



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

SATURDAY, THE TWENTY EIGHTH DAY OF JULY TWO THOUSAND
EIGHTEEN

:Present:

Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member

O.P. No. 1 of 2017

Between:

1. Southern Power Distribution Company of Andhra Pradesh Limited, Rep. by its Chairman & Managing Director Beside Srinivasa Kalyanamandapam, Tiruchanur Road, Tirupathi – 517 501
2. Eastern Power Distribution Company of Andhra Pradesh Limited, Rep. by its Chairman & Managing Director P & T Colony, Seethammadhara Visakhapatnam – 530 020

... **Petitioners**

AND

1. M/s Sri Vijayeebhava Enterprises Private Ltd Flat. No. 1602, A-Block, Meenakshi Trident Towers Opp: Ramky Towers, Gachibowli, Hyderabad- 500 032
2. M/s Karam Chand Thapar & Bros Limited Thapar House, #25, Brabourne Road, Kolkata
3. M/s Jindal Aluminium Ltd Jindal Nagar, Tumkur Road, Bangalore – 560 073
4. M/s Rayala Wind Power Company Private Ltd Plot No.1366, Road No 45, Jubilee Hills, Hyderabad – 500 033
5. M/s Sunwin Power tech India (P) Ltd 6-3-883/A/10, Padmavathi place, Punjagutta, Hyderabad
6. M/s Vibrant Green tech India Ltd D.No.4-3-377/1, Bank Street, Koti, Hyderabad – 500 095
7. M/s Mythrah Vaayu (Indravathi) Pvt Ltd 8001 S.No.109, Q-City Nanakramguda, Gachibowli, Hyderabad

8. M/s Mangalam Fashions Limited
Registered Office Address: 22, Camac Street, Kolkata-700 016
(deleted as per docket orders dated 24-06-2017)
9. M/s Woodside Fashions Limited
22, Camac Street, Kolkata – 700016 (West Bengal)
(deleted as per docket orders dated 24-06-2017)
10. M/s Levelstate Systems Pvt. Ltd
Regd.Office: Productivity Road, Signature I, 404, Vasodara - 390 007
11. M/s Ushodaya Enterprises Private Limited
Eenadu Corporate Office, Ramoji Film City
Anajpur Village, Hayathnagar Mandal. R.R. Dist - 501 512, Telangana State
(deleted as per docket orders dated 19-08-2017)
12. M/s Shrinath Gum & Chemicals
E-278, M.I.A. 2nd Phase, Basni, Jodhpur – 342 005 (India)
13. M/s Shree Ram Industries
C-80, Marudhar Industrial Area, Basni -2, Jodhpur - 342 005
(deleted as per docket orders dated 16-09-2017)
14. M/s Om Prakash Soni, 113, PWD Colony, Jodhpur
(deleted as per docket orders dated 16-09-2017)
15. M/s Sai Pet Preforms, Sy No 157/2
Sanklapur Industrila Estate, Hospet- 583 201, Karnataka
16. M/s Manoj Agarwalla
PO- Dhansar, Dhanbad, Jharkhand – 828 106
(deleted as per docket orders dated 19-08-2017)
17. M/s Imperial Arts, G-618-619, EPIP Boranada, Jodhpur – 342 012
(deleted as per docket orders dated 19-08-2017)
18. M/s Eenadu Television Pvt Ltd
H.No.1-10-76, Fair Fields, Begumpet, Hyderabad – 500 016
(deleted as per docket orders dated 16-09-2017)
19. M/s Hi-Tech Systems & Services Ltd
White House, 119, Park street, Kolkata – 700 016 (WB)

20. M/s Prince Art Exporter
F-288-89, M.I.A., 2nd Phase, BASNI, Jodhpur - 342 005
(deleted as per docket orders dated 19-08-2017)
21. M/s Orange Anantapur Wind Power Pvt Limited
F-9, First Floor, Manish Plaza 1
Plot No.7, MLU, Sector-10, Dwaraka, Delhi – 110 075
22. M/s Kaushaliya Devi Dhoot
Lodha Street, 1st A Road, Sardarpura, Jodhpur – 342 011
23. M/s Satyanaryana Dhoot
Lodha Street, 1st A Road, Sardarpura, Jodhpur- 342 001 (Rajasthan)
24. M/s Chimique (India) Ltd
13/3 New Grain Market, Siwani Mandi-127 046, Bhiwani, Haryana
25. M/s Rajasthan Gum Private Limited, H.O: E-8-9, G-234-236 & SP-6
Agro Food Park, Boranada, Jodhpur – 342012 (Rajasthan)
26. M/s Jai Bharat Gum & Chemicals Ltd
Regd. Office: Siwani Mandi -127 046, Distt. Bhiwani, Haryana
27. M/s Dinesh Enterprises
E-274, M.I. Area, II Phase, Basni, Jodhpur - 342 005
28. M/s Sandla Wind Power Project Limited
RO: 11-103, GCP Business Center, Vijay Char Rasta
Memnagar, Ahmedabad, Gujarat, India – 380 052
29. M/s Jed Solar Parks Pvt Ltd., Plot No.1131/A, Sai Square
Road No 36, Jubilee Hills, Hyderabad – 500 033
30. M/s Poly Solar Parks Pvt Ltd., Plot No.1131/A, Sai Square,
Road No. 36, Jubilee Hills, Hyderabad – 500 033
31. M/s Hetero Wind Power (Pennar) Pvt., Ltd
#7-2-A2, 3rd Floor, Industrial Estate, Sanath Nagar, Hyderabad
32. M/s KCT (20.4 MW) Renewable Energy Pvt Ltd
#25, Thapar House, Brabourne Road, Kolkata

33. M/s Ostro Anantapur Pvt Ltd
Unit No.G-0, Ground Floor, Mira Corporate Suites
Mathura Road, 1&2 Ishwar Industrial Estate, New Delhi – 110 065
34. M/s Orange Uravakonda Wind Power Pvt Ltd
F-9, First Floor, Manish Plaza 1, Plot No7, MLU
Sector-10, Dwaraka, Delhi – 110 075
35. M/s ZR Renewable Energy Pvt Ltd
6-3-249/6, Road.No.1, Banjara Hills, Hyderabad – 500 034
36. M/s Sterling Agro Industries Ltd, 11th Floor, Aggarwal Cyber Plaza-II,
Netaji Subhash Place, Pithampura - 110034
37. M/s Danu Wind Parks Pvt Ltd
1-111/RC/11-B & 12-B/201, Survey No.60
Raghavendra Colony, Kondapur - 500 084
38. M/s NATCO Power Pvt. Ltd
Natco House, Road No.2, Banjara Hills, Hyderabad – 500 034
39. M/s RBA Properties Ltd, 22, CAMAC Street, Kolkata -700 020
(deleted as per docket orders dated 24-06-2017)
40. M/s Renew Wind Energy Pvt Ltd
10th floor, DLF Square
M-Block,Jacaranda Marg, DLF City, Phase-II, Gurgaon-122 002
41. M/s Atria Wind Power Private Limited
Atria Power 1st. No.11 Commissariat Road, Bangalore - 560 025
42. M/s Ranganayaka Spinning Mills Pvt Ltd
Room No.304, AP Cotton Association
Building, Lakshmi Puram, Guntur – 522 007, Andhra Pradesh
43. M/s Tata Power Renewable Energy Limited
A Block, 34, Sant Tukaram Road
Carnac Bunder, Mumbai – 400 009, Maharashtra
44. M/s Mytrah Vayu (Tungabadra) Pvt Ltd
8001, Q-City, S.No.109, Nanakramguda
Gachibowli, Hyderabad - 500 032

45. M/s. Vayu Urja Bharat Private Limited
F.No.402, D.No.1-2-605, Vaibhav Kunj Apartment
Lower Tank Bund, Hyderabad
(impleaded as per orders on I.A.No.4 of 2017 on 29-04-2017)
46. M/s. Ostro AP Wind Private Limited
Unit G-0, Ground Floor, Mira Corporate Suites
1 & 2 Industrial Estate
Mathura Road, New Delhi – 110 065
(impleaded as per orders on I.A.No.4 of 2017 on 29-04-2017)
47. M/s. Ostro Andhra Wind Private Limited
Unit G-0, Ground Floor, Mira Corporate Suites
1 & 2 Industrial Estate
Mathura Road, New Delhi – 110 065
(impleaded as per orders on I.A.No.4 of 2017 on 29-04-2017)

... Respondents

This Original Petition has come up for hearing finally on 07-04-2018, in the presence of Sri P. Shiva Rao, learned Standing Counsel for the petitioners and Sri V. Sailendra representing (i) M/s. Sri Vijayeebhava Enterprises Private Limited (ii) M/s. Karam Chand Thapar & Bros Limited (iii) M/s. Levelstate Systems Private Limited (iv) M/s. Ushodaya Enterprises Private Limited (v) M/s. Sai Pet Preforms (vi) M/s. Eenadu Television Private Limited (vii) M/s. Hi-Tech Systems & Services Limited (viii) M/s. Kaushaliya Devi Dhoot (ix) M/s. Satyanarayana Dhoot (x) M/s. Chimique (India) Ltd., (xi) M/s. Rajasthan Gum Private Limited (xii) M/s. Jai Bharat Gum & Chemicals Limited (xiii) M/s. KCT (20.4 MW) Renewable Energy Private Limited & (xiv) M/s. ZR Renewable Energy Private Limited, respondents and Indian Wind Power Association (IWPA) – AP State Council, objector and respondents 8, 9 and 39 were ordered to be deleted from the array of the respondents on 24-06-2017, respondents 11, 16, 17 and 20 were deleted from the array of the respondents as per orders dated 19-08-2017, respondents 13, 14 and 18 were deleted from the array of the respondents as per orders dated 16-09-2017 and respondents 45 to 47 were impleaded as per orders in I.A.No.4 of 2017 on 29-04-2017. After carefully

considering the material available on record and after hearing the arguments of the learned counsel for both parties and the objectors, the Commission passed the following:

ORDER

A petition under Regulation 55 (2) & (3) of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 to issue notice to all the wind generators whose projects were commissioned and who entered into Power Purchase Agreements with the Andhra Pradesh distribution companies and to amend the wind generation tariff orders dated 01-08-2015 and 26-03-2016 to pass on GBI (Generation Based Incentives) amounts to the Andhra Pradesh distribution companies in compliance with clause 20 of Regulation 1 of 2015 and other appropriate orders.

2. The two distribution licensees of the State of Andhra Pradesh are the petitioners and they claimed that the Commission made the Regulation 1 of 2015 dated 31-07-2015 stating the terms and conditions for tariff determination for wind power projects in the State of Andhra Pradesh for the period FY 2015-16 to FY 2019-20 in exercise of the powers conferred on it under Sections 61, 86 and 181 of the Electricity Act, 2003 and all other enabling powers after previous publication. Clause 20 of the Regulation prescribes that the Commission shall take into consideration any incentive or subsidy offered by the Central or State Government including the Accelerated Depreciation (AD) benefit, if availed by the generating company, for the wind power projects while determining the tariff under these regulations. The Commission notified the generic preferential tariff for wind power on 01-08-2015 for wind power projects commissioned during 01-08-2015 to 31-03-2016 at Rs.4.83 per unit (without availing AD) and Rs.4.25 per unit (availing

AD) and again notified on 26-03-2016 for FY 2016-17 at Rs.4.84 per unit (without AD) and Rs.4.25 per unit (with AD). The Generation Based Incentive provided by the Government of India to the developers of wind power projects commissioned in 2015 and 2016 was not factored in determining the tariff under the two tariff orders. The expert group of NITI Aayog in its report dated 31-12-2015 noted most feed-in-tariffs approved by the State Electricity Regulatory Commissions to be not even considering the generation based incentives to be available or not available. Hence, it recommended that the GBI payments be offered to the procuring utility. The petitioners requested the Commission through a letter dated 30-10-2015 to amend the tariff to pass on the incentive to the distribution licensees / consumer which will help in lowering the power purchase cost and the burden on the consumers. The petitioners approached the Commission with this petition to amend the orders dated 01-08-2015 in O.P.No.3 of 2015 and 26-03-2016 in O.P.No.13 of 2016. The Commission has wide powers to revise and amend the tariff beyond the power of review it has. Hence, the petition.

