



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

Dated: 13-12-2017

Present
Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghunath, Member
Sri P. Rama Mohan, Member

In the matter of 41 Nos. Power Purchase Agreements entered by the Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) with various wind power developers upto end of FY 2016-17

The public hearing has come up for hearing finally on 28-10-2017 in the presence of Sri P. Shiva Rao, learned Standing Counsel for APSPDCL, Sri S.V.S. Chowdary, learned counsel representing (1) M/s. Arkas Energy LLP; (2) M/s. Poonawalla Aviation Pvt Ltd., (3) M/s. Poonawalla Shares & Securities Pvt. Ltd., (4) M/s Cyza chem. Pvt. Ltd., (5) Villos Green Field Farms (6) M/s. Cyrus Poonawalla Family Trust (7) M/s. Poonawalla Estates Stud And Agri Farm Pvt. Ltd., (8) Chanda Investment & Trading Co. Pvt. Ltd., (9) M/s. Adurjee & Bros Pvt. Ltd., (10) M/s. Naukhal Investment Pvt Ltd., (11) M/s. Eenadu Television Pvt. Ltd., (12) M/s. Ushodaya Enterprises Pvt. Ltd [Renewable Energy Division] (13) M/s. Jai Bharat Gum & Chemicals Ltd., (14) M/s. Rajasthan Gum Pvt. Ltd., (15) M/s. Chimique (India) Ltd., Sri K. Ravi Kumar Reddy, Chairman & Managing Director representing M/s. Axis Energy Ventures India Pvt. Ltd., Sri S. Niranjan Reddy, Sr. Advocate, Ms. Puja Priyadarshini, Advocate representing M/s. KCT Renewable Energy Pvt. Ltd., Sri Challa Gunaranjan, learned counsel representing (1) M/s. Mangalam Fashions Ltd., (2) M/s. HC Commercial Ltd., (3) M/s.RSM Estates Ltd., (4) M/s Daulat Financial Services Pvt. Ltd., Sri K. Gopal Choudary, learned counsel representing (1) M/s Sembcorp Green Infra Ltd & (2) M/s. Renew Power Ventures Pvt. Ltd. [M/s.

Molagavalli Renewable Pvt. Ltd], Sri. A. Vishwanath representing M/s. PTC Energy Ltd., Sri. M. Venugopala Rao, Sr. Journalist & Convenor, Centre for Power Studies; Sri. S. Chandramouli representing APSEB Engineers' Association and Sri. S. Prathap representing APSEB Asst. Engineers' Association, learned objectors. No other objectors made any further submissions. After carefully considering the material available on record and after hearing the arguments of all the parties, the Commission passed the following:

ORDER

The Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff determination for Wind Power Projects) Regulations, 2015, Regulation 1 of 2015 came into force on 31-07-2015 and shall remain in force upto 31-03-2020. The Regulation was made applicable to wind power projects commissioned within the State of Andhra Pradesh subsequent to its notification i.e., 31-07-2015. The Tariff Period under Regulation 5 read with Regulation 2 (p) is twenty five years from the date of commercial operation and the Control Period is from 31-07-2015 to 31-03-2020. A single part tariff which is a generic preferential tariff shall be notified by the Commission at the beginning of each financial year in the Tariff Period of twenty five years. Under Regulation 9, all wind power projects shall be treated as 'must run' power plants and shall not be subjected to 'Merit Order Despatch'. Capacity Utilization Factor for the control period was prescribed at 23.5% by Regulation 21. Deviation from Norms in fixing the tariff subject to the deviated tariff not exceeding the levelized tariff calculated on the norms is permitted for the reasons for deviation recorded in writing. The Commission is given the power of relaxation under Regulation 23 and the power to issue Orders and Practice Directions under Regulation 24 and the power to remove difficulties under

Regulation 26. Regulation 27 (ii) states that Model Power Purchase Agreements earlier approved by the Commission shall be applicable to all the wind power projects established since the Regulations coming into force also to the extent of consistency.

2. By Order No.3 of 2015 dated 01-08-2015, the generic preferential tariff at Rs.4.83 ps per unit without A.D. benefit and Rs.4.25 ps per unit with A.D. benefit, was notified for 2015-16. In O.P.No.13 of 2016, the generic preferential tariff for 2016-17 was notified on 26-03-2016 at Rs.4.84 ps per unit without A.D. benefit and Rs.4.25 ps per unit with A.D. benefit.

3. The Chairman & Managing Director, AP Transco addressed the Commission on 30-10-2015 to amend the parameters specified in Regulation 1 of 2015 relating to capital cost, depreciation, return on equity, operation and maintenance expenditure, CDM benefits, subsidy or incentive by the Government, capacity utilization factor, A.D. benefit and rebate.

4. The Commission informed by a letter dated 15-02-2016 that it desired the efficacy of the Regulation to be observed for a reasonably sufficient period of time before any necessary action is taken for amendments.

5. The Southern Power Distribution Company of Andhra Pradesh Limited by letters dated 07-06-2016, 06-12-2016, 20-01-2017, 26-02-2017 & 23-02-2017 submitted forty Power Purchase Agreements with the respective wind power project developers for consent to the Commission.

6. Later, the A.P. Distribution Companies filed O.P.No.1 of 2017 concerning Generation Based Incentive (GBI) requesting to amend the wind generators' tariff orders dated 01-08-2015 and 26-03-2016, passing on GBI amount to AP Discoms so

as to be in compliance with the clause 20 of the Regulation 1 of 2015. O.P.No.1 of 2017 is still pending before the Commission.

7. The A.P. Distribution Companies also filed O.P.No.5 of 2017 to curtail the control period of Regulation 1 of 2015 upto 31-03-2017 and permit the A.P. Distribution Companies to procure power from wind producers from 2018-19 through competitive bidding in consonance with the guidelines of MNRE, Government of India and National Tariff Policy, 2016. That petition is also pending before the Commission.

8. In a letter dated 03-03-2017, the Chief General Manager, APSPDCL requested to permit the distribution companies to withdraw 41 wind power producers' Power Purchase Agreements due for the consent of the Commission without considering them for grant of consent. The capacity utilization factor has become higher due to advancement of technology than what was considered by the Commission in its Regulation or orders and other State Electricity Regulatory Commissions reduced the tariff for wind power projects. The Central Electricity Regulatory Commission in its draft Regulations issued on 16-02-2017 considered only 5.28% depreciation per annum for the first thirteen years and spread the remaining depreciation during the remaining useful life of the projects considering salvage value of the projects as 10% of the project cost. The Central Electricity Regulatory Commission also reviewed the interest on debt due to the interest rates being reduced progressively and the Return on Equity was proposed to be considered at about 14% (post tax). The cost on working capital was also proposed to be reduced accordingly and the capacity utilization factor was proposed to be increased by 3% as the large turbine models with hub heights of around 100 meters led to increase of 6 to 8 % of CUF. Competitive bidding by Solar Energy Corporation of India Limited was stated to have fetched lowest tariff of Rs.3.46 per unit and

hence AP Distribution Companies filed O.P.No.5 of 2017. Mytrah Energy and Inox Wind Infrastructure Services who quoted Rs.3.46 ps per unit in the competitive bidding, entered into Power Purchase Agreements with APSPDCL at preferential tariffs of Rs.4.83 and Rs.4.84 per unit. The higher tariff for AP State is detrimental to the interest of the consumers of the State. The A.P. Distribution Companies entered into an MoU with the Ministry of Power, Government of India and they reached the target of the MoU, the Wind Policy, 2015 and the orders of the State Government. The Commission granted consent to the Power Purchase Agreements with a total capacity of 2043 MW and about 41 Power Purchase Agreements are pending for grant of consent by the Commission. Therefore it has been decided not to purchase power from big generators with whom Power Purchase Agreements were entered into but approval of the Commission was not given. Hence, the distribution companies requested to return 41 Power Purchase Agreements in original without considering grant of consent, except the Agreement with Zindal Aluminum Limited which was already accorded conditional consent.

9. The Commission returned the subject Power Purchase Agreements without considering the same for grant of consent by a letter dated 20-03-2017.

10. The AP Discoms instructed the concerned Superintending Engineers and Chief Engineers by a Memo dated 26-04-2017 not to take joint meter readings for the forty one wind power projects until further instructions from the Corporate Office of Southern Power Distribution Company of Andhra Pradesh Limited, Tirupati.

11. Subsequently, the Southern Power Distribution Company of Andhra Pradesh Limited addressed a letter to the Commission dated 03-06-2017 stating that M/s. Axis Energy Ventures India Private Limited submitted an undertaking dated 22-05-2017 to accept the two Power Purchase Agreements for a total capacity of 210 MW which were returned. The Andhra Pradesh Power Coordination Committee

(APPCC) directed the Southern Power Distribution Company of Andhra Pradesh Limited by a letter dated 30-05-2017 to resubmit the two Power Purchase Agreements dated 30-11-2016 and 23-02-2017 for the consent of the Commission. Earlier, the State Government issued G.O.Ms.No.15 of 2015 dated 27-11-2015 approving a proposal for entering into a Memorandum of Understanding with M/s. Axis Energy Ventures India Private Limited and M/s. Suzlon Energy Limited for development of 4000 MW renewable energy power projects over five years and for a manufacturing facility by M/s. Suzlon Energy Limited. Both the companies entered into a Memorandum of Understanding with the State Government dated 04-12-2015 and a Project Implementation Agreement was entered into on 03-02-2016. A project agreement was entered into on 03-02-2016 with NREDCAP. The Principal Secretary, Energy Department, Government of Andhra Pradesh directed the Distribution Companies to sign the Power Purchase Agreements in respect of 4000 MW renewable energy power by a letter dated 28-03-2016 and the Southern Power Distribution Company of Andhra Pradesh Limited requested the Commission for permission to enter into advance Power Purchase Agreements. Again, the Principal Secretary, Energy Department of State Government by a letter dated 11-08-2016 directed to obtain necessary approvals from the Commission by submitting Long Term Load Forecast Plans, Resource Plan and Power Procurement Plan before entering into Power Purchase Agreements. The Commission informed by a letter dated 02-09-2016 that utilities are at liberty to consider and determine their response and further action in accordance with law keeping in view the Government letters. The Andhra Pradesh Power Coordination Committee in its meetings was stated to have accorded permission for signing Power Purchase Agreements for 210 MW and for execution of plan for another 105 MW in 2017-18. The two companies entered into the Project Implementation Agreement dated 03-10-2016. It was requested,

hence to accord consent in view of the decision and Memorandum of Understanding etc., having been entered into with the prior knowledge of the Commission.

12. The Southern Power Distribution Company of Andhra Pradesh Limited subsequently addressed a letter dated 04-08-2017 stating that an approval was given in respect of M/s. Zindal Aluminum Limited for 25.2 MW in view of the conditional consent granted earlier and the other Power Purchase Agreements were permitted to be withdrawn. Subsequently, there was a joint meeting on 05-06-2017 in which developers agreed to form a small working group and informed the distribution companies for further deliberations on the cost reduction proposals. However, no such proposals were submitted and in the meanwhile M/s. Orange Uravakonda approached the Hon'ble High Court and the Hon'ble High Court directed the Commission to resolve the issue within three months. The projects under forty one Power Purchase Agreements of a capacity of 811.40 MW were already commissioned and the developers were representing to the State Government and the Distribution Companies that they invested around Rs.5000 crores in the most backward districts of Rayalaseema viz., Anantapur and Kurnool leading to generation of employment for several thousands. They claimed that they had to repay the loans taken for investment on the projects and the Principal Secretary, Energy Department in a meeting on 04-07-2017 decided that the wind Power Purchase Agreements already signed may be submitted to the Commission by the Distribution Companies for consent, subject to such generation being within the approved quantum of energy as per the Retail Supply Tariff Order dated 30-03-2017. The Andhra Pradesh Power Coordination Committee and the Distribution Companies decided in the meeting on 13-07-2017 to resubmit the forty Power Purchase Agreements withdrawn earlier and one Power Purchase Agreement entered into with NREDCAP prior to 31-03-2017 subject to the wind power

generation being within the approved dispatch quantity of 6190.56 MU, subject to the outcome of O.P.No.5 of 2017. Therefore, the Distribution Companies requested the Commission to consider the issue covering forty one Power Purchase Agreements earlier entered into by the Distribution Companies and pass orders, subject to the outcome of the petitions and negotiation process with the developers.

13. As O.P.Nos.1 of 2017 and 5 of 2017 for factoring Generation Based Incentive in the tariff and to curtail the control period of Regulation 1 of 2015 respectively are pending in public hearings being held in respect thereof and as the issues involved in processing the request for consent to the forty one Power Purchase Agreements and the two petitions will be overlapping, it was felt desirable that this issue also may be processed through public hearing.

14. The Commission accordingly issued public notice inviting comments/views/suggestions from all interested persons/stakeholders on the request of the Distribution Companies concerning forty one Power Purchase Agreements.

15. Villoo's Greenfield Farms, Cyza Chem Private Limited, Poonawalla Shares & Securities Pvt. Ltd., Poonawalla Aviation Pvt Ltd., Cyrus Poonawalla Family Trust, Poonawalla Estates Stud and Agri Farm Pvt. Ltd., Chanda Investment & Trading Co. Pvt. Ltd., Adurjee & Bros. Private Limited, Naukhal Investment Private Limited, Arkas Energy LLP, Jai Bharat Gum & Chemicals Ltd., Rajasthan Gum Private Limited, Chemique (India) Ltd., Mayank Green Energy, Hi-Tech Systems & Services Ltd., & Sri KPR Infra & Projects Limited, filed identical objections claiming that relying on the Wind Power Policy of Government of Andhra Pradesh and the Andhra Pradesh Electricity Regulatory Commission Tariff Order for FY 2016-17, they set up their respective power projects and signed the respective Power Purchase Agreements with the Andhra Pradesh Distribution Companies and the respective projects were commissioned in March, 2017. The Southern Power Distribution Company of Andhra

Pradesh Limited submitted their Power Purchase Agreements for consent, but they were returned by the Commission without giving an opportunity of hearing to them. Again the Southern Power Distribution Company of Andhra Pradesh Limited submitted these Power Purchase Agreements for consent and the Power Purchase Agreements are not affected by O.P.No.5 of 2017 for curtailment of the control period of the Regulation 1 of 2015 as the Power Purchase Agreements were based on tariff applicable for FY 2016-17. Hence, any consent cannot be subjected to the outcome of O.P.No.5 of 2017. The Ministry of New and Renewable Energy, Government of India observed that the Governments could not go back on contractual agreements and requested the concerned State Governments to take up the matter with the State Electricity Regulatory Commissions respectively for consent and the Principal Secretary, Energy Department, Government of Andhra Pradesh requested the Commission accordingly. The GBI guidelines issued by MNRE clearly indicate that GBI revenue is over and above the tariff determined by the respective State Commissions. The Power Purchase Agreements are adopting the model draft Power Purchase Agreements approved by the Commission and the Commission's order dated 01-08-2014 clearly stated that the model draft Power Purchase Agreements may be adopted for all cases where wind power projects were established pursuant to the order dated 15-11-2012 in O.P.No.13 of 2012 and such agreements in such formats upto 31-03-2015 shall be deemed to have been regulated by the Commission and no separate consent from the Commission shall be required. However, the Distribution Companies concerned are required to file a copy of duly executed Power Purchase Agreements duly certifying that the agreements followed the applicable model of Wind Power Purchase Agreements. Hence, these objectors requested the Commission to give consent to all the forty

one Power Purchase Agreements as per the letter dated 01-08-2014 and clause 27 (ii) of Regulation 1 of 2015.

16. M/s. Axis Energy Ventures India Private Limited claimed that it is related to eighteen Power Purchase Agreements stated in their objections, which are part of forty one Power Purchase Agreements under consideration. The eighteen Power Purchase Agreements were executed in pursuance of the commitment under the Project Implementation Agreement dated 03-10-2016. The Project Implementation Agreement was principally intended to record the intent of the parties to execute Power Purchase Agreements as approved by the Commission from time to time. The entire project capacity of 4000 MW involves an investment of around Rs.28000 crores and generates direct employment to around 18000 persons. Axis Energy has already invested about Rs.2500 crores in implementation of these projects. The eighteen Power Purchase Agreements for aggregate capacity of 336 MW were within the capacity permitted by Andhra Pradesh Power Coordination Committee and these Power Purchase Agreements adopting model draft Power Purchase Agreements approved by the Commission shall be deemed to have been regulated by the Commission and no separate consent from the Commission is required according to the order of the Commission dated 01-08-2014 read with clause 27 (ii) of Regulation 1 of 2015. Thus, the eighteen Power Purchase Agreements deemed to have been approved by the Commission require no further consent. Axis Energy also referred to MNRE's letters. It stated that the Southern Power Distribution Company of Andhra Pradesh Limited which had taken joint meter readings since the commissioning of the project was not processing the invoices due to non-receipt of Andhra Pradesh Electricity Regulatory Commission's consent. It expressed its reservations on the decision of the Commission to invite comments etc., and

requested to issue necessary directions not requiring any further approval but directing release of payments for certified joint meter readings.

17. Eenadu Television Private Limited and Renewable Energy Division of Ushodaya Enterprises Private Limited in their objections stated that they set up their wind power projects based on the Wind Power Policy of the Government and Andhra Pradesh Electricity Regulatory Commission's tariff order for FY 2016-17, signed the Power Purchase Agreements with the Andhra Pradesh Distribution Companies and WTGs were commissioned in March, 2017. The Power Purchase Agreements submitted for consent were returned by the Commission without giving an opportunity to them at the behest of the Southern Power Distribution Company of Andhra Pradesh Limited. Now again the Southern Power Distribution Company of Andhra Pradesh Limited is seeking consent and O.P.No.5 of 2017 has no bearing on their projects with the Power Purchase Agreements based on 2016-17 tariff. Regarding O.P.No.1 of 2017, they stated that they are not claiming a GBI for their projects and hence the outcome of O.P.No.1 of 2017 also has no bearing on them. Hence, they requested for consent to their Power Purchase Agreements.

18. KCT Renewable Energy Private Limited, in their preliminary representation claimed that sufficient details/information was not furnished regarding the basis and breakup of 6190.56 MUs, the fixed CUF of 23.5% being universal for wind producers or only for these 41, status of RPO compliance for five years, minutes of the meetings etc. The forty one Power Purchase Agreements are deemed to have been approved as per the letter of the Commission dated 01-08-2014 and clause 27 (ii) of the Regulation 1 of 2015. The objector referred to the orders of the Commission in O.P.Nos.14 to 25 of 2012 dated 11-08-2014 to contend that explicit consent is not required for wind Power Purchase Agreements executed in the approved model format. Generic tariff is a complete package and piecemeal amendment by modifying

its individual components cannot be done and it cannot be sought to be tried up on the basis of actuals. The decision of the Hon'ble Appellate Tribunal for Electricity in NTPC Ltd. Vs. UPPCL and others reported in Appeal No.148 of 2015 was referred to claim that tariff once fixed on the basis of normative parameters should not be opened even if there is any variation between normative and actual. To the same effect is Gujarat Urja Vikas Nigam Limited Vs GERC reported in Appeal No.279 of 2013. Referring extensively to the Electricity Act, 2003 and Regulation 1 of 2015, the objector contended that restricting the CUF to 23.5% under Regulation 1 of 2015 is not in conformity with the Electricity Act. The Southern Power Distribution Company of Andhra Pradesh Limited is going contrary to the Wind Power Policy of 2015. The objector signed two Power Purchase Agreements with the Southern Power Distribution Company of Andhra Pradesh Limited for 20 MW each and the voluntarily executed agreements cannot be unilaterally given a go-bye by the Southern Power Distribution Company of Andhra Pradesh Limited. In Gujarat Urja Vikas Nigam Limited Vs EMCO Ltd., (2016) 11 SCC 182, the Hon'ble Supreme Court noted that the Power Purchase Agreement does not give any option to the respondent to opt out of the terms of the Power Purchase Agreement and any freedom of contract even for the power producer is extinguished after the Power Purchase Agreement was entered into. The doctrines of legitimate expectation, promissory estoppel and vested rights operate against the Southern Power Distribution Company of Andhra Pradesh Limited and in favour of the power developers. The objector relied on Mahabir Vegetable Oils Private Limited Vs State of Haryana (2006) 3 SCC 620, Appeal No.279 of 2013 of the Hon'ble Appellate Tribunal for Electricity, Delhi Electricity Regulatory Commission Vs BSES Yamuna Power Limited, (2007) 3 SCC 33 and MRF Vs Assistant Commissioner (2006) 8 SCC 702 to discredit the relief sought for by the Southern Power Distribution

Company of Andhra Pradesh Limited and desired the Power Purchase Agreements already approved to be enforced.

19. The Society for Water, Power and Natural Resources Conservation Awareness and Monitoring (SWAPNAM) through its Associate President Mr. P.S. Chiranjeevi desired that allocation of potential sites to developers through competitive bidding may be examined and progressively increased RPPO may be adopted to enable the Distribution Companies to plan for R.E. procurement. As SECI competitive bidding proved that wind tariff of Rs.3.50 is sustainable even for low wind zones, the Distribution Companies may be insisted upon to contract with the wind projects only through competitive bidding. The Karnataka Electricity Regulatory Commission issued orders on 04-09-2017 revising the levelized tariff from Rs.4.50 to Rs.3.74 while highlighting that the new tariff policy dated 28-01-2016 envisages procurement of renewable energy only through competitive bidding. The Commission observed that a Power Purchase Agreement can be enforceable only after approval by the Commission and for complying with the RPPO, a Distribution Company can enter into a Power Purchase Agreement at the generic tariff determined by the Commission which would be generally approved. Karnataka Electricity Regulatory Commission stated that the new tariff of Rs.3.74 is applicable to the projects which were approved but not commissioned and projects which were commissioned but not approved. This Commission revised the RPPO by its orders dated 31-03-2017 and the solar tariff is also reduced to Rs.3.50 per unit now. The Distribution Companies did not evaluate the various options available to them to comply with the RPPO and did not follow the public policy of competitive procurement. Hence, it was requested that all the 41 Power Purchase Agreements be rejected in the energy surplus situation, to avoid Rs.868 crores burden on the consumers.

20. Oranage Uravakonda Wind Power Private Limited in its objections stated that the public notice is not clear about its scope or issues involved. The public notice may be withdrawn in view of the lack of details and transparency in compliance with Section 86 (3) of the Electricity Act, 2003. There is no legal basis or requirement for the public notice or public hearing which are without jurisdiction and what were the Distribution Companies seeking from the Commission is not clear from the letter dated 04-08-2017. The Power Purchase Agreements cannot be discriminated on the basis of consent received or not received and no consent is required under the present legal framework. The Southern Power Distribution Company of Andhra Pradesh Limited cannot resile from its contractual commitments. Orange Uravakonda Wind Power Private Limited filed W.P.No.19688 of 2017 in which the Hon'ble High Court ordered on 16-06-2017 that the Commission should be approached for adjudication of disputes and accordingly O.P.No.36 of 2017 was filed before the Commission, which is pending. The Power Purchase Agreement of Orange Uravakonda Wind Power Private Limited was executed on 31-05-2016 as per the model Power Purchase Agreement format and unconditional commissioning certificates were issued to the wind turbines of Orange Uravakonda Wind Power Private Limited on 26-08-2016, 03-10-2016, 03-11-2016 and 02-12-2016. The project achieved Commercial Operation Date on 28-07-2016 unconditionally. Subsequent Power Purchase Agreements of the Southern Power Distribution Company of Andhra Pradesh Limited were taken on record by the Commission. Orange Uravakonda Wind Power Private Limited was raising regular bills and receiving payments from the Southern Power Distribution Company of Andhra Pradesh Limited till January, 2017 and the Southern Power Distribution Company of Andhra Pradesh Limited approved the assignment of the Power Purchase Agreement to the lenders on 23-07-2016. The Power Purchase Agreement was

submitted to the Commission for information on 07-06-2016 and this capacity was included in the Aggregate Revenue Requirement for FY 2017-18, which was accepted by the Commission. O.P.Nos.1 and 5 of 2017 have no impact on the present consideration. The tariff order of the Commission dated 26-03-2016 is applicable and it cannot be reviewed herein. Orange Uravakonda Wind Power Private Limited was supplying power and the Southern Power Distribution Company of Andhra Pradesh Limited was receiving the same since July, 2016 after execution of the Power Purchase Agreement on 31-05-2016. The Southern Power Distribution Company of Andhra Pradesh Limited was paying for the supplied power as per the invoices at the agreed tariff. While it is not known whether any public hearings were held earlier for grant of consent to the Power Purchase Agreements, the binding and enforceable contract cannot be renegotiated. Orange Uravakonda Wind Power Private Limited has no notice or information of withdrawal of the agreement from the Commission unilaterally and there is no legal basis or procedure for such withdrawal and there is no requirement of consent as per the letter of the Commission dated 01-08-2014 and the order in O.P.Nos.14 to 25 of 2012 dated 11-08-2014. Under the Electricity Act, 2003 and the Regulations made there under, enforceability of the Power Purchase Agreement is not dependent on the approval or the consent of the Commission and the project capacity was already included in the Aggregate Revenue Requirement and accepted by the Commission in its order dated 31-03-2017. As held by the Hon'ble Supreme Court in Union of India Vs Madanlal Yadav (1996) 4 SCC 127, the Southern Power Distribution Company of Andhra Pradesh Limited cannot take advantage of its own wrong. The Hon'ble Supreme Court reiterated the principle in K.P. Singh Vs State of Bihar (2007) 11 SCC 447. The capacity is within the RPP0 limit of the Southern Power Distribution Company of Andhra Pradesh Limited as evident from NREDCAP letter dated 16-12-2016. As

held by the Hon'ble High Court of Delhi in Raghunath Rai & another Vs Jageshwar Prashad Sharma & another, an agreement cannot be avoided on the own ipse dixit of a party for nonperformance of the terms on his part and under the guise of consent, tariff cannot be reopened. What cannot be done directly cannot be done indirectly as held by the Hon'ble Supreme Court in Cine Exhibition Private Limited Vs Collector (2013) 2 SCC 698. The legitimate expectation of a developer to get the tariff fixed by the Commission cannot be negated in opposition to the electricity law and the policy of the Central and the State Governments. The tariff determined by the Commission cannot be under negotiation and Orange Uravakonda Wind Power Private Limited is entitled to specific performance of its contract. Hence, consent be granted unconditionally at the tariff applicable.

21. Sembcorp Green Infra Limited in its objections stated that the Power Purchase Agreement signed by GIWSL for 49.5 MW capacity on 18-02-2017 with the Southern Power Distribution Company of Andhra Pradesh Limited is well within the electricity regulatory framework and strictly as per model Power Purchase Agreement preapproved by the Commission. The regulations or the agreement did not talk about any requirement of consent or approval from the Commission except as stated in the letter dated 01-08-2014 to keep the record with a copy of duly executed Power Purchase Agreement being filed. GIWSL is supplying energy to the Southern Power Distribution Company of Andhra Pradesh Limited from their 49.9 MW Kararikonda wind power project since March, 2017 and raised invoices amounting to Rs.201.54 millions. Hence, the Southern Power Distribution Company of Andhra Pradesh Limited be directed to comply with its obligation under the agreement and release the amount against the pending invoices.

22. Renew Power Ventures Private Limited in its objections referred to Regulation 1 of 2015, the two tariff orders under it, the approved model Power Purchase

Agreements and absence of any requirement for specific approval of such agreements in terms of the model Power Purchase Agreements. The tariff orders have become final and binding on the Southern Power Distribution Company of Andhra Pradesh Limited and the grounds for withdrawal stated in the letter dated 03-03-2017 did not relate to the legality and validity of the Power Purchase Agreements. Significant capital was invested in the project, both parties are estopped from going back on their promises when both acted upon the same. The principle was clearly upheld by the Hon'ble Supreme Court in Monnet Ispat and Energy Limited Vs Union of India (2012) 11 SCC 1. O.P.Nos.1 and 5 of 2017 are independent events.

23. PTC Energy Limited in its objections stated that relying on the Wind Power Policy of the State Government and Andhra Pradesh Electricity Regulatory Commission tariff order for FY 2016-17, they set up four wind power projects in Kurnool and Kadapa districts with an aggregate capacity of 188.8 MW commissioned before 31-03-2017. The Power Purchase Agreements were returned by the Commission without giving the developers any opportunity of hearing and O.P.No.5 of 2017 does not apply as the tariff applicable is as in the FY 2016-17. The Government of India and the Government of Andhra Pradesh desired not resiling from contractual agreements and the project has considered the revenue stream coming from GBI. As per GBI guidelines of MNRE, the Power Purchase Agreements are as per the model Power Purchase Agreements not requiring any separate consent and hence consent for all the forty one Power Purchase Agreements was requested to be given.

24. DINDORE Winds in their objections stated that if the Commission is accepting the proposal of the Southern Power Distribution Company of Andhra Pradesh Limited and is conducting public hearings, it brings lot of uncertainty with far reaching

implications on future investment. When there was a clear practice of model Power Purchase Agreement not requiring prior consent, this process of public hearing made the entire credibility of the regulatory process questionable by the bankers/financial institutions and investors. This regulatory uncertainty in a capital incentive industry will affect the viability of the developers, projects and the financial institutions. There cannot be any discrimination between different Power Purchase Agreements governed by same regulations in the procedure for consideration and this is in spite of a direction from a State Government to approve these Power Purchase Agreements on MNRE direction. In view of Regulation 1 of 2015 and the two tariff orders, the public hearing is bad in law and there is no requirement under law to give consent to the Power Purchase Agreements. Section 21 (5) of the A.P. Electricity Reform Act, 1998 is absent in the Electricity Act, 2003 and the Southern Power Distribution Company of Andhra Pradesh Limited did not challenge the regulation or tariff orders. The Power Purchase Agreement is a binding and enforceable contract. The arbitrary conduct of the Southern Power Distribution Company of Andhra Pradesh Limited dishonouring the Power Purchase Agreements is invalid and O.P.Nos.1 and 5 of 2017 are independent events. Inviting public hearing on such morphed issues will start a wrong practice in precedent and hence the proceedings may be quashed and the Power Purchase Agreement already approved by the Commission may be honoured by releasing the amounts against pending invoices.

25. Mangalam Fashions Limited, H.C. Commercial Limited, R.S.N. Estates Limited and Daulat Financial Services Private Limited in their objections reiterated similar contentions as others that their projects having been commissioned on 31-03-2017 and their Power Purchase Agreements having been entered on 20-02-2017, the attempt to renegotiate the tariff under the guise of the consent is impermissible and the Southern Power Distribution Company of Andhra Pradesh

Limited is not accepting the invoices for the energy supplied and not making payments for the same. The conditions proposed by the Southern Power Distribution Company of Andhra Pradesh Limited are extraneous and these objectors are not claiming GBI for the projects relating to which the Power Purchase Agreements are entered. Hence, O.P.Nos.1 and 5 of 2017 have no relevance to them. However, subsequently these objectors applied on 25-09-2017 to IREDA for registration under GBI scheme.

26. Amrit Bottlers Private Limited in their objections stated that they set up a 2 MW power project relying on the Wind Power Policy of the State Government and the tariff order of the Commission for 2016-17. They entered into a Power Purchase Agreement with AP Discoms on 20-02-2017 and the wind turbine generator was commissioned on 31-03-2017. Their Power Purchase Agreement shall not be affected by O.P.No.5 of 2017 as it pertains to 2016-17 and as they did not claim any GBI for their project, the outcome of O.P.No.1 of 2017 is also inapplicable to them. Hence, they requested for consent to their agreement.

27. Bommidala Enterprises Private Limited in their objections raised identical contentions and stated that their wind power plant is also of 2 MW with a Power Purchase Agreement executed on 16-02-2017 and the plant commissioned on 31-03-2017.

28. Adani Green Energy Limited in their comments stated that tariff discovered through a competitive bidding elsewhere in the country should not be applied to Andhra Pradesh projects as there are various causes for quoting a lower tariff in the competitive bid referred to. The projects are of the size of 250 MW each and economy of scale led to a tariff of Rs.3.46 ps kWh. Generic tariff determined by the Commission on state specific parameters and small project size cannot be compared with a project specific tariff. Most of the bids are from Tamil Nadu where the PLF is

very high and only 4 were successful bidders. There was no bidder from Andhra Pradesh and all high wind sites of Andhra Pradesh were exhausted. SECI projects are proposed to be connected with ISTS and evacuation of 250 MW through 220 kV DC line will reduce overall costs. Under cost plus regime, developers are forced to invest in the small size projects located in remote areas with locations for substations far off. ISTS connected projects have no risk of backing down due to transmission constraints or grid unavailability. Cost plus projects connected with State grid face backing down on regular basis adversely impacting the revenue. The payment security mechanism through power trader is suitable with the developer entering into a contract with the power trading agency. The commissioning schedule is more convenient than for developers under cost plus regime and the factors cannot be compared regarding different projects. Any revision or revocation or renegotiation of Power Purchase Agreements has negative consequences. The Indian Banks Association in their communication dated 09-08-2017 raised concerns about cancellation or renegotiation of signed agreements and the projects will become unviable if the contracted price is back tracked. The Indian Banks have assisted in investments of lakhs of crores of rupees and the Southern Power Distribution Company of Andhra Pradesh Limited cannot cancel or renegotiate the terms of signed Power Purchase Agreements. The Ministry of New and Renewable Energy addressed a letter dated 21-08-2017 about State Commissions not providing consent to wind power projects leading to an atmosphere of uncertainty. The Ministry requested the State Governments to issue directions to the State Commissions for grant of consent under Section 108 of the Electricity Act, 2003. The delay in consent will have a direct impact on the economic viability of the projects. The MNRE also issued a letter on 23-08-2017 that for 2017-18 and 2018-19 wind power should be procured at Field In Tariff (FIT). The Karnataka State Electricity Regulatory

Commission issued a generic tariff order for wind power projects dated 04-09-2017 curtailing the control period of the earlier tariff order and re-determining the generic tariff parameters. This action is prospective and projects commissioned within the time line of the Power Purchase Agreement should be protected. The Capacity Utilization Factor (CUF) increased due to change of technology and wind turbine design and the CUF fixed by the Commission has to be changed. The CUF of Andhra Pradesh is lower by 10 to 15% than SECI projects of Gujarat and Tamil Nadu.

29. The APSEB Engineers' Association in their objections about the Power Purchase Agreements being withdrawn and resubmitted stated that the stoppage of supply to Telangana State resulted in 459 MW net off power remaining with Andhra Pradesh and the wind power need not be purchased, imposing huge burden on the consumers. In a meeting held by the Principal Secretary, Energy on 27-02-2017, it was decided that there shall not be any further Power Purchase Agreements with wind developers until a midterm review by the cabinet. Any sudden fall or rise of wind and solar power will cause severe grid disturbance increasing exorbitantly the deviation settlement mechanism charges and penalties. The penalty as per CERC Regulations is heavy and as wind and solar units are must run units, AP Genco thermal stations are backed down. AP Genco cost per unit has increased and a provision has to be made in the tariff order to compensate these aspects. The damage to AP Genco units due to haphazard operation is putting psychological pressure on the employees of AP Genco. AP Grid has 5800 MW of renewable energy which is out of proportion being 77% of the total energy demand. The grid is becoming unstable and hence the Association desired approval of these 41 Power Purchase Agreements to be rejected.

30. The APSEB Assistant Engineers' Association in its objections stated that the Southern Power Distribution Company of Andhra Pradesh Limited has a surplus of 10486 MU for 2017-18 with 17.56% of non-solar non-conventional energy share. Wind power itself is 16.34% at 6191 MU with a higher tariff. This wind power is hence unnecessary and in fact CUF of wind mills has increased and cost of power generation is in down trend. The grid is suffering instability imposing unexpected load reliefs due to the volatile nature of non-conventional energy and it is not advisable to inject it more. The Southern Power Distribution Company of Andhra Pradesh Limited has surplus of 14053 MU for 2018-19 and there is no need to purchase power from these 41 wind power developers.

31. The Wind Independent Power Producers Association (WIPPA) in their suggestions stated that the parameters having been fixed by Regulation 1 of 2015 and the two tariff orders, calling for a public hearing to discuss the same again retrospectively is unnecessary and bad in law. No separate consent from the Commission is required for an agreement in the approved model format. The Southern Power Distribution Company of Andhra Pradesh Limited did not challenge the regulation or the tariff orders in spite of participating in the process and it cannot seek any review under the guise of consent. The other grounds raised by the Association are identical to those raised by others and it stated that till the tariff order was revised by the Commission to the level of Rs.4.70, there was negligible renewable capacity addition in the State of Andhra Pradesh. Hence, it sought for compliance of the contractual obligations by the Southern Power Distribution Company of Andhra Pradesh Limited and release of amounts as per the pending invoices.

32. The Indian Wind Turbine Manufacturers Association in its comments stated that a decision herein will have a significant bearing on the viability of wind power

projects and overall investors' sentiments. MNRE addressed a letter dated 21-08-2017 desiring State Electricity Regulatory Commissions to give consent to wind power projects commissioned before 31-03-2017, if necessary by the State Government issuing directions under Section 108 of the Electricity Act, 2003. The result of O.P.Nos.1 and 5 of 2017 can only be prospective. The quantity of wind power procurement cannot be restricted and the WEGs subjected to back down should be compensated calculating the loss of generation at the normative CUF based on the Power Purchase Agreements which has to be included as an additional clause in the Power Purchase Agreement. Similarly, in MNRE draft guidelines, a clause relating to payment of security should also be included.

33. The Indian Wind Power Association in their representation reiterated the same views and requested the Southern Power Distribution Company of Andhra Pradesh Limited to be directed to follow Regulation 1 of 2015 and release the pending payments for the energy supplied.

34. Sri M. Venugopala Rao, Senior Journalist and Convenor, Centre for Power Studies, Sri Ch. Narasinga Rao, State Secretariat Member, CPI (M), Sri Penumalli Madhu, State Secretary, CPI (M), Sri A. Punna Rao and Sri B. Tulasi Das in identical objections stated that withdrawal and resubmission of the Power Purchase Agreements exposes the failure of the powers that be to take timely and prudent decisions. Commission in the tariff order for 2017-18 determined availability of a surplus of 12013.95 million units which would involve an avoidable burden of Rs.2102.44 crores at Rs.1.75 per kWh towards payment of fixed charges. In the same tariff order, the Commission approved NCE of 10316.46 MU, which is 20.60% of approved sales against the RPPO of 9% for the year 2017-18. Though the Commission approved the Power Purchase Agreements of a capacity of 2403 MW of wind power, it approved energy dispatch from wind power to a tune of 6190.56 MU.

Such approval is imprudent and detrimental to larger consumer interest. Generic tariffs for wind power were fixed *suo motu* without factoring the GBI, allowing generators to unduly pocket the same. Again generic tariff was fixed for 2017-18 in O.P.No.5 of 2017, though O.P.No.5 of 2017 is already pending. This was in spite of the fact that auction by Solar Energy Corporation of India fetched lowest tariff at Rs.3.46 kWh. The urgency in issuing such orders *suo motu* is unexplained. The subject petition should be kept pending till the disposal of O.P.Nos.1 and 5 of 2017. If consent is given to the Power Purchase Agreements, availability of NCE will be increased to 11986.81 MU and surplus power to 13684.30 MU. The difference between the tariff fixed by the Commission and the tariff fixed by SECI will involve a difference of Rs.230.46 crores per annum and Rs.5761.50 crores for 25 years additionally. For purchasing wind power generated with a claimed investment of Rs.5000 crores, the Distribution Companies have to pay Rs.20207 crores during 25 years and in spite of threefold increase of stub height and consequently the energy yield and power generation taking annual CUF to 30% or more, the reduced capital cost is not taken into consideration to reduce the wind power prices. It is strange that the Commission issued orders fixing generic tariff for wind power without any hearing or public hearing and not considering the falling prices of wind power and wind turbines. Responsibility of the powers that be and the Commission for the adverse consequences cannot be brushed aside and the approvals/consents by the Commission were without taking a holistic and objective view. The present public hearing cannot undo the irreparable damage done to the larger consumer interest on a long term basis. The Karnataka Electricity Regulatory Commission took a pro-consumer initiative *suo motu* reducing the tariff for wind power from Rs.4.50 ps per unit to Rs.3.74 ps per unit in its order dated 04-09-2017. Karnataka Electricity Regulatory Commission made detailed observations applying the revised tariff from

the date of the order, restricting tenure of the Power Purchase Agreement to 20 years etc. It observed that any material change in the circumstances and parameters effecting generic tariff already determined is a ground for curtailment of the existing control period and redetermination of the generic tariff. Avoidable burden is going to be imposed on the consumers. Promoting projects with lower CUF will not serve public interest. The Commission can revisit the generic tariff at any time and the present exercise is within its powers. A Power Purchase Agreement becomes enforceable document only on approval by the Commission. There is no legitimate expectation in law or fact involved and the Commission is empowered to revise any control period for valid reasons against which there can be no estoppel. Therefore the objectors requested to keep this matter pending till the orders on O.P.Nos.1 and 5 of 2017, reject consent for the said 41 Power Purchase Agreements, direct the Distribution Companies not to enter into new Power Purchase Agreements with generators of non-conventional energy including wind power, dispense with the practice of determining generic tariff for wind power and make competitive bidding mandatory for procurement of the same and make it obligatory for the Distribution Companies to submit the Power Purchase Agreement before commencement of the projects.

35. One Sri A. Vishwanath, an Engineer associated with wind energy sector, in his submissions referred to various developer risks due to uncertainties in wind forecasts, payment delays by Distribution Companies, arbitrary back down of renewable projects in spite of must run status without any compensation, absence of any concept of fixed charge, increased regulatory standards for renewable projects and projections vis-à-vis actual yielding from projects. He pointed out that in the recent wind season, the entire capacity of wind energy that could be harnessed was only 75% of 6190.58 MU as against the installed capacity of about 3800 MW.

Hence, absorption of additional capacity from these 41 projects is not a huge concern.

36. An unnamed industry well wisher sent a letter dated 22-11-2017 stating that the unprecedented move to introduce competitive bidding for wind power projects caused huge damage and only 2 bids were announced for 1000 MW each in the current financial year. The State Governments stopped signing Power Purchase Agreements at Field In Tariff. The industry news is that this Commission will approve 6000 MWs in Andhra Pradesh to Suzlon under FIT route. This is favouring one company and such discrimination amounts to favouritism. Hence, he requested to provide an equal opportunity for all the manufacturers and investors. Hence, no permission or ratification of any power sale agreement should be granted to Suzlon or its customers.

37. The letter from the National Solar Energy Federation of India to the Principal Secretary, Energy of the State Government was communicated to the Commission in which the Federation complained against cancellation of their commitments by some State Distribution Companies for solar projects awarded earlier at higher tariffs due to downward trend in the tariffs of solar projects in the recent past. The projects become unviable when they were implemented at higher cost in the past and some State utilities are backing down the projects in spite of their must run status. The payment for solar power is also getting delayed and hence the Federation desired that the Power Purchase Agreements should not be so tampered or revised. The Federation hence requested against cancellation or renegotiation of the Power Purchase Agreements and also that the developers should not be pressurized to voluntarily offer reduction in tariff.

38. The Indian Banks Association represented to the Ministry of Power through a letter dated 09-08-2017 on similar lines claiming the actions to be in violation of

National Policy and the aggressive plans of Government of India for capacity addition in renewable sector will be adversely affected. Hence, the Banks Association also desired renewable power to continue to have must run status without any cancellation or renegotiation of the Power Purchase Agreements or tariffs.

39. The Southern Power Distribution Company of Andhra Pradesh Limited in its response to the objections of Sri M. Venugopala Rao and others and SWAPNAM stated that the 41 Power Purchase Agreements were submitted for consent subject to dispatch of wind power being regulated to the extent of the approved quantum of energy of 6190 MU for 2017-18 and also subject to the outcome of the petitions and negotiation process with the wind developers. The Distribution Companies had also requested for factoring the GBI in the tariff and the Distribution Companies would not have any additional burden. The payment is restricted to normative CUF of 23.5% mentioned in Regulation 1 of 2015 and the Distribution Companies also sought for amendment in Regulation 1 of 2015. Second phase of bidding by SECI for wind power projects realized the tariff at Rs.2.64 ps per unit. Karnataka Electricity Regulatory Commission also adopted the lower tariff and all the relevant orders/documents will be placed before the Commission.

40. The Joint Secretary, Ministry of New and Renewable Energy, Government of India addressed the State of Andhra Pradesh among others in his letter dated 21-08-2017 about some SERCs not according consent for wind power projects commissioned before 31-03-2017 for which Power Purchase Agreements have already been signed. He opined that this creates uncertainty in the wind sector and going back on contractual documents may not be appropriate. Further the Vice Chairman, Nitiyaayog reiterated that Governments should not go back on contractual agreements. He further requested State Commissions to be approached for consent

and desired that State Governments should issue directions to the Commissions under Section 108 of the Electricity Act, 2003. The Principal Secretary, Energy, Government of Andhra Pradesh communicated the letter to the Commission with his letter dated 29-08-2017 requesting for necessary action as per that letter.

41. There was another letter from the same Joint Secretary, Government of India dated 23-08-2017 about the bids for wind power being closed at a record low tariff of Rs.3.46 ps per unit. The Ministry of New and Renewable Energy desired that during the transition period from Field In Tariff to competitive bidding, the States continue to procure wind energy for fulfillment of their non RPO requirement, if such power is available at a reasonable price determined by the appropriate Commissions. This letter was also communicated again by the Principal Secretary, Energy of State Government to the Commission for necessary action.

42. Karnataka Government have addressed that State Electricity Regulatory Commission on 28-08-2017 to consider the wind projects commissioned before 31-03-2017 for which Power Purchase Agreements have already been signed according to the advice given by the MNRE.

43. The Indian Power Association enclosed a copy of news report in Economic Times dated 28-11-2017 with their letter dated 30-11-2017 with reference to Karnataka Electricity Regulatory Commission's order dated 04-09-2017 revising wind power tariff to Rs.3.74 ps per unit from Rs.4.50 ps per unit and the later clarification issued by that Commission. The news report states that the Karnataka Electricity Regulatory Commission is evaluating each project on case by case basis. The news report referred to the order of the Commission dated 04-09-2017 reducing the tariff, the directions of the Karnataka Government under Section 108 of the Electricity Act, 2003 to approve the Power Purchase Agreements signed and projects commissioned before 31-03-2017 at the old rate of Rs.4.50 per unit, objection by the

Commission that the same is not in public interest and the Karnataka Commission finally commencing approval of the old Power Purchase Agreements at old tariffs.

44. Apart from oral arguments advanced by the learned counsel for parties and some stakeholders, written submissions were made in writing by some and the entire material on record is the subject of the present consideration.

45. The point for consideration is the manner in which the subject wind Power Purchase Agreements have to be justly, fairly and reasonably considered on merits in fact and law and in the best interests of the power sector, the utilities and consumers/stakeholders in the State of Andhra Pradesh.

46. The Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of tariff determination for wind power projects) Regulations, Regulation 1 of 2015 apply to the wind power projects to be commissioned within the State of Andhra Pradesh for generation and sale of electricity wholly or partly to the distribution licensees within the State of Andhra Pradesh subsequent to the date of notification of the Regulations i.e., 31-07-2015 and where tariff is to be determined by the Commission under Section 62 read with Section 86 of the Electricity Act, 2003 as per Regulation No.3. That the subject 41 Power Purchase Agreements fall within the ambit and scope of Regulation 1 of 2015 is not in dispute. Regulation No.4 makes the Control Period under the Regulations end by 31-03-2020 and the Tariff Period was stated by Regulation No.5 to be equal to the useful life of the project defined as 25 years from the date of Commercial Operation by Regulation No.2 (p). Hence, the proceedings for determination of generic preferential tariff under Regulation No.6 will determine the tariff for the entire duration of the tariff period. Regulation No.27 (ii) makes model Power Purchase Agreements earlier approved by the Commission to be applicable to the extent they are in consonance with the

Regulations and these 41 Power Purchase Agreements are claimed to be in the format of the model Power Purchase Agreements so approved by the Commission.

47. The contention of all the developers is that in the light of the letter from the erstwhile Andhra Pradesh Electricity Regulatory Commission dated 01-08-2014, these Power Purchase Agreements have to be merely filed before the Commission so that the copies so filed are placed on record when they are certified to be following applicable model Power Purchase Agreements. The Commission stated in that letter that it approved model Power Purchase Agreements for wind power projects either coming under cluster scheme or for a single developer connected to a designated substation based on the Power Purchase Agreement format approved by the Commission earlier in O.P.No.40 of 2010 on 30-03-2010, with some drafting changes for simplification. The Commission also declared that Power Purchase Agreements executed upto 31-03-2015 in these formats shall be deemed to have been regulated by the Commission and no separate consent from the Commission shall be required. The developers herein are relying on the applicability of the models approved by this letter to them also because of Regulation No.27 (ii) of Regulation 1 of 2015.

48. These developers also further rely on the order of the erstwhile Commission in O.P.Nos.14 to 25 of 2012 dated 11-08-2014. The Commission in its order opined that Power Purchase Agreements cannot be found void for want of the Commission's approval and it is open to the Regulatory Commission to take on record the Power Purchase Agreement without issuing specific orders granting consent. The Commission also noted that there is no obligation on the Commission under Regulation 1 of 2008 to approve the Power Purchase Agreements executed between generators and licensees, the Regulation only requiring the Commission to determine the tariff as per its stipulations. The Commission determined that even

though its explicit consent to Power Purchase Agreements is not required, it will treat the Power Purchase Agreements as applications for tariff determination and pass orders. The Commission also held withdrawal of the Power Purchase Agreement by the APGENCO is not valid as the withdrawal from the agreement was without notice, without capacity and in deviation from the procedure prescribed by the Power Purchase Agreements for dispute resolution.

49. The withdrawal of these 41 Power Purchase Agreements under the letter dated 03-03-2017 was stated to be without any information or notice to any of the 41 developers and the return of the agreements by the Commission with a letter dated 20-03-2017 was also without any information or notice to or any reasonable opportunity of hearing to any of the developers. If so, the letter dated 01-08-2014 and the order dated 11-08-2014 of the erstwhile Andhra Pradesh Electricity Regulatory Commission may suggest the request for and grant of withdrawal of these 41 Power Purchase Agreements to be open to question and these Power Purchase Agreements are not void for want of explicit consent. In fact, no separate consent may be necessary when they are filed before the Commission for record with due certification that they are in the approved model format. The judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No.148 of 2015 dated 04-05-2016 between NTPC Limited and U.P. Power Corporation Limited and others was referred to wherein the Hon'ble Appellate Tribunal for Electricity noted that in fixing the normative parameters for determination of tariff, the Commission follows the procedure laid down in Section 67 of the Electricity Act, 2003 duly safeguarding consumers interest and at the same time recovering cost of electricity in a reasonable manner. It was also observed that while framing the tariff Regulations, Central/State Commissions consider the stakeholder/public opinion and as per National Tariff Policy etc., the Regulations are framed. It was also held that once the

tariff has been fixed on the basis of normative parameters, the same should not be opened even if there is any variation between normative and actual. The weight to be attached to the tariff determined by the Commission in accordance with Regulation 1 of 2015 is thus sought to be emphasized.

50. In Gujarat Urja Vikas Nigam Limited Vs Gujarat Electricity Regulatory Commission and others, Appeal No.279 of 2013, decided on 22-08-2014, the Hon'ble Appellate Tribunal for Electricity referring to the earlier precedents from the Hon'ble Supreme Court and the Appellate Tribunal held that in exercise of the regulatory power, the appropriate Commission can revisit the tariff and reopen the Power Purchase Agreements especially where public interest is involved and the interest of the consumers so requires. The Hon'ble Appellate Tribunal for Electricity further held that it has to be seen whether there is any legal right available to the Appellant arose out of cause of action to seek reduction of normative tariff and consequently agitate for reopening the Power Purchase Agreement to reduce the tariff to disincentivise the renewable energy developers which would discourage future investments in the sector. On facts, the Hon'ble Appellate Tribunal for Electricity found that the tariff order was accepted by all parties and acted upon, the Power Purchase Agreements entered into by the parties were confirmed by the State Commission, the said tariff was also adopted by the Gujarat Government and notified. An attractive tariff itself was the incentive and this cannot be sought to be taken away long after generators acted upon the same. When the generic tariff was already determined by the State Commission through tariff order on the basis of normative principles, the Appellant did not have the power or authority to alter any terms of the Power Purchase Agreement except through mutual consent of both parties. The Hon'ble Appellate Tribunal for Electricity also referred to the question of taking cognizance of subsequent events/developments, doctrines of promissory

estoppel, legitimate expectation, res judicata, vested rights etc., and concluded that there was no ground for redetermination of tariff. The principles of these decisions applied to the facts of the present case may indicate that the duly framed Regulation 1 of 2015 being in force and the duly determined preferential generic tariff being in operation, any variations in cost may not by themselves be grounds to interfere with the generic tariff. However, when public interest and interest of consumers required, the appropriate Commission can undoubtedly revisit the tariff and reopen the Power Purchase Agreements. It is also open to alter any of the terms of the Power Purchase Agreements through mutual consent of both parties.

51. The State Wind Power Policy under G.O.Ms.No.9 dated 13-02-2015 promised the wind power developers, among other things not only the State Government incentives promised at item No.8 but also assured encouragement to wind power generation during the operative period of 5 years, particularly the tariff was assured to be that determined by this Commission.

52. Though it was held in Energy Watchdog and others Vs Central Electricity Regulatory Commission and others 2017 (4) SCALE 580, relied on by the Distribution Companies that the general regulatory power under Section 79 (1) (b) can be used in a situation where there are no framed guidelines or guidelines framed do not deal with a given situation, if there are guidelines issued by the Central Government under Section 63 governing the situation, the Commission is bound by those guidelines. Though the letter dated 21-08-2017 from the Ministry of New and Renewable Energy, Government of India did not trace itself to any provisions of any statute or rules or regulations and though the contents thereof did not amount to any statutory guidelines from the Government of India, the views of the Government of India cannot be totally brushed aside and have to be duly taken note of in arriving at an appropriate conclusion herein. In that letter, contractual agreements were

requested to be honoured and it was desired that the State Electricity Regulatory Commissions should not withhold consent for wind power projects commissioned before 31-03-2017 for which Power Purchase Agreements have already been signed. Of course, though the letter desired that the State Government should issue directions to the State Commissions under Section 108 of the Electricity Act, 2003, no such directions were given and the State Government merely communicated the letter to the Commission for necessary action. In the meanwhile, the copy of the letter addressed by the Ministry of New and Renewable Energy to the State Government on 07-12-2017 was sent to the Commission by mail by the State Government obviously for information, wherein the Government of India noted renegotiation or cancellation by some states of the Power Purchase Agreements for wind and solar power projects due to discovery of lower tariffs in some other State in response to the state/central bids. The Secretary, MNRE observed that the market discovered tariff is primarily dependent upon quality of renewable energy resource at specific location, land cost, bid conditions, State policies, payment terms and conditions etc. Hence, he opined that the tariff discovered at one location cannot be compared to another either within a State or outside and cancellation of bids or Power Purchase Agreements affects the image of the State in particular and the Country in general. The Secretary to the Government of India therefore requested the State Governments not to cancel or renegotiate due to lower tariff being discovered elsewhere. Distinction between different locations and the credibility of the transaction entered into by the State utilities are undoubtedly factors to be taken into consideration in evaluating the effect of discovery of lower tariff elsewhere.

53. Regulation 1 of 2015 is still in force and the provisions thereof, the validity of which were not challenged in any other proceedings, have to be given their due effect. The Regulation mandates fixation of a single part tariff which is a generic

preferential tariff at the beginning of each financial year and so long as the Regulation is in force, the Commission has no choice except to do the same. The Tariff Orders dated 01-08-2015 and 26-03-2016 under Regulation 1 of 2015 were in compliance of the statutory obligations and the fixation of the generic preferential tariff was as per the formula provided by the Regulation itself. The Commission is bound to follow the financial principles laid down in Chapter 2 of the said Regulation and holding any hearing or public hearing does not arise in issuing orders *suo motu* as it is a matter of giving effect to the regulatory provision which left no scope for taking into consideration any extraneous factors beyond the provisions themselves like discovery of lower tariff elsewhere or the like. That the Regulation itself is ill-conceived or of adverse impact for that reason may be a relevant point but the Commission has no choice except complying with the Regulation as it stands. Any amendment or repeal of the provisions having negative effect or adverse impact has to be considered separately and for the purposes of considering the present batch of Power Purchase Agreements, these considerations may not be open to be relied on.

54. Therefore, the subject Power Purchase Agreements being governed by Regulation 1 of 2015 have to be dealt with according to its provisions. The annual generic preferential tariff fixed under the Regulations will normally apply for the tariff period of 25 years from the date of commercial operation on entering into the Power Purchase Agreements in the format of the models earlier approved by the Commission as permitted under Regulation No.27 (ii) thereof. While it should be noted that no part of Regulation 1 of 2015 prohibits the parties from deviating from the generic preferential tariff, Power of Relaxation under Regulation No.23 or the Power of Removal of Difficulties under Regulation No.26 or the Power of Deviation under Regulation No.22 of Regulation 1 of 2015 may come to the aid of the parties to the Power Purchase Agreement in that regard. It may also be noted that 5

developers, who are parties to the present proceedings specified in the letter of the Southern Power Distribution Company of Andhra Pradesh Limited dated 03-03-2017 were stated to have participated in the competitive bidding conducted by SECI quoting a tariff of Rs.3.46 ps per unit and if the generation of wind power which is the subject of the competitive bidding therein and the generation of wind power under the Power Purchase Agreements herein are fairly comparable, this fact may present a circumstance in favour of justification for attempting to have the tariff fixed under the Power Purchase Agreements herein reasonably reduced.

55. While the necessity and justification for restricting the control period under Regulation 1 of 2015 or amending the parameters fixed by that Regulation are not the subject matter of the present consideration, the various circumstances relied on in the letters of the Southern Power Distribution Company of Andhra Pradesh Limited dated 30-10-2015 and 03-03-2017 relating to the Capacity Utilization Factor, depreciation, interest on debt, return on equity, interest on working capital, capital cost, operation and maintenance expenses, CDM benefits, subsidy or incentive by the Government and rebate etc., cannot be lightly brushed aside. The Capacity Utilization Factor is claimed to have increased significantly in view of the change in wind turbine technology and models, stub heights and capacities and it is claimed that there is an increase of 6 to 8% in terms of Capacity Utilization Factor than the 23.5% fixed by the Commission. Interest rates are claimed to be on the decrease with consequent effect on the capital cost, depreciation, return on equity etc. Capital Cost is also claimed to have been affected by the change in technology and cheaper wind turbines with higher capacity. The terms and conditions of the Power Purchase Agreements in question herein may have to be reassessed and reevaluated in the manner permitted by the Power Purchase Agreements themselves, if such a necessity arises. Model Power Purchase Agreements as they stand now as

approved by the Commission, provide in Article 7 that any and all incentives/ conditions envisaged in the Articles of the Power Purchase Agreements are subject to modification from time to time as per the directions of the Andhra Pradesh Electricity Regulatory Commission. Article 11.2 provides for modification of the agreement if it is in writing and signed by the duly authorized representatives of the wind power producers and the Distribution Companies subject to the condition that any further modification of the agreement shall be done only with the prior approval of the Andhra Pradesh Electricity Regulatory Commission. It also provides that the amendments to the agreement as per the respective orders of the Andhra Pradesh Electricity Regulatory Commission from time to time shall be carried out. All the agreements also specifically stated that the terms and conditions of the agreement are subject to the provisions of the Electricity Act, 2003 and amendments made to the Act from time to time and also subject to Regulation by the Andhra Pradesh Electricity Regulatory Commission. Thus, it is clear that moulding the Power Purchase Agreements appropriately from time to time was conceived by the Power Purchase Agreements themselves.

56. The letter dated 03-03-2017 from the Southern Power Distribution Company of Andhra Pradesh Limited speaks of the distribution companies reaching the target in respect of wind power but it is not stated that the wind power to be generated due to these plants operating under the Power Purchase Agreements is not required. It is the downward trend of the wind power tariffs that made the Andhra Pradesh Distribution Companies make the request for withdrawal of these agreements. But, the other factors raised by the Government of India in their subsequent letters were not taken into account. In the letter dated 04-08-2017 which led to the present consideration, the claim of the developers of investing around Rs.5000 crores in the most backward districts of Rayalaseema particularly Anantapur and Kurnool Districts

creating employment for several thousands of people was referred to. The liability of the developers to their lenders was also referred to. The claim of the developers in their objections herein is that they were motivated or persuaded to invest in these generating plants believing and acting upon the Wind Power Policy, 2015 of the State Government and Regulation 1 of 2015 of this Commission. The developers bring in not only their facing financial crisis but also the doctrines of legitimate expectation, promissory estoppel etc. Neither the applicability of these well established jurisprudential doctrines nor the fact of the developers being put to serious economic trouble can be denied outright. The credibility of the State and its institutions and the investor confidence are open to be claimed to have been shaken. Probably that was why while observing the limits of the approved dispatch quantity as per the tariff order of FY 2017-18 of this Commission, it was resolved in the official meeting held by the Principal Secretary, Energy on 04-07-2017 that these Power Purchase Agreements may be resubmitted to the Commission again for consent. Thus ultimately it becomes a question of balancing conflicting factors and interests and there appeared to be no absolutes either way.

57. Sri M.Venugopala Rao and others with similar views pointed out the failure of the developers to come up with any proposals for cost reduction in spite of meetings in that regard and also pointed out the approved sales of NCE at 20.60% for 2017-18 against minimum 9% NCE to be procured under the Renewable Power Purchase Obligation. It has to be noted that what was prescribed by the Regulation on Renewable Power Purchase Obligation was the minimum renewable energy that has to be procured and there is no cap on the quantum of such energy that can be procured. It is open to procure much more renewable energy than the minimum which should be a commercial and practical decision to be taken by the utilities concerned. The approved energy dispatch from wind power units in the tariff order

of 2017-18 at 6190.56 MU was not “for reasons best known to the Commission itself” as stated by the objectors but for reasons and circumstances projected by the Distribution Companies in their Aggregate Revenue Requirements. Approving or purchasing higher quota of NCE than the minimum prescribed may be financially detrimental to the consumer interest but with reference to the objects behind promoting renewable energy as against the conventional energy even at a higher cost, the same may be in promotion of public interest. Factoring the generation based incentive is a question to be determined in O.P.No.5 of 2017 on which no opinion can be expressed herein. If the result of O.P.No.1 of 2017 and O.P.No.5 of 2017 has any legal effect and impact on these or other Power Purchase Agreements, the same will remain to be given effect to even after passing orders herein and there is no advantage or disadvantage to the consumer interest by deciding the present issue now and O.P.Nos.1 and 5 of 2017 subsequently. Undoubtedly the purchase of wind power under these Power Purchase Agreements will be much costlier in comparison to the procurement of wind energy through competitive bids by Solar Energy Corporation of India but the pre-existing contractual obligations cannot be straightaway nullified on the ground of these subsequent developments. Any interference with contractual rights of the parties on the strength of such extraneous reasons will only result in unnecessary litigation. It should also be noted that capacity of wind generating units and the actual generation of wind power by these units may be poles apart, generation of wind power depending on the season, speed of the wind and other vagaries of nature and it was canvassed during arguments that the actual generation was much less than what was estimated in the retail tariff order of 2017-18.

58. While the Commission should take note of the limitations of its so called inherent power in the light of the observations of the Hon’ble Supreme Court in

Gujarat Urja Vikas Nigam Limited Vs Solar Semi Conductor Power Company, C.A.6399 of 2016, decided on 25-10-2017, their Lordships of the Hon'ble Supreme Court noted in that case that the Commission cannot extend the control period of tariff order in exercise of its inherent jurisdiction and consequently vary the terms of the Power Purchase Agreement. It should be noted that the Hon'ble Supreme Court still left the liberty to the Commission which is available to it for re-determining the tariff if otherwise permissible under law. Sri M. Venugopala Rao and similar objectors raise a very relevant issue about the stub height now being increased to 120 meters from 40 to 50 meters and the capacity of the machines being increased to 2.1 MW. The annual CUF was stated to be possibly increasing by 30% more with the capital cost getting reduced as unit capacity increases. This has to be a relevant circumstance to be considered when any modification of the Power Purchase Agreements becomes a subject of consideration by the Commission in future.

59. The learned objector and similar objectors rightly relied on the order of the Karnataka Electricity Regulatory Commission dated 04-09-2017 which is obviously a clear pro-consumer initiative *suo motu* reducing the tariff from Rs.4.50 ps to Rs.3.74 ps per unit for the various reasons stated therein. However, subsequent to the directions of the Karnataka Government under Section 108 of the Electricity Act, 2003, the Karnataka Electricity Regulatory Commission is stated to be evaluating each project on case by case basis for approving the Power Purchase Agreements signed and projects commissioned before 31-03-2017 at the old rate of Rs.4.50 ps per unit. In this case also, the Regulation in force being what it is and the transactions under the Power Purchase Agreements being of a similar content and character, any retrospective revision of generic preferential tariff may encounter substantial legal difficulties. However, in view of the surplus scenario being projected it is but desirable that the distribution companies should be directed not to enter into

any fresh Power Purchase Agreements not only with the wind power developers but any power developers using any fuel or source for generation without prior information to and permission of the Commission so that there will be better regulatory control over the sector and better management of power purchase cost which is stated to be constituting about 80% of the Aggregate Revenue Requirement of the Distribution Companies.

60. One more factor that has to be taken into consideration is that in the Aggregate Revenue Requirement submitted by the two power distribution companies of Andhra Pradesh for the FY 2018-19, the Power Purchase Agreements under consideration herein are taken into account and it is also to be noted that these wind power developers are claiming to be already injecting the power generated by them into the grid and the very instruction of the distribution companies not to take joint meter readings for these projects until further instructions in their Memo dated 26-08-2014 vindicates the stand of such power being generated and received.

61. While the other issues need to be gone into in depth in O.P.Nos.1 and 5 of 2017, as already stated, whatever legal consequences flow from the orders on those petitions, they will be binding on parties to these Power Purchase Agreements to the extent relevant to each of them which cannot be predicated herein. So if it is said that the orders herein will be subject to final result of O.P.Nos.1 and 5 of 2017, it will be only recording that legal effect and whether any of the present wind power developers will be subjected to such impact will have to be clarified in such orders. While the principles laid down in the various decisions cited by various objectors are unexceptionable, their application to the facts of the present case is underlying the present discussion and conclusions and other peripheral issues raised like the pendency of the Power Purchase Agreements with the Commission for a significant time need not be gone into elaborately in view of the conclusions on the core issue.

While there should be balancing of interests of all the stakeholders, the same should be in tune with the provisions of the statutes, rules and regulations.

62. Thus, the contention that the letter of the erstwhile Commission dated 01-08-2014 and the order of the erstwhile Commission dated 11-08-2014 make any approval or consent of the Commission specifically for each Power Purchase Agreement not necessary and it will suffice to send a copy of executed Power Purchase Agreement for record of the Commission has considerable force and if so these Power Purchase Agreements may have to be deemed to have been regulated by the Commission. Even otherwise the Power Purchase Agreements in accordance with Regulation 1 of 2015 and the tariff orders passed thereunder cannot be considered to be vitiated by any invalidating factors. These wind power generating plants with agreed dates of commercial operation and injecting power into the grid being received by the two distribution companies in the State of Andhra Pradesh may not be justifiably asked to put the clock back, more so, when the establishment of these generating units was actuated by the Wind Power Policy of the State Government and the Regulation by the State Commission. However, if any legal consequences flow from the orders that may be passed in O.P.No.1 of 2017 and O.P.No.5 of 2017 on the file of this Commission, the parties to the Power Purchase Agreements shall be bound by them. The terms and conditions incorporated in the Power Purchase Agreements shall be subjected to any modification in the manner provided by the Power Purchase Agreements themselves. Where the interests of the public or consumers or for that matter any stakeholders is involved, it is open to the Commission to revisit the terms and conditions of the Power Purchase Agreements including determination of the tariff in the manner provided by the Power Purchase Agreements and permitted by the provisions and principles of law. The scope for such modification and amendment covers the request for permitting the negotiation

process with the wind developers as stated in the letter dated 04-08-2017. When the relations between the parties are governed by contractual obligations and rights arising out of *consensus ad idem*, any change in the same is equally permissible and acceptable in law through the same process of agreement between the parties. The rights and obligations of the parties under the Power Purchase Agreements will also be subject to any change in law i.e., any change in the statutes or rules or regulations governing these Power Purchase Agreements. Incidentally the distribution companies have to be directed not to enter into any fresh Power Purchase Agreements with any power developers using any source or fuel for power generation without prior intimation to and permission from the Commission until further orders from the Commission depending upon any change of circumstances or exigencies of the power sector.

63. The present consideration has to be ordered in tune with the above conclusions. Accordingly,--

- a) the subject Power Purchase Agreements are regulated by the Commission as having its consent and are taken on record;
- b) these Power Purchase Agreements and the parties thereto shall be bound by the legal consequences that may flow concerning each of them from the orders that may be passed or the directions that may be given in O.P.No.1 of 2017 and O.P.No.5 of 2017 on the file of this Commission;
- c) any and all incentives/conditions envisaged in the Articles of the Power Purchase Agreements are subject to modification from time to time as per the directions of the Andhra Pradesh Electricity Regulatory Commission as agreed under Article 7 of the Power Purchase Agreements;
- d) any modification of the Power Purchase Agreements shall be of force and effect only when it is in writing and signed by the duly authorized

representatives of the wind power producers and the distribution companies, subject to the condition that any further modification of the agreements shall be done only with the prior approval of the Andhra Pradesh Electricity Regulatory Commission as envisaged under Article 11.2 of the Power Purchase Agreements. The parties to these Power Purchase Agreements are at liberty to come to an agreement regarding any modification or amendment of any terms and conditions on voluntary negotiations between themselves in this regard and approach the Commission to give effect to such agreements in the manner provided by the Power Purchase Agreements;

- e) the terms and conditions of the Power Purchase Agreements are subject to the provisions of the Electricity Act, 2003 and amendments made to it from time to time and also subject to Regulation by the Andhra Pradesh Electricity Regulatory Commission as stipulated at item No.5 of the preamble to the Power Purchase Agreements and the amendments to the Power Purchase Agreements as per the respective orders of the Andhra Pradesh Electricity Regulatory Commission shall be carried out from time to time as stipulated by Article 11.2 of the Power Purchase Agreements;
- f) the distribution companies are at liberty to invoke the enabling Articles in the Power Purchase Agreements for any modification or amendment to the relevant terms and conditions dependent on the Capacity Utilization Factor, capital cost, depreciation, interest, return on equity and the like and to approach the Commission for appropriate reliefs and any such requests will be considered on merits in accordance with law, with notice to and a reasonable opportunity of hearing to the other parties to the respective Power Purchase Agreements;

- g) the rights and obligations of the parties under the Power Purchase Agreements shall be subject to change in law i.e., any change in statutes or rules or regulations governing these Power Purchase Agreements;
- h) both the distribution companies in the State of Andhra Pradesh are hereby directed not to enter into any fresh Power Purchase Agreements with any power developer using any source or fuel for power generation, without prior intimation to and permission from the Commission until further orders from the Commission depending upon any change of circumstances or exigencies of the power sector in the State.

This order is corrected and signed on this the **13th day of December, 2017.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman