing the floor price and forbearance price the CERC has prejudiced the

legitimate interest of the RE Generators in as much as the pending RECs would now be purchased at prices which are much less than the prices at which they would have been originally purchased if the scheme had been implemented strictly, the defaulting Obligated Entities having thereby been rewarded.

55. The appellants also plead that the impugned order is a result of exercise which was flawed since the mandatory consultation with FOR was not done and the requisite data in terms of the guideline in the Regulation 9 was not collected from "*across States in the Country*", no endeavor having been made to gather information as to "*variation*" in the "*cost of generation*" of different renewable energy technologies and in APPC, the "*expected electricity generation*" from RE sources, the "*expected renewable energy capacity*" and the RPO "*targets set by various State Commissions*", the order falling foul of Regulation 9(2).

56. The Respondents defend the impugned order submitting that the change in Forbearance & Floor Price has been necessitated by market changes as the landscape of renewable energy in the country has undergone a massive alteration wherein the renewable energy tariff of solar and wind projects has declined substantially. It is submitted that the CERC has duly complied with the requirements of Regulation 9 (1) and (2) of REC Regulations. For ascertaining the variable cost of generation, the Commission has relied upon "*tariff determined by appropriate Commission*"

or “*bid discovered tariff*”. But from 2017-18 onwards CERC has done away with the practice of issuing generic tariff for Wind (Non-Solar) and Solar power. Thus, the Wind (Non-Solar) and Solar tariff is determined by bid-discovered tariff while SERC determined tariff is utilized for Small Hydro, Biomass and Biofuel/ Bagasse (Non-Solar). It is argued that while computing Floor and Forbearance price, CERC has used APPC and SERC notified tariff for all non-solar renewable energy technologies including bid-discovered tariff for Wind Projects and preferential tariff for small hydro, Biomass and Biofuel Co-generation. It is submitted that the appellants had raised similar contentions in their challenge to the 2017 REC Price Order which were repelled by this tribunal by Judgment dated 12.04.2018. The respondents submit that if the RECs are unreasonably priced, the Obligated Entities would get further disinterested from REC markets and, hence, CERC has deemed it necessary that the floor price and forbearance price of RECs reflect the market realities and must move with the market price of renewable power.

57. In the submission of the contesting respondents (mainly CPPs), the REC Project has two components - Electricity component (the price at which energy is sold in a PPA) & Renewable Energy Certificates (price at which REC is sold in exchange). It is argued that Floor Price of ‘zero’ does not indicate a loss to the seller of the REC, it merely indicating that REC generator is already earning enough profit (PPA tariff). The Floor Price is

determined at zero when the Electricity component earned by the Seller is sufficient to cover the minimum project viability cost as guaranteed under the REC mechanism, even if they do not get any price of REC. The impugned decision is sought to be justified by plea that after taking into account relevant factors, the floor price was ascertained by the Commission to be in the 'negative', i.e. 'less than zero' and, therefore, it was fixed at Zero. It is also argued that such determination does not mean that trading will take place at Zero, since it (trading) can take place at any price between floor and forbearance price. Reliance is placed on the observations of this tribunal in its judgment dated 12.04.2018 to the effect that "*majority of States in the country do not need any floor price support as Minimum Project Viability Requirement is negative in those states*".

58. On the subject of unsold inventory (of RECs), which has been one of the contentions of the appellants, the contesting respondents rely on judgment dated 12.04.2018 of this tribunal submitting that if the prices are kept artificially high then RECs may remain unsold as the Obligated Entities may seek to fulfil their RPO by means other than purchase of RECs and further that since sufficient time is given by the Regulations to RE generators for selling RECs, the certificates may have remained unsold also due to expectation of RE generators for better future prices. Relying upon data on the sale of RECs as against the issuance of RECs during the period FY 2011-12 to FY 2019-20, it is submitted that the RECs consumed

are much more than total RECs issued during the year. It is speculated that on account of non-availability of required number of RECs in the market, the Obligated Entities in certain cases may not have been able fulfil their entire RPOs.

59. It is the submission of the respondents that there is no legal mandate under the Electricity Act or under the Regulations to provide public hearing since Section 62 and 64 do not apply to Determination of Floor and Forbearance price of RECs. The plea is that CERC has followed the principles of natural justice by publishing the Proposal order dated 31.03.2020, inviting comments and suggestions of all stakeholders, the time for which was extended to 08.05.2020 at the request of stakeholders on account of the prevailing circumstances of lockdown due to Covid-19, the grievances about non grant of public hearing having been rejected by the Hon'ble Supreme Court finding no irregularity in the conduct of proceedings upon consideration of application - in Civil Appeal (Diary) No. 22737 of 2018 - seeking stay of the proceedings arising from the Proposal Order dated 30.03.2020 raising the same grounds.

60. We may say here itself that since the plea of denial of public hearing has admittedly already been considered and rejected by Hon'ble Supreme Court, we are not entertaining such argument in these appeals. Our focus would be on the merits of the challenge to the impugned decision on the touchstone of REC Regulations.

Maintainability of appeals

61. Objection to the maintainability of the appeals is raised on the grounds that the Central Commission has exercised its Regulatory/ Legislative jurisdiction while passing the impugned order and that the exercise undertaken by the Central Commission, while passing the impugned order, cannot be termed as undertaken under a dispute adjudicatory function. Reliance is placed on decision of Supreme Court reported as *PTC India Ltd. v. Central Electricity Regulatory Commission* (2010) 4 SCC 603. We may extract the relevant part of the said ruling as under:

> "*55. To regulate is an exercise which is different from making of a regulation. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure taken under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgment of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulations.*

…
65. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a regulation stands on a higher pedestal vis-à-vis an order (decision) of CERC in the sense that an order has to be in conformity with the regulation…
66. While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contract coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margins. That itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.
Summary of our Findings:
92. (i) …
…
(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.
…
(v) If a dispute arises in adjudication of interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however no appeal to the Appellate shall lie on the validity of a regulation made under Section 178.
…"

(Emphasis Supplied)

62. We must reject the contention that the determination of REC Prices cannot be termed to be a tariff determination. As already noticed, the REC Mechanism envisages for the generator's recovery of cost with sufficient returns by bifurcating the tariff receivable into two components, one being the tariff equivalent to the tariff of conserving electricity sources for the brown component of the electricity sold to the distributing licensee of the State (equivalent to APPC) and, the other, the price at which the RECs are to be sold by the generator to the Obligatory Entity of other States. This gives to the orders revising the Floor and Forbearance Prices of the RECs the color of a Tariff Order. There is no doubt that the power of judicial review of a regulation (delegated legislation) framed by a Commission is not vested in this tribunal but we have the necessary jurisdiction, in terms of Section 111, to adjudicate upon an appeal filed by anyone aggrieved from a decision-making process (order) of a Commission or a dispute arising for adjudication of interpretation of a regulation framed by such Commission under the Electricity Act. The objection to maintainability is misconceived and so rejected.

Non-compliance with Regulation 9(2)

63. It appears that in the previous round of challenge to the approach of CERC for determination of floor and forbearance prices by Order dated

30.03.2017, which had become subject-matter of appeal nos. 95, 105 and 173 of 2017, decided by judgment dated 12.04.2018 of this tribunal, one of the grievances was that the CERC had gone by the bid-discovered tariff instead of its own tariff orders. The contentions of the appellants in those proceedings were noted in the judgment dated 12.04.2018 as under:

> "*4.2 The CERC in the Impugned Order has deviated from its usual practice of calculating the floor and forbearance price by taking the CERC benchmark capital cost. CERC in all its previous Orders for determination of floor and forbearance price of RECs has taken into account the tariff determined for Solar PV and thermal plants in its own tariff Orders. The said methodology has been followed by CERC for the past six years and was also used for determining floor and forbearance price in the Previous REC Order.*
>
> *4.3 CERC in the Impugned Order, for the first time, has used Bid Discovered Tariff for all States and Union Territories (UTs) in India. The Appellants have alleged that CERC has failed to provide any cogent reasoning for such a departure and ignored its own Tariff Orders which have been passed for determination of Solar PV and thermal plants and using bid discovered tariff as reference tariff for determining floor and forbearance cost of RECs is in violation of Regulation 9 of the CERC REC Regulations.*"
>
> (Emphasis supplied)

64. It is pointed out that the appellant Green Energy Association, while prosecuting its earlier appeal no. 95 of 2017, had argued (in the written submissions) as under:

> "*6.26 The Central Commission has relied upon the current solar tariff that has been discovered in the auctions conducted during January 2016 to February 2017. This approach is wrong as the Central Commission itself in its order dated 23.08.2011 had rejected the NVVN discovered solar tariff (through bids) and had relied upon the tariff determined by Central Commission in terms of the Central*

Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2010 and the subsequent amendments. However, in the Impugned Order, Central Commission goes back and picks up tariff discovered in auctions. This somersault, particularly when vested rights are affected is not permissible."

(Emphasis supplied)

65. Similarly, the other two appellants (*Indian Wind Power Association* and *Uttar Pradesh Sugar Mills Co-Gen Association*), had pressed their appeals (nos. 105 and 173 of 2017) submitting thus:

"*7.13 This reduction is moreover, also based on a totally new methodology for determination of floor and forbearance price of REC in significant departure to the principle followed uniformly under the previous REC pricing orders.*

7.14 It is the Appellants' contention in these appeals that the reduction of REC pricing by adopting new methodology and making it applicable retrospectively is improper and without considering and / or adhering to the provisions of the Electricity Act, National Tariff Policy and the REC Regulations, which stood acted upon and recognise a vested right in favour of the members' of the Appellants' Association to have their existing renewable energy projects continue to be governed under and/or in terms of the principles followed in earlier REC Pricing Orders dated 01.06.2010 and 23.08.2011.

7.35 The Central Commission has further arbitrarily changed the methodology used for determination of floor and forbearance price which was earlier based on the National RPO target set up under the NAPCC issued by the Government of India, the tariff determined by the Central Commission under its RE tariff Regulations and Average power procurement Cost (APPC) of various state distribution licensees. In the impugned Order dated 30.03.2017 the Central Commission while determining the REC pricing has wrongly considered and used the RE tariff determined by a few state commissions and APPC."

(Emphasis supplied)

66. This tribunal, it is pointed out, had identified the core issue and answered it, by judgment dated 12.04.2018, thus:

> "*Issue 2: Whether change in methodology for determining the floor & forbearance prices, discontinuation of vintage multipliers, etc. is reasonably justified?*
>
> *"The Appellants have repeatedly emphasised that the Central Commission in impugned order has deviated from its usual practice of calculating the floor and forbearance prices considering its own benchmark capital cost without assigning any cogent reasoning. It has used bid discovered tariff in specifying the floor price of RECs. The Central Commission has clarified that a tariff fixation exercise or use of a particular methodology in such an exercise cannot be considered as a representation or a guarantee. In fact the provision in the REC Regulations for specifying floor and forbearance price is discretionary in nature and any change in methodology cannot be termed as a deviation from an alleged promise or representation. Further, the Vintage Multiplier in case of solar was introduced by the Central Commission through its third amendment to the Regulations and was valid up to 31.03.2017. The Appellants were well aware of the timeframe and did not choose to challenge the amendment and now after completion of the statutory period provided in the REC Regulations are claiming vested right. Going through various material placed before us, it is relevant to note that the Central Commission has done away with a practice of issuing the generic tariff for RE projects from 2017-18 onwards and accordingly the earlier practice of using Commission notified tariff as a reference price for determination of floor and forbearance price of REC is of no relevance now. In view of the growing competition and induction of latest technologies, more and more generators are participating in the auctions/bids with considerable reduced cost of generation. Thus, the Central Commission*

in specifying REC prices, has shifted to bid discovered prices in place of earlier generic tariff fixed by it when the RE sector specially solar was in infancy stage. Similar is the case of Vintage Multiplier which was specified based on its necessity under the discretionary powers of the Central Commission. The Central Commission has adequately dealt with these matters in the impugned order with cogent reasoning and we do not find any infirmity or otherwise, unjustness in specifying the floor and forbearance prices of REC and discontinuation of the Vintage Multiplier. [Para 12.9]

"Per Contra, the Central Commission has submitted that it is required to take a holistic view of the market and balance the interest of the stakeholders. In fact, REC is not issued with a fixed price on it, rather it is issued to an eligible entity on the basis of units of electricity generated/consumed from a RE source. The pricing is a market based instrument and governed by the cost, demand and supply of the electricity generated from RES. It would be evident on comparison of REC prices over the years since the inception of REC framework that there has been a consistent downward trend in the REC prices for both solar as well as non-solar. The pricing of RECs is, therefore, non-static and the Central Commission must take into account sector realities. Thus, the Appellants cannot claim a vested right to a fixed floor price. While referring to REC Regulations, it is clear that the Central Commission may provide from time to time the floor and forbearance price taking into account a progressive reflection of the cost of supply of electricity through solar and non-solar sources of renewable energy. As such, the Appellants cannot claim vested right to get a specific floor price beyond the specified control period which ended on 31.03.2017. It has also been added by the Central Commission that suggestions to link the validity of RECs with the viability of the project i.e. to provide for control period for a total life of the projects to enable viability access of the project was

rejected by the Commission as far back as in 2010. It is also submitted by the Central Commission that it has duly examined the viability of solar projects in 17 states by comparing the average bid tariff with the respective states APPC and it has emerged that majority of the States enlisted do not need any floor price support, as Minimum Project Viability Requirement (MVPR) is negative in those States. For example, Madhya Pradesh, the floor price based on MVPR is determined at Rs.0.44/unit and hence, there is sufficient buffer to account for large scale efficiencies. [Para 12.16]

The Appellants have contended that the impugned order passed by the Central Commission is a serious blow to the RE generators and many of them may be on the verge of being declared NPA due to drastic reduction in REC prices. The impugned order has affected the vested rights of the generators and squarely falls under the Doctrine of Promissory Estoppel. They have further submitted that the right to recover tariff for supplied electricity is a right protected under the Statute, once the regulator admits for tariff having not been recovered. It is thus duty of the Regulator to ensure the recovery of tariff for the projects who have participated in the REC scheme. The Central Commission has clarified that it is required to take a holistic view of the market and strike a balance between the interests of various stakeholders. The REC pricing is a market driven instrument and governed by cost, demand and supply of electricity generated from various RE sources. In fact, with this rationale only, the REC prices have undergone a consistent downward trend since the inception of REC framework. Accordingly, the pricing of RECs being dynamic in nature and aligned with sectoral realities cannot be claimed by the Appellants as a matter of vested right to have a fixed floor price. We have gone through the facts and figures presented by the Appellants and the Respondent Commission and note that majority of States in the country do not need any floor price support as

Minimum Project Viability Requirement is negative in those states. For instance, the State of Madhya Pradesh, the floor price based on MPVR is determined as Rs. 0.44/unit which has sufficient buffer as compared to the floor price of Rs.1.00/unit specified by the Central Commission. Another important fact is that among the three routes available for RE generators, the REC capacity is dominated by RE generators operating under CGP and OA route rendering APPC route as the last choice. It may be due to the fact that under the APPC route, the RE generator gets lower tariff than the reference price level under CGP & OA route. This issue of higher realisation of revenue by RE generators by sale/consumption of electricity under OA/CGP route has been raised by different State commissions/stakeholders from time to time. Keeping all these facts in view, we are of the opinion that REC prices being non-static and market driven cannot be claimed as a matter of vested rights by RE generators. [Para 12.17]

After due consideration of oral and documentary evidence available in the file and after careful perusal of the impugned order passed by the Central Commission, we do not find any error or illegality nor the Appellants have made out any case to interfere in the well considered impugned order passed by the Central Commission. It is undoubtedly clear that the generation from RE sources, in its all forms, being environment friendly, is required to be promoted to their fullest potential. The Government has accordingly provided enabling environment for development of RE sources so as to achieve the national commitment for achieving desired percent generation from non-fossil fuels by 2030. The statutory framework created by the Govt. from time to time including the Electricity Act, Electricity Policy, Tariff Policy etc. lays emphasis on the promotion of RE generation. With this background, Renewable Projects Obligation (RPO) has been prescribed to be complied with by all obligated entities in a time bound manner with reference to its growth trajectory in the future. CERC as facilitator has brought out REC Regulations from time to time stipulating the prices of REC i.e. floor and forbearance price. In earlier years of its regulations, the Central

Commission used to determine the REC prices based on its own benchmark capital cost but with the growing competition and induction of efficient & cheaper technology, it has now switched over to the method of specifying REC prices based on the prices discovered from bids and / or auctions. The earlier REC prices used to be higher due to higher generic tariff and higher benchmark capital cost of RE projects. Now, the bid discovered prices of RE generation are lower because of more and more competition. The lower REC prices now stipulated to be applicable from 01.04.2017 is the case for which the RE generators are agitated. The various issues related with the RE generation such as stranded REC inventory, recovery of cost, RPO compliances, market realities, etc. have duly been analysed by the Central Commission in the impugned order with the rationale thereof. It is also relevant to mention that the RE generators have flexibility to sale their power through all the three routes available i.e. OA/CGP/APPC. Keeping all the facts associated with the case in view, we are of the firm opinion that the impugned order passed by the Central Commission does not suffer from any legal infirmity or ambiguity. [Para 12.18]"

(Emphasis supplied)

67. It is the argument of the respondents that the previous round had approved the methodology used and so the issue cannot be reopened.

68. Upon careful appraisal of the arguments which are put forward in the present proceedings, and the nuances of the issues raised in previous round, we find the plea of *res judicata* misplaced. The rule of *res judicata* applies when the subsequent case is (i) between the same parties; (ii) respecting the same issues; and (iii) and on the *same cause of action* [see *Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhoy* 1970 (1) SCC 613 and *Canara Bank v. N.G. Subbaraya Sety & Anr.* (2018) 16 SCC

228]. The following passage from the decision in *Mathura Prasad Bajoo Jaiswal* (supra) should suffice to repel the objection raised before us:

> "***5.*** *But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority,*

nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law."

(Emphasis Supplied)

69. The issues involved in the present proceedings arising from a different cause of action are not focused on the interpretation of Regulation 9 of the REC Regulations but primarily concern certain errors stated to have been committed by CERC in the decision-making process. Illustratively, reference may be made to the submission of the appellants that CERC has proceeded to examine the matter on basis of (as quoted in the impugned order) of the Regulation 9(2) of the REC Regulations as it stood prior to its amendment in 2013 rendering it arguably "*fundamentally flawed*".

70. The judgment dated 12.04.2018 of this tribunal has not yet attained finality. The challenge by second appeals assailing the same is still pending before Hon'ble Supreme Court. More than that, however, it is the material difference in the arguments pressed, as indeed the distinguishing features of the order under challenge before us, which obliges us to consider the contentions of the parties vis-à-vis merits or correctness of the process leading to, and the end-result of the impugned exercise undertaken by CERC, afresh and with open mind, not feeling bound by the dispensation through earlier judgment dated 12.04.2018. If we may add, the previous judgment has not dealt with some of the nuanced arguments raised before

us which we deal in the discourse that follows and, therefore, comes across as *sub silentio*.

71. In above context, we must note that the challenge in previous round - where the methodology adopted by CERC was similar (bid-discovered price rather than the tariff determined) – was mounted primarily on basis of grievances in the nature that the order dated 30.03.2017 of the Commission was incorrect since it reflected "*deviation*" or "*departure*" from past practice wherein the floor and forbearance price was statedly fixed "*by taking CERC benchmark capital cost*" and "*arbitrarily changed*" to reliance on "*current solar tariff … discovered in the auctions conducted*", the latter being a "*totally new methodology*" and adversely affecting the "*vested right*" of the "*existing renewable energy projects*". This tribunal had considered the said appeals and decided the same by judgment dated 12.04.2018 examining the justification or otherwise of "*change in methodology*" by "*discontinuation of vintage multipliers*" and "*usual practice of … considering … benchmark capital cost*". The departure from past methodology was upheld noting certain facts like CERC having "*done away with a practice of issuing the generic tariff for RE projects from 2017-18 onwards*" rendering "*the earlier practice of using Commission notified tariff as a reference price … of no relevance*", approving use of data relating to bid-discovered price since "*more and more generators are participating in the auctions/bids with*

considerable reduced cost of generation", the subject of pricing being "*market based instrument and governed by the cost, demand and supply of the electricity generated from RES*", a "*consistent downward trend in the REC prices for both solar as well as non-solar*" being noticeable "*on comparison of REC prices over the years since the inception of REC framework*", there being no case made out for a "*vested right to a fixed floor price*", the examination of the "*viability of solar projects in 17 states by comparing the average bid tariff with the respective states APPC*" having shown that "*majority of the States enlisted do not need any floor price support, as Minimum Project Viability Requirement (MVPR) is negative in those States*". This tribunal in the said earlier decision also accepted the argument that "*RE generators have flexibility to sale their power through all the three routes available i.e. OA/CGP/APPC*", the Government having "*provided enabling environment for development of RE sources so as to achieve the national commitment for achieving desired percent generation from non-fossil fuels by 2030*", the "*REC prices being non-static and market driven*" since the REC capacity is "*dominated by RE generators operating under CGP and OA route rendering APPC route as the last choice*". Pertinently, there was no argument raised nor scrutiny of the previous order of CERC done from the perspective as to whether the methodology adopted passes the muster of extant Regulation 9(2) of REC Regulations.

72. We find force in the submissions of the appellants that the impugned order suffers from infraction of Regulation 9(2) of RE Regulations. The fundamental error lies in the fact that there is no determination of "*cost of generation*" or expected RE generation capacity or variations therein to justify a fresh determination. The "*cost of procurement*" may be an indicator of the "*cost of generation*" but cannot fully reflect the same if the data respecting the former is gathered from a category that cannot be treated as truly representative of all RE generators.

73. The very premise to go solely by competitive bid-discovered tariff on the ground that CERC and some SERCs have discontinued determining generic tariff for wind and solar RE seems erroneous. Reference may be made here to Regulation 7 of the CERC 2017 RE Tariff Regulations reading thus:

> "*7. Project Specific tariff*
> *a) <u>Project specific tariff, on case to case basis, shall be determined by the Commission for the following types of projects</u>:*
> *i. Solar PV and Solar Thermal;*
> *ii. Wind Energy (including on-shore and off-shore);*
> *iii. Biomass Gasifier based projects; if a project developer opts for project specific tariff;*
> *iv. Biogas based projects; if a project developer opts for project specific tariff;*
> *v. Municipal Solid Waste and Refuse Derived Fuel based projects with Rankine cycle technology;*
> *vi. Hybrid Solar Thermal Power Projects;*
> *vii. Other hybrid projects include renewable–renewable or renewable– conventional sources, for which renewable technology is approved by MNRE;*

viii. Any other new renewable energy technologies approved by MNRE.

b) Determination of Project specific tariff for generation of electricity from such renewable energy sources shall be in accordance with such terms and conditions as stipulated under relevant Orders of the Commission.

c) No annual generic tariff shall be determined for the technologies mentioned in Clause (a) of this Regulation. Financial and Operational norms as may be specified would be the ceiling norms while determining the project specific tariff."

(Emphasis Supplied)

74. The Central Commission may no longer be determining generic tariff, but it was still determining *project specific tariff*, which would be under Section 62 and, therefore, sufficient normative data for determining the cost of generation across the country could still be gathered. Be that as it may, the option to access the requisite normative data from the POSOCO (the Central Agency) or the FOR (the other consultee statutorily mandated) under Regulation 9(1) of the REC Regulations could have been explored. The exercise of determining floor and forbearance price of RECs, based on necessary inputs including *variation* in *cost of generation* need not have been based on cost of procurement (though that may be one indicator). The CERC has the resources to undertake market study, collect and get collated empirical data or details to substantiate the impressions (or assumptions) on market 'reality' on which the proposal was put out and later adopted. But, recourse to such options has been sidelined. In fact, in our reading of the REC Regulations, the general rule is that the price of

REC is to be discovered by trading in power exchange, the determination by CERC of the floor and forbearance price being by way of an exception. For such exception to be applied, the Commission must reach a satisfaction that there is a case made out for its intervention in terms of proviso to Regulation 9(1). As a natural corollary, every time the Commission decides to change the floor and forbearance prices, it must base its determination on market study and pick up the methodology suitable to the prevailing market conditions bearing in mind the objectives of the law and Regulations occupying the field.

75. Though referred to in the setting of the argument of CPPs that the fixation of the floor price at ZERO is reflective of the conclusion of the Commission that there is no need to fix any floor price (given the market conditions), the following passage from Appendix-1 ("*Proposal for Determination of Forbearance Price and Floor Price of RECs*") of the preliminary order dated 31.03.2020 (proposal order) has been relied upon:

> "*4.1.2 Floor Price for Non-solar REC*
>
> i. Floor price is determined on the difference between the project viability requirement and APPC determined for different RE technologies across states. The highest difference for each technology is the Technology Specific Floor Price for each non-solar technology. This Technology specific Floor Price is mapped with the respective capacity share of the technology to arrive at the weighted average Technology Specific Floor Price for each technology.

> ii. This approach for floor price is considered necessary given the current state of demand-supply of REC market. The Commission in its Order dated 30.03.2017, had directed the staff to examine the need of determining the floor price of REC and whether going forward the floor price can be removed. Based on the aforesaid analysis, it is evident that the market has matured and to encourage sale of RECs and promote trade, floor price is no longer required. Accordingly, the Commission has considered Scenario 2 and proposes to remove the floor price. …"
>
> (Emphasis supplied)

76. Curiously, by directions issued in the impugned order dated 17.06.2020, the Commission also directed (vide para 71.4) "*the Staff to undertake review of REC mechanism in the light of the prevailing market developments, including inter alia review the floor and forbearance price for Rec mechanism and vintage or technology multiplier*". This demonstrates that the *review* of the REC mechanism from the particular viewpoint of proposal to remove the floor price by the staff assisting CERC, in terms of directions in order dated 30.03.2017, has not been completed. If the requirement of such review at the staff level was still felt incumbent (and, therefore, reiterated), it is questionable as to why the Commission should have resorted to such radical change without awaiting the result of proper in-house study.

77. Be that as it may, if the Commission was satisfied that the market had matured to the extent that fixing of floor price was "*no longer required*", it being our view that *floor price* and *forbearance price* go together, we

wonder as to why should it (the Commission) persist with intervention by exercising its power under proviso to Regulation 9(1). If the need to determine price does not exist any further for one, there cannot be determination of the other. We reiterate that, under the REC mechanism, given shape by REC Regulations, the general rule is that the market be allowed to have a free hand for discovery of price of REC. The intervention by CERC under proviso to Regulation 9(1) is by way of an exception. The Commission decided in 2010 to intervene, the objective being to protect the competing stakeholders – RE generators and the Obligated entities. It has been revisiting the subject by orders passed *from time to time*. In our view, each time the Commission revisits the subject, it must first compulsorily address the basis issue as to whether there is (continued) need for such intervention. That question precedes the actual determination of floor *and* forbearance price. It seems such threshold scrutiny was not undertaken.

78. We agree with the appellants that CERC has fallen into grave error by relying upon the competitive bid tariffs adopted by some ERCs because of the declining trend of bid discovered tariff on assumption that such phenomena could only be due to a reduction in cost of generation and for the reason that various Commissions have stopped passing generic tariff orders. Such approach is more in breach, than compliance, of Regulation 9(2) of the REC Regulations. The appellants are right in pointing out that Regulation 9(2)(a) by way of a purposeful omission mandates the Central

Commission to arrive at the (normative) "*Cost of Generation*" and not *some tariff* paid to the RE generators. The reference to projects under Sections 62 and 63, and under the REC mechanism, is made only for determining the "*Expected Generation of Power*" under Regulation 9(2)(c). Pertinently, the RE generators under the REC Mechanism must supply, in terms of Regulation 5 of the REC Regulations, their brown component at par with the conventional sources of energy without any concessional or promotional benefits. In fact, the availing of such benefits renders them ineligible for REC mechanism. Therefore, they cannot be compared with the RE generators under the Preferential mechanism or under competitive bidding mode which indisputably receive such concessions or promotional benefits. To complete the discussion, reference is made to exemptions afforded to competitive projects like inapplicability of Inter State Transmission System (ISTS) charges and losses which are generally more than 45% of the bid tariffs (statedly Rs. 1.36 per Unit approximately on average) discovered through various competitive bidding rounds. The error in the calculations is bound to creep in if bid-discovered price of procurement of RE is taken without factoring in the value of concessions availed, as has been done by CERC.

79. The National Tariff Policy, 2016 lays emphasis on the statutory principle that while determining tariff, safeguarding of consumers' interests

alongside recovery of the cost of electricity in a reasonable manner shall be ensured. We may quote the following passage from the said document:

> "*8.2 Framework for revenue requirements and costs*
> *8.2.1 The following aspects would need to be considered in determining tariffs:*
> *…*
> *(7) Section 61 of the Act mandates that the Appropriate Commission, while determining tariff, shall not only ensure safeguarding of consumer's interests but also the recovery of the cost of electricity in a reasonable manner. Section 62 of the Act further provides for periodic tariff adjustment during a year to take care of the variation in fuel price, as may be specified.*"
>
> (Emphasis Supplied)

80. The appellants rightly point out that the price discovery methodology through competitive bidding route functions on the principle of bidders placing the most competitive bid after considering the scale and size of their power projects and individual risk appetite and tends to ignore the above-mentioned objective of the declared State policy. The final price or tariff discovered under competitive bidding route is for specific and individual PPAs which are usually large-scale projects after considering the economies of scale. If the lowest bid made by one of the bidders (which may have ample risk appetite and ability to cross subsidize within its projects) is relied upon while determining the Forbearance and Floor Prices which are applicable to all the RE generators, it would likely have the potential of rendering small scale RE generators unviable and thereby

pushing them out of the RE industry making the dispensation anti-competitive, an anathema to the public policy reflected in the Electricity Act.

81. The 'competitive bid tariff' adopted by various State Commissions cannot be blindly and mechanically taken as a benchmark to accurately determine the variation in the cost of generation of different RE sources of electricity, across the country. Competitive bidding-tariff-based determination of REC prices would lead to an unjust treatment to REC based projects which have foregone the benefits of concessional charges on the basis of REC eligibility criterion established by the Commission. This means that REC based project will get the Floor and Forbearance prices on the basis of projects which are getting such concessional treatment. This leads to a discriminatory situation wherein unequals will be treated as equals. This breaches the rule against discrimination and arbitrariness.

82. The Central Commission has sought to defend the impugned decision submitting that "*the pricing of RECs was computed taking into account the market realities*" and that it (CERC) has "*determined the floor and forbearance price based on the market realities and with due regard to the need for balancing the interest of consumer and investors.*" The following observations in the impugned order, however, reflect a different approach:

"*55. Some stakeholders have submitted that bid prices for projects which are yet to be commissioned have been considered. They have submitted that there have been instances where the bids considered in the tabulation have been scrapped or cancelled by agencies. Some stakeholders have requested to consider Scenario 1 for determining the floor price and forbearance price of Non-Solar RECs while others have suggested to compare the same with existing preferential tariffs determined by SERCs. In general, these stakeholders have submitted that methodology used for determining the floor price and forbearance price of RECs is to be reviewed and the methodology based on market transaction data may be considered as significant market price/ transactions data are available for several years now.*

56. The review of methodology entails an amendment in the REC Regulations which is beyond the scope of this exercise. The Commission has considered a balanced approach to safeguard the interests of the eligible RE generators and obligated entities."

(Emphasis Supplied)

83. It is trite that *unequals cannot be treated equally* [see *U.P. Power Corpn. Ltd. v. Ayodhya Prasad Mishra (2008) 10* SCC 139]. The problem with the reliance on cost of procurement under bid route is that the competitively bid projects are not at all comparable with entities eligible for RECs. As said before, the bid-discovered tariff does not include factors such as transmission losses and charges which, if added, would jack up the cost of procurement, the competitively bid projects, unlike REC projects, being entitled to such benefits as deemed generation/assured offtake, full (100%) grid availability, payment security by Central Govt etc. Having regard to the process involved, the price discovery through

competitive bidding route works on the principle that a bidder would place the most competitive bid factoring in the scale and size of its power project and individual risk appetite. The final price or tariff discovered under competitive bidding route is for specific and individual PPAs which are usually large-scale projects after considering the economies of scale. It cannot be denied that the lowest bid by one bidder with ample risk appetite and ability to cross-subsidize within its projects may not be an accurate parameter to determine the Forbearance and Floor Prices for universal application to all the RE generators, it possibly having the potential to push small scale RE generators out of the RE sector and be anti-competitive and, thus, against the law.

84. As already seen, Regulation 9 of REC Regulations provides for fixing of "*floor price and forbearance price*", should the Commission choose to do so in terms of the discretion given by the proviso, the general rule being that the price of REC "*shall be discovered*" by market in the power exchange where it can be traded. The definition of "*floor price*", as given in Regulation 2(1)(f), clarifies that it is meant to be "*the minimum price*" to be determined by the Commission in accordance with the regulations "*at and above which*" the REC can be traded in the power exchange. The trading may be "*at*" or "*above*" the floor price fixed. Seen in light of the express terms of the said statutory meaning, the determination of the floor price at ZERO makes the entire exercise questionable. The RECs represent the

green component which cannot be recovered if they are expected to be passed on to the obligated entities at ZERO value. Since there is no quarrel with the proposition that the Floor Price is the minimum REC price guaranteed to the RE generator so that its project is viable, fixing it at ZERO makes the working of the REC mechanism lopsided.

85. It was argued by the learned counsel for contesting respondents (representing the cause of the Obligated entities) that the fixing of ZERO floor price is only indicative of the decision *NOT TO FIX* any floor price, reference being made to the (already quoted) observations of CERC in the proposal order (dated 30.03.2017) to the effect that "*it is evident that the market has matured and to encourage sale of RECs and promote trade, floor price is no longer required*". Since no reiteration of this assumption in the impugned order has been pointed out to us, we asked the learned counsel for CERC to confirm if that is how the Commission would also project the impugned decision but did not get any clear reply. We do not find anything in the impugned order for such assumption to be made. That apart, this defence of ZERO determination of floor price, even otherwise, is unacceptable. It bears repetition to note that Regulation 9 of REC Regulations provides for fixing of "*floor price and forbearance price*". The *floor price* is to protect the interests of the RE generators, in compliance with the objectives of the law mandating promotional measures for this sector to be adopted. The *forbearance price*, on the other hand, is to

protect the interests of the Obligated entities such that they are not fleeced adding unduly to the cost of procurement which, in turn, is going to be the burden of the consumer at large whose interests are also to be protected. In this scheme of things, if the Commission intends to exercise its prerogative under proviso to Regulation 9(1), and proceed to determine the prices of RECs, it must fix both the *floor price* as well as the *forbearance price*.

86. It is a settled principle of law that "and" is conjunctive in nature and that provisions separated by the use of conjunction "and" must be read conjointly. In *Hyderabad Asbestos Cement Products and Ors. v. Union of India and Ors*. (2000) 1 SCC 426, the Supreme Court ruled thus:

> *"8. The language of the rule is plain and simple. It does not admit of any doubt in interpretation. Proviso (i) and (ii) are separated by the use of conjunction 'and'. They have to be read conjointly. The requirement of both the provisos has to be satisfied to avail the benefit. Clauses (a) and (b) of proviso (ii) are separated by the use of an 'or' and there the availability of one of the two alternatives would suffice. Inasmuch as cement and asbestos fibre used by the appellants in the manufacture of their finished excisable goods are liable to duty under different tariff items, the benefit of proforma credit extended by Rule 56A cannot be availed of by the appellants and/has been rightly denied by the authorities of the Department."*
>
> (Emphasis supplied)

87. The use of the word "and" between floor price and forbearance price, in the proviso, makes it clear that the Commission is bound by Regulations to fix both floor and forbearance prices. If the legislature had not intended

that both forbearance price and floor price be provided or if the legislature had envisaged a situation where only one can be provided then it would have used word "or" instead of "and". It bears repetition to say that the regulation mandates the determination of "*floor price and forbearance price*". The use of the word "*and*" between "*floor price*" & "*forbearance price*" leaves no scope for the Commission to choose to fix only one of them. If the Commission is satisfied that it must intervene in the market forces, it must do so on both fronts. Fixing the *forbearance price* but declining to do so for *floor price* amounts to pandering to the cause of only one side but not the other. This is neither fair nor just.

88. It is, however, also the argument of the Respondents that fixing the floor price at ZERO does not mean that the RE generators would not get any return on the RECs by trading in the power exchange. The submission is misconceived since the data shown demonstrates that the trading of the RECs has generally taken place at the Floor price, possibly because there has been supply of the RECs more than the demand.

89. It has been pointed out that POSOCO, one of the consultee agencies mentioned in Regulation 9 of REC Regulations, in its Report dated 31.07.2018, had recorded the above, as a fact, as under:

> "*7.3 Regulatory changes in REC Market design*
> *Modification in price discovery methodology and matching rules in Renewable Energy Certificate Market have been*

carried out by the Hon'ble Commission based on the market feedback. The changes carried out are briefly mentioned below

...

ii. During the last few years, in the REC market segment, the supply was much higher than the demand and the market was clearing at the floor price. The algorithm for determining equilibrium price and matching rules for selection of the order/volume in REC market segment was based on "Price time priority", i.e. when more than one order is having the same price, the order placed earlier in time would get the priority. It was observed that during the initial few trading sessions, sellers who placed their bids in the initial period of bidding window only were able to sell the RECs. The REC mechanism also intends to make up the additional revenue requirement for the 'green component' and thus, there was a need for making the mechanism more equitable.

…

14. Challenges and Way Forward

i. RPO Compliance

Non-compliance of the RPO by the obligated entities and subsequent buildup of the REC inventory is a cause of concern for the stakeholders. Therefore, strict enforcement of RPO compliance is sine qua non for vibrant REC market in the country.

As per, Electricity (Amendment) Bill 2014, obligated entities may be mandated to "procure electricity from or any market instrument representing the renewable energy sources for meeting their RPO". The focus on market instrument in the amended bill will also facilitate the purchase of RECs by the obligated entities.

Recently, MNRE has setup an RPO compliance cell, which will coordinate with the authorities concerned for periodic reporting and apprise the authorities for compliance of the RPO. The RPO compliance cell will help SERCs to enforce the compliance of RPO regulations.

ii. Mismatch between Demand and Supply of RECs

In the REC market, supply of RECs is more in comparison to demand. Accordingly, sell bids outnumber the buy bids; therefore, the floor price becomes the market clearing price both for solar RECs and non-solar RECs since June 2013 & September 2012 respectively. This has skewed the discovery of prices of REC at Power Exchange(s). With the

increasing instance of compliance of RPO by the obligated entities, it is expected that price discovery will improve at Power Exchanges i.e. MCP will be more than the floor price of the RECs in future."

(Emphasis Supplied)

90. The validity of the RECs is only for a period of 1,095 days. Therefore, the RE generators whose RECs are on the verge of lapse tend to sell the same at a price lower than the one prevailing on the exchange which, in turn, would further erode its market price. The total elimination of the floor price snatches away the benefit assured by REC Scheme from the hands of the RE generators enlisted thereunder.

91. There is not sufficient data shown to support the contention that there would be no loss to the REC project developer even when the Floor Price is set at ZERO. Reliance on statistics of bid-discovered tariff, treated as the cost of power, without comparing the same with the tariff actually received by the RE generators under the REC mechanism seems misleading. The RE generators under the REC Mechanism are obliged to sell their brown component at par with the conventional sources of energy without any concessional or promotional benefits and cannot be compared with the RE generators under the Preferential mechanism or under the competitive bidding mode which receive various concessions or promotional benefits.

92. This brings us to yet another error committed by the Commission. As has already been noticed, clause (2) of Regulation 9 of REC Regulations mandates that the Commission, in determining the floor and forbearance prices shall be guided, amongst others, by the "*Variation*" in "*cost of generation* (*of different renewable energy technologies*)" as also in "*Pooled Cost of Purchase* (or APPC)", the insistence being on such variations to be examined "*across States in the country*". A fortiori, the data required to be gathered in such respect must pertain to all the States of the Union and definitely not only some of the States, picked up randomly or selectively. The APPC data relied upon by CERC to compare with the '*bid-discovered tariff*' for the conclusions reached by the impugned order is quite clearly incomplete and incorrect. It is not in dispute that in its draft Order dated 31.03.2020, the CERC has considered the APPC Tariff of only a handful of State Commissions, instead of considering the APPC Tariff determined by all the State Commissions, without even attempting to provide a cogent rationale for ignoring the APPC determined by the other State Commissions. We accept the argument of the appellants that simply ignoring a large number of State Commissions and picking up APPC determined by just a handful of other State Commissions is manifestly arbitrary and contrary to the REC Regulations which are binding also on the Commission.

93. It is not a correct argument of the respondents that the challenge by these appeals cannot succeed because the appellants have not questioned the methodology. The appellants have challenged the underlying data relied upon by the Central Commission while determining the REC prices.

94. It is one of the contentions of the appellants that States like Tamil Nadu, Karnataka, Gujarat, Maharashtra and Rajasthan have capped the APPC price and the actual realization in such States to REC based RE generator is far less than the APPC figures considered by the Central Commission in its draft Order. It is averred that the actual realization to the RE generators by way of APPC is far less in these States than the figures which have been relied upon by the Central Commission in its determination. It is the case of the appellants that since certain States have capped their APPC, RE generators in such States do not have the benefit of the dynamic nature of the APPC which increases or decreases due to variation in purchase by the Distribution Licensee from conventional source of power. It is contended that the States in question (which have capped the APPC) have done it under the impression that the balance cost would be recovered by the RE generators through the REC prices. It is argued that ignoring the actual realization to the RE generators while determining the Forbearance Price and Floor Price of the RECs and to further reduce such prices - particularly the lowering of the Floor price to Rs.0/- when the

APPC has been capped by such State Commissions - constitutes a double jeopardy to the RE Generators, wholly contrary to the mandate under Section 66 read with Section 178 of the Electricity Act laying emphasis on promotion of RE based generation in the Country.

95. While there can be no quarrel with the submission that it is critical that the data used for determination of the floor and forbearance price should be realistic, given the course we choose, we do not wish to make any comment on the views canvassed by appellants vis-à-vis the analysis on comparison of APPC rates and actual realization. Suffice it to say that the arguments about the error committed by picking up data without considering the effect of capping and the assumptions on which it statedly has been done are weighty and could not be sidelined. The fact, however, remains that use of sample data from only seven States is a violation of the guiding principles ("*across States in the country*") provided by the Regulations and vitiates the end-product.

96. It does not make any sense to expect the RECs to be traded, sold or purchased *at* ZERO value, particularly when the impugned order applies such determination *retrospectively* to the RECs issued on or after 01.04.2017. But for the impugned order, the said previously issued RECs would command the floor price in terms of the order governing the subject

which the former order is to supersede. In other words, the minimum worth of the existing RECs is taken away and they are as good as rendered worthless papers for no fault of the RE generators.

97. The Central Commission has applied the new dispensation by the impugned order *retrospectively* only to the non-solar RECs and not to the solar RECs. This makes the exercise even more arbitrary particularly as cogent rationale for such distinct treatment must be discernible. The revised Floor price of non-solar REC to Rs.0/MWh even for RECs issued between 01.04.2017 and 17.06.2020 is sought to be justified on the reasoning that the Interim Order dated 08.05.2017 passed by the Hon'ble Supreme Court is not applicable on RECs issued after 01.04.2017. This is also misconceived.

98. The Electricity Act, and the REC Regulations, do not conceive of such retrospective operation of orders on the subject as at hand. The REC framework, as envisaged, is based on the principle that both the components, the brown (electricity generated by the RE generators) and the green (RECs) would be sold contemporaneously. There seems merit in the plea that due to non-compliance of the RPO targets by the Obligated Entities, the recovery of green component (RECs) by the RE generators have been seen generally to lag behind, adding to the reasons for huge

unsold inventory. Applying the lowered floor and forbearance prices *retrospectively* results in a scenario wherein the RECs issued towards a particular APPC tariff would have to be sold at reduced price, creating a viability gap. RE generators which have received RECs towards the electricity sold at much lower APPC tariff cannot be equated with the RE generators which have received RECs towards the electricity sold at much higher APPC tariff.

99. Revising the REC prices retrospectively is unreasonable. The price of RECs fixed earlier took into account their cost of generation under Regulation 9(2)(a) of the REC Regulations at the relevant time. However, applying the reduced price to prior RECs will result in a situation where the old projects in REC mechanism will never recover their cost of generation which is violative of Section 61(h) as well as 61(d) of the Electricity Act and the National Tariff Policy, 2016 which mandate recovery of cost of electricity in a reasonable manner. As pointed out, the National Tariff Policy, 2016 has suggested that the Central Commission ought to provide a vintage based multiplier for the old plants/ projects:

> *"6.4 (1)…*
> *…*
> *(iv) Appropriate Commission may also provide for a suitable regulatory framework for encouraging such other emerging renewable energy technologies by prescribing separate technology based REC multiplier (i.e. granting higher or lower number of RECs to such emerging*

technologies for the same level of generation). Similarly, considering the change in prices of renewable energy technologies with passage of time, the Appropriate Commission may prescribe vintage based REC multiplier (i.e. granting higher or lower number of RECs for the same level of generation based on year of commissioning of plant).”

(Emphasis supplied)

100. Noticeably, in the previous round of appellate scrutiny of the preceding order on the subject also the plea of promissory estoppel was raised by RE generators. Their plea was that if the Central Commission had not fixed the floor price, such generators would not have participated in the REC scheme so as to sell electricity on a real time basis at APPC and recover the renewable energy component of tariff on a deferred basis at the REC floor price. This argument, however, was not accepted in judgment dated 12.04.2018 by this tribunal on the reasoning that there “*cannot be a plea of Promissory Estoppel against legislation, more so against a provision providing discretionary power*”, the provision of Floor Price and Forbearance Price being itself discretionary.

101. Unlike the tone, tenor and effect of the order dated 30.03.2017 under challenge then, the Commission has now (by the impugned order) reduced the price to be reduced to the level of ZERO and made it effective retrospectively. Since this dispensation adversely affects the value of the RECs issued on or after 01.04.2017 and even those issued prior to the

draft order dated 31.03.2020, the grievance founded on doctrines of *promissory estoppel* and *legitimate expectation* cannot be brushed aside. With due deference, we must say that this line of argument of the appellants is not directed, not at least in the proceedings before us, against the legislation or the regulatory framework giving discretionary power to CERC to determine the floor and forbearance prices. The expectation that the RE generators would get their due (towards green component) by sale of RECs at or above the floor price legitimately arises from the decision of CERC to intervene, in terms of the discretion given by the proviso to Regulation 9(1), rather than let the market decide on basis of demand and supply principles. By such intervention, an assurance is held out that CERC intends to ensure, by its determination, that the RE generators would get due and reasonable returns of the cost of generation and the Obligated entities would not be burdened unduly because of the RPO targets. Participation in REC scheme is voluntary. By participating therein, the RE generators expect due returns. The reduction of floor price to ZERO, even for the RECs issued prior to the date of proposal, is breach of the promise held out. This definitely attracts the doctrine of *promissory estoppel.*

102.In *Kusumam Hotels. v. KSEB & Ors.* 2008(13) SCC 213, the Supreme Court held as under:

"21. It is now a well settled principle of law that the doctrine of promissory estoppel applies to the State. It is also not in dispute that all administrative orders ordinarily are to be considered prospective in nature. When a policy decision is required to be given a retrospective operation, it must be stated so expressly or by necessary implication. The authority issuing such direction must have power to do so. The Board, having acted pursuant to the decision of the State, could not have taken a decision which would be violative of such statutory directions."

(emphasis supplied)

103. In *Transmission Corporation of AP & anr. v. Sai Renewable Power Pvt. Ltd. & Ors* 2011(11) SCC 34, it was held thus:

82. The principle of promissory estoppel, even if, it was applicable as such, the Government can still show that equity lies in favour of the Government and can discharge the heavy burden placed on it. In such circumstances, the principle of promissory estoppel would not be enforced against the Government as it is primarily a principle of equity. Once the ingredients of promissory estoppel are satisfied then it could be enforced against the authorities including the State with very few extra ordinary exceptions to such enforcement. In the United States the doctrine of Promissory Estoppel displayed remarkable vigor and vitality but it is still developing and expanding. In India, the law is more or less settled that where the Government makes a promise knowing or intending that it would be acted upon by the promissory and in fact the promissory has acted in reliance of it, the Government may be held to be bound by such promise.

83. It is a settled canon of law that doctrine of promissory estoppel is not really based on principle of estoppel but is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can also be the basis of a cause of action. Even if we assume that there was a kind of unequivocal promise or representation to the respondents, the reviews have taken place only after the period specified under the guidelines and/or in the

PPAs was over. This is a matter which, primarily, falls in the realm of contract and the parties would be governed by the agreements that they have signed. Once these agreements are singed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel."

(Emphasis supplied)

104. Clearly, the impugned decision ignores the public policy and cannot be upheld. In case of retrospective operation, the RE Generators will not be able to receive the minimum price of the green component of the Renewable Power sold by them at par with Conventional Power as assured at the relevant point of time, thereby causing grave loss and injury to such RE Generators. Equity lies in favour of the RE generators.

105. For the foregoing reasons, we find that the impugned order is vitiated since it is in gross violation of the guidance provided by Regulation 9(2) of REC Regulations.

Non-compliance with Regulation 9(1)

106. The case of the appellants founded on plea of non-compliance with Regulation 9(1) of REC Regulations is also resisted by the Respondents on the basis of the adjudication by this tribunal in previous round of appellate scrutiny of determination by CERC of floor and forbearance prices by Order dated 30.03.2017, challenged by appeals (nos. 95, 105 and 173 of 2017),

decided by judgment dated 12.04.2018. The observations in the judgment dated 12.04.2018, as relevant to the subject, are quoted as under:

> "*Per contra, the Central Commission has submitted that it derives its power to provide for floor and forbearance price from Regulation 9 which stipulates that the Central Commission shall determine the floor and forbearance price after consultation with the Central agency and Forum of Regulators and shall be guided, inter-alia, by principles provided under Regulation 9(2). The Central Commission has further brought out that before passing the impugned order, it had sought views, comments, suggestions etc. on the draft order from all stakeholders including State Commissions, Central Agency NLDC etc. The comments received from the Central Agency have been duly recorded in the stakeholder's comments in Section II of the Impugned Order. The relevant extract of Central Agency (POSOCO) is as " POSOCO submitted that revision in REC Forbearance and Floor Price is a much awaited step to increase the redemption of RECs by the buyers." The Central Commission has reiterated that it has passed the impugned order in accordance with the Electricity Act, National Electricity Policy, National Tariff Policy, REC Regulations etc. and as such, the question of any contravention of the existing statutory frameworks does not arise. Moreover, none of the appellants had demonstrated how the impugned order violates the statutory framework including REC Regulation 9(2).* [Para 12.2]
>
> *We have gone through the written submissions of the Appellants as well as the Central Commission and analysed the same with respect to the provisions of the statutory framework namely the Electricity Act, National Electricity Policy, National Tariff Policy, REC Regulations, etc. We have noted the deliberations and analysis brought out in the impugned order dated 30.03.2017 and found that the impugned order has been passed adhering to the REC Regulations and in a transparent manner. The Central Commission has invited views and suggestions from all stakeholders and duly analysed the same before arriving at the concluding remarks. The REC Regulations have been notified by the Central Commission in exercise of its powers under Section 66 read with Section 178(2) (y) of*

the Electricity Act, 2003 and the operating regulation provides as under:-

… [Para 12.2]

It would be evident from the above provisions under the regulations that the price of RE certificates is market driven and dynamic in nature. The fixation of floor and forbearance prices for solar as well as non-solar RE have to be provided by the Central Commission from time to time in consultation with POSOCO, the Central Agency and also viewing into market realities at the power exchange. As mentioned in the statement of reasons issued along with the regulations, the concept of REC seeks to address the mismatch between availability of RE sources and the requirement of obligated entities to meet their RPO. It has been clarified by the Central Commission that the REC mechanism is basically aimed at promoting the development of renewable energy sources and to provide an alternative mode to the RE generators for recovery of their project costs through brown & green components. In view of these facts, we observe that the Central Commission has passed the impugned order in accordance with various statutory framework such as the Act, Electricity / Tariff Policies, REC Regulations, etc. and does not cause to show any violation thereof. [Para 12.4]"

107. Clearly, the need for consultation with FOR was not considered by the tribunal in the previous round. On the contrary, the judgment proceeded on assumption that "*consultation with POSOCO, the Central Agency and also viewing into market realities at the power exchange*" were sufficient tests to be applied, the prime concerns being as to whether the order had been passed "*in a transparent manner*". Since the focus of argument pressed for our consideration vis-à-vis the impugned order is on mandate of proviso to Regulation 9(1) for "*consultation*" also with FOR, a plea not

examined in the previous judgment, we would reject the argument of *res judicata* in this respect as well.

108. The captive power producers, leading the defence of the impugned order, rely on their reply (filed as fifth respondent in first captioned appeal), particularly para 6 (i) and (ii) to argue that there is no case made out of non-compliance with regulation 9(1) of REC Regulations. In the said pleadings, all that has been averred is that in terms of Regulation 9(1), "*the price of an REC shall be as discovered in the Power Exchange*" and that the proviso thereto permits that "*the Commission may, in consultation with the Central Agency and Forum of Regulators from time to time provide for the Floor Price and Forbearance Price separately for solar and non-solar RECs*". Reference is then made to the guiding principles set out in Regulation 9(2). There is no assertion whatsoever that Regulation 9(1) was followed in letter or spirit.

109. As already noted, the proviso to Regulation 9(1) comes into play if the Commission decides to use its discretionary power to determine the floor and forbearance price, rather than leaving it entirely to the discovery of price of RECs at the power exchange. In such scenario, the first step is mandated as "*consultation with the Central Agency and Forum of Regulators*". As also already noted the "Central Agency" referred to in the

proviso is POSOCO which was invited to participate in the exercise leading to the impugned order being passed. The non-compliance is alleged in respect of the requirement to engage "*in consultation*" the other statutory body i.e. the *Forum of Regulators* ("FOR").

110. In *Cellular Operators Association of India & Ors. v. Telecom Regulatory Authority of India & Ors.* (2016) 7 SCC 703, the Supreme Court ruled that where a statute demands transparency and consultation with a specific authority or interested parties, such consultation must be carried out at the time when the proposal is at a formative stage and the authority must give an intelligent consideration and an intelligent response to the comments received:

> "*82. In fact, a judgment of the Court of Appeal in England, being R. v. North and East Devon Health Authority, ex p Coughlan [R. v. North and East Devon Health Authority, ex p Coughlan, 2001 QB 213 : (2000) 2 WLR 622 (CA)] , puts the meaning of "consultation" rather well as follows: (QB p. 258 C-D, para 108)*
>
> *"108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.…"*
>
> *(emphasis supplied)*

No doubt in the facts of the present case, the Authority did hold due consultations with all stakeholders and did allow all stakeholders to make their submissions to the Authority. However, we find no discussion or reasoning dealing with the arguments put forward by the service providers, that call drops take place for a variety of reasons, some of which are beyond the control of the service provider and are because of the consumer himself. Consequently, we find that the conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at.

83. We are cognizant of the fact that ordinarily legislative functions do not require that natural justice be followed. However, it has been recognised in some of the judgments dealing with this aspect that natural justice need not be followed except where the statute so provides.

…

91. In Corpus Juris Secundum (March 2016 Update) it is stated:

> *"Under the informal rule-making requirements of the Federal Administrative Procedure Act, after a federal administrative agency considers the relevant matter presented, it must incorporate in the rules adopted a concise general statement of their basis and purpose. The purpose of the requirement is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's actions. The requirement is a means of holding an agency accountable for administering the laws in a responsible manner, free from arbitrary conduct. The statement is not intended to be an abstract explanation addressed to an imaginary complaint but is intended, rather, to respond in a reasoned manner to the comments received, to explain how the agency resolved the significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. The statement must identify what major issues of policy were ventilated and why the agency reacted to them as it did and should enable a reviewing court to ascertain such matters. The statement must respond to the major comments received, explain how they*

affected the regulation, and, where an old regulation is being replaced, explain why the old regulation is no longer desirable.

Agencies have a good deal of discretion in expressing the basis of a rule. The requirement is not to be interpreted over literally, but it should not be stretched into a mandate to refer to all specific issues raised in the comments on the proposed regulations. Although an agency must genuinely consider comments it receives from interested parties, there is no requirement that an agency discuss in great detail all comments, especially those which are frivolous or repetitive. Although the agency need not address every comment received, it must respond in a reasoned manner to those that raise significant problems, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. Conclusory statements will not fulfil the administrative agency's duty to incorporate in adopted rules a concise general statement of their basis and purpose. The agency must articulate a satisfactory explanation for its action, including a rational connection between the facts it found and the choices it made. Under some circumstance, agencies must identify specific studies or data that they rely upon in arriving at their decision to adopt a rule.

…

94. The finding of the High Court that a transparent process was followed by TRAI in making the impugned Regulation is only partly correct. While it is true that all stakeholders were consulted, but unfortunately nothing is disclosed as to why service providers were incorrect when they said that call drops were due to various reasons, some of which cannot be said to be because of the fault of the service provider. Indeed, the Regulation, in assuming that every call drop is a deficiency of service on the part of the service provider, is plainly incorrect."

(Emphasis Suppled)

111. In In *State of Kerala and Ors. v. Kerala Rare Earth and Minerals Limited and Ors*. (2016) 6 SCC 323, the Supreme Court reiterated the following well-settled principle:

> *"16. It is well settled that if the law requires a particular thing to be done in a particular manner, then, in order to be valid the act must be done in the prescribed manner alone ..."*

112. The Forum of Regulators, constituted under section 166 of Electricity Act has been fully alive to the *pros* and *cons* of the regulations governing REC mechanism and implications thereof for the stakeholders or competing interest groups. Reference has been made to the views formulated by FOR in the past (2009 to 2014). Since the CERC did not solicit views of FOR in the run up to the impugned order it did not have the opportunity to do so at that stage.

113. Section 79(3) of the Electricity Act stipulates that the "*Central Commission shall ensure transparency while exercising its powers and discharging its functions.*" As noticed above, Regulation 9(1) of the REC Regulations stipulates that the Central Commission while determining the REC Regulations shall *consult* with both, the Central Agency (POSOCO) and the Forums of Regulations. The contesting Respondents, relying on *State Bank of Patiala and others vs. S.K. Sharma* (1996) 3 SCC 364, have contended that the *substantial compliance* for consultation with the Central Agency and the Forum of Regulations has been made by the Central Commission, while passing the Impugned Order, as POSOCO and various State Commissions were called upon and had submitted their comments.

This submission is *ex-facie* misleading. There has been no consultation with FOR. The consultation with the SERCs cannot be taken as due compliance with requirement of consultation with FOR. Both are distinct bodies and one cannot be the substitute for the other, particularly as their roles and functions are different. The settled position of law that when a statute provides for a thing to be done in a particular manner it must be done in the manner prescribed and in no other way has been ignored. The test of *substantial compliance* is indeed as to whether prejudice has been caused to the affected party. Since we do find element of prejudice to the cause of RE generators by exclusion of FOR, the plea of *substantial compliance* is found to be specious.

114. The Central Commission has *recorded* submissions of some of the stakeholders, and one of the two mandatory consultees (i.e. POSOCO), but the impugned order does not seem to set out reasons for rejection of some of the important comments, some relevant part of summary of such inputs being as under:

> "*34. Comments on the methodology for computation of floor price and forbearance price*
>
> *Stakeholders Comments*
>
> - *Delhi Electricity Regulatory Commission (DERC) has stated that the Commission while computing the forbearance price and floor price has not considered*

parameters like actual availability of RECs and delay in SCOD of RE Plants whose PPAs have been signed. DERC has requested to consider these parameters for determination of floor price and forbearance price of RECs as these factors play a critical role in meeting RPO for States like Delhi which do not have much RE potential. Without consideration of these parameters for determination of forbearance price and floor price, the current exercise may prove futile.

- *Karnataka Electricity Regulatory Commission (KERC) has submitted that while computing the average bid price, CERC has first computed the average of maximum and minimum bid price under each bid and then, the average of this average of all bid is considered, which is not correct. KERC suggested that for each year, the weighted average of all bids put together should be considered. KERC has also stated that since in computation of floor price and forbearance price, APPC of FY19 is considered, the bid price should also be considered for FY19 only so that the comparison is for the same year.*

…

- *POSOCO has submitted that in previous six months i.e. from October 2019 to March 2020, Solar RECs are being traded at forbearance price which is Rs.2400/-. In such a scenario, reducing the forbearance price may reduce the interest of RE Generating companies to participate in REC Mechanism, which may create shortfall of RECs in the inventory.*

…

Analysis and Decision:

…

38. The Commission has noted the suggestions and would like to reiterate that the principles outlined in Regulation 9(2) of the REC Regulations have been followed while determining the forbearance price and floor price. Adoption of any other parameter(s) would be a deviation from the REC Regulations. The parameters as suggested by the stakeholders tantamount to an amendment in REC Regulations which is beyond the scope of this exercise.

…

67. Comments on Penal Provisions for non-compliance of RPO in extent SERC Regulations:

Stakeholders Comments

- *Delhi Electricity Regulatory Commission has submitted that if there is no floor price of RECs, then the provisions of penalty indicated by DERC in its Regulations, which plays a deterrent role, will fall flat since in absence of any Floor Price, it is difficult to consider the Power Purchase Cost projections towards RPO compliance while determining ARR of the DISCOMS.*
- *POSOCO has submitted that the RPO Regulations notified by the respective SERCs have provisions of linking the default in meeting of RPO with the forbearance price. Hence, reducing the forbearance price may be detrimental to the overall REC Mechanism.*

…

Analysis and Decision:

68. Several stakeholder have pointed out the linkage of forbearance price (and floor price) with penal provisions for non-compliance of RPO in Regulations notified by various State Electricity Regulatory Commissions while ensuring that the same will act as a deterrent against default in RPO. The Commission is of the view that at present RE power can be procured by the obligated entities at significantly low price to fulfil RPO, and as such the floor and forbearance price for REC would have to be aligned to the market realities. Deciding RPOs and providing for deterrence for non-compliance of RPOs is the domain of SERCs and they may, if deemed fit, review the basis of deterrent against default in RPO compliance."

(Emphasis supplied)

115. The process of *consultation* mandated by the Regulations is not an empty formality. The Commission has failed to show, either in the impugned order, or by proceedings drawn anterior thereto, conscientious

consideration of, or sufficient reasons cited for, either accepting or rejecting such comments as noted above. The requirement in Regulations of "*consultation*" with the two specified agencies – POCOSO and FOR – is, as observed in *Cellular Operators Association of India* (supra), a means of holding the statutory authority (CERC) "*accountable for administering the laws in a responsible manner, free from arbitrary conduct*". The ultimate decision of the authority after "*consultation*" mandated by law "*must articulate a satisfactory explanation for its action, including a rational connection between the facts it found and the choices it made*". The impugned order fails to pass this muster as well. We find the observations of CERC vis-à-vis the above-extracted comments of DERC, KERC, POCOSO rather vague.

116. In the above-noted facts and circumstances, we accept the plea of the appellants that the impugned order is vitiated because the CERC failed to abide by statutory mandate of *consultation* with FOR in terms of proviso to Regulation 9(1). This vitiates the exercise rendering it arbitrary. We are of the considered opinion that some of the errors in compliance with Regulation 9(2) of REC Regulations may not have been committed if the Commission had scrupulously abided by procedural requirements of *consultation* in terms of proviso to Regulation 9(1).

CONCLUSION

117. Having regard to the findings returned above, holding CERC in gross violation in the matter of compliance with Regulation 9(1) and 9(2) of REC Regulations in proceedings leading to, and the final result in, the impugned order, the deficiencies being not mere irregularities but illegalities that go to the root vitiating the end-product rendering it arbitrary, the appeals must succeed. Thus, we set aside the order dated 17.06.2020 passed in Petition no. 05/SM/2020, by the Central Electricity Regulatory Commission, revising the floor and forbearance price of solar and non-solar RECs at Rs. 0/MWh and Rs. 1000/MWh respectively.

118. To obviate any confusion, and for removal of doubts, if any, we direct, more as a consequence, and also for the reason that there cannot be a vacuum, that the order(s) governing the subject immediately prior to the passing of the impugned order would stand revived and continue to prevail to regulate the pricing and trading of the RECs so long as a fresh order on the subject is not issued, in accordance with law.

119. We are conscious that as a result of the impugned order being passed, retrospectively tinkering with the pricing of RECs issued on or after 31.03.2017, trading in their respect would have been unfairly and unjustly adversely affected. In order to do complete justice, we also direct that the

RECs which were still valid for trading at the power exchange under REC Regulations as on the date (17.06.2020) the impugned order was passed, and have remained unsold till date, shall continue to be valid and be good for sale or purchase for the then remainder period of their validity, computed with reference to the date of the impugned order, and that the purchase thereof, during the period of such extended validity, by the Obligated entities shall be treated as good compliance with RPO targets. The Central Commission shall issue formal orders to this effect and give the same due publicity for information of all stakeholders within two weeks hereof.

120. The appeals and pending applications are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 09th DAY OF NOVEMBER, 2021.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Judicial Member