3. Notices were given to all the 44 wind power developers said to be concerned and a public notice was also issued inviting views / objections / suggestions of interested persons / stakeholders.

4. Three wind power developers said to be interested in the subject matter of the petition and said to be effected by its result were also impleaded as per orders in I.A.No.4 of 2017 dated 29-04-2017.

5. Respondents 8, 9, 11, 13, 14, 16, 17, 18, 20 and 39 filed memos stating that they are not claiming Generation Based Incentives, since they already claimed Accelerated Depreciation and as the subject matter of the petition is not applicable to

them, they may be removed as parties from the said petition. Respondents 8, 9 and 39 were ordered to be deleted from the array of the respondents on 24-06-2017. Respondents 11, 16, 17 and 20 were deleted from the array of the respondents as per orders dated 19-08-2017. Respondents 13, 14 and 18 were deleted from the array of the respondents on 16-09-2017. That leaves respondents 1 to 7, 10, 12, 15, 19, 21 to 38 and 40 to 44 among the original respondents and respondents 45 to 47, who were impleaded as per orders in I.A.No.4 of 2017 on 29-04-2017.

6. Counters / replies / responses / objections / views / suggestions were received from the contesting respondents and other stakeholders / interested persons. The petitioners filed their rejoinders to the same. Respondents 2 and 32 filed memos on 13-07-2017 for release of outstanding amounts as per the tariff orders etc., and after the oral and written submissions were concluded and the matter was reserved for orders, the petitioners filed I.A.No.8 of 2018 for reopening the matter and receiving the two decisions relied on by the petitioners and the undertaking said to have been given by M/s. Axis Wind Farms (Anantapur) Private Limited and I.A.No.8 of 2018 was allowed on 31-03-2018. I.A.Nos.9 to 13 of 2018 were filed by some other respondents respectively to expedite disposal of this petition, as the petitioners were deducting Generation Based Incentives from their bills and the said I.As., were also ordered on 31-03-2018 specifying that the matter will be disposed of as expeditiously as possible, subject to the other works of the Commission and physical possibilities for early disposal. After further oral and written submissions from the parties, the matter was again reserved for orders on 07-04-2018.

7. Respondents 5, 6, 28 and 31 in their counters referred to the Wind Power Policy of the State Government under G.O.Ms.No.9 dated 13-02-2015 and Regulation 1 of 2015 of the Commission as encouraging them to set up wind power projects in the State in view of the preferential tariff. Respondents 5, 6, 28 and 31 set up wind power projects of a capacity of 4 MW, 8.8 MW, 50.4 MW and 49.5 MW respectively under Agreements with the New Renewable Energy Development Corporation of Andhra Pradesh Limited dated 03-06-2015, 03-06-2015, 22-01-2016 and 26-11-2015 respectively. They entered into Power Purchase Agreements dated 12-11-2015, 28-11-2015 and 15-12-2015, 15-03-2016 and 16-03-2016 respectively. The wind power projects were synchronized on 28-11-2015, 28-11-2015, 31-03-2016 and 19-06-2016, 13-07-2016 and 21-08-2016 respectively. Since the Commercial Operation Dates, these respondents are supplying power to the 1st petitioner under the respective Power Purchase Agreements. The petition is not maintainable being for review of the tariff order dated 01-08-2015 and 23-06-2016, when clause 49 of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 applies and when the Commission has no inherent powers under Section 151 of the Civil Procedure Code which cannot be conferred by clause 55 (2) & (3) of the Regulation of the Commission. Clause 55 (2) & (3) cannot apply to substantive rights but only to procedural aspects and the petition is barred by limitation under clause 49 of the Regulation being beyond 90 days. The tariff orders in O.P.No.3 of 2015 and O.P.No.13 of 2016 worked themselves out on completion of the respective financial years and any variance of the orders amounts to retrospective fixation of tariff, which is impermissible vide **(2009) 11 SCC 244 (Para 30)** and Appeal No.111 of 2010 (FB) (Para 40). The wind tariff orders were unchallenged and final and have to be complied with, vide Union of India & another

Vs Ashok Kumar Aggarwal (2013) 16 SCC 147 and Hope Plantations Limited Vs Taluk Land Board, Peermade & another (1999) 5 SCC 590 and Vaayu (India) Power Corporation Private Limited Vs APERC, Appeal No.215 of 2014. The present policy on Generation Based Incentive was known to the petitioners, when the Commission took up proceedings for issuing wind tariff orders and there is no error apparent on the face of the record. Clause 20 of Regulation 1 of 2015 only makes the Commission consider any incentives or subsidies offered by the Government and it is not mandatory to incorporate each and every incentive or subsidy or offer and after the tariff order was pronounced, no incentive can be considered to re-determine the tariff. Revisiting of the tariff results in reopening of the Power Purchase Agreement, which was said to be prohibited by the Hon'ble Appellate Tribunal for Electricity in Gujarat Urja Vikas Nigam Limited Vs Gujarat Electricity Regulatory Commission, as such revisiting results in disincentivising the project developers and discouraging future investment in the sector. The decision in Ritwik Energy Systems Vs Transmission Corporation of Andhra Pradesh Limited, Appeal Nos.90 and 91 of 2006 was followed. The Hon'ble Appellate Tribunal for Electricity also laid down in Appeal No.279 of 2013 that once a Power Purchase Agreement was executed, there is no power or authority to alter any of the terms of the Agreement except through mutual consent. The respondents made significant investment relying on the tariff determined by the Commission and the doctrines of *promissory estoppel* and *legitimate expectation* come to play, as held by the Hon'ble Appellate Tribunal for Electricity in Appeal No.279 of 2013. These respondents, therefore, claimed that the policy of the Central Government cannot be defeated by denying the incentive to the developers in any manner and the aim to broaden the investor base through entry of large Independent Power Producers and Foreign Direct Investments cannot be

nullified by the incentive being taken into account while fixing the tariff. Hence, respondents, 5, 6, 28 and 31 desired that the petition be dismissed.

8. Respondents 4, 29, 30, 33, 40, 45, 46 & 47 in their counters contended that the orders in O.P.No.3 of 2015 dated 01-08-2015 and O.P.No.13 of 2016 dated 26-03-2016 were misconstrued and misunderstood. Petition in the form of review is barred by limitation beyond 90 days in view of the Regulation 49 (1) of Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. The Generation Based Incentive scheme was notified on 17-12-2009 and extended by a notification dated 04-09-2013 by the Ministry of New and Renewable Energy. The broadening of the investor base and entry of large Independent Power Producers and Foreign Direct Investors through Indian Renewable Energy Development Agency were intended by the scheme and Regulation 1 of 2015 was made providing for tariff determination for wind power projects in Andhra Pradesh. The Commission determined the tariff *suo motu* by its orders dated 01-08-2015 and 26-03-2016. There is no error apparent on the face of the record and the Hon'ble Supreme Court held in State of West Bengal Vs Kamal Sengupta (2008) 8 SCC 612 that while exercising the power of review, the Court / Tribunal concerned cannot sit in appeal over the judgment. The uncontested orders dated 01-08-2015 and 26-03-2016 had attained finality and the parties are bound to ensure compliance of the same. It is not open for the petitioners to seek reduction of tariff on the ground of Generation Based Incentive in a collateral proceeding. In Union of India Vs Major S.P. Sharma 2014 (6) SCC 351, the Hon'ble Supreme Court held that in a country governed by rule of law, finality of judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. What cannot be done directly, cannot be done indirectly as held in Ram Chandra Singh Vs Savitri Devi (2004) 12

SCC 713. In MNTL Vs Telecom Regulatory Authority of India AIR 2000 Delhi 208, the principle laid down by the Hon'ble Supreme Court that what could not be done directly, could not be done indirectly by using regulatory powers given to the authority, was reiterated. The Commission becomes a '*functus officio*' once it passed the orders and published / notified them as held in State Bank of India Vs S.N. Goyal (AIR 2008 SC 2594). Clause 4.6 of the Generation Based Incentive scheme itself clearly provides that the incentive is over and above the tariff approved by the State Electricity Regulatory Commissions in various States and the Commission hence was not required to take the scheme into account in determination of tariff. Tariff cannot be revisited with retrospective effect as held in UJVNL Vs UERC and others, Appeal No.189 of 2015. A Power Purchase Agreement like any other contract cannot be construed by reading into it more than what has been explicitly agreed between the parties as held in Rajasthan State Industrial Development & Investment Corporation Vs Diamond & Gem Development Corporation (2013) 5 SCC 470. While the counters of the 4th respondent and 7 others reiterate some of the contentions which are raised in the counters of the 5th respondent and 3 others, it was further contended that NITI Ayyog report is only recommendatory and cannot supersede the notification issued by the Government of India. In any view, the draft report deals with incentive in the future and does not alter the 2013 MNRE scheme. The marginal cost of conventional power is higher than the tariff allowed by the Commission and hence if NITI Ayyog report could not be considered by the Commission, then also Generation Based Incentive cannot be passed on in the tariff. There was a letter from the distribution companies dated 30-10-2015 to the Commission seeking Generation Based Incentive as pass through and the Commission not allowing it in its order dated 26-03-2016 indicates that the issue was considered and denied. The

orders were not challenged by the petitioners who entered into Power Purchase Agreements on the basis of such orders. Amendments to the detriment of wind power developers cannot be brought at a later stage after working out the tariff vis-à-vis the incentive as held by the Hon'ble Appellate Tribunal for Electricity in Ritwik Energy Systems Vs Tarini Infrastructure case. Hence, these respondents also sought for dismissal of the petition.

9. Respondents 7 and 44 in their counters contended that the orders in O.P.No.3 of 2015 dated 01-08-2015 and O.P.No.13 of 2016 dated 26-03-2016 were misconstrued and misunderstood. The nature of the petition is obscure and uncertain. If it purports to be a review petition, it is barred by limitation and no facts or grounds upon which a review petition is maintainable were even stated. If it is not a review petition, the petitioners did not mention under what provision of law, the petition was filed or the Commission is vested with the power to grant any relief. The Commission has only those powers expressly vested in it and has no other inherent power unlike the inherent power of a civil court with residual sovereign power. The Commission cannot confer powers on itself and clause 55 (2) and (3) of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 refer to procedural matters but not to altering the rights and obligations of the parties or varying or amending an order which attained finality. The respondent No.7 entered into Power Purchase Agreements dated 31-12-2015 and 23-02-2016 for a capacity of 39.90 MW and 65.1 MW in terms of the generic tariff. The 44th respondent entered into Power Purchase Agreements dated 05-03-2016 and 15-06-2016 for a capacity of 99.30 MW and 100.6 MW in terms of the generic tariff. The tariff orders were expressly accepted by the distribution licensees, who entered into Power Purchase Agreements in terms thereof and the Commission became

'functus officio' in the matter. Regulation 20 only stated that the Commission has to only consider any incentives or subsidies offered by a Government and it is not mandatory to incorporate each and every incentive or subsidy. It is not open to the Commission under regulatory framework to consider any incentive and re-determine the tariff, after the tariff orders were pronounced. Clause 20 of the Regulations has to be interpreted in terms of the scheme of the Government of India. The Government of India introduced a scheme in exercise of its constitutional executive power which is co-extensive and co-terminus with the legislative powers of the Parliament. The scheme is financed from the consolidated fund of India and any other statutory authority or Government cannot divert or appropriate the funds disbursed under the scheme. When the scheme itself specifies the beneficiary, the Commission cannot order any misappropriation of the amounts. Any revision of tariff with retrospective effect after the expiry of the control period is wholly misconceived. The issue of Generation Based Incentives being a pass through was considered and denied by the Commission which order was not challenged by the petitioners. Impugned orders cannot be reopened and hence these respondents also sought for the dismissal of the petition.

10. The 36th respondent filed its counter stating that the petition is contrary to the regulatory principles under the Electricity Act, 2003 and Regulations there-under and it is not maintainable. Binding Power Purchase Agreements duly executed cannot be violated. The respondent arranged his affairs based on the generic preferential tariff and it is not open to the petitioners to seek peculiar reliefs. The well reasoned tariff orders with notice to all the stakeholders led to the fixation of tariff. Niti Ayyog report is not a policy decision and the recommendations of the Niti Ayyog are not binding. The Commission considered all relevant incentives and benefits. The policy

decision of the Government of India is not to take into account the Generation Based Incentives. The State Commission was correct and justified in determining generic preferential tariff and passing on Generation Based Incentives. The question of passing on the benefit of GBI to the petitioners does not arise, as it is not supposed to be passed on or shared. If relief prayed for is granted, it will be contrary to the statutory principles of promoting renewable sources of energy. Any change in costing will adversely impact the financial viability of the wind power projects. While Accelerated Depreciation is not claimed, the Generation Based Incentive cannot be shared contrary to the scheme stating the incentive to be over and above the generic preferential wind tariff determined by the Commission. The petitioners made similar claim in 2017-18 ARR and hence the 36th respondent desired the petition to be dismissed.

11. The 34th respondent filed its counter further claiming that the GBI scheme itself stated that the incentive is over and above the tariff that may be approved by the State Electricity Regulatory Commissions in various States i.e., the incentive that is sanctioned by the Union Government to enhance the availability of power to the grid will not be taken into account while fixing the tariff by the State Regulators. The 1st petitioner did not challenge the tariff orders and entered into a Power Purchase Agreement with the 34th respondent as per the tariff determined by the Commission. While issuing the tariff orders, the Commission noted the Generation Based Incentive scheme to be over and above the tariff prescribed by the Commission. Karnataka Electricity Regulatory Commission determined the tariff in O.P.No.19 of 2012 between Indian Wind Energy Association Vs Bangalore Electricity Supply Company Limited, as per para 4.6 of the GBI scheme circular dated 04-09-2013. Gujarat Electricity Regulatory Commission also in O.P.No.2 of 2016 held that the

wind power developer can retain the benefit of GBI. The Commission would have stated in Regulation 20 itself like in the case of AD benefit that the GBI is also encapsulated. Reopening of the Power Purchase Agreement by re-determining the tariff is impermissible. Hence, the 34th respondent also desired the petition to be dismissed.

12. The 43rd respondent in its views, objections and suggestions stated that the State Electricity Regulatory Commissions of Rajasthan, Gujarat, Maharashtra and Karnataka followed the scheme and endorsed that the GBI benefit should be over and above the tariff determined by SERCs. The copies of the orders in order No.2 of 2016 of the GERC, the generic tariff order for wind power projects of RERC, O.P.No.19 of 2012 of the KERC and MERC Regulations 2015 are also filed and the GBI scheme and APERC Regulations were considered in fixing the tariff. Any change through a contrary interpretation will have a negative impact on investment in wind power in the State. It will defeat the State Wind Policy and Regulation 1 of 2015.

13. Danu Wind Parks Private Limited (37th respondent) and Ecoren India Energy Private Limited, the objectors claimed that it is evident that the policy direction under clause 4.6 of the GBI scheme of MNRE is not to consider the incentive while fixing the tariff. GBI should be an additional revenue for the wind developers. Clause 24 of the MERC Terms and Conditions for Determination of Renewable Energy Tariff Regulations, 2015 specifically provided that in case the Central or State Governments or their agencies provide any GBI which is specifically over and above the tariff, such incentive shall not be taken into account while determining the tariff. RERC terms and conditions for determination of tariff for renewable energy sources

– wind and solar energy Regulations, 2014 stated in clause 21 that the Generation Based Incentive / tariff subsidy, if allowed by Central / State Governments, would be governed by the terms and conditions of such scheme. The Central Electricity Regulatory Commission while determining the tariff for non AD projects has not considered the revenue from the GBI for determining the tariff relying on the intent of GBI policy. Wherever there had been a case for sharing the revenue, the appropriate Commission provides that in the Regulations for eligibility for revenue sharing. There is no ground to believe that the Commission has not considered the incentive while determining the tariff. If the distribution companies were not convinced of the same, they should have got the order reviewed. The tariff order cannot be revisited after 2 years making retrospective changes in tariff, which was disallowed by the Hon'ble Supreme Court and Hon'ble Appellate Tribunal for Electricity in several orders. The Regulation nowhere provides the mechanism for refund of the incentives or subsidies. The petition amounts to change in the Regulations which should be through a new Regulation but not convenient interpretation. The utility did not serve any notice to the petitioners seeking a refund of the incentive. The generators and their financing institutions will be put to significant financial burden if they were to share the GBI incentive and in O.P.No.13 of 2012 in spite of specific request by the distribution companies, GBI benefit was not passed on to the distribution companies which order was not questioned. Hence, the objectors desired the petition to be rejected.

14. Sri M. Venugopala Rao, Senior Journalist and Convener, Centre for Power Studies in his objections dated 16-03-2017 stated that the system of determination of generic preferential tariff is outdated and against the larger consumer interest as there is no transparent and real competitive bidding. Two government orders within 3

months enhanced the generic tariff for wind power by Rs.0.50 ps per unit and contrary to its own regulations, the Commission did not factor Generation Based Incentive while determining the tariff for wind power projects commissioned in 2015 and 2016. The powers that be and the Regulatory Commissions were giving undue benefits to the developers. The guidelines of the Government of India for procuring non-conventional energy are not mandatory and public sector utilities of the Government of India are following the process of competitive bidding which recently fetched the lowest tariff of Rs.3.46. The tariffs fixed by this Commission are comparably very high. The consent to the Power Purchase Agreements based on preferential generic tariff is causing irreparable damage to the consumers. The Commission has to review its orders and correct its failure at least to the extent of GBI and the incentive is given by the Government of India from public exchequer. In his further objections dated 18-08-2017, Sri M. Venugopala Rao stated that no public hearings were held before issuing the tariff orders dated 01-08-2015 and 26-03-2016 and hence factoring in GBI also similarly did not require any public hearing. The Commission should have amended the earlier orders by factoring GBI into tariffs as per clause 20 of Regulation 1 of 2015 reducing the burden on the consumers. In the name of encouraging Non-Conventional Energy, Generation Based Incentive is provided by the Government of India and as the Discoms are entering into Power Purchase Agreements with wind power units based on generic tariff without any competition to meet the Renewable Power Purchase Obligations with the generating units being treated as must run units, clause 20 of Regulation 1 of 2015 stipulated that incentives given should be factored into a higher generic tariff. The Commission made the Regulation after public hearing and must have taken all factors into consideration. Public money in the form of Generation Based Incentive is made a

part of capital cost of the units and while factoring the Generation Based Incentive into generic tariff, the purpose of clause 20 of Regulation 1 of 2015 will be achieved in which, a generator has no role to play. The guidelines issued by the Government of India are only recommendatory and not mandatory. As the Regulation cannot be amended with retrospective effect, giving effect to it will not amount to any retrospective order. The Commission did not record any reasons for not factoring Generation Based Incentive into tariffs in its orders dated 01-08-2015 and 26-03-2016, deviating from its own Regulations, confirming it to be an error or omission. The Commission should come to the rescue of the vast multitude of consumers by exercising its legitimate authority by factoring Generation Based Incentive with retrospective effect and interest on the amount to be due to the Discoms from the developers. The Discoms should be allowed to deduct the amount from the monthly bills of the wind power units.

15. The Indian Wind Energy Association complimented the State Discoms for procuring wind power through Power Purchase Agreements at APERC determined tariff which attracted the developers to invest in the State. Clause 4.6 of the GBI scheme clearly stated that the incentive of GBI is over and above the tariff that may be approved by the State Electricity Regulatory Commission in various States. In other words, an incentive that is sanctioned by the Union Government to enhance the availability of power to the grid will not be taken into account, while fixing the tariff by the State Regulator. Incentives may be provided to the Discoms to tide over the financial situation over and above the incentives available to the wind generators, as expected in the new GBI scheme.

16. The Indian Wind Power Association claiming to represent 1602 members with a capacity of 12,266.85 MW contended that this review petition beyond 90 days is barred by limitation in terms of Regulation 49 (1) of Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. There was no error apparent on the face of the record to make a review and the tariff orders dated 01-08-2015 and 26-03-2016 attained finality. They cannot be amended or altered in any manner and the parties are bound to ensure compliance. In Appeal No.279 of 2013 between Gujarat Urja Vikas Nigam Limited Vs Gujarat Electricity Regulatory Commission, the Hon'ble Appellate Tribunal for Electricity following the Appeal Nos.90 and 91 and Batch of 2006 observed that it is the duty of the Commission to incentivise generation of energy through Renewable Sources for which purpose only the Power Purchase Agreements can be reopened but not to curtail the incentives or re-determine the tariff. Any alteration can be only through mutual consent. The GBI guidelines of 2009 issued by MNRE clearly stated the incentive to be over and above the State Commissions' tariff which can be considered under Regulation 20 of Regulation 1 of 2015 but the Generation Based Incentive could not have been passed on to the distribution companies. The policy of the Central Government cannot be defeated by denying to incentive to the developers in any manner. In its additional submissions dated 20-05-2017, the Association submitted that inherent powers cannot be resorted to in contravention of specific stipulations under the statute / regulation as held in **K.K. Velusamy Vs N. Palanisamy (2011) 11 SCC 275**. The inherent powers of the Commission under Regulation 55 (2) and (3) cannot be invoked in violation of Regulation 49 (1). The tariff orders vested substantive rights in the wind power developers which cannot be abrogated by invoking inherent powers as held in **Padamsen Vs State of U.P. (1961) 1 SCR 884**. The wind power

developers have also a right to claim the determined tariff on the basis of *promissory estoppel* and *legitimate expectation* as held by the Hon'ble Appellate Tribunal for Electricity in Appeal No.279 of 2013. The Commission is bound to consider any scheme of incentives only in accordance with the terms thereof and as the scheme gives the incentives over and above the tariff, the tariff orders are perfectly in strict compliance of the Regulation. The Gujarat State Electricity Regulatory Commission and the Rajasthan State Electricity Regulatory Commission decided in their orders that the wind power developers can retain the GBI over and above the tariff determined by the State Commission. Hence, the Association desired the petition to be dismissed.

17. The petitioners filed a rejoinder to the counters filed by all the contesting respondents contending that the Regulation specifying terms and conditions of tariff need not be constant or static for the entire 25 year period of a Power Purchase Agreement. Clauses 54 to 60 of Andhra Pradesh Electricity Regulatory Commission Business Regulations 2 of 1999 are relevant for the powers of the Commission in this regard and the Hon'ble Supreme Court in U.P. Power Corporation Limited Vs NTPC Limited and others, **2009 ELR (SC) 0013** held that revision of tariff must be distinguished from a review of a tariff order and even principles of *res judicata* will have no application to a jurisdiction of this nature. The Hon'ble Supreme Court further held the Central Electricity Regulatory Commission to have a plenary power with its inherent jurisdiction saved and is empowered to lay down its own procedure. Making of a tariff is a continuous process and it can be amended or altered by the Commission, if any occasion arises therefor either on an application filed by the generating companies or by the Commission on its own motion. If the Commission exercises a *suo motu* jurisdiction of review, limitation prescribed by the Regulation

shall not apply and the Commission only must act within a reasonable time. The Hon'ble Supreme Court held in Tata Power Company Limited Vs MERC and others 2009 ELR (SC) 0246 that the function of the Commission is to determine the tariff for generation, supply, transmission and wheeling of electricity and as part of the Regulation, the Commission can also adjudicate disputes regarding the agreements. The Hon'ble Supreme Court also held in Gujarat Urja Vikas Nigam Limited Vs Tarini Infrastructure Limited **(2016) 8 SCC 182** that the generic tariff decided by the Commission is amenable for amendment in public interest by the same Commission even after the approval of the Power Purchase Agreement. The petitioners are only seeking orders supplementing the tariff orders in consonance with clause 20 of Regulation 1 of 2015 and the Hon'ble Supreme Court held that PTC India Limited Vs CERC in 2010 that Regulation is a subordinate legislation with which all the agreements should be aligned. The purport of clause 20 should be correctly captured in the tariff orders and the period of 90 days contemplated for the review petition is not applicable for revision of tariff. The policy for Generation Based Incentives for grid inter active wind power projects issued in 2009 was extended by an order dated 04-09-2013. Clause 4.6 of the policy cannot prevail over clause 20 of Regulation 1 of 2015 and the Central Electricity Regulatory Commission in its decision on the issue while framing a Regulation for tariff determination from RE sources in 2012 clearly took a decision that as the preferential tariff is determined upon ascertaining normative costs and performance parameters and allowing recovery of reasonable costs and returns, it is fair that any subsidy, accelerated depreciation benefit or Generation Based Incentive as a substitute for AD benefit be factored in while determining the tariff. The various decisions cited by the objectors / respondents are not applicable to the facts and the decision of the Hon'ble Appellate

Tribunal for Electricity in Gujarat Urja Vikas Nigam Limited Vs Gujarat Electricity Regulatory Commission dated 22-08-2014 is *subjudice* in a Civil Appeal before the Hon'ble Supreme Court and cannot be relied on. Hence, the petitioners prayed for amending the tariff orders dated 01-08-2015 and 26-03-2016 to transfer the GBI amount received by the wind generators to AP Discoms in compliance with clause 20 of Regulation 1 of 2015.

18. The petitioners were alleged by respondents 2, 21, 32, 36 and 40 to be deducting the Generation Based Incentive from the payments due from them in terms of the respective Power Purchase Agreements for the energy supplied even before adjudication of the matter by the Commission and filed memos respectively to direct the petitioners to pay the said amounts to the respective respondents.

19. In the meanwhile, respondents 34, 40 and 46 filed W.P.No.15479 of 2018, 15402 of 2018 and 15364 of 2018 before the Hon'ble High Court against the petitioners to issue appropriate writ against the Commission to dispose of this petition by delivering the judgment at the earliest to avoid severe financial distress to them due to arbitrary and illegal deduction of Rs.0.50 ps per kWh from the bills of these respondents. The Hon'ble High Court disposed of the Writ Petitions by its orders dated 04-06-2018 directing to decide this petition within two months from that date after hearing all the effected parties as any further delay may result in writ petitioners suffering financial loss.

20. Written Submissions were filed by the petitioners, contesting respondents and Indian Wind Power Association and a number of documents, judicial precedents and decisions of the Hon'ble Appellate Tribunal for Electricity were filed before the

Commission which will be appropriately referred to and dealt with in this order in due course.

21. The point for consideration is whether the Generation Based Incentive received by the different wind power generators under the scheme of Government of India has to be factored in determining the tariff for wind power projects in accordance with clause 20 of Regulation 1 of 2015 and the orders dated 01-08-2015 and 26-03-2016 notifying generic preferential tariff in respect of wind power projects in the State should accordingly give effect to the same ?

22. The Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulations, 2015, Regulation 1 of 2015 were made in exercise of the powers conferred on the Commission by Sections 61, 86 and 181 of the Electricity Act, 2003. Section 61 makes the appropriate Commission making the tariff regulations guided by the principles and methodologies specified by the Central Electricity Regulatory Commission for determination of the tariff applicable to generating companies [Section 61 (a)], conduct of generation, transmission and distribution and supply of electricity on commercial principles [Section 61 (b)], safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner [Section 61 (d)] and the promotion of co-generation and generation of electricity from renewable sources of energy [Section 61 (h)]. Section 62 (4) provides for tariff or part of any tariff being amended, ordinarily not more frequently than once in a financial year. Section 86 not only makes it a function of the State Commission to determine the tariff but also makes it responsible for regulation of purchase and procurement of electricity by distribution licensees including its price. It also makes

promotion of co-generation and generation of electricity from renewable sources of energy, another function of the Commission. In making regulations under Section 181, the Commission should ensure that they are consistent with the Act and the Rules to carry out the provisions of the Act. Regulation 1 of 2015 was made by this Commission keeping in view these and other relevant provisions of the Electricity Act, 2003, the Andhra Pradesh Electricity Reform Act, 1998 and the various Rules and Regulations already made under them.

23. The power to review the Regulations earlier to 31-03-2020 till which date the Regulations would otherwise be in force was retained by the Commission by clause 1 (2) of the Regulations and clause 6 directs the Commission to notify generic preferential tariff on *suo motu* basis at the beginning of each financial year. The tariff structure under clause 7 consists of return on equity, interest on loan capital, depreciation, interest on working capital and operation and maintenance expenses. Clause 20 specifically provided that the Commission shall take into consideration any incentive or subsidy offered by the Central or State Government including Accelerated Depreciation benefit, if availed by the generating company, for the wind power projects, while determining the tariff under the Regulations. While the financial principles in Chapter 2 of the Regulations cover every conceivable expense incurred and investment made by the generating company, the direction to the Commission by clause 20 that it shall take into consideration any subsidy or incentive availed obviously means on a purposive and harmonious construction and interpretation of all the relevant clauses put together that from out of the tariff under clause 7 or the levelled tariff under clause 8 consisting of the specific cost components and factors, the benefit received by availing any subsidy or incentive from any Central or State Government shall have to be given credit to in the final

determination of tariff or levelized tariff. The words incentive and subsidy were not subjected to any restrictions or limitations in effect or substance or meaning.

24. This apart, clause 22 of the Regulations provides that for the reasons recorded in writing, the tariff for sale of electricity by the wind power projects may be determined in deviation from the norms specified in the Regulations. Clause 23 provides for the power, for reasons to be recorded in writing, to relax any of the provisions of the Regulations by the Commission *suo motu* or on an application, while issue of orders and practice directions for implementation of the Regulations is the subject of clause 24. Commission has the power to remove difficulties by a general or specific order under clause 26. These clauses thus show that any deviation from or relaxation of the provisions of the Regulation is permissible for the reasons recorded in writing and the incidental and ancillary power to give appropriate and required effect to the Regulations rests with the Commission under clauses 24 and 26 as well as clause 25 under which the Commission may vary or alter or modify or amend any provisions of the Regulations. However, as already stated, deducting any incentive or subsidy availed by a wind generator from the cost components and factors under clause 7 and / or clause 8 is what the Regulations have unambiguously prescribed and any conceivable difficulty or problem in such interpretation can be overcome by taking recourse to clauses 22 to 26 of Regulation 1 of 2015 together to the extent each of the clauses may apply. With this statutory background, it is of-course seen from the tariff orders dated 01-08-2015 and 26-03-2016 that any Generation Based Incentive was not taken into account in the determination of the tariff for a part of financial year 2015-16 (from 31-07-2015 to 31-03-2016) and the whole financial year 2016-17. The parameters given in the Regulations were computed as per Regulations to arrive at generic preferential tariff in both the orders

and tariff was fixed for both without Accelerated Depreciation benefit and with Accelerated Depreciation benefit. The benefit of no other subsidy or incentive was referred or taken into account and no reasons were mentioned for such a course of action.

25. The scheme for implementation of Generation Based Incentive (GBI) for grid interactive wind power projects with the approval of His Excellency, the President of India was issued by the Ministry of New and Renewable Energy, Government of India on 17-12-2009. The incentive of Rs.0.50 ps per unit of electricity is in parallel with Accelerated Depreciation on a capital exclusive manner with a cap of Rs.62 lakhs per MW as per the scheme. The generating companies can avail either Accelerated Depreciation or Generation Based Incentive but not both as per clause 3.1 eligibility, of the scheme. It is true that clause 4.6 of the scheme states that “this incentive is over and above the tariff that may be approved by the State Electricity Regulatory Commissions in various States. In other words, this incentive that is sanctioned by the Union Government to enhance the availability of power to the grid will not be taken into account while fixing the tariff by State Regulators”. The Policy dated 17-12-2009 makes no reference to any provision or any statute or rule or regulation and ex-facie appears from its plain and unambiguous language to have been issued in exercise of the executive or administrative power of the Ministry of New and Renewable Energy, Government of India. This scheme was extended for the 12th plan period also by a communication dated 04-09-2013 but the cap was enhanced to Rs.100 lakhs per MW. The Indian Renewable Energy Development Agency Limited (IREDA) was named as the implementation agency of the scheme and it issued operational guidelines for implementation of the incentive on both the occasions which also clearly stated that the companies shall be allowed to avail

either Accelerated Depreciation or Generation Based Incentive, but not both. It is of-course stated that Generation Based Incentive is over and above the tariff approved by State Electricity Regulatory Commissions. The operational guidelines issued on 28-12-2013 after extension of the GBI scheme on 04-09-2013 were revised as on 22-04-2015. In Annexure 'B' applicable for projects commissioned on or after 01-04-2014, the generating company has to specifically declare that they shall not claim Accelerated Depreciation on the wind mill installed and registered under GBI scheme. At 2.2 of the revised guidelines dated 22-04-2018, the incentive was stated to be available even for projects set up for inter-state sale of power to the grid through tender / bidding route where the tariff is not determined by State Electricity Regulatory Commissions and the utility has to clearly indicate the applicable tariff including of GBI component, to provide the GBI.

26. Thus since the advent of GBI scheme in 2009, Accelerated Depreciation and Generation Based Incentive are mutually exclusive. In the tariff orders dated 01-08-2015 and 26-03-2016, the levelized generic preferential tariff was fixed separately, one without considering the Accelerated Depreciation and the other with Accelerated Depreciation, the difference between both being Rs.0.58 ps and Rs.0.59 ps respectively. The benefit of Accelerated Depreciation is thus deducted from the tariff when availed, while the benefit of GBI was not deducted whether availed or un-availed, thus giving an additional benefit of Rs.0.50 ps per unit over and above the tariff without Accelerated Depreciation benefit. When Accelerated Depreciation and Generation Based Incentive are mutually exclusive even according to the scheme of the Government of India, the purpose of both being the same to incentivize renewable power generation through wind, such unilateral advantage to those who opt for GBI scheme in contrast with those who opt for Accelerated Depreciation

benefit cannot be considered fair or reasonable just or equitable or based on any reasonable classification based on intelligible criteria. Such a differential treatment to similarly or identically placed wind generators may be offending the fundamental right of equality before law and equal protection of laws. The norms of this well settled principle should therefore lead to the wind generators availing wind generation based incentives in not claiming them or if availed, refunding the said benefits to the distribution companies reducing the tariff payable by the distribution licensee to the extent of such Generation Based Incentive. The National Tariff Policies dated 06-01-2006 and 28-01-2016 were referred to, which shall be taken as providing guidance to the State Electricity Regulatory Commissions as per the Electricity Act, 2003, which emphasized the need for maintenance of a balance between the interests of consumers and the need for investments, while laying down the rate of return. The 2006 Policy states that the appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity. It was also stated that new capacity addition should deliver electricity at most efficient rates to protect the interests of the consumers. Under the 2016 National Tariff Policy also, appropriate return on investment in power sector and availability of electricity to different categories of consumers at reasonable rates were considered essential to be balanced. It was rightly stated to be a critical challenge for the regulatory process. Consumer interest was stated to be the best served in ensuring viability and sustainability of the entire value chain of the power sector, while facilitating the power supply at reasonable rate to the consumers. In terms of recovery of all prudent costs, the appropriate Government and the appropriate Commission were desired to ensure viability of generation, transmission and distribution of electricity. Projects with lower green house gas

emissions were to be provided adequate incentives while taking into account the benefits obtained from clean development mechanism. The 2016 Policy also mandates that new capacity addition should deliver electricity at most efficient rates to protect the interests of the consumers. The Policy also specifically directed to take into account both the availability of all renewable energy sources and its impact on retail tariffs. When it came to distribution, the Policy specifically directed the Commissions to strike the right balance between the requirement of the commercial viability of distribution licensees and consumer interests. Thus, a close examination of the two National Tariff Policies of 2006 and 2016 makes it clear that a delicate balancing of competing necessities and interests is the rule governing generation, transmission or distribution of electricity and the basic approach is to strive to provide an appropriate return on investment while ensuring availability of electricity to different categories of consumers at most efficient, economic and reasonable rates. While the investors should recover all prudent costs, the distribution licensee and the consumer can be subjected only to reasonable and bearable tariffs. The report of the expert group of Niti Ayyog on 175 GW RE by 2022 dated 31-12-2015 states that an inherent limitation for Generation Based Incentive has been its ability to offer tariff comfort to the procurers end, as most feed-in-tariffs approved by State Electricity Regulatory Commissions do not even consider GBI to be available or not available. The report hence suggested a possible change in GBI mechanism to offer GBI payments to the procuring utility with clearly defined responsibilities for the Discoms which could motivate the utilities to buy more Renewable Energy, enhance transparency, facilitate timely payments to generators and ease out the administration of the incentive. It was suggested that such GBI payments can be related to 75% of the difference between the tariffs of Renewable Energy and

alternate marginal source to ensure prudence in Renewable Energy procurement process. The Wind Power Policy, 2015 of the Government of Andhra Pradesh under G.O.Ms.No.9 dated 13-02-2015 had the objective of promoting wind power generation in the State of Andhra Pradesh through various measures specified in the Policy which do not encompass the determination of tariff in the substantial sense except exemptions granted in respect of power evacuation supervision charges, transmission and distribution charges for wheeling of power etc., and hence the Policy has no direct impact on the questions in issue herein. Reverting back to Niti Ayyog expert groups recommendations, it may be noted that, suggestions to offer the GBI payment to the procuring utility is in tune with the language and philosophy of clause 20 of Regulation 1 of 2015.

27. The order of the Rajasthan Electricity Regulatory Commission in the matter of determination of generic tariff for sale of electricity to distribution licensee from wind power plants getting commissioned during FY 2016-17 dated 25-05-2016 was referred to and Regulation 21 of RERC RE Tariff Regulations, 2014 was referred to in the order as requiring the Commission to take into consideration any incentive or subsidy or benefit available from Central or State Government including Accelerated Depreciation benefit if availed by a generating company for determining the tariff but it was specifically provided that the Generation Based Incentive / Tariff subsidy, if allowed by Central / State Government would be governed by the terms and conditions of such scheme. Thus, the Regulation itself mandates that any Generation Based Incentive would be governed by the terms and conditions of such scheme consequently excluding it from the consideration of the Commission, while determining the tariff. It is clear that the Rajasthan Electricity Regulatory Commission in making the Regulation desired and laid down that the Generation Based Incentive

shall be governed by its scheme and not by any consideration by the Commission as in the case of any other incentives or subsidies or benefits from Central or State Government including the Accelerated Depreciation benefit. However, clause 20 of Regulation 1 of 2015 of this Commission did not make any such exception of this incentive or benefit that is Generation Based Incentive whatever be the scheme under which the said incentive is allowed and availed. As such the Rajasthan example is of no avail in considering the manner in which Generation Based Incentive availed by any generator should be dealt with in the determination and payment of tariff.

28. Similarly, Order No.2 of 2016 of the Gujarat Electricity Regulatory Commission dated 30-08-2016 in the matter of determination of tariff for procurement of power by the distribution licensees and others from wind power project was also referred to during the hearing. That Commission in its discussion paper proposed that Generation Based Incentive shall be shared between the developer / investor and the distribution licensee / end consumer in equal proportion but the objectors reacted against the same as Generation Based Incentive is over and above the tariff. The Commission, while noting that the Generation Based Incentive is over and above the tariff approved by the State Electricity Regulatory Commissions, opined that the cost plus approach followed by it in arriving at the single levellized tariff was after taking into account the benefit due to Accelerated Depreciation and in view of the same, it decided that the Generation Based Incentive will not be shared with distribution utilities and end consumers. The Commission decided that the wind power developers / investors, who are eligible to claim Generation Based Incentive as per MNRE guidelines can retain the incentive over and above the tariff determined by the Commission. It has to be noted that the

Gujarat Electricity Regulatory Commission in this order observed that the Income Tax Act, 1961 allowed everyone to avail Accelerated Depreciation benefit as per its provision and as the Commission has allowed all reasonable costs and returns to be recovered from the tariff. It is fair that any benefit occurring due to subsidy / Accelerated Depreciation would be factored in, while determining the tariff. The Commission, therefore, decided not to accept the suggestion that two separate tariffs with and without Accelerated Depreciation benefit may be specified as the IPPs may not be in a position to avail the Accelerated Depreciation benefit and determined the single levelized tariff taking into account the benefit of Accelerated Depreciation available under the Income Tax Act. The tariff determined took into account the project costs, performance parameters and financial parameters and from the gross tariff arrived at, the depreciation benefit was deducted to determine the net tariff at Rs.4.19 ps kWh payable by the distribution licensees to the wind generators. In the orders of this Commission dated 01-08-2015 and 26-03-2016, the Commission notified the generic preferential tariff per unit at different rates for those availing Accelerated Depreciation and those without availing Accelerated Depreciation. If those who availed Accelerated Depreciation retain the same and also claim the tariff fixed for those not availing Accelerated Depreciation, they will gain an unfair advantage and similarly, if Generation Based Incentive is availed and tariff fixed for those not availing Accelerated Depreciation were to be claimed and paid, then those generators will gain an undue advantage. As Gujarat Electricity Regulatory Commission determined only single levelized tariff on cost plus approach minus depreciation benefit, all the generators stand on the same footing, while the determination of tariff by this Commission with and without Accelerated Depreciation benefit also results in equal treatment of generators availing or not availing

Accelerated Depreciation. However, if the Generation Based Incentives were to be permitted to be retained and the higher of tariffs applicable for not availing Accelerated Depreciation were to be paid, those availing Accelerated Depreciation and not getting the Generation Based Incentive or those who did not avail either benefit will suffer a disadvantage. While Gujarat Electricity Regulatory Commission's order shows no provision similar to clause 20 of Regulation 1 of 2015 in their Regulations, the said Commission giving effect to Generation Based Incentive operational guidelines is due to the benefit due to the Accelerated Depreciation benefit already taken into account in specifying the single levelized tariff.

29. The Karnataka Electricity Regulatory Commission in its order in O.P.No.19 of 2012 & batch dated 10-10-2013 was dealing with petitions by associations having wide membership of wind energy developers and wind turbine manufacturers in the country. Dealing with the Generation Based Incentive provided by the Government of India at Rs.0.50 ps per kWh, the Commission decided not to factor these incentives while computing the tariff for wind power projects as per para 4.6 of the Circular dated 04-09-2013 issued by the Government of India, Ministry of New and Renewable Energy. Thus, it is a decision of the Commission without reference to any regulations made by it. Though the Commission referred to the scheme being guided in the determination of wind power tariff on the broad principles contained in the tariff policy, previous tariff orders and the Karnataka Electricity Regulatory Commission (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2014 and the Karnataka Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2011, no specific provision in the policy or orders or regulations referred to was referred to by the Commission as forming the background or basis for its decision not to factor

Generation Based Incentive in computing the tariff. It relied on only para 4.6 of the Generation Based Incentive Circular of the Government of India dated 04-09-2013.

30. The Maharashtra Electricity Regulatory Commission determined the generic tariff for Renewable Energy for FY 2017-18 by an order dated 28-04-2017 in Case No.33 of 2017. The determination was done in accordance with the Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2015. The Commission referred to Clause 24 of its Renewable Energy Tariff Regulations, which provided that any grant, subsidy or incentives availed by a Project Entity shall be deducted by the Distribution Licensee in subsequent bills raised by the particular Project Entity towards the sale of electricity in suitable instalments or within such period as may be stipulated by the Commission. The Commission observed that thus the Regulations take into account the impact of any such grant, subsidy or incentive availed by a Project Entity. However, as the nature and quantum of such subsidies etc., and their applicability to different projects varies from time to time in the opinion of the Commission, the Commission did not consider them for the computation of the generic tariff, but it was provided in the Renewable Energy Tariff Regulations for their deduction by the distribution licensees where applicable. However, in the last proviso to clause 24 of Renewable Energy Tariff Regulations, the Commission specifically provided that in case the Central or State Government or their agencies provide any Generation Based Incentive which is specifically over and above the tariff, such incentive shall not be taken into account while determining the tariff, which makes it clear that but for the proviso, this incentive also is one that the Commission shall take into consideration, if availed, while determining the tariff under the Regulations, as per clause 24 as a grant or subsidy or incentive offered by the Central or State

Government or their agencies, such availed incentive is otherwise subject to being deducted by the distribution licensees in the subsequent bills after availment of such incentive by the power projects. This clause 24 is thus in sharp contrast with clause 20 of Regulation 1 of 2015, which only provided for all such incentives being taken into consideration and thus being liable to be deducted by the distribution licensees after availment.

31. The Chhattisgarh State Electricity Regulatory Commission (Terms and Conditions for determination of general tariff and related matters for electricity generated by plants based on renewable energy sources) Regulations, 2012 was also referred to during the hearing, which has a similar provision to clause 20 of Regulation 1 of 2015, in Clause 22.1 of that Regulation but the said provision has a specific proviso stating that “Provided further that in case any Central Government or State Government notification specifically provides for any Generation based Incentive over and above tariff, the same shall not be factored in while determining Tariff”. Thus, while any capital or subsidy or incentive or grant offered by the Central or State Government shall be taken into consideration for determination of project specific tariff, it is clear that as a matter of policy of that Commission, any Generation Based Incentive under a Central or State Government notification was excluded from such consideration by the specific proviso. The position obviously meant and suggests that any such Generation Based Incentive would also have been covered by the main clause 22.1 but for the proviso and should have been taken into consideration in determining the project specific tariff. It was also clear that if any Generation Based Incentive is prohibited from being factored in, it is because of the proviso and not otherwise. Therefore in interpreting clause 20 of Regulation 1 of 2015 which is in *pari materia* with clause 22.1 of the Chhattisgarh State Electricity

Regulatory Commission's Regulation, it is clear that all the incentives including the Generation Based Incentive will be covered by the main clause and if it were to be excluded from consideration in determining the tariff, a specific exemption as provided under the proviso to clause 22.1 must have been provided to clause 20 herein also.

32. Various precedents were also referred to during the hearing and in Gujarat Urja Vikas Nigam Limited Vs Tarini Infrastructure Limited and others **(2016) 8 Supreme Court Cases 743**, the Hon'ble Supreme Court was considering the questions whether the tariff fixed under the Power Purchase Agreements is *sacro sanct* and inviolable and beyond review and correction by the State Electricity Regulatory Commission which is the statutory authority for fixation of tariff under the Electricity Act, 2003. The power of tariff determination was observed by the Hon'ble Supreme Court to be statutory and it is the determination made in exercise of the statutory powers which got incorporated in a mutual agreement between the parties involved. The Gujarat Regulations were noted by the Hon'ble Supreme Court to have made the tariff so fixed subject to periodic review. The decisions wherein it was laid that the word "regulate" is wider to confer a power to regulate by increasing or decreasing the rate were also noted, the test being what is that is necessary must be done to maintain, increase or secure supply of the essential articles in question and to arrange for equitable distribution and its availability at fair prices. The Hon'ble Supreme Court observed it to be a sound principle of interpretation to confer a power of flexibility of tariff stipulated and not inviolability, if public interest dictated by the surrounding events and circumstances require a review of the tariff. The Hon'ble Supreme Court noted the principles on which tariff is to be determined as commercial principles, while the consumer interest is to be safeguarded and

recovery of costs on electricity in a reasonable manner is ensured. The detailed analysis and ratio laid down suggest no rigidity or inflexibility in the tariff determined and public interest, consumer interest, full cost recovery of electricity etc., are laid down as the guiding factors in the matter. The Hon'ble Supreme Court ultimately upheld the orders of the Hon'ble Appellate Tribunal for Electricity which held in favour of a review of the tariff in exercise of the statutory powers vested in the State Electricity Regulatory Commissions if fully justified on the surrounding facts and circumstances. Thus the decision appears to rather support the view that if not factoring in Generation Based Incentive in the tariff is violation of clause 20 of Regulation 1 of 2015, the State Commission has a power of review to take corrective action and it may be noted that it is not a review in the sense of a review under clause 49 of Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 with a prescribed period of limitation of 90 days. In Uttar Pradesh Power Corporation Limited Vs National Thermal Power Corporation Limited and others **(2009) 6 Supreme Court Cases 235**, the Hon'ble Supreme Court noted that earlier in V.S. Rice and Oil Mills Vs State of A.P. **AIR 1964 SC 1781**, it was observed that the word 'regulate' is wide enough to confer power to regulate either by increasing the rate or decreasing the rate, the test being what is it that is a necessary or expedient to be done to maintain, increase or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices.

33. In Income Tax Officer, Alleppy Vs M.C. Ponnose and others **AIR 1970 SC 385**, the Hon'ble Supreme Court while upholding the jurisdiction of a sovereign legislature to enact laws with retrospective effect observed that persons or authorities exercising subordinate legislative function cannot make a rule, regulation

or bye-law which can operate with retrospective effect unless the person or authority to whom the powers of making a rule or regulation have been delegated by the legislature by the language employed in the statutory provision by necessary provision or implication empowering the authority concerned to make a rule or regulation with retrospective effect. The principle is unexceptionable but the question in the present case is the effect of clause 20 of Regulation 1 of 2015 but not giving any retrospective effect to it from now. Clause 20 was born and in effect and force along with the birth, effect and force of Regulation 1 of 2015 and the question herein is whether the said clause was not given effect to in spite of being applicable in respect of the Generation Based Incentive.

34. In State of Rajasthan and others Vs Basant Agrotech (India) Limited (**2013**) **15 Supreme Court Cases 1** also the question involved was retrospective increase of the rate of tax and the Hon'ble Supreme Court found nothing in the statute governing the issue conferring jurisdiction or involving a delegation to issue notification in respect of the rate with retrospective effect. As such the notification covering period prior to the date of publication of it in the official Gazette was held to be a transgression of the statutory postulate. However, in so far as clause 20 of Regulation 1 of 2015 is concerned what is contended is about the provision unambiguously covering Generation Based Incentive also since inception but not about the Generation Based Incentive being attempted to be brought under that provision retrospectively.

35. Modi Food Products Ltd. Vs Commissioner of Sale Tax, U.P., **AIR 1956 Allahabad 35** is a case where the Hon'ble High Court refused to give retrospective

effect to a new rate which subsequently came into force, to assessments of the previous years, which contingency does not arise here.

36. India Sugars and Refineries Ltd., Hospet Vs The State of Mysore and others **1958 The Indian Law Reports Mysore 688** is a case where it was held that a power conferred by legislature on a subsidiary body to issue notifications cannot be exercised retrospectively unless it is expressly stated so. It is only those powers which are expressly conferred that can be exercised by the delegated authority. The decision noted the difference in this respect between the power of legislative body and that of a delegated authority. In the present case the question is not exercise of any retrospective jurisdiction to issue notifications or do any other act. Clause 20 of Regulation 1 of 2015 is only prospective in operation since Regulation 1 of 2015 came into force and the issue herein is not giving effect to and not complying with the said clause but not any retrospective consideration of any incentive or subsidy in determining the tariff.

37. The Judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No.279 of 2013 between Gujarat Urja Vikas Nigam Limited Vs Gujarat Electricity Regulatory Commission and others was rendered on a petition by Gujarat Urja Vikas Nigam Limited, the appellant to re-determine the capital cost and tariff which were fixed in an earlier order in exercise of regulatory powers, which was dismissed considering it to be a review petition filed after a considerable lapse of time. The Hon'ble Appellate Tribunal for Electricity observed that the strict rules of CPC do not apply to the proceedings before the State Commission which is free to decide on its own procedure which satisfies two aspects that is principles of natural justice and transparency. It also held that the petition was for revising the tariff in public interest

in exercise of the regulatory powers in view of the subsequent developments and is not a review petition. Referring to precedents, the Hon'ble Appellate Tribunal for Electricity concluded that in exercise of the regulatory powers, the appropriate Commission can revisit the tariff and reopen the Power Purchase Agreements especially where public interest is involved and the interest of consumers so requires. The question of limitation does not arise if it was not a review petition. While observing that the appropriate Commission has the duty and obligation to ensure that the project developers intending to install power projects through renewable sources of energy are encouraged, the Hon'ble Appellate Tribunal for Electricity noted that the promotional generic tariff itself was the incentive which cannot be sought to be taken away long after the generators have acted upon the same. The decisions of the Hon'ble Supreme Court holding that while exercising regulatory powers, the regulator has wide power regarding incidental and supplementary powers, the Hon'ble Appellate Tribunal for Electricity concluded that the State Commission would not be expected to revisit the generic tariff and thereby to disincentivise the project developers and consequently discourage the future investment in the sector when it was not established by the appellant that there is a legal right available to the appellant to seek redetermination of tariff by reopening the Power Purchase Agreements. It is clear that if there is a legal right available to seek redetermination of tariff, the jurisdiction of the State Commission to revisit the generic tariff is not taken away. In the present case the noncompliance with clause 20 of Regulation 1 of 2015 in respect of Generation Based Incentive is claimed to have infringed the rights of the distribution licensees which, if proved to be true, confers jurisdiction on the State Commission to revisit the tariff, which under such circumstances will not be barred by the limitation applicable to the petition for review.

38. Delhi Cloth & General Mills Limited Vs Union of India (1988) 1 Supreme Court Cases 86 is a case where the *doctrine of promissory estoppel* was exhaustively discussed and it was pointed out that the *doctrine of promissory estoppel* can be invoked if the party asserting the estoppel must have acted upon the assurance given to him or must have relied upon the representation made to him and changed or altered his position. The alteration of position by the party is the only indispensable requirement of the doctrine. It is not necessary to prove further any damage, detriment or prejudice. In the present case, no generator can claim to have changed or altered his position by relying on any assurance given by clause 20 of Regulation 1 of 2015 and the plain and unambiguous language of the said clause indicates that any subsidy or incentive from the Central or State Government shall be taken into consideration in determining the tariff. The fact that it was not so taken into consideration in spite of the mandate of the regulation will not entitle any generator to claim to be either unaware of the clause or to have understood the clause as conveying anything else than what it plainly does. The Hon'ble Supreme Court also made it clear that the doctrine cannot be invoked if it is found to be inequitable and unjust and as already stated allowing any wind generator to retain the benefit of Generation Based Incentive will result in inequitable discrimination between them and other generators in the matter of recovering the price of electricity supplied.

39. The doctrine of *legitimate expectation* is the subject of consideration in Punjab Communications Limited Vs Union of India and others (1999) 4 Supreme Court Cases 727. While noting that the principles of *legitimate expectation* are still at a stage of evolution, the Hon'ble Supreme Court observed the basic principle of *legitimate expectation* to be based on an express promise or representation or by established past action or settled conduct. Any substantive *legitimate expectation* of

a favourable view on examination of clause 20 of Regulation 1 of 2015 as not covering any Generation Based Incentive could not have been conceived and the protection of substantive *legitimate expectation* was held to be based on 'Wednesbury' unreasonableness which means that the judgment whether public interest overrides any substantive *legitimate expectation* of any individual will be for the decision maker who has made the change in the policy and the Courts will intervene in the decisions only if they are satisfied that the decision is irrational or perverse.

40. The Hon'ble Supreme Court dealt with the *doctrine of legitimate expectation* in U.P. Awasthi Vs State of U.P. (1995) 2 Supreme Court Cases 326 also and held that the principles of natural justice, as a part of procedural law have been applied and extended to quasi-judicial proceedings and administrative matters to ensure that no one is adversely affected without reasonable opportunity and fair hearing. Every wind power generator and every stakeholder interested in the issue was given individual and general (public) notice and every opportunity of being heard in these proceedings and as already stated there was no *legitimate expectation* which was unjustly wiped out.

41. In Kunhayammed and others Vs State of Kerala and another (2000) 6 Supreme Court Cases 359, the legal implications and impact of an order rejecting petition for grant of special leave under Article 136 of the Constitution of India was considered by the Hon'ble Supreme Court and the logic underlying the doctrine of merger is stated to be that there cannot be more than one decree or operative order governing the same subject matter at a given point of time. The decree or order of superior court or tribunal or authority is final, binding and operative in which the

decree or order of the court or tribunal or authority below is merged. However, it was clearly stated that the doctrine is not of universal or unlimited application and the nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or what could have been laid shall have to be kept in view. The various orders under consideration in the present inquiry have thus to be examined with reference to the tests laid down by the Hon'ble Supreme Court.

42. The judgment of the Hon'ble Appellate Tribunal for Electricity in Gujarat Urja Vikas Nigam Limited Vs Green Infra Corporate Wind Power Limited and others **2015 SCC Online APTEL 15** is a case where the Hon'ble Appellate Tribunal for Electricity on elaborate consideration laid down that there is no bar on the appropriate Commission preventing it from entertaining the petition for modification of tariff after execution of the Power Purchase Agreement. The Hon'ble Appellate Tribunal for Electricity did not find any fetters in law on the power of the appropriate Commission to undertake such exercise to amend or to revoke the tariff as demanded by the exigencies of a situation. In fact, the Hon'ble Appellate Tribunal for Electricity pointed out that the State Commission should look after the welfare of the consumer at large and balance has to be struck between the consumers and renewable energy sector and to achieve this objective, the State Commission has to reopen the Power Purchase Agreements sometimes executed by the renewable energy developers and distribution licensees.

43. Union of India and others Vs Major S.P. Sharma and others **(2014) 6 Supreme Court Cases 351** dealt with the *doctrine of pleasure* and was cited to show that a decision rendered by a competent court cannot be challenged in a collateral proceedings for the reason that if it is permitted to do so, there would be

confusion and chaos and the finality of proceedings would cease to have any meaning. The Hon'ble Supreme Court in Hope Plantations Limited Vs Taluk Land Board, Peermade and another **(1999) 5 Supreme Court Cases 590** held it to be an important consideration of public policy that the decisions pronounced by the courts of competent jurisdiction should be final unless they are modified or reversed by the Appellate Authority. These authorities are cited with reference to the earlier orders of this Commission and otherwise on the subject.

44. Delhi Electricity Regulatory Commission Vs BSES Yamuna Power Limited and others **(2007) 3 Supreme Court Cases 33** dealt with the principles for tariff determination and observed that the investors were put on notice regarding the tariff structure before privatization which the bidders are required to take note of before making bids. The Delhi Electricity Regulatory Commission was required to be guided by the directions in matters of policy involving public interest as Government may issue from time to time. The questions in issue therein do not appear to throw any direct light on the issue involved herein.

45. The petitioners relied on Shree Sidhali Steels Ltd. and Ors Vs State of Uttar Pradesh and Ors **AIR 2011 SC 1175** for the principle that there cannot be estoppel against the statute and a benefit which was granted or curtailed in exercise of statutory powers can be subsequently withdrawn in exercise of another statutory power. The principles of *promissory estoppel* cannot be invoked where public interest warrants or against a statute. It was also noted that the recipient of a concession has no legal enforceable right against any Government to grant of concession except to enjoy the benefits of the concession during the period of its grant. The Government is equally free to modify its industrial policy and grant, modify

or withdraw fiscal benefits from time to time. On the principles of the decision, either in public interest or in view of clause 20 of Regulation 1 of 2015, there can be no *estoppel* against the petitioners claiming the benefit of Generation Based Incentive to themselves as against the wind power developers in view of the manner in which the tariff was determined by the Commission with or without Accelerated Depreciation benefit.

46. Indian Thermal Power Limited Vs State of Madhya Pradesh **2000 (1) SCR 925** is also a case where contentions on the basis of *legitimate expectation* and *promissory estoppel* were raised and the decision to invite fresh bids on the basis of the least tariff criteria in the place of Power Purchase Agreements were challenged and it was held that it is not possible for courts agreeing with the contention that the least tariff criteria was not a good criteria when larger public interest was considered in arriving at the conclusion.

47. Along with I.A.No.8 of 2018 to reopen this petition for further hearing, the petitioners sought to place reliance on two orders of the Hon'ble Appellate Tribunal for Electricity in Maruthi Suzuki India Limited Vs Haryana Electricity Regulatory Commission in Appeal No.103 of 2012, where the Hon'ble Appellate Tribunal for Electricity delivered its judgment on 24-03-2015 and in Appeal No.126 of 2016 between Odhisa Power Generation Corporation Limited and Odhisa Electricity Regulatory Commission and others, where the Hon'ble Appellate Tribunal for Electricity delivered its judgment on 06-04-2017. In the former case, the principle laid down by the Hon'ble Supreme Court is that any policy direction by the State Government cannot be pushing the Electricity Board to perform its obligation beyond the limits of a statute, but any policy direction, which in its due performance keeps

the Board within its permissible statutory limits, would be binding on the Board. In the later decision, the Hon'ble Appellate Tribunal for Electricity similarly observed that the directions issued by the State Government under Section 108 (1) in matters of policy involving public interest have a guiding force. Undoubtedly the State Commission should follow them but it is the duty of the State Commission to see that the provisions of the said Act and the regulations issued by it which are binding on it are followed. Any policy direction which transgresses or overrides the same cannot have guiding force. While the power to issue directions under Section 108 conferred on the State Government is identical to the power conferred on the Central Government to issue similar directions on identical facts and circumstances, thus any policy direction which transgresses or overrides the provisions of the Electricity Act, 2003 or Regulation 1 of 2015 issued there-under, cannot have any guiding force on the State Commission.

48. The non-availability of inherent powers to the Commission under clause 55 (2) and (3) of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the petition being one for review under clause 49 of the said Regulations being barred by time, the tariff orders dated 01-08-2015 and 26-03-2016 having worked themselves out due to afflux of time not being reviewable, retrospective fixation of tariff being impermissible, the wind tariff orders having become final in the absence of any challenge, clause 20 of Regulation 1 of 2015 prescribing only consideration of any incentive or subsidy but not its incorporation or deduction, revisiting the tariff being prohibited to curtail the incentives for nonconventional energy projects, the terms and conditions of a Power Purchase Agreement being unalterable except through mutual consent, the applicability of the doctrines of *promissory estoppel* and *legitimate expectation*, the Generation Based

Incentive Scheme categorically specifying the incentives to be over and above the tariff, the absence of any error apparent on the face of the record in the wind tariff orders to permit any review, the Commission having become *functus officio* after tariff determination, the absence of any power to the Commission to annul clause 4.6 of the Generation Based Incentive Scheme, Generation Based Incentive not being considered as pass through in spite of the letter of the petitioners dated 30-10-2015, the Generation Based Incentive Scheme being one in exercise of constitutional executive power of the Central Government which is coextensive and coterminous with the legislative power of the Parliament funded from the consolidated fund of the Government of India under Parliamentary approval and supervision etc., are the various grounds thus raised by the respondents and other objectors against the reliefs prayed for by the petitioners with reference to clause 20 of Regulation 1 of 2015 on the ground that the wind tariff orders dated 01-08-2015 and 26-03-2016 did not factor in the Generation Based Incentive in violation of clause 20.

49. The wind tariff orders dated 01-08-2015 and 26-03-2016, as already stated only fix the tariff with or without Accelerated Depreciation benefit and made no reference at all to the Generation Based Incentive. There cannot be considered to be any conscious application of mind to the issue of factoring in the Generation Based Incentive into the generic tariff, in fixing the tariff on both the occasions taking into account of the parameters prescribed by the Regulation for both the contingencies of with or without Accelerated Depreciation benefit. As already stated, the tariff fixed confers an advantage on those generators eligible for tariff without Accelerated Depreciation benefit as against those generators claiming tariff with Accelerated Depreciation benefit which would not have been the contingency if Generation Based Incentive also is given the same treatment as Accelerated

Depreciation benefit. Both wind tariff orders did not consider the earlier letter from the petitioners dated 30-10-2015. The response of the Commission in its letter dated 15-02-2016 was an answer to the request by the petitioners for making amendments to Regulation 1 of 2015 observing that the efficacy or otherwise of the Regulation brought into force only on 31-07-2015 needs to be observed for a reasonably sufficient period of time and the request to factor in Generation Based Incentive was neither looked into nor considered in any manner specifically and the same cannot be construed either as implied acceptance or implied rejection of the request. Similarly the orders dated 01-08-2015 and 26-03-2016 also were *suo motu* made by the Commission only with reference to the parameters for fixation of tariff laid down in Regulation 1 of 2015 but with reference to no other factor or circumstance. Accelerated Depreciation benefit was considered and factored into the tariff due to clause 20 specifically referring to the same while any Generation Based Incentive or any other incentive or subsidy did not attract the attention of the Commission in the absence of any specification or any stakeholder bringing them specifically to its notice during that period. Similarly, the projections by the petitioners in their Aggregate Revenue Requirement for their Retail Sale Business for the years 2015-16, 2016-17 and 2017-18 were filed by the respondents to show that the reduction in the levellised tariff by Rs.0.50 ps in the ARR of FY 2017-18 without ever challenging the orders of the Commission fixing the tariff in its various orders for wind power projects is impermissible and even if the Commission were showing the same reduced tariff in its estimates of power purchase cost, the same confers no right to the petitioners to get over the tariff determined by the Commission from time to time which has been incorporated into the respective Power Purchase Agreements of the distribution licensees with the generators.

50. The Hon'ble Supreme Court in Uttar Pradesh Power Corporation Limited Vs National Thermal Power Corporation Limited and others **(2009) 6 Supreme Court Cases 235** while distinguishing between a revision of tariff from review of a tariff order observed that in cases of these nature, even principles of *res judicata* have no application, as the Commission has a plenary power and inherent jurisdiction laying down its own procedure. It also observed that making of the tariff is a continuous process and it can be amended or altered if any occasion arises therefor not only on an application but also on its own motion. If it is exercise of a *suo motu* jurisdiction the period of limitation will not apply though the Commission must act within a reasonable time. In Tata Power Vs Maharashtra Electricity Regulatory Commission **2009 ELR (SC) 0246**, the Hon'ble Supreme Court referred to the function of the Commission under Section 86 (1) (b) to determine the tariff for generation and to adjudicate upon the disputes between the licensees and the generating companies. As such exercise of its regulatory function, the Commission's jurisdiction to undertake a revision of the tariff in public interest remains intact and even if clause 55 (2) and (3) of the Procedural Regulations of 1999 referring to the inherent powers of the Commission were to be considered of no direct application, still the mere mention of a wrong or incorrect provision of law will not divest the Commission of its jurisdiction, if it otherwise has such jurisdiction. In fact, the relief sought for by the petitioners is neither an amendment nor a review of the tariff orders dated 01-08-2015 and 26-03-2016 but it is only seeking a further order supplementing the original order by taking into consideration the Generation Based Incentive also in determining the tariff which was not considered earlier. Any period of limitation prescribed by clause 49 of Procedural Regulations hence has no relevance.

51. The petitioners also rightly referred to the decision of the Central Electricity Regulatory Commission on Generation Based Incentive subsequent to the scheme at para 4.10.2 of Statements of objects and reasons of its 2012 Regulations wherein it clearly pointed out that the tariff is determined upon ascertaining normative costs and performance parameters and in view of the fact that all reasonable costs and returns are being allowed to be recovered through such preferential tariff, it is fair that any subsidy, Accelerated Depreciation benefit or Generation Based Incentive (which is substitute for Accelerated Depreciation benefit) be factored in while determining the tariff. The reasoning of the Central Electricity Regulatory Commission is of great persuasive value herein. Coming to an identical conclusion on similar facts and under similar circumstances will be in tune with the fundamental principles of judicial procedure and accepted parameters of justice, equity and good conscience.

52. The Generation Based Incentive scheme of the Government of India does not trace the scheme to any exercise of power by the Government of India under the Electricity Act, 2003 or any rule or regulation made there-under or any other enabling statute or statutory rule or statutory regulation. It is thus clearly and unambiguously a scheme formulated and brought into force in exercise of the administrative power of the Government of India. It is true that the executive power of the union under Article 73 of the Constitution of India extends to the matters with respect to which Parliament has power to make laws but the proviso to Article 73 (1) (a) itself provides that such executive power shall not extend in any State to matters with respect to which legislature of the State has also power to make laws. Electricity is covered by Entry 38 in List-III – Concurrent List of the Constitution of India. Of-course subject to Electricity Act, 2003, the executive power of the union is restricted to the extent of

proviso to Article 73 (1) (a). Article 73 (1) (a) does not make the legislative power of the Parliament and the executive power of the union identical and it is only with respect to the matters covered by the executive power, the identification was with reference to the legislative power of the Parliament and if determination of tariff under Regulation 1 of 2015 is within the statutory and administrative jurisdiction of the State Commission, by an executive or administrative scheme of the Government of India, the subordinate legislation made under Regulation 1 of 2015 cannot be overruled. The administrative scheme has to be considered as subject to the statutory regulations which is a subordinate legislation and when clause 20 of Regulation 1 of 2015 makes no exception in respect of any subsidy or incentive in general or Generation Based Incentive under Generation Based Incentive Scheme in particular, any mention in the scheme in clause 4.6 of the Generation Based Incentive being over and above any tariff determined by any State Commission, cannot override clause 20 of Regulation 1 of 2015. Consequently, the Generation Based Incentive also has to be taken into consideration in determining the tariff on the plain and unambiguous language of clause 20. The words 'shall be taken into consideration' have already been referred to as being interpreted as making such incentive or subsidy being given credit to in the generic preferential tariff arrived at and the Generation Based Incentive has hence to be appropriately deducted from such tariff. It is also said that since the GBI scheme is funded from the budgetary allocation approved and made by the Parliament to be met from the consolidated fund of India, the scheme acquires the flavour of having been made in exercise of the legislative power of the union, hence overriding Regulation 1 of 2015. What expenditure shall be considered as expenditure charged on the consolidated fund of India has been stated in article 112 (3) of the Constitution of India and article 112 (1)

and (2) show the annual financial statement or budget also to be covering sums required to meet other expenditure proposed to be made from the consolidated fund of India. Approval of such other expenditure which is not charged upon the consolidated fund of India through an appropriation bill / Act under article 114 of the Constitution of India will not make the sums required to meet the expenditure under any administrative scheme impress a legislative character on the scheme itself. The nature of the scheme under an executive order in exercise of the executive power under article 73 and the authorization of the expenditure for carrying out such scheme under a Parliament legislation are two different and distinct things and the administrative scheme, still remaining as an administrative scheme even after any legislative approval of the expenditure for its implementation, cannot override a legislation or a subordinate legislation made in exercise of the delegated power to make subordinate legislation under the statute. Hence Regulation 1 of 2015 should prevail over the GBI scheme.

53. While recovery of the full cost for generation by the developers is ensured in the manner of determination of tariff on the parameters prescribed by Regulation 1 of 2015, allowing any Generation Based Incentive to be retained while not allowing any Accelerated Depreciation benefit to be not retained will amount to unjust discrimination, irrational classification and unreasonable categorization of wind power generators similarly and identically situated. That apart when the determination of tariff under Regulation 1 of 2015 is based on the principle of full cost recovery of generation for the generator, allowing any Generation Based Incentive to be retained in addition will be promoting unjust enrichment and not preserving the right to a reasonable return on equity. The petitioners cannot be considered to be prevented by any acquiescence in making the claim to the GBI amounts as the gap

of time between the tariff order dated 01-08-2015 and Discoms' letter dated 30-10-2015 cannot be considered to be so wide as to erase the rights of the distribution licensees due to any implied acquiescence. In Shree Shidbali Steels Limited **AIR 2011 SC 1175** the Hon'ble Supreme Court upheld the freedom of the Government to grant, modify or withdraw fiscal benefits from time to time under which circumstances the principle of *promissory estoppel* would not be attracted. It was held that there can be no estoppel against the statute in withdrawal of a statutory notification as an exemption can be taken away under the very power under which it was granted. The decision clearly shows that the State Government should be guided by larger public interest in taking such fiscal decisions in which the court cannot interfere. If any *promissory estoppel* or similarly any *legitimate expectation* do not come into play, then, as held in Indian Thermal Power Limited Vs State of Madhya Pradesh and others **2000 (1) SCR 925**, larger public interest should be the governing consideration in determination of the tariff. There is nothing irregular or strange in the wind power generators receiving the Generation Based Incentive giving the details of the amounts received by them towards such incentive which can be charged from the monthly bills of the developers if Generation Based Incentive is considered to be such as to be factored into the tariff under clause 20 of Regulation 1 of 2015 which is the conclusion of the Commission herein. Such course of action has become necessary as it was not factored into the tariff in the earlier tariff orders unlike the Accelerated Depreciation benefit. This petition has been filed before this Commission on 14-02-2017 and is pending till now and the consequences of such pendency before this Commission should not be laid at the door of any party to the proceedings as it is well settled that an act of court should prejudice no one. If clause 20 of Regulation 1 of 2015 makes it mandatory that such

incentive should be taken into consideration and it is not so taken into account so far it is infringement of a provision in a subordinate legislation having statutory force and has to be corrected. Regulation 1 of 2015 came into force with effect from 31-07-2015 the date of its publication in the official Gazette and as such questions of limitation under the general law of limitation under the Limitation Act, 1963 or otherwise do not arise to disable the distribution licensee to recover any such amount to which they are entitled in accordance with law. Thus, while the petitioners are not estopped by their conduct from seeking the reliefs herein, the question of any review or amendment to the earlier tariff orders does not arise in granting the reliefs which only amount to giving effect to clause 20 of Regulation 1 of 2015 in respect of the Generation Based Incentive which no way interferes with the determination of tariff earlier except making such tariffs subject to the Generation Based Incentive being factored into it. While the jurisdiction of the Commission to consider this petition is traceable to specific provisions of the Electricity Act, 2003 or Regulation 1 of 2015, the availability of any inherent powers etc., under any enabling provisions will be of a peripheral effect and needs no further probe. The financial implications to the Discoms or the generators are not relevant factors vis-à-vis legal rights and obligations of the parties under law and even if such economic consequences have to be taken into account, while the generators are already recovering the full cost of generation therefor through the tariff determined under the Regulation, the factoring in of the Generation Based Incentive into it will only help the public utilities that is Discoms in further serving larger consumer interest with the breathing space provided by making such significant sum available to them in accordance with the statutory regulations. Public interest should prevail over private interest is the accepted principle in such cases.

54. The written submissions of the respondents laid much emphasis on precedents against invocation of inherent power against specific provisions of the statute or procedure expressly provided but as already stated the reliefs sought for are to give effect to Regulation 1 of 2015 and it is well settled that mere mention of a wrong provision of law will not disentitle a party to a relief, if it is otherwise entitled to it. If clause 55 (2) and (3) of Conduct of Business Regulations, 1999 were to be considered as only strengthening the specific provisions under which tariff determination can be made by the Commission, no such wrong also need be presumed. That the power to determine the tariff includes power to vary, modify, alter and amend or appropriately mould the tariff in accordance with law cannot be in dispute. There is no doubt that the tariff orders dated 01-08-2015 and 26-03-2016 have become final in the absence of any challenge by any stakeholder but what is sought for herein is to factor in the GBI into the tariff which was not the subject of consideration in the earlier tariff orders, the omission by the Commission to consider the same being now found to be in violation of clause 20 of Regulation 1 of 2015. If revision of tariff is admittedly within the jurisdiction of the Commission, it will not tantamount to unsettling the earlier tariff orders or reopening any settled questions but only amount to taking into consideration facts and circumstances as mandated by law which ought to have been taken into consideration but not taken into consideration. While the proposition that what cannot be done directly cannot be done indirectly is not in dispute, the principle that the Commission becomes a *functus officio* after determination of the tariff under the earlier orders can apply to the extent of matters considered and decided in the earlier tariff orders but not matters which were not considered and decided. The Commission cannot be considered to have applied its mind to the issue and decided it on merits or in its

discretion, to exclude the Generation Based Incentive from consideration, without any such indication either in the proceedings leading to the making of Regulation 1 of 2015 or the tariff orders dated 01-08-2015 and 26-03-2016. Any conscious and specific application of mind by the Commission to the issue of Generation Based Incentive cannot be a matter of presumption but of proof. Though a request appeared to have been made in the public hearing leading to the wind tariff order of 2012, in the final determination there was no reference to the same which is sought to be construed as equal to a conscious application of mind by the Commission. In any view, Regulation 1 of 2015 was an event subsequent to that order. It has to be remembered that even to apply the principle of *res judicata* under Section 11 of the Code of Civil Procedure, 1908, the matter should be one which ought to have been made a ground of defence or attack to consider such matter to be directly and substantially in issue in the former suit. While the matter of Generation Based Incentive has not been heard and finally decided by the Commission in any of its three earlier orders, any application of any principle of constructive *res judicata* does not arise as the issue of Generation Based Incentive is not such as ought to have been raised and decided as a matter directly or substantially in issue. While it is true that Regulation 1 of 2015 provided for a single part levelled tariff for the tariff period, the said Regulation made under Section 61 is subject to the provisions of the Electricity Act, 2003, as stated in Section 61 itself and Section 64 (6) provides for an amendment of a tariff or tariff orders. Even otherwise, irrespective of the petitioners praying for the amendment of the tariff orders, what has been prayed for in effect and substance is giving effect to clause 20 of Regulation 1 of 2015 without in any manner otherwise touching upon the determination of the tariff in the earlier orders of the Commission. Such consideration is in public interest and not prejudicial to the

renewable energy generators. While the Power Purchase Agreements between the distribution licensee and the wind power generators are undoubtedly legally enforceable contracts but in factoring in the Generation Based Incentive into the tariff, the same is only giving effect to a regulatory provision but not revisiting any terms and conditions of the Power Purchase Agreements which bind the parties only to the tariff payable as per Regulation 1 of 2015. The tariff could not be understood in the contract in any other manner and passing on any Generation Based Incentive to the petitioners will be only by those generators who availed such benefit and not otherwise as sought to be projected by the respondents in their written submissions. There will be no regulatory uncertainty by giving effect to the regulation in letter and spirit instead of failing to give effect to a specific provision. The Wind Power Policy of the State or the Tariff Policy are no way defeated by giving effect to clause 20, while protecting full cost recovery generation for the wind power developers. The marginal or low impact of deduction of Generation Based Incentive on retail tariff is immaterial as it is not the financial implication that matters but the enforceable legal rights arising under the Regulation. To say that Regulation 1 of 2015 should be amended to factor in the Generation Based Incentive is an attempt to confuse and when clause 20 says 'any incentive', the words are wide enough to cover Generation Based Incentive also. The question whether any amendment to the regulation can only be prospective in nature is hence irrelevant and *promissory estoppel* and *legitimate expectation* are equally extraneous for the present consideration as discussed earlier. It was sought to be contended that the consumer interest cannot override the interest of the developers or other stakeholders but the decision of the Hon'ble Appellate Tribunal for Electricity relied on in GUVNL Vs Green Infra Wind Power Company Limited Appeal No.198 of 2014 is for the principle that the balance

has to be struck between protection and encouragement of renewable sources of energy and the consumer interest but not that consumer interest is a factor foreign to such consideration. Thus, the elaborate written submissions of respondent No.4 and others cannot convince the Commission of any need not to factor in Generation Based Incentive notwithstanding the specific language of clause 20. The principle that executive power is coextensive with the legislative power does not clothe the exercise of executive power with the character of legislative power, as it is only regarding its extent but not nature.

55. Additional written submissions of respondent No.7 and others in para 2.3 conveniently omit the words 'unless amended or revoked' from Section 64 (6) of the Electricity Act, 2003 to claim the subject tariff orders to be beyond interference for 25 years and the effect of those words in the provision itself should answer the plea. Article 77 (3) of the Constitution of India which deals with the conduct of Government Business is brought in the said submissions. Article 77 (3) is for making Government Business Rules by the President and not for making schemes by the Government Departments like the Generation Based Incentive scheme of MNRE. Equally strange is the attempt to bring in Section 175 of the Electricity Act, 2003 as making the Generation Based Incentive scheme a law which is unaffected even by the Electricity Act, 2003 or the power of the Commission to make regulations under Section 181. By what cannon of construction the Generation Based Incentive policy can be considered to be a law is unknown, while the nature of Regulation 1 of 2015 cannot be in dispute. If Regulation 1 of 2015 and Generation Based Incentive Policy are read together harmoniously as desired by these respondents, it would only mean that the incentive may be over and above the tariff determined by the State Commission for purposes of grant of incentive but for the purposes of arriving at the

tariff or levelized tariff payable by the distribution licensees, the incentive so availed by the generating company has to be taken into consideration and there is nothing illegal in the claim of the petitioners.

56. The relief sought for is not interference with or substitution of any Government Policy by the Commission as sought to be projected by Indian Wind Power Association (IWPA) in its written submissions but it is only consideration of the manner in which the monetary benefit received under the Policy should be accounted for between the generator and the distribution licensee, without prejudicially effecting the recovery of the actual cost of generation by the generator and without overburdening the distribution licensee and the consumers. It is already stated that any question of limitation is not involved and the other aspects raised are covered earlier in this order. As advised in the written submissions of Indian Wind Power Association (IWPA) what is attempted herein is balancing the interests of the consumer and the financial viability of the developer and not undue preference to either.

57. It should however be noted that the copy of undertaking given by Axis Wind Farms (Anantapur) Private Limited on 06-03-2018 filed by the petitioners along with I.A.No.8 of 2018 is of no relevance for determination of this dispute being an understanding between the person who undertook and the petitioners irrespective of the outcome of this petition.

58. The memos filed by respondents 2, 21, 32, 36 and 40 alleged that the petitioners deducted the Generation Based Incentive from the amounts payable to the respective respondents under monthly bills even pending adjudication in violation of the Power Purchase Agreements and the tariff orders of this Commission

unilaterally and they sought for directions for payment of the said amount in compliance with the tariff orders. There can be absolutely no doubt that the petitioners should not have taken recourse to deduction of the Generation Based Incentive from the monthly bills payable to the respective generators even without any determination by the Commission. Such unilateral action, more so, from a public utility fully owned by the State Government does not reflect any respect for rule of law guaranteed by the Constitution of India or the procedures duly established by law for getting any legal rights and obligations upheld or enforced. However, in view of the conclusion that clause 20 of Regulation 1 of 2015 should be duly given effect to in respect of Generation Based Incentive also, no further action is being taken in this regard except placing on record the grave displeasure of the Commission against the petitioners on this count. It may also be noted that in O.P.No.5 of 2017 on the file of this Commission orders on merits after contest were pronounced on 13-07-2018 declaring Regulation 1 of 2015 to have ceased to be in force with effect from 01-04-2017 and the petitioners can procure wind power either under Section 63 through a transparent process of bidding or under Sections 61, 62, 64 and 86 (1) (b) of the Electricity Act, 2003 and under Sections 21 and 26 of the Andhra Pradesh Electricity Reform Act, 1998 and rules, regulations, practice directions and orders issued there-under till a regulation is made by this Commission while in the meanwhile, Central Electricity Regulatory Commission Regulation of 2017 shall provide the guiding principles therefor. The impact of the said orders is subject to an appeal before the Hon'ble Appellate Tribunal for Electricity or a writ petition before the Hon'ble High Court of Judicature at Hyderabad for the State of Telegana and the State of Andhra Pradesh or the Hon'ble Supreme Court as the case may be. The impact of the ratio decidendi and the order in O.P.No.5 of 2017 dated 13-07-2018 is

not adverse to the conclusions arrived at herein on the subject matter of this petition. The result of O.P.No.5 of 2017 and this petition can and should be harmoniously given effect to.

59. Thus on an exhaustive consideration of all the questions in issue between the petitioners on one hand and the respondents and the objectors on the other, it is clear that the Generation Based Incentive if availed by a wind power generator under the scheme of the Government of India has to be factored in the tariff determined under Regulation 1 of 2015, under the orders dated 01-08-2015 in O.P.No.3 of 2015 and 26-03-2016 in O.P.No.13 of 2016. An inadvertent omission to give effect to clause 20 of Regulation 1 of 2015 in letter and spirit in the said two tariff orders by the Commission should not prejudice the petitioners in their right to enforce their legal right under the Regulation and should not confer an unfair advantage to the wind power generators, who wish to avail both the higher tariffs paid for wind power supplied, without availing Accelerated Depreciation benefit and also the Generation Based Incentive, without reference to each other. For the elaborate reasons given hereinbefore, the petition has to be ordered accordingly in favour of the petitioners appropriately moulding the relief in accordance with law. As not giving effect to clause 20 earlier is not the fault of either party, the parties can be directed to bear their own costs in this petition.

60. Therefore, the Generation Based Incentive claimed and availed by the wind power generators under the scheme of the Government of India is hereby directed to be given credit to in the tariff determined for the wind power projects under Regulation 1 of 2015 by the orders of the Commission dated 01-08-2015 in O.P.No.3 of 2015 and 26-03-2016 in O.P.No.13 of 2016 and the petitioners are permitted to

deduct the amounts so claimed and availed towards such Generation Based Incentive by any wind power generator and only pay the balance of tariff payable to such wind power generator for the electricity supplied by such generator to the petitioners respectively out of the monthly bills payable since the filing of the petition on 14-02-2017 until such availed Generation Based Incentive is totally given credit to in the tariff payable by the petitioners to such generators respectively. The Original Petition is ordered accordingly. No costs.

This order is corrected and signed on this the **28th day of July, 2018.**

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman