



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P. No. 05 of 2017

Dated : 13-07-2018

Present

Justice Sri G. Bhavani Prasad, Chairman

Dr. P. Raghu, Member

Sri P. Rama Mohan, Member

Between:

Southern Power Distribution Company of Andhra Pradesh Limited

Eastern Power Distribution Company of Andhra Pradesh Limited

....Petitioner(s)

AND

-NIL-

....Respondent

This petition has come up for Public Hearing on several occasions and finally on 06-01-2018 in the presence of Sri P. Shiva Rao, learned Standing Counsel for the Petitioner(s), Sri Deepak Choudhury, Indus law, Advocates for Axis Energy Ventures India Private Limited and Sri M. Tharun, learned counsel representing Sri Challa Gunaranjan, learned counsel for Greenco Rayala Wind Power Private Limited, and M/s Re Gen Powertech Private Limited, M/s Indian Wind Energy Association, M/s Wind Independent Power Producer Association (WIPPA), M/s Indian Wind Power Association (AP State Council), M/s Indian Wind Turbine Manufacturers Association (IWTMA), , M/s INOX Wind Ltd., M/s Mytrah Energy (India) Pvt. Ltd., M/s Adani Green Energy Ltd., M/s Prayas (Energy group) and Sri M. Venugopala Rao, Sri M. Thimma Reddy, learned objectors. After carefully considering the material available on record and after hearing the arguments of all the parties, Commission passed the following:

O R D E R

Per Dr.P.Raghu and Sri P.Rama Mohan, Hon'ble Members

A petition dated 06th March, 2017 under section 55 (1) & (2) of APERC business regulations 2 of 1999 read with the Articles 23, 24, 25 and 26 of the APERC Regulation No.01 of 2015 dated 31-07-2015 praying the Commission (i) to curtail the control period of the Regulation No.01 of 2015 (Terms and Conditions for Tariff Determination for Wind Power Projects in the State of Andhra Pradesh) for the period valid up to 31-03-2017 (ii) to determine the tariff for FY2017-18 considering the emerged facts stated in the petition and market discovered price and formulating appropriate parameters, in view of the issues stated in the petition and also the precarious financial position of the petitioners (AP DISCOMs).

2. The relevant facts and averments mentioned / made in the petition are as under:

- a) Government of Andhra Pradesh (GoAP) has announced Andhra Pradesh Wind Power Policy, 2015 on 13.02.2015. An extract from the Policy says, "Considering the good wind power potential existing in the State and to achieve 4000 MW capacity addition through wind power during the next 5 years period, there is a need to bring out comprehensive wind power policy."
- b) The annual wind power capacity addition plan as indicated under the 'Power for All' Memorandum of Understanding (MOU) signed between Government of Andhra Pradesh and Government of India is as follows:

Year	FY14-15	FY15-16	FY16-17	FY17-18	FY18-19	Total
NCE- Wind Power (MW)	250	600	800	1000	1500	4150

- c) Subsequently, Andhra Pradesh Electricity Regulatory Commission in exercise of the powers conferred under sections 61 and 86 read with section 181 of the Electricity Act, 2003 (Central Act 36 of 2003) and all other powers enabling it in this behalf and after

previous publication, passed Regulation No.1 of 2015 dated 31-07-2015 stating the terms and conditions for determination of tariff for Wind Power Projects to be commissioned during the period FY2015-16 to FY2019-20.

- d) Pursuant to the above said regulation, Commission has passed orders dated 01-08-2015, determining the tariff applicable for wind power projects to be commissioned during 01-08-2015 to 31-03-2016 as Rs. 4.83 per unit without Accelerated Depreciation (AD) and Rs. 4.25 per Unit with AD.
- e) In pursuance to the said regulation, Commission through an Order dated 26-03-2016 also notified the generic preferential tariff for wind power based on certain parameters and considering the useful life of the wind power project as 25 years. The levelled generic preferential tariff determined is Rs. 4.84 per unit without considering the AD and Rs. 4.25 per unit with AD (for FY 2016-17).
- f) Ministry of New and Renewable Energy (MNRE), Government of India had announced the continuation of the scheme of Generation Based Incentive (GBI) on 04th September, 2013. The scheme was applicable for 15,000 MW installed during the 12th plan period. Under this scheme, a GBI was offered to wind energy generators at Rs. 0.50 per kWh of electricity fed into the grid for a period not less than 4 years and a maximum period of 10 years with a cap of Rs. 100 lakh/MW.
- g) Driven by attractive tariffs and favourable policy scenario of GoAP, significant investments are made in setting up wind power projects in the State. The installed capacity of wind power projects commissioned in the State of AP as on 28.02.2016 is 2005.6 MW.
- h) During 2015-16, the AP State has seen a capacity addition of 400.1 MW of wind power. Out of the anticipated capacity addition of 800 MW planned for FY2016-17, 598.5 MW has already been commissioned as on 31.12.2016 and another 1913.6 MW capacity of wind power projects are expected to be commissioned by

31.03.2017. Thus, the State is likely to get a capacity addition of approximately 2512.1 MW of wind power by the end of FY2016-17, as against the planned capacity addition of 800 MW.

- i) Vide letter dated 30-10-2015, the petitioners have requested the Commission for making certain amendments to the APERC Regulation No.1 of 2015 besides amendment of tariff order dated 01-08-2015 in respect of FY2015-16.
- j) In response, vide letter dated 15-02-2016 the Commission has informed that, “the amendments sought for in Regulation No.1 of 2015 have been noted in the Commission and as the said regulation was notified only on 31st July 2015, its efficacy or otherwise needs to be observed for a reasonably sufficient period of time and thereafter the Commission may take necessary action as deemed fit”.
- k) Further, the Commission has issued Regulation No.1 of 2015 (Terms and Conditions for Tariff determination for wind projects) in the State of Andhra Pradesh for the period from FY2015-16 to FY2019-20 considering the parameters as hereunder:

	Parameter	Value
A	Tariff Period	25 years
B	Useful life	25 years
C	Capital cost	600 lakhs / MW (including evacuation cost)
D	O&M Expenses	8.57 lakhs/ MW
E	O&M Expenses' Escalation	5.72% p.a
F	Depreciation for the first 10 years	7% p.a.
G	Depreciation for the remaining useful life of the plant	1.33 % p.a.
H	Capacity Utilization Factor (CUF)	23.5%
I	Return on Equity	16% (MAT/Income Tax pass through)
J	Interest on Cost on Debt	13%
K	Tenure of Loan	10 years
L	Interest on Working Capital	13.50%
M	Debt Equity Ratio	70:30

- l) Accordingly, in pursuance of the above said regulation, the Commission passed orders dated 01-08-2015 & 26-03-2016

determining the tariff for wind power projects entering PPAs during the FY2015-16 & FY2016-17 respectively, by considering the parameters as hereunder:

	Parameter	Value	
		FY 2015-16	FY 2016-17
A	Tariff Period	25 years	25 years
B	Useful life	25 years	25 years
C	Capital cost	600 lakhs / MW (including evacuation cost)	600 lakhs / MW (including evacuation cost)
D	O&M Expenses	8.57 lakhs/ MW	9.06 lakhs/ MW
E	O&M Expenses' Escalation	5.72% p.a	5.72% p.a
F	Depreciation for the first 10 years	7% p.a.	7% p.a.
G	Depreciation for the remaining useful life of the plant	1.33 % p.a.	1.33 % p.a.
H	Capacity Utilization Factor (CUF)	23.5%	23.5%
I	Return on Equity	16%	16%
J	Interest on Cost on Debt	13%	12.76%
K	Tenure of Loan	10 years	10 years
L	Interest on Working Capital	13.50%	13.26%
M	Debt Equity Ratio	70:30	70:30
N	Discount Rate	10.81%	10.64%

m) In view of the said capacity addition as contemplated in the policy, already achieved RPPO obligation by APDISCOMs and the market trend of other procurers getting wind power at much lesser tariff from the same developers, the following points are submitted for curtailment of operation period of the existing regulation No.1 of 2015 by 31-03-2017.

Gol in the revised National Tariff Policy, 2016 which is issued as per Section - 3 of Electricity Act, 2003, at clause 6.4(2) specified that:

“Procurement of power by distribution licensee from renewable energy sources (except waste to energy plants) from projects above the notified capacity, shall be done through competitive bidding process from the date to be notified by the Central Government.

However, till such notification, any such procurement of power from renewable energy source projects may be done under section 62 of the Electricity Act, 2003. While determining the tariff from such sources,

the appropriate Commission shall take into account the solar radiation and wind intensity which may differ from area to area to ensure that the benefits are passed on to the consumers”.

- n) Ministry of New and Renewable Energy (MNRE), Govt. Of India, New Delhi has issued guidelines for implementation of “Scheme for setting up of 1000 MW ISTS - connected wind power projects”. Under the said scheme, Solar Energy Corporation of India Ltd. (SECI) is nominated as the implementing agency for setting up of 1000 MW ISTS - connected wind power projects under competitive bidding process.
- o) In the above said competitive bidding floated by SECI for procurement of 1000 MW power source from wind projects has received the tariff at Rs. 3.46 per unit. The preferential tariff fixed by the Commission for the projects which entered into PPAs during 01-04-2016 to 31-03-2017 is Rs. 4.84 plus taxes. Aside of the same, the projects commissioned before 31-03-2017 will be getting a generation based incentive of Rs. 0.50 per unit subject to a limit of Rs. 1 Crore per MW. Though site conditions of Tamil Nadu State and the State of Andhra Pradesh are different, still it is observed that the tariff decided by APERC is much higher than what has been discovered in the recent competitive bidding. Hence, in public interest and in the interest of end consumers in the State to get Green energy at the lowest possible cost, the Commission is requested to amend the regulation curtailing its effect up to 31-03-2017 and for future period competitive bidding process may be adopted in consonance with guidelines of Ministry of Power, Govt. of India. (emphasis supplied)
- p) The Central Electricity Regulatory Commission published the draft RE Tariff Regulations, 2017 wherein certain modified parameters were proposed due to the emerged situation in the country which are as follows: (i) Loan Tenure - 13 years, (ii) Interest rate - consideration of normative interest rate of two hundred (200) basis points above the average State Bank of India MCLR (One Year Tenor)

for the last available six months of the relevant year of the control period for determination of tariff. (iii) Depreciation and loan repayment - 7% per annum for first 10 years and equally divided thereafter for the balance period. (iv) Return on Equity - 14% (post tax) for the next Control Period (2015-2020). (v) Interest on Working Capital - Normative Interest rate of three hundred (300) basis points above average State Bank of India MCLR (One Year Tenor) prevalent during the last available six months of the relevant year of the Control Period for the determination of tariff. (vi) Capacity Utilisation Factor (CUF) - The CUF is 6-8% more than that of 23.5% considered earlier for the Control Period 2015-2020.

- q) Based on the past data of wind power generation, MPERC has issued a revised tariff order considering a higher CUF of 23% from 20% in the earlier order. The relevant extract from the MPERC tariff order for procurement of power from Wind Electric Generators, March 2016 is as here under:

“Also, some of the better sites shall be repowered in future i.e. the existing WEGs of lower hub-height and capacity shall be replaced by newer WEGs with higher hub-heights and higher capacities. As such, there is a scope of further increase in capacity utilization factor. In view of the above, the Commission has decided to adopt capacity utilization factor of 23% as reasonable for determination of tariff in this control period for new projects only”.

- r) The Commission has determined the tariff for wind power generation as per the “Terms and Conditions of Tariff Determination for wind power tariff in the State of Andhra Pradesh - Regulation No.1 of 2015” and passed orders dated 01-08-2015 & 26-03-2016 respectively. Because of higher tariff for wind power, there is phenomenal increase in wind power capacity which is evident during FY2016-17, which indicates that the wind power developers in the State are gaining more than reasonable return when compared to the other States. This highest addition of wind power capacity in the year 2016-17 is much higher than the policy

targets and the same results in additional burden on the end consumers in the State. Considering the said quantum of additional capacity, the petitioners decided not to procure any wind power from new generators during FY 2017-18.

- s) In view of the above circumstances and the change in the financial and technical parameters with reference to the wind tariff regulations, and also as observed from the lowest tariff obtained through competitive bidding conducted by SECI, APDISCOMs request the APERC to consider curtailment of the control period of the present regulation 1 of 2015 up to 31-03-2017 and permit them to procure power from wind power producers in the State of Andhra Pradesh from FY2018-19 onwards through competitive bidding in consonance with the guidelines of the MNRE, GoI and National Tariff Policy , 2016.
- t) The Commission under clauses 23, 24 and 25 of Regulation No. 01 of 2015 has wide powers to revise / amend the duration of control period of regulations dehors to the powers of review under sub-clause 2 of clause 55 of APERC Conduct of Business Regulations 2 of 1999.
- u) In view of the above and also the precarious financial position of the APDISCOMs the petitioners prayed the Commission for the reliefs as sought in public interest and to meet the ends of justice.

3. During the course of public hearing several organisations/ associations / individuals have filed / made written / oral submissions on the contents of the petition. As the objections are multiple but overlapping in nature the same are summarized as under:

- 3.1 Sri Dheeraj Jain, Head - Regulatory Affairs, M/s Regen Powertech Pvt. Ltd. has stated that against the vision and objective of Government of India to achieve 60 GW wind energy generation by 2022, at the end of 2016 the installed wind generation capacity is 29 GW only. Thereby, needing induction of further 31 GW capacity in the next 6 years which requires generation of 5 GW on an average per

year compared to average 2.5 GW being commissioned at present per year. This necessitates forward looking and robust regulatory and policy framework to incentivise wind power generation to achieve the targets.

The concerns of the DISCOMs cannot be met or addressed by curtailing the APERC regulation (No.1 of 2015) upto 31-03-2017. On the other hand they can be addressed by amending RPPO regulation to be aligned with MoP long term RPPO trajectory for the period FY2016-19. Further, while the regulation and the generic tariff issued thereof are as per section 62 of the Electricity Act, 2003, the SECI 1000 MW wind competitive bidding is an implementation of the scheme rolled down by MNRE for procurement of wind power from ISTS connected wind power projects. As the process of regulation making and tariff determination is robust and regulated involving the views of all the stake holders, the concerns of the petitioners can be addressed when the tariff determination for FY2017-18 is rolled out by the Commission. The process of determination of wind tariff by the Commission and discovery of tariff to competitive bidding will have to go simultaneously even after notification of bidding guidelines by the Central Government as even for competitive bidding within the State of Andhra Pradesh the ceiling tariff in all likelihood will be the tariff determined by the Commission. The concerns of the petitioners to avoid purchase of expensive RE power as per tariff determined by the Commission's regulation can be addressed through prevailing RPO regulations / wind policy and procurement of RE power can be done after the notification of bidding guidelines by Gol. It is also contended that non-procurement of wind power from new generators for FY 2017-18 by the petitioners has no relation with the subject matter of RE regulation which may be taken separately as per proviso 2 of RPO Regulations. It is also suggested that there must be a gestation period for the competitive bidding process to be evolved and thereafter a gradual transition may be made from determined tariff to adoption of discovered tariff by the Commission. Section 62

& 63 of Electricity Act, 2003 make a distinct approach for tariff determination under the cost plus method (section 62) and competitive bidding route (section 63).

3.2 Sri M. Venugopala Rao, Senior Journalist & Convenor, Centre for Power Studies, Hyderabad has stated that the reasons cited by the petitioners to curtail the regulation No.1 of 2015 upto 31-03-2017 amply justify the repeated requests made to the Commission by him and others to dispense with the system of (i) determining preferential generic tariff for purchasing RE including wind power (ii) allowing DISCOMs to enter into long term PPAs on the basis of such tariffs and direct the DISCOMs to follow transparent and competitive bidding for purchasing power both conventional and RE, in tune with the prudent RPPO and long-term load forecast determined by the Commission after holding a public hearing on the same.

3.3 Shri Manish K. Singh, Secretary, Indian Wind Energy Association, New Delhi, Sri O.P.Taneja and Sri Rishabh Dayani of Indian Wind Turbine Manufacturers Association have offered their view/suggestions as under:

- i. "Control Period" as per regulation is the period during which the norm for determination of tariff specifying these regulations shall be remain valid (from the date of regulation till 31-03-2020). The Control period intended to provide regulatory certainty and continuity of the principles that will be followed in pursuance of section 61(h) and 86(1)(e) of Electricity Act, 2003 to ensure promotion and harnessing of RE sources. Hence, any midcourse revision can be done only under exceptional circumstances supported through adequate technical, legal or scientific reasons.
- ii. The petitioners in the guise of seeking amendment is actually seeking to abolish RE tariff determination process under section 62 and insist on competitive bidding under section 63 for wind tariff determination.

- iii. Regulations once notified, being subordinate legislation (statute), cannot be amended through petition and any alteration, modification or amendment of regulation can only be initiated by the concerned Commission. Else, the affected party may approach Hon'ble High Court for amendment / challenge of regulation.
- iv. The financial position of DISCOMs cannot be a ground for seeking curtailment of control period under regulations. More so as the wind power installation achieved in AP is only 2.14 GW compared to the existing potential of 44.2 GW and the capacity addition target of 8.1 GW fixed by the Gol.
- v. RE tariff regulations for a control period of 5 years were formulated only two years back and curtailing the same amounts to introducing regulatory uncertainty for off-take and price being detrimental for harnessing available RE potential in the State.
- vi. Under cost plus regime distribution licensee would recover the cost of RE procurement through ARR and hence there is no financial implication for the DISCOMs.
- vii. Even APERC's MYT regulations have a control period of 5 years which the petitioner is not seeking to curtail.
- viii. The Commission while determining the tariff for wind power during the control period had always given preference in terms of allowing higher tariffs than the tariff for conventional power under the provisions of Electricity Act, 2003 (section 61(h)) guided by the need for promotion of co-generation and generation of electricity from renewable sources of energy. Hence, the Commission should continue preferential tariff for wind energy based on cost plus regime by ascertaining the normative cost and performance parameters so that all reasonable costs and return are being allowed and recovered through such preferential tariffs. For the same reasons they would like to disallow the curtailment of control period sought for by the petitioners and to determine tariff as per regulation.

- ix. Commission is requested to adopt a cautious and calibrate approach as the success of procurement through competitive bidding has not yet been established for wind energy.
- x. Regarding the claim of the petitioners that the generic tariff determined by the APERC is higher than the tariff discovered under competitive bidding by SECI, its contended that there are several concessions for power evacuation for ISTS like waiver of ISTS transmission charges and losses, open access and scheduling related charges borne by DISCOMs, RLDC / SLDC charges limited to the charges applicable to the contracted capacity of the DISCOM and trading margin has to be borne by the DISCOMs at 7 paise per unit.
- xi. Hence, except for the cost of wheeling charges and losses upto the interconnection point to be borne by developer, cost of transmission charges from delivery point to receiving substation has to be borne directly or indirectly by the DISCOMs. Hence, effective cost of RE procurement under SECI's competitive bidding process for DISCOMs in non-windy States could still be higher.
- xii. No draft competitive bidding guidelines have been released by Central Govt. or MNRE for wind power.
- xiii. As there has been no immediate change in the market conditions during the last 2 years so as to move towards competitive bidding process, the norms considered by the Commission for determining the tariff for financial years 2015-16 & 2016-17 may be continued for the next year and the request of the petitioners to curtail the control period and determine the tariff for FY 2017-18 is opposed as there is no scientific or legal rationale in the petitioners' request to determine new parameters on the basis of which tariff could be determined.
- xiv. As the control period of 5 years (FY2015-16 to FY2019-20) under the Regulation is intended to provide the regulatory certainty and assurance of continuity that will followed in pursuance of section 61(h) & section 81 (e) of the Electricity Act, 2003 for promotion of

RE sources, several wind developers has invested heavily in the wind power projects and the wind energy capacity is likely to reach 2512.1 MW by the end of FY2016-17 against the planned capacity of 800 MW.

xv. Indian Wind Energy Association has relied on the following decision to support its arguments :

- a) A Regulation made under section 178 under the authority of delegated legislation can be tested only in judicial review proceedings before the courts and not by way of appeal before Appellate Tribunal for Electricity as held by Hon'ble Supreme Court of India in PTC India Ltd. Vs. Central Electricity Regulatory Commission (2010) 4 SCC603.
- b) In Motilal Padampat Sugar Mills reported in 1979 (2) SCC 409, the Hon'ble APEX court held that the doctrine of promissory estoppel can be applied against the State.
- c) Under clauses 23 & 24 of Regulation No.1 of 2015 it is not permissible to review the Regulation as there is no provision for curtailment in these clauses. Clauses 25 & 26 also do not empower the Commission to curtail the control period and tariff determined hence the petition is not maintainable.

3.4 Sri K.R.Nair, President, Indian Wind Power Association and Sri P.A. Srinivasa Rao, Director, M/s Greenco Rayala Wind Power Private Limited have stated the following:

- i. The petition is not maintainable as it is against the basic principles of Electricity Act, 2003 and various policies made there under. The tariff has to be determined by the Commission under section 62 read with section 61 more specifically section 61(h) which requires promotion of cogeneration and generation of electricity from renewable sources of energy.
- ii. The Regulation 1 of 2015 is made by APERC under the powers conferred on it by section 61 and 86 read with section 181 of

Electricity Act, 2003 and shall be in force from the date of publication, and unless reviewed earlier or extended by the Commission and shall remain in force upto 31st March, 2020.

- iii. The petitioners sought invoke clauses 23,24 & 25 of Regulation No.1 of 2015 to request the Commission to restrict the control period upto 31-03-2017. These clauses are as under:

“23. Power to Relax: The Commission may, by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected, relax any of the provisions of these Regulations on its own motion or on an application made before it by an interested person.

24. Issue of Orders and Practice Directions: Subject to the provisions of the Act, the Andhra Pradesh Electricity Reform Act, 1998 and these Regulations, the Commission may, from time to time, issue orders and practice directions in regard to the implementation of these Regulations, the procedure to be followed and other matters, which the Commission has been empowered by these Regulations to specify or direct.

25. Power to Amend: The Commission may, at any time, vary, alter, modify or amend any provisions of these Regulations.”

It is well settled principle of law that the rule making power “for carrying out the purpose of the act” is a general delegation therefore any regulation or amendment thereof should be consistent with the provisions of the Act.

- iv. The petitioners’ request that APERC should enable them to procure power through competitive bidding process followed by SECI / MNRE for FY2018-19 is violative of the provisions of Electricity Act, 2003 as power can be procured under section 62 through competitive bidding strictly as per guidelines issued by Central Govt. and there is no occasion for the State Commission to direct such procurement / process followed by SECI / MNRE.
- v. As the distribution licensees under the regulatory regime of the Electricity Act, 2003 can only procure the power on the tariff either

determined or approved by the State Commission and section 63 prescribes that:

“Notwithstanding anything contained in section 62, the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issue by the Central Government.”

Hence, the bidding sought to be undertaken by the petitioners in terms of the said guidelines of SECI / MNRE as such cannot be treated as a valid and transparent bidding in terms of section 63 of Electricity Act, 2003.

The MNRE’s bidding guidelines for ISTS 1000 MW power are intended only for wind power projects connected to inter- state transmission system. Hence, the request of the petitioner to procure wind power through competitive bidding is not correct as Gol has not issued any guidelines for wind power procurement as required under section 63 of the Act.

- vi. The reliance by the petitioners on draft CERC RE tariff Regulation for control period 2017-20 dated 16-02-2017 which are yet to be finalised is unrealistic and unjust as APERC wind tariff regulations are consistent with the prevailing CERC RE tariff Regulations, 2012.
- vii. The data provided in the petition does not tally with the wind installation figures provided by NREDCAP:

S. No.	Installed Capacity as per DISCOMs	Installed Capacity as per NEDCAP
1	2005.6 MW (as on 28.02.2016)	1416.32 MW (As on 31.03.2016)
2	4517.7 MW (anticipated on 31.03.2017)	2142.72 (As on 28.02.2017)

- viii. The claim of petitioners that they have complied with RPO obligation is not true and correct as one of the DISCOMs admitted in RP No. 19 of 2015 its non-compliance from FY2012-13 to FY 2016-17 and requested for carry forward for the next five years which the Commission has accepted and allowed that the backlog of RPO obligation is to be fulfilled in each of the corresponding years beginning from FY2017-18 to FY2021-22.
- ix. The claim of the petitioners that they have already achieved RPO targets provided under GoAP Wind Power Policy, 2015 is misconceived and misleading as the petitioners are supposed to comply with RPO targets specified by the Commission under its RPO Regulations.
- x. The Commission is requested to dismiss the petition and to determine the tariff for FY2017-18 as per the provisions of the existing Regulations with a specific direction to DISCOMs to sign PPAs as per the terms and conditions specified by the Commission.
- xi. Further, through their letter dated 17-01-18 they have filed guidelines for tariff based competitive bidding process for procurement of power from grid connected wind power projects issued by the Ministry of Power, Gol through its gazette notification dated 8-12-2017, which are applicable to:
- “These guidelines are being issued under the provisions of section 63 of the Electricity Act, 2003 for long-term procurement of electricity through competitive bidding process, by the ‘Procurer(s)’, from grid-connected Wind Power Projects (‘WPP’) having, (a) individual size of 5 MW and above at one site with minimum bid capacity of 25 MW for intra-state projects; and (b) individual size of 50 MW and above at one site with minimum bid capacity of 50 MW for inter-state projects”.*
- xii. Further, in the monthly review meeting dated 02-01-2018 (reported by the Business Line in its January 10, 2018 edition) conducted by the Secretary, Ministry of New and Renewable Energy, Government of India with various members in wind power industry including the

Chairman and President of IWPA, the Secretary, MNRE confirmed that for wind power projects of capacities less than 25 MW, the feed-in tariff shall continue.

3.5 Sri M.Thimma Reddy, Convenor, People’s Monitoring Group on Electricity Regulation, Hyderabad has stated the following:

- i. Based on reasons given seeking curtailment of the Regulation upto 31-03-2017, the Commission is requested to give consent to the petitioners’ request accordingly.
- ii. The Indian Wind Energy Association (InWEA) through O.P.No. 13 of 2012 petitioned the Commission seeking relief under section 94(1) (f) of Electricity Act, 2003, among other things, to limit the control period of wind tariff order of 2009. The Commission in its Order dated 15-11-2012 consented to the request of the petitioners and ordered, “.... the Commission proposes to curtail the control period prescribed in the 01-05-2009 Order upto a day prior to the issue of the present fresh order”. (P.25, para 20(i)) Following this precedent, the Commission is requested to limit the control period of Regulation 1 of 2015 upto 31-03-2017.
- iii. Even during the public hearing held before the issue of Regulation No. 01 of 2015 it was represented that cost-plus method has become outdated and open competitive bidding has become an important tool for discovery of efficient price. Recent Supreme Court orders on coal mining and subsequent allotment of coal mines on the basis of competitive bidding also once again bring to the fore the need to follow competitive bidding process in determining wind energy (tariff) also, as was done in the case of solar energy since 2009.
- iv. Section 61 of the Electricity Act, 2003 provides that Commission shall be guided by “the factors which would encourage competition, efficiency, economical use of resources, good performance and optimum investments. Hence, determination of

wind energy tariff through competitive bidding is in keeping with provisions of the Act.

- v. Considering the unit price discovered at Rs. 3.46 per unit in SECI's competitive bidding in 2016, the Commission is requested to not only curtail the Regulation to 31-03-2017 but also make competitive bidding mandatory for discovery of wind power price and also identifying wind power developers. In fact, Gujarat & Rajasthan Electricity Regulatory Commissions have issued such directions / Regulations making it mandatory to discover wind power tariff through competitive bidding.
- vi. It is also suggested that the competitive bidding process is truly open, transparent and the process is not sabotaged and the wind tariff is not rigged by the cartelisation of the participants in the bidding process.
- vii. As the State Government has directed the DISCOMs to enter into Power Purchase Agreement with Wind Energy Developers consequent to the project implementation agreement (PIA) entered into with M/s Suzlon Energy Ltd. and M/s Axis Energy Ventures India Pvt. Ltd., the Commission may advise the Govt. of Andhra Pradesh under section 86(2)(i) either to cancel the PIA or ensure that the developers agree to supply the wind power at Rs. 3.46 per unit discovered in the bidding conducted by SECI.

3.6 Sri Sunil Jain, President, Wind Independent Power Producers Association has stated the following:

- i. Though the price discovered for wind power is Rs. 3.46 per unit in the competitive bidding conducted by SECI unit, majority of the bids came from Tamil Nadu where PLF is considerably higher than Andhra Pradesh.
- ii. Though National Power Policy (NTP), 2016 prescribes that the States shall endeavour to procure power from renewable energy sources through competitive bidding to keep the tariff low from the date of notification of guidelines for such bidding process by

the Central Government such notification is yet to be issued and in the meanwhile a large number of wind IPPs have executed PPAs with APDISCOMs, wherein, time period of 18 to 24 months period was provided for commissioning the wind power project from the date of PPA execution and for some of the projects the commissioning may be beyond 31-03-2017.

- iii. The Commission may appreciate that already executed PPAs are contractually binding on the DISCOMs and any attempt to violate the same would breach the principles of promissory estoppels. Hence, new PPAs of wind projects coming after 01-04-2007 may be executed under competitive bidding process as per NTP, 2016.

3.7 Sri Awnish Pandey, Deputy Manager (Regulatory), M/s INOX Wind Limited, Noida has stated the following:

- i. Control period of five years for FY2015-16 to 2019-20 in Regulation No.1 of 2015 is decided with a view to give the investors a clear picture of regulatory framework for the entire period. As wind power projects are capital incentive, investors make investment in the State when they find certainty and return on investment on the basis of regulatory framework. Hence, curtailing the Regulation based on the price discovered in the subsequent competitive bidding will put all the investment made at risk. Hence, the Commission is requested to keep the faith of the investors and not to curtail the control period of the Regulation.
- ii. The petitioners at para No. 18 of their petition mentioned that due to high capacity addition of wind power in FY2016-17, the they have decided not to procure any wind power from new generators during FY2017-18. However, the demand projections mentioned in the power for all MoU signed between Govt. of Andhra Pradesh and Gol and RPO mentioned in the draft Regulations, wind power requirement in Andhra Pradesh is as follows:

Year	Demand forecast starting from FY - 17-18 As per the power for all MOU	Proposed Non Solar RPO As per draft RPO regulation	Annual Non Solar Power required in AP	Annual Non Solar MW required in AP	Wind Capacity @ CUF of 23.5 %
	(Mus)	%	Mus	(MW)	(MW)
2017-18	71696	9.50%	6811.12	777.53	3308.6

However, as per NREDCAP the nodal agency, Andhra Pradesh has a cumulative installed capacity of 2142.74 MW wind energy as on 28-02-2017. Hence, there is a scope to procure more wind power to meet the RPPO obligation and also to meet the growing demand in the State.

- 3.8 Sri N. Sreekumar and Ashwin Gambhir, Prayas (Energy Group), Pune** have welcomed the petition and requested the Commission to give consent to it as they have been arguing for introducing competitive bidding in wind power sector for the past few years. It is important to frame guidelines for competitive bidding and ensure that they are followed so that, the benefits of competition would benefit the consumer and the sector.
- 3.9 Sri Tushar Goyal, Mytrah Energy (India) Pvt. Ltd.** has stated the following:
- i. The claim of the petitioners that wind power generators in Andhra Pradesh are gaining more than reasonable returns compared to other States is objected, as the wind generators have signed PPAs with DISCOMs as per preferential tariff decided by the APERC by considering all the technical, financial conditions prevailing at that time for which the DISCOMs have not raised any objection at that time.
 - ii. Even as per NTP 2016, procurement of power from renewable energy sources above the notified capacity shall be done through competitive bidding process from the date to be notified by the Central Govt. which is yet to be done.

- iii. There are many projects in the State which have signed PPA at preferential tariff with DISCOMs and are at various stages of erection and commissioning which may be after 31-03-2017 also and hence the Regulation may be continued till 31-03-2020 and the DISCOMs shall be directed to continue to procure power where PPAs were already signed.

3.10 Sri Rakesh Shah, Vice President, Sri Dharmendra Gupta, M/s Adani Green Energy Limited (AGEL), Ahmedabad have stated the following:

- i. The petition has no legal ground as any amendment of Regulation cannot be done by the Commission on mere filing of a petition. It can be amended by challenging before the High Court or on *suo-motu* basis by the Commission as Regulations are gazette notifications (subordinate legislation).
- ii. The petitioners are misleading the Commission in the guise of tariff discovered in the recent ISTS connected 1000 MW wind power procurement bid which is Rs. 3.46 per unit which is lower than the prevailing generic tariff of Rs. 4.84 plus taxes and projects commissioned before 31-03-2017 are eligible for Generation Based Incentive of Rs. 0.50 paise per unit subject to limit of Rs.1 Crore / MW.
- iii. AGEL submits that tariff discovered through competitive bidding should not be made applicable to the projects in Andhra Pradesh for the following reasons:
 - a. In the bidding of SECI for 1000 MW wind power four bidders won the bids for a project size of 250 MW each. Economy of scale is a major factor for reducing the cost, whereas the Commission has fixed the norms for determining the generation tariff based on State specific parameters and small size of projects and hence there is no comparison between the two.
 - b. In the SECI national level bids, eight (8) came from Tamilnadu and one each from Gujarat & Karnataka, of which three from

Tamilnadu and one from Gujarat are successful. There is no bidder from Andhra Pradesh wherein high wind sites have already been exhausted and developers have to develop small size multiple projects on low wind sites.

- c. SECI bids are proposed to be connected with ISTS and evacuation of 250 MW through 220 kV D/C would reduce the overall cost evacuation whereas in cost plus regime developers are to forced invest in small size projects located in the remote areas and substations are located at far-off locations.
- d. For ISTS connected projects there would not be any risk of backing down or curtailment of wind power during transmission constraints of grid availability unlike projects under cost plus regime, connected to State grid face major issue of backing down / curtailment which impacts the revenue of the small projects.
- e. In the SECI bid, the developer signs Power Purchase Agreement with power traders who will sign power supply agreement with non-windy State, wherein the payment security is ensured unlike the small projects where the payment security is a concern due to financial health of DISCOMs.
- f. In the SECI bid projects, there is sufficient time for commissioning the project after signing the Power Purchase Agreement, whereas in the cost-plus regime the applicable tariff is based on year of commissioning and there is a pressure to commence the project in the same financial year. The above factors have a crucial role in pushing the tariff down in SECI bid projects and the same analogy cannot be applied to projects located in Andhra Pradesh where the power cannot be supplied at the same rate discovered through SECI competitive bidding.
- g. The petitioners have provided a reference of Draft CERC (Terms and conditions for tariff determination for Renewable Energy Sources) Regulations, 2017 norms, and requested to revise existing norms of APERC Wind Tariff Regulation, 2015. It is to be noted

that the Central Electricity Regulatory Commission RE Tariff Regulations, 2017 are in the draft phase and Central Electricity Regulatory Commission has proposed not to determine generic tariff for wind power projects. Based on the draft regulations petitioner has proposed to specify certain financial and technical parameters for determination of existing tariffs without the support of any data.

- h. The CERC draft guidelines proposed changes in interest rate, return on equity, interest on working capital or capacity utilization factor, capital cost (to be determined for each project). The petitioners requested not to change the existing norms on these parameters.
- i. The capital cost shall be revised upward for FY2017-18 and future competitive bidding process may be adapted in consonance with guidelines of Ministry of Power which are yet to be notified keeping view the provisions of section 62 & 63 of Electricity Act, 2003 and NTP, 2016.

3.11 M/s Axis Energy Ventures India Pvt. Ltd. have stated the following:

In terms of various agreements executed with Government of Andhra Pradesh and its agencies, including the petitioners, Axis Energy has committed to develop 4000 MW Renewable Energy projects in the State of Andhra Pradesh, comprising of 3000 MW wind power projects and 1000 MW of Wind - Solar hybrid power projects. The action of petitioners in filing the petition in O.P. No. 5 of 2017 seeking (i) To curtail the control period of the Regulation 1 of 2015 i.e. to limit the same upto 31.03.2017 (ii) To consider the emerging facts and market discovered price and formulate appropriate parameters, and to determine the tariff for 2017-18 would result in stalling the construction of wind power projects which are under construction or at various stages of planning thereby causing irreparable injury to Axis Energy.

- a. All the projects capacities committed by Axis energy under the agreements mentioned above are required to be commissioned by 31-03-2022. In terms of the Project Implementation Agreement dated 03-10-2016 executed by the petitioners all the power generated from the projects was agreed to be purchased by the petitioners at a tariff determined by the Commission in accordance with sections 61, 62 & 86 of the Electricity Act, 2003.
- b. Infrastructure projects are set up with debt facilities availed from banks and financial institutions as is the case with wind power projects. The financing plan based on which the lenders agreed to provide debt are primarily built on the tariff offered to the projects under the Power Purchase Agreement executed by the DISCOM / off-taker. In curtailing the control period of Regulation 1 of 2015, the financing and execution of the future projects would be pushed into uncertainty and would stall the efforts and investments already put in the projects.
- c. As the petitioners under agreements executed with Axis Energy pursuant to MoU with Govt. of Andhra Pradesh have committed to procure the entire electricity from the wind energy projects constructed by M/s Axis energy, the petitioners' request to curtail the control period of Regulation 1 of 2015 and procure renewable energy on competitive bidding ought not to be allowed.
- d. Curtailment of control period besides stalling the future projects will also affect large scale employment opportunities associated with project development activities which is one of the objectives envisaged under Wind Power Policy, 2015 of Govt. of Andhra Pradesh. It will cause irreparable loss to Axis energy and also put the debt facilities extended by banks and financial institutions towards development of wind projects committed by Axis Energy into jeopardy.
- e. Curtailment of control period of Regulation 2015 as sought by the petitioners cannot be allowed by the Commission. In this regard,

Hon'ble Supreme Court in **Gujarat UrjaVikas Nigam Limited and Solar Semiconductor Power Company (India) Pvt. Ltd., & Others** decided under **Civil Appeal No. 6399 of 2016** has laid down that “the Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise provided under the Act.” The Hon'ble Supreme Court while referring to the judgement in **GUVNL Vs. EMCO Ltd. and Others** decided under **Civil Appeal No. 1220 of 2015** that extending the control period of a Regulation is beyond the powers of the Commission. Therefore, going by the same principle it would mean that the curtailment of the Regulation No.1 of 2015 would also fall beyond the scope of the Commission. The Hon'ble Supreme Court in the said ruling discussed the scope of the exercise of inherent powers to be confined to procedural aspects only and not substantive. Hence, if the prayer of the petitioners to curtail the control period of Regulation 2015 were to be allowed, it would result in miscarriage of justice as well as contrary to the principle laid down by the Hon'ble Supreme Court.

- f. Even as per NTP,2016, procurement of renewable power by DISCOMs is to be done through competitive bidding process from the date notified by Central Government and till then the tariff of renewable energy procured may continue to be determined under section 62. The guidelines issued are still at draft stage hence, the petitioners' reliance on the same is devoid of merits.
- g. The petitioners referred to SECI competitive bidding conducted recently but the same is without any authority in the absence of guidelines and further such bids are not comparable to the wind sites in Andhra Pradesh which are less productive. Hence, the petition should not be allowed.

- h. The contention of petitioners that rise of wind power projects in Andhra Pradesh is due to higher tariffs is objected as the same were determined by the Commission after public hearing and due process of law.
- i. The petitioners' reference to provisions / clauses 23,24,25 & 26 of the Regulation which permit review / amendment of any and not all the provisions, is objected. What the petitioner is seeking is not amendment but virtually doing away with said Regulation without bringing any new Regulation. Hence, the petition is devoid of merits and may be dismissed in the interest of the justice as mentioned above.

4. The petitioners, through a memo dated 28.04.2017 stated to be for proper adjudication of the matter, have filed a copy of CERC (Terms and conditions for Tariff Determination from Renewable Energy Sources) Regulation, 2017 dated 17-04-2007 issued by CERC, New Delhi along with the statement of reasons thereof dated 18-04-2017 wherein CERC has considered and analysed all the objections / suggestions filed by various stake holders during the course of public hearings and reasons for its decision on the terms and conditions for determination of tariff from renewable energy sources in the Regulation mentioned above.

5. The petitioners, vide letter dated 28.04.2017, have also filed their replies to the various objections filed by the wind generators, associations and others, and their replies are summarized as under:

- a. The Commission has powers to vary, alter or amend any provision of the Regulation as per clause (23,24) 25 of the Regulation.
- b. The Regulation has nowhere specified that it is applicable to either small or big projects only.
- c. The apprehension of the objectors that the projects connected to the State grid face major issues of evacuation infrastructure cost, back down / curtailment of wind power making a direct impact on the wind power projects is not correct as they are exempted from transmission wheeling charges as per the Govt. of Andhra Pradesh

wind policy, 2015 and they are declared must-run plants without any backing down as approved in the Aggregate Revenue Requirement for FY2017-18 by the Commission.

- d. CERC has fixed the control period of the Regulation as 3 years instead of 5 years considering the reduction prices of equipment and also in view of the discovery of lower tariff through the competitive bidding process.
- e. The parameters proposed towards interest rate, return on equity, interest on working capital, CUF and capital cost are all based on the CERC Regulation which specifies the reasons for modification of these parameters.
- f. The petition for curtailment of Regulation is in accordance with NTP, 2016 and the achievement of wind generation and entered into Power Purchase Agreements of about 3115 MW wind energy upto FY2016-17. Hence, the DISCOMs intend to procure power from wind developers if any only through competitive bidding process as per guidelines to be notified by MNRE.
- g. The DISCOMs have achieved RPPO obligation of 5.18 % against the target 5% for FY2015-16. With the capacity addition of wind and solar projects the DISCOMs would have achieved the renewable energy procurement at 18.23% as against the RPPO obligation norm of 9% fixed by the APERC for FY2017-18.
- h. APDISCOMs proposed to procure power from if any required through competitive bidding from FY2018-19 to relieve the financial burden of Distribution Companies and end consumers of the State following similar procedure directed by GERC and RERC.
- i. The claim of objector(s) that the success of competitive bidding procurement is not yet established is not correct as tariff of Rs. 3.46 per unit as per SECI's competitive bidding is far less than the generic tariff determined by APERC Regulation.

- j. APDISCOMs have already submitted objections on APERC Regulation No.1 of 2015 vide their letters dated: 30-10-2015 and 10-12-2016, followed by the present petition seeking the curtailment of Regulation upto 31-03-2017.
- k. MPERC has issued revised tariff order considering a higher CUF of 23% from 20% in view of higher hub-heights and high capacities.
- l. APDICOMs have filed petition to enhance the CUF by 6 to 8% from the existing norms of 23.5% considering the hub heights and technological changes in WTG equipment.
- m. The installed capacity of wind power projects by the end of FY2016-17 is 3756.9 MW including other RE sources, the total capacity of RE projects in Andhra Pradesh is 5869.75 MW which is approximately 18% of supply of energy on an average.
- n. The prayer / request to curtail the control period and amendments proposed to the parameters for the determination tariff from 01-04-2017 is based on prevailing facts and circumstances and in consumer interest.

6. **Commission's analysis and decision**

Before analysing the rival claims / contentions filed by the petitioners and various objectors, institutions, persons, it is apt to **identify the issues** which require determination and decision of the Commission. The same are identified as under:

- l. Whether “the prayer of the petitioners (a) to restrict the control period of the Regulation No.1 of 2015 (Terms and Conditions for tariff determination for wind power projects in the State of Andhra Pradesh for the period) upto 31-03-2017, and (b) consider the emerging facts and market discovered price to formulate appropriate parameters to determine tariff for FY 2017-18” is maintainable and is in accordance with law?

II. Whether the Commission has the power to restrict the Regulation in modification / amendment of the existing Regulation No.1 of 2015 which is valid upto 31-03-2020.

III.If so, whether the Regulation can be curtailed upto 31-03-2017 or any other date?

IV. Whether curtailment of Regulation as prayed for by the petitioners will affect the interests of wind power generators as claimed by the various stakeholders in their objections?

7. Let us examine each of the above issues as under:

7.1 The petitioners as mentioned in the para-2 above have requested the Commission to restrict the control period of Regulation No.1 of 2015 upto 31-03-2017 broadly for the following reasons:

- i. Consequent to the Solar Policy of Govt. of Andhra Pradesh, 2015 and the Regulation No.1 of 2015 dated 31-07-2015 issued by APERC, significant investments have been made in the generation of wind power in the State and the State has seen the capacity addition of 400.1 MW during FY 2015-16 and 2512.1 MW upto 31-03-2017 against anticipated capacity addition of 800 MW upto 31-03-2017, thus, resulting additional burden on the consumers in the State due to higher wind generic tariff prevailing in the State. Considering the fall in the market prices of wind power as seen from the SECI competitive bidding procurement during FY2016-17 in which the price discovered was Rs. 3.46 per unit vis-a-vis the preferential generic tariff of Rs. 4.84 plus taxes fixed by APERC for the projects wherein PPAs entered into during FY2016-17, Regulation No.1 of 2015 / generic tariff requires revision / modification. It is also highlighted that NTP,2016 prescribes that the Distribution Licensees procure power from renewable energy resources (except from waste to energy plants), from projects (above the notified capacity) through competitive bidding process from the date to be notified by the Central Government. It is also claimed that DISCOMs through their petition dated 30-10-2015

have already requested the Commission for certain amendments to the Regulation seeking modification of parameters, like capital cost, depreciation, return on equity, CUF etc. But, the Commission informed the DISCOMs that the efficacy of the Regulation or otherwise needs to be observed for a reasonably sufficient period of time and thereafter the Commission may take necessary action as deemed fit. In their petition, the petitioners referred to the parameters, both technical and financial mentioned in the present Regulation and also the revised parameters proposed by the CERC in its draft regulations dated 16-02-2017, which were finally notified on 17-04-2017 to be adopted as guidelines for determination of wind power tariffs for FY2017-18. The petitioners have requested to permit them to procure power from Wind power producers for the State of Andhra Pradesh from FY2018-19 onwards through competitive bidding in consonance with guidelines of MNRE / MoP, Gol (to be) issued. In the same vein DISCOMs have specifically mentioned that they have decided not to procure any wind power from wind generators during FY2017-18.

- ii. The DISCOMs have requested the Commission to revise / amend the duration of the control period of the Regulation No.1 of 2015 as per clause 23,24 & 25 of the Regulation read with sub clause-2 of clause 55 of APERC's Conduct of Business Regulation No.2 of 1999.

7.2 On the other hand, the main contention of the objectors is that a number of wind generators have made significant investments for generation of wind power in the State of Andhra Pradesh consequent to the Regulation No.1 of 2015. Any restriction / curtailment of the Regulation will adversely affect their investments and cause financial burden on them. The Commission is obliged to promote cogeneration and generation of electricity from renewable source of energy as per section 61 (h) (Tariff Regulation) while determining the tariff under section 62 of the Act for supply of electricity by generating company

to a Distribution Licensee and as Regulation No.1 of 2015 is made for a control period of 5 years from FY2015-16 to FY2019-20, any amendment thereof should be consistent to the provisions of the act and any curtailment will defeat the objects / provisions of the Act. It is also contended that procurement of power at a tariff determined in accordance with competitive bidding guidelines can be done only after issue of notification by the Central Govt. for future and not based on the draft guidelines. It is further contended that the principles of promissory estoppel will apply in this context. It is also claimed that clauses 23,24 & 25 of the Regulation relied upon by the petitioners do not empower the Commission to curtail the control period of Regulation and tariffs determined thereof.

7.3 Coming to the legal issues raised it is contended that Regulation once made cannot be curtailed on a petition filed by the DISCOMs. It can be amended suo-motu by the Commission or when challenged before a court of law.

7.4 The objectors have relied on the 2 decisions of Supreme Court (mentioned at Para 3.3 (xv) above) to contend that curtailment of control period (of Regulation) is beyond the competence of the Commission and the Commission has no inherent power to curtail the control period of the Regulation as requested by the petitioner.

8. **Issues I & III:**

We have gone through the detailed submissions made by the petitioners and the various objectors / others and carefully considered them in the light of the provisions of Electricity Act, 2003, the Regulations made there under and the NTP,2016 and the decisions of APERC and also of other Commissions on this subject and also the case law cited by the various stakeholders mentioned above.

8.1 The petitioners' main contention that the wind tariffs need revision due to the dynamics of the power sector i.e. change in technological and financial parameters adopted in the Regulation and also the fall in tariffs in SECI's competitive bidding in the year FY 2016-17 to

Rs.3.46 per unit is undeniable. Having recognised the same the CERC has issued draft Regulation, CERC (Terms and Conditions of tariff determination for renewable energy sources) Regulation No. 2016 on 16-02-2017 inviting suggestions from various stake holders in response to which many of the wind generators/ Associations, who have filed objections in this petition have also filed suggestions / comments before CERC. Having considered them CERC has issued the final guidelines on 17-04-2017.

8.2 As per this Regulation, the control period or review period under the Regulation shall be of 3 years of which first year is FY2017-18. It is also decided that for solar PV and Solar thermal, wind energy (including on-shore and off-shore), Bio-mass gasifier based projects, hybrid solar power projects etc. project specific tariff on case to case basis shall be determined by the CERC and no annual generic tariff shall be determined for the technologies (Solar, wind, bio-mass etc.) mentioned therein.

8.3 The CERC after considering the suggestions / views of various stakeholders has decided the Return on Equity at 14%, interest on working capital at the rate equivalent to normative interest rate of (300) basis points above the average SBI MCLR (1 year tenure) prevalent during the last available six months for determination of the tariff. CUF and O&M expenses, rebate etc. mentioned therein and specified parameters for each RE source. For wind power projects it is specified that the Commission determines only project specific capital cost based on the prevailing market trends for wind energy projects. CUF norms for the 3 year control period will be as follows:

Annual Mean Wind Power Density (W/m ²)	CUF
Upto 220	22%
221-275	24%
276-330	28%
331-440	33%
>440	35%

The annual mean wind power density specified in sub-regulation shall be measured at 100 meter hub-height.

Operation and Maintenance (O&M) Expenses: The Commission shall determine only Project Specific O&M Expenses based on the prevailing market information.

- 8.4 While deciding above norms and parameters, for determination of wind power tariff, the CERC took into consideration the comments / suggestions received. Some of them have welcomed the proposal for Project Specific Tariff determination and not to determine generic tariff for wind and solar projects etc. The CERC found that under the prevailing market conditions (fall in wind and solar tariffs in competitive biddings) where most of the solar projects have come primarily through competitive bidding and similar trend is visible for wind projects, the Commission took the view that setting generic wind tariff based on norms does not provide right price signals. Further, MNRE was in the process of finalizing guidelines for tariff based competitive bidding process for wind projects, which were later issued on 08-12-2017.
- 8.5 The above analysis clearly shows that the market conditions and the trend of fall in tariff is clearly ripe for introduction of competitive bidding for discovering market price for wind tariff and generic tariff is no longer necessary. The fact that CERC has fixed the control period of Regulation as 3 years only itself shows express recognition of the dynamics of increase in technological efficiency and falling wind tariffs.
- 8.6 Further, the DISCOMs have achieved the RPPO obligation for both wind and solar power by FY2016-17 itself. In fact, they have achieved the procurement targets of RE power including backlog as per the Commission's directions for FY2017-18. The details are as under:

Compliance of RPPO Obligation by AP DISCOMS for FY 2016-17												
Discom Name	Discom consumption for FY 2016-17	Consumption claimed by DISCOM for RPPO obligation as per Regulation 1 of 2012 of APERC										
		Non-Solar RE Obligation					Solar RE RPPO Obligation					
		Non-solar RE RPPO Obligation to be complied (4.75% of consumption)	RPPO met from Non-Solar RE generators	No of Non-solar RE certificates submitted by Discom	Non-solar RPPO complied against 4.75%	Balance Certificates to be submitted by Discom for FY 2016-17	Solar RE RPPO Obligation to be Complied (0.25% of consumption)	RPPO met from Solar RE generators	No of Solar RE Certificates submitted by Discom	Solar RPPO complied against 0.25%	Balance Certificates to be submitted by Discom for FY 2016-17	TOTAL (NS+SL) RPPO met by DISCOMS
MWH	MWH	MWH	Nos	%	Nos	MWH	MWH	Nos	%	Nos	%	
EPDCL & SPDCL	52,637,000	2,500,258	3,408,699	0	6.48%	0	131,593	1,302,000	0	2.47%	0	8.95%

Wind capacities commissioned in AP

	FY 2015-16	FY 2016-17	FY 2017-18
Capacity (MW)	760.5	2363.15	764.16

Details of Renewable Energy Procurement permitted as per Retail Supply Tariff Orders

	FY 2017-18		FY 2018-19	
	MU	% of Total	MU	% of Total
APERC Approvals				
Solar	3543.69	6.26	4224.10	6.94
Non-Solar	6772.77	11.97	8382.76	13.78
Total NCE	10316.46	18.23	12606.86	20.72
Energy Despatch	56583.52		60842.78	

- 8.7 The above details show that the DISCOMS have achieved the RPPO obligation of both solar and non-solar (including wind) and achieved wind capacity addition is 3123.65 MW compared to the projected target of 800 MW by FY 2016-17 as per Gol guidelines for State of Andhra Pradesh. The DISCOMS are likely to achieve the Renewable Energy Procurement permitted as per Retail Supply Tariff Orders as per the details given above. Considering the above facts, the DISCOMS proposal not to procure any wind power from wind generators during FY2017-18 is eminently justified. The procurement of wind power at prevailing generic tariff increases the financial

burden of the DISCOMs which ultimately is passed on to the consumers who have to bear the same.

- 8.8 Electricity Act, 2003 is enacted with object of not only consolidating the laws relating generation, transmission, distribution, trading and also use of electricity, but also (among others) promoting competition, protecting the interest of the consumers, rationalization of electricity tariff etc. While Section 62 prescribes that the Commission shall determine tariff for supply of electricity by generating company to a distribution licensee, Section 61 requires the Commission to make Regulations to specify the terms and conditions for determination of tariff u/s 62 and in doing so shall be guided by :

Section 61.....

“ (d) safeguarding of consumers’ interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(h) the promotion of co-generation of electricity from renewable energy sources of energy;

(i) the National Electricity Policy and tariff policy;”

“Section 86(1)(b) dealing with functions of the Commission specifies that the Commission :

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

- 8.9 Thus, the Commission which is entrusted with the function of regulating electricity purchase and procurement by DISCOMs shall be primarily guided by safeguarding the consumer interest and when the DISCOMs are seeking to restrict the control period of the Regulation No.1 of 2015 in consumer interest, the Commission can certainly exercise its powers in public / consumer interest to consider such request, of course considering all the relevant factors. Clause

55 of Regulation No.1 of 1999 of APERC speaks of the inherent powers of the Commission as under:

“(1) Nothing in these Regulations shall be deemed to limit to or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission;

(2) Nothing in these Regulations shall bar the Commission from adopting a procedure which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient.

(3) Nothing in these Regulations shall expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.”

8.10 In the case of GUVNL V. Tarini Infrastructure Limited and others the Hon'ble Supreme Court has examined the powers of the State Commission u/s 86(1)(b) to regulate the price of sale and purchase of electricity between the generation companies and Distribution Licensees. In that context the Honourable Court has analyzed and examined the meaning and scope of the word “regulate”. It is observed

“that “regulate” is a word of broad import having abroad meaning and comprehensive in scope. “Regulate” is variously defined as meaning to adjust ; to adjust, order or governed by rule, method or establish mode. It is also defined as meaning to direct; to direct by rule or restriction.

It was further observed by the Hon'ble Supreme Court

“19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word “regulate” is not synonymous with the word “prohibit”. This is true in a general sense and in the sense that mere Regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to Regulation and in absence of restrictive words, the power

must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of Rule or guiding principle to be followed, or the making of a Rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious Regulation consists of suppression. It would therefore appear that the word "Regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."

The Regulations made by the Commission thus arise from the power to regulate which includes the power to alter, amend or modify based on the context involved as explained by the Hon'ble Supreme Court above. This is what the Commission has attempted in this order to secure the interest of the consumers which is the prime objective of Electricity Act, 2003.

- 8.11 In this context it is appropriate to refer the decision of the erstwhile APERC (before bifurcation of the State) dated 15-11-2012 in O.P. No.13 of 2012 wherein, the Indian Wind Energy Association is the petitioner and DISCOMs are the respondents. In the petition, the petitioner has requested for curtailing the then existing APERC wind tariff order dated 01-05-2009 which is valid for a control period for 5 years upto 31-03-2014 and to limit / curtail the period to 31-12-2011. The request of the curtailment is based on the claim that the Commission as per Electricity Act, 2003 has to take steps for promotion of cogeneration and generation of electricity from renewable sources and the State is unable to attract the wind power investors because the wind tariff is inadequate and not sufficient to ensure adequate returns and thus not able to encourage renewable energy sector in the State. Considering the wind energy growth in neighbouring states Karnataka & Tamilnadu which are offering adequate compensation to the investors, Andhra Pradesh was not

able to match the growth prospects offered by these States. Consequent to the detailed study by the CERC on the various parameters involved in renewable energy generation and evolving guiding principles for tariff determination from renewable energy sources which have been adopted by various States, the petitioner requested the Commission to take due cognizance of the provision of the Electricity Act, 2003, NTP and curtail the existing Regulation upto 31-12-2011 and determine the tariff afresh based on the revised parameters for future wind energy projects as per section 61 of the Electricity Act, 2003. The petitioner has requested to revise the capital cost, interest on debt, RoE etc. to determine the tariff for future wind projects after the curtailing the Regulation upto 31-12-2011.

- 8.12 The Commission having considered the submissions / arguments of the petitioner and other stakeholders / participants with a view to promote and encourage the harnessing of renewable energy and the deficit power scenario prevailing at that time and the available wind energy potential, has passed an Order curtailing the wind tariff order dated 01-05-2009 upto 14-11-2012, the date prior to the issue of its order dated 15-11-2012.
- 8.13 Thus, when the Commission can curtail the control period of the existing Regulation / Tariff Order to promote and encourage renewable resources of energy, Commission can certainly exercise the same power to curtail the control period of the Regulation No.1 of 2015 in the interest of the consumers, after considering all the relevant factors. The Commission draws its powers from section 181 of the Electricity Act, 2003 to make Regulations (by notification) consistent with Act and the rules, generally to carry out the provisions of the Act. When the Commission has powers to make a Regulation for above purpose, it follows as a corollary that it has powers to vary, alter, modify or amend any provisions of the Regulations which obviously includes curtailing the scope and the control period of the Regulation for sufficient and valid reasons

(clause 25 of the Regulation No.1 2015 read with clause 55 of Regulation No.1 of 1999 referred to above).

- 8.14 The petitioner through Memo dated 16-11-2007 has filed a copy of tariff order issued by Karnataka Electricity Regulatory Commission (KERC) dated: 04-09-2017 in the matter of “Revision of generic tariff for wind power projects and mandatory procurement of wind power through competitive bidding” along with a press release by Gol dated 05-10-2017 wherein, it was mentioned that wind tariff in India touches the lowest level of Rs. 2.64 per unit in the second wind auction conducted by SECI on behalf of MNRE, Gol much lower than Rs. 3.46 per unit discovered in February, 2017.
- 8.15 The Karnataka Electricity Regulatory Commission, in its order dated 04-09-2017, after considering the objections / suggestions of various stakeholders, the NTP, 2016 mandating procurement of renewable energy through competitive bidding, CERC guidelines / Regulation for project specific tariff determination for wind power projects and the decision of GERC dated 30-08-2016 for downward revision of wind power tariff and the submissions of the DISCOMs for revision of the parameters (technical & financial) for redetermination of wind tariff, has concluded that “circumstances necessitating the revision of existing tariff for wind projects exist and the revision of tariff / Regulation can be made either suo-motu or on an application made by generator or a Distribution Licensee. It has rejected the contention that such revision cannot be made. The contention of the project developers that curtailment of the control period would affect the investors and financial viability of the projects was held to be not valid either in law or in facts. It was noted that the generic tariff for renewable energy sources issued by the Commission is a standing offer to project developers intending to supply power to a DISCOM / ESCOM and it is for the DISCOM to decide to enter into Power Purchase Agreement at a such rate and, the approval of the PPA by the Commission is a must for the PPA to become enforceable. Otherwise, a developer acting on PPA without approval of the

Commission will be doing so at his own risk. It was also held that the Commission is empowered to decide control period or effective / applicable period for its generic tariff orders and also revise any control period before its expiration for valid reasons and there can be no promissory estoppel for the exercise of such powers by the Commission. The KERC revised the technical and financial parameters governing the determination of wind power tariff and re-determined the tariff at Rs. 3.74 per unit for wind energy in the State of Karnataka applicable for all new wind projects, PPAs for which are entered into and approved by the Commission after its order dated 04-09-2017 subject to the quantum as may be fixed by the Commission separately. This order of the Karnataka Electricity Regulatory Commission was not challenged before Appellate Tribunal for Electricity or any court of law as per the information available as on date.

- 8.16 We are in agreement with the findings and observations of the Karnataka Electricity Regulatory Commission mentioned above. We are of the view that the guidelines issued by CERC requiring Project Specific Determination of tariff for wind power projects for and from FY 2017-18 is correct and needs to be adopted for all PPAs entered into after 01-04-2017, as it considers all the prevailing technical and financial parameters for determination of tariff. The Commission is well within its powers to alter / amend the Regulation in the discharges of its function under the Act. The Commission exercises its inherent powers mentioned in clauses (a) & (b) of sub-clause 55 of Regulation No.1 of 1999 to meet the end of justice i.e. in public interest, by making necessary changes or amendments to the existing Regulation.
- 8.17 Considering the factual and legal position and the various issues discussed above, the Commission is of the firm view that the prayer of the petitioners to curtail the present Regulation No.1 of 2015 upto 31-03-2017 is valid, correct and is accepted as it is in the interest of

the consumers who ultimately bear the generic wind tariff or any tariff determined u/s 62 by the Commission.

- 8.18 In this context, it may be useful and appropriate to refer to the order No.6 of 2018 dt: 13-04-2018 issued by Tamilnadu Electricity Regulatory Commission in the matter of generic tariff for wind power and other related issues. In its order TNERC has considered the guidelines / parameters issued by Central Electricity Regulatory Commission for project based determination of wind power tariffs dated: 17-04-2017 and modified them suitably to suit the regional conditions and determined the generic tariff for the period 01-04-2018 to 31-03-2020 at Rs. 2.86 / unit. The Indian Wind Turbine Manufacturers Association has responded to this order, as per media reports, and felt that the tariff between Rs. 3.10 paise and Rs. 3.20 paise per unit may be correct. This is highlighted only to show that the fall in wind tariffs due to technological advances and falling interest rates is a matter of reality and read together with the lower wind tariff of Rs.2.43 per unit in recent SECI competitive bidding calls for amendment of the APERC Regulation No.1 of 2015 so as to curtail the same upto 31-03-2017 in consumer interest and determine the project based wind tariff, as discussed above, for the period commencing from 01-04-2017.
- 8.19 As already mentioned above that the petitioners have committed themselves not to procure any wind power during FY2017-18 and in fact no Power Purchase Agreements entered into (if any) were filed before the Commission upto 31-12-2017 for its approval.
- 8.20 The Commission, in its order dated 13-12-2017 in the matter of 41 Nos. Power Purchase Agreements entered by the Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) with various wind power developers upto end of FY2016-17, has clearly directed that *“both the distribution companies in the State of Andhra Pradesh are hereby directed not to enter into any fresh Power Purchase Agreements with any power developer using any*

source or fuel for power generation, without prior intimation to and permission from the Commission until further orders from the Commission depending upon any change of circumstances or exigencies of the power sector in the State”.

- 8.21 The DISCOMs have filed 12 PPAs on 10-01-2018 entered into by them with M/s Axis Wind Energy Pvt. Ltd. However, it is mentioned that the tariff shall be determined by APERC u/s 61, 62 & 86 of Electricity Act, 2003 and any Regulation made there under. The same has been examined by the Commission and it was informed, inter-alia, that further action, if any on merits and as per law can be taken only upon filing an application for determination of tariff u/s 62.
- 8.22 Even if PPAs were entered into by the DISCOMs with the wind generators they are not enforceable under law unless they are specifically approved by the Commission u/s 86 (1) (b). As seen from the ARR proposals for FY2017-18 & 2018-19 submitted by the DISCOMs the State achieved surplus power generation, met and even exceeded the RPPO obligation and unless and until there is a need to purchase power the Commission is not obliged to approve the Power Purchase Agreements. While considering any such PPAs the Commission shall be guided by the consumer interest as also the principles and methodologies specified by Central Commission for determination of tariff as mentioned u/s 61. Accordingly, the Commission would like to follow the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 dated 17-04-2017 for determination of project specific wind tariff for such PPAs entered into on or after 01-04-2017 by the DISCOMs if it is otherwise found necessary to procure power at competitive rates in the interest of the consumers at large in the State of Andhra Pradesh. Hence, the wind generators who have setup wind power projects in Andhra Pradesh have no reason to have any fear that their financial interests are adversely affected if the Regulation No.1 of 2015 is curtailed upto 31-03-2017. There is another set of 4 PPAs filed by the same Axis wind Energy on 18-01-

2018 but for which no such PPAs were filed by the DISCOMs. Hence, the same were returned as no request on the said PPAs is received from the DISCOMs. Subsequently the CGM, P&MM, IPC, APSPDCL vide letter dated 02-05-2018, submitted 4 Nos copies of the PPAs essentially requesting for necessary consent of the Commission. The same have been examined in the Commission and the PPAs returned with certain observations as mentioned therein, vide letter dated 01-06-2018.

- 8.23 Hence, the Commission accepts the prayer of the petitioner to curtail the Regulation No.1 of 2015 treating it as valid upto 31-03-2017. This Regulation is accordingly curtailed upto 31.03.2017 by the Commission in exercise of the powers conferred on it under section 181 read with section 61, 62 & 86 (1) (b) of Electricity Act and clause 55 of Regulation 1 of 1999 referred to above. Consequently, the Order of the Commission dated 30.03.2017 in O.P. No. 15 of 2017 (issued suo-motu computing generic tariff for wind power projects) stands nullified with effect from 01.04.2017, means it ceases to exist in the eyes of law from that date.
- 8.24 However, this Regulation will continue to be applicable to all the PPAs which were entered into upto 31-03-2017 and approved by the Commission. Any PPAs entered into after 31-03-2017 will be subject to determination of project specific wind tariff by taking into all the relevant factors and on the merits of each case. Thus, the issues mentioned at Sl. No. I & III at para-6 above are decided in the affirmative i.e. in favour of the petitioners.
- 8.25 Here, it is appropriate to refer to the decision of the Commission in it's Order dated 30-03-2017 in O.P.No.15 of 2017 (SUO-MOTU) in the matter of notifying the generic preferential tariff applicable from 01-04-2017 to 31-03-2018 in respect of Wind Power Projects in the State of Andhra Pradesh pursuant to clause 6 of Regulation 1 of 2015. Wherein, it was specifically mentioned that, "this order is subject to any further or final orders that may be passed by the Andhra Pradesh

Electricity Regulatory Commission in accordance with law in O.P.NO.5 of 2017 and O.P.No.1 of 2017 on its file and on the letters / communications received by the Commission and clubbed with the said Original Petitions 5 of 2017 and 1 of 2017 and any other orders that may be passed in any matter incident or ancillary thereto”. Hence, if any wind power generator has made any investment / signed PPA after 01-04-2017 in any wind power project he is fully aware of the consequences of the above order of the Commission.

9. Coming to the **issue No. II** i.e. regarding the powers of the Commission to curtail the Regulation some of stakeholders have cited Hon’ble Apex court’s decisions in support of their claim that the Commission doesn’t have such powers. The same are discussed as under:

9.1 M/s Axis Energy India Pvt. Ltd., contends that the curtailment of control period mentioned in Regulation No.1 of 2015 as sought by the petitioner cannot be allowed by the Commission in view of the principle laid down by the Hon’ble Supreme Court in **Gujrat UrjaVikas Nigam Limited and Solar Semiconductor Power Company (India) Pvt. Ltd. & Others decided under Civil Appeal No. 6399 of 2016** wherein it was held that “the Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise provided under the Act.” Hon’ble Supreme Court, while referring to the judgement in **GUVNL Vs. EMCO Ltd. and Others(2016) 11 SCC 182** decided under **Civil Appeal No. 1220 of 2015** held that extending the control period of a Regulation is beyond the powers of the Commission.

9.2 We have gone through the above decisions of the Hon’ble Supreme Court and found that were rendered in a different context and not applicable in the present situation. In the case of **Gujrat UrjaVikas Nigam Limited and Solar Semiconductor Power Company (India)**

Pvt. Ltd. & Others, the Hon'ble Supreme Court referred to its earlier decision in the case of **GUVNL Vs. EMCO Ltd. And Others(2016) 11 SCC 182**. In the former case before the State Commission, the petitioner sought extension of control period of PPA for the reason that it could not achieve the CoD within the due date mentioned in the PPA. While the Commission decided that it cannot be done in individual case and can be done in the large number of cases together for reasons of force majeure etc., the Appellate Tribunal for Electricity directed that it may be reconsidered by the Commission as it has inherent powers to determine the terms of Power Purchase Agreement. On appeal by **Gujrat UrjaVikas Nigam Limited**, the Hon'ble Supreme Court dismissed petition in limine and directed that the Commission shall decide the issue afresh without being influenced by the observations of APTEL. Thereafter the Commission extended the control period i.e. time for commissioning of the project as requested. The APTEL confirmed the Commission's decision. The GUVNL took up the issue in appeal before the Hon'ble Supreme Court.

- 9.3 Hon'ble Supreme Court has examined the question as to whether the Commission has power to extend the control period provided under the Power Purchase Agreement / Tariff Order. In this context it is useful to mention the relevant facts on the basis of which the Hon'ble Supreme Court decided the issue. GERC issued a tariff order on 29-01-2010 fixing tariff for solar photovoltaic projects commissioned from the date of its order till 31-12-2011 at the rate of Rs. 15 per unit for first 12 years and Rs. 5 per unit for next 13 years total 25 years. For solar projects which are delayed and commissioned beyond 31-12-2011 GUVNL shall pay tariff as determined by GERC for solar projects effective on the date of commissioning of the solar projects or the above tariff whichever is lower. In fact, it has issued a discussion paper and held public hearings to determine such generic tariff which was proposed to be on the lower side compared to the tariff mentioned above.

- 9.4 The project developer **Solar Semiconductor Power Company (India) Pvt. Ltd.** could not secure the land at the originally allotted place and changed the location and informed GUVNL through its letter dated 19-04-2011. Accordingly, a supplementary PPA was entered into on 10-05-2011 wherein it was mentioned that non-availability of transmission system at the new location will not be considered as sufficient ground for exemption from payment of liquidated damages. Other terms of PPA dated 30-04-2010 remained the same.
- 9.5 While deciding the issue Hon'ble Supreme Court referred its earlier decision in the case of **Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited and another** held that the respondent and the APTEL they clearly overlooked and the first respondent ignored one crucial condition in PPA as under:
- “In case, commissioning of solar power project is delayed beyond 31-12-2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for solar projects effective on the date of commissioning of solar power project or abovementioned tariff, whichever is lower.”*
- 9.6 With the above observations the court held that the above decision *with its pointed reference to application of “lower of the two tariffs” fairly applies to this case.*
- 9.7 “However, while addressing another grey area as to whether the Commission has the power to amend tariff despite the terms of the PPA, this court in **Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and others**, after analyzing scheme of the Act, has answered the question in affirmative.”
- 9.8 After referring to the above decision the Hon'ble Supreme Court dealt with the issue of inherent powers of the Commission. It has referred to Regulation of the Commission providing for the inherent power of the Commission to the extent making such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission. The Hon'ble Supreme Court has observed as under:

“It has to be borne in mind that such inherent powers are to be exercised notwithstanding only the restrictions on the Commission under the Conduct of Business Regulations, meaning thereby that there cannot be any restrictions in the Conduct of Business Regulations on exercise of inherent powers by the Commission. But the specified inherent powers are not as pervasive a power as available to a court under section 151 of the Code of Civil Procedure, 1908:

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

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

The preamble of the Act mentions “protecting interest of consumers” and section 61(d) requires that the interests of the consumers are to be safeguarded when the Appropriate Commission specifies the terms and conditions for determination of tariff. Under section 64 read with section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

In the instant case before the Hon'ble Supreme Court it was held “Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent No.1 of appellant. Hence, the Commission cannot extend the time stipulated under PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85 (of GERC) and therefore there cannot be extension of control period of PPA (which is a contract agreed between the parties) under the inherent powers of the Commission.”

- 9.9 As seen from the facts of the case discussed above, decided by Hon'ble Supreme Court they relate to extension of time stipulated under the PPA for applicability of the tariff determined as per agreement between the parties and approved by the Commission. Hence, the decision of the Hon'ble Supreme Court does not support the contention of the objectors regarding curtailment of control period of Regulation. In the present petition the issue is different. The petitioner has sought curtailment of the control period of the Regulation No.1 of 2015 which laid down the parameters for determination of generic tariff for the control period and the Commission after considering all the relevant factors decided that the applicability of the regulation needs to be curtailed upto 31-03-2017, in the larger interest of the consumers which is the primary objective of the Electricity Act, 2003. At the same time, the interest of the generators is not affected as the DISCOMs have decided not to procure any power from wind generators from 01-04-2017 till 31-03-2018 and in any case such cases will be dealt with case wise for determination of project-wise tariff if it is found necessary for the DISCOMs to purchase power on merits in each instance.
- 9.10 The provisions of the Act and the Regulation are silent on the extension or curtailment of control period for the applicability / amendment of the parameters laid down in the Regulation for determination of generic tariff and hence the Commission is within its powers to take a decision in the larger consumer interest as decided in the instant case.
- 9.11 Regarding the contentions of other objectors on the applicability of promissory estoppel it is to be mentioned that there is no loss or damage of interest to the generators who have invested in the wind power projects based on the Regulation as already discussed above. Further, Commission being a statutory body constituted under the Electricity Act it is not an instrumentality of State and hence the principle of promissory estoppel does not apply, more so when the decisions are in accordance with the objects of the Act and in larger

public / consumer interest. We have gone through the decisions cited on this aspect and find that they are not relevant and applicable in this context. Hence, such contention is rejected.

9.12 Another issue raised is that if Commission wants to amend, alter or modify the Regulation it can be done either suo-motu or when challenged before the court and not on the basis of a petition filed. This contention is without any merit and deserves to be rejected for the reason that when the Commission can exercise such powers suo-motu logically Commission can exercise the same powers when a petition is filed before it bringing the need and justification to the fore for such amendment, alteration/ modification.

10. The DISCOMs are at liberty to follow the “Guidelines issued for Tariff Based competitive bidding process for procurement of Power from Grid Connected Wind Power Projects” by MoP dated 08-12-2017, from 01-04-2018. These guidelines were issued under the provisions of Section 63 of the electricity Act, 2003 for long-term procurement of electricity through competitive bidding process, by the ‘Procurer(s)’, from grid-connected Wind Power Projects (‘WPP’) having, (a) individual size of 5 MW and above at one site with minimum bid capacity of 25 MW for intra-state projects; and (b) individual size of 50 MW and above at one site with minimum bid capacity of 50 MW for inter-state projects.

10.1 For wind power projects which do not come within the scope of above bidding guidelines the Commission shall determine the wind tariff as project specific tariff under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff determination from Renewable Energy Sources) Regulations, 2017, which are valid from 01-04-2017 to 31-03-2020.

11. **Issue IV:** Whether curtailment of Regulation as prayed for by the petitioners will affect the interest of wind power generators as claimed by some stakeholders in their objections.

11.1 Some of the objectors have claimed that they have executed various agreements with Govt. of Andhra Pradesh and its agencies including

the DISCOMs and they are committed to develop 4000 MW of Renewable Energy projects in the State of Andhra Pradesh comprising 3000 MW wind power and 1000 MW wind solar hybrid power and the petition to curtail Regulation No.1 of 2015 would result in stalling the construction of wind power projects under construction, causing irreparable loss and injury to such developers. Further, the petitioners under agreement executed with them (Axis energy) pursuant to MoU with Govt. of Andhra Pradesh have committed to procure the entire electricity generated from the projects constructed by them and hence the petitioners' request to curtail the Regulation and procure power through competitive bidding ought not to be allowed.

- 11.2 The contentions of the objectors are not correct and cannot be accepted. Even if there is agreement for development of wind power projects and understanding or agreement with DISCOMs for purchase of power they are not binding on the Commission. The Commission while exercising its powers u/s 86 (1) (b) is bound to verify whether there is a need to procure power and if so determine the quantum and the price and terms of PPA, before according approval if necessary if it is in consumer interest. The wind power developers can have no vested right in claiming that once they agree to develop wind power projects on the basis of agreement with Govt. of Andhra Pradesh, the DISCOMs were obliged to procure power. Unless and until the Commission verifies and approves each PPA in the interest of the consumers, such agreements can have no relevance and not enforceable and cannot be taken cognizance of under law (Electricity Act, 2003).
- 11.3 Nevertheless, we have discussed above that if the DISCOMs decide to procure power from wind developers in the State of Andhra Pradesh and submit the PPAs before the Commission, the Commission shall examine the same on merits of each case and will determine the Project Specific tariff after considering all the relevant factors including the CERC guidelines for procurement of wind power dated

28-04-2017 referred above. Thus, there is no loss or damage caused to the interests of the wind developers in Andhra Pradesh. Further, the promotion of development of wind power projects by itself doesn't mean that the DISCOMs are bound to procure power from such projects unless there is necessity in doing so and if it is in the interest of the consumers, especially in a power surplus scenario as it is existing during the last 2 years in State of Andhra Pradesh. They have choice to sell the power in open access or through exchange or through any other means as per law. Thus, the contentions of the objectors in this regard are, without merit and hence rejected.

12. To sum up and conclude:

- i. The Commission accepts the request / prayer of the petitioners to curtail Regulation of No.1 of 2015 upto 31-03-2017 for the detailed reasons discussed above. The control period of the Regulation is accordingly curtailed upto 31-03-2017 by the Commission in exercise of its powers conferred on it under section 181 read with Sections 61, 62 and 86(1) (b) of Electricity Act, 2003 and clause 55 of Regulation 1 of 1999 issued by the Commission. However, this Regulation continues to apply for the wind energy projects with whom DISCOMs of Andhra Pradesh have entered into Power Purchase Agreement upto 31-03-2017 and were approved by the Commission. Consequently, the Order of the Commission dated 30.03.2017 in O.P. No. 15 of 2017 (issued suo-motu) stands nullified with effect from 01.04.2017, i.e, it ceases to exist in the eyes of law from that date.
- ii. Any Power Purchase Agreement entered into by DISCOMs after 01-04-2017 shall be processed by the Commission on merits of each case, and the tariff will be determined as per the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 applicable for the period 01-04-2017 to 31-03-2020, under section 86 (1) (b) read with sections 61 & 62 of the Act.
- iii. The petitioners are at liberty to procure wind power w.e.f. 01-04-2018 as per the guidelines for tariff based competitive bidding

process for procurement of power for grid connected wind power projects of MoP / MNRE dated 08-12-2017 as per the applicability of guidelines and the size of the projects.

- iv. This order is to be read with APERC order dated 30-03-2017 in O.P.No.15 of 2017 (SUO-MOTU) in the matter of notifying the generic preferential tariff applicable from 01-04-2017 to 31-03-2018 in respect of wind power projects in the State of Andhra Pradesh pursuant to Regulation 6 of Regulation 1 of 2015, and APERC's order dated 13-12-2017 in the matter of 41 Nos. Power Purchase Agreements entered by the Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) with various wind power developers upto end of FY 2016-17 referred to above.

Sd/-

P. Rama Mohan
Member

Sd/-

Dr.P.Raghu
Member

per the Hon'ble Chairman, Justice G. Bhavani Prasad

13. I had the benefit of going through the erudite and comprehensive opinion rendered by Dr. P. Raghu, Hon'ble Member with which, Sri P. Rama Mohan, Hon'ble Member concurred. All decisions of the Commission are governed by majority under Section 92 (3) of the Electricity Act, 2003 and Section 9 (3) of the Andhra Pradesh Electricity Reform Act, 1998 read with Regulation 19 of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. As such, the said opinion shall be the decision of the Commission in the matter.

14. Though I am in broad agreement with the directions given in the order on the conclusions arrived at on the strength of the detailed reasoning given therein, I am not in total agreement with the entire reasoning. Hence, I wish to express myself on some relevant aspects reflecting my own perceptions and understanding of the matter.

15. The questions in controversy in the Original Petition basically revolved on Regulation 1 of 2015 and the power of the Commission with reference to regulation making. The power of the State Electricity Regulatory Commission to make regulations is conferred by Section 181 of the Electricity Act, 2003 and subject to the condition of previous publication, the State Commission may make a regulation consistent with the Electricity Act, 2003 and the Rules there under generally to carry out the provisions of the Act which regulation may provide for all or any of the matters specified by sub-Section (2) of Section 181. The power of the State Commission to make Regulation 1 of 2015 under Sections 61, 86 and 181 of the Electricity Act, 2003 is not in dispute and the prayer of the petitioners to curtail the control period of the said Regulation upto 31-03-2017 is undoubtedly covered by the same power with the Commission having every jurisdiction to vary or alter or modify or amend any of the provision of the Regulation, as specified by clause 25 of Regulation itself or to repeal the Regulation which is inherent in the power to make a regulation. The Original Petition after being taken on file was slated for public hearing and was placed on the website of the Commission, inviting the views / objections / suggestions of the interested persons / stakeholders, which procedure is identical to the procedure followed for complying with the requirement of previous publication under Section 181 (3) of the Electricity Act, 2003. Even under the Andhra Pradesh Electricity Reform Act, 1998, Section 54 conferred the power on the Commission to make regulation by notification in the official gazette. If the two requirements of previous publication and notification in the official gazette are satisfied, the grant of relief in this Original Petition will be consistent with the regulation making power under Section 181 of the Electricity Act, 2003. There is no prescribed manner in which the process of regulation making has to be initiated and whether it is *suo motu* by the Commission or on the Commission being moved by a petition or communication or representation or request, the same may not make any difference to the validity and legality of the process of regulation making. In that view, the controversy about the procedure required to consider the reliefs prayed for and the manner of granting it, if the Commission were in favour of granting it needs no deep research into various peripheral issues raised by the parties and if any restriction of the period for which Regulation 1

of 2015 were to be in force were to be imposed by this order, notification of the same in the official gazette will satisfy the statutory requirements of regulation making, while the requirement of previous publication has already been satisfied.

16. In so far as the prayer of the petitioners to curtail the control period of the said Regulation upto 31-03-2017 is concerned, the scope for such restriction has been provided in clause 1 (2) of Regulation 1 of 2015 itself which stated that “these regulations shall come into force from the date of their publication in the official gazette and unless reviewed earlier or extended by the Commission, shall remain in force upto 31-03-2020”. The said clause thus gives the scope for three contingencies, firstly, the regulation continuing in force upto 31-03-2020; secondly, the regulation being reviewed earlier to 31-03-2020 to decide whether it should continue in force on such review and if so, upto what date; and thirdly, whether the regulation can and has to be continued to be in force beyond 31-03-2020 on extension by the Commission and if so, upto what date. The jurisdiction of the Commission to decide to have the regulation in force upto the date or period determined by it before or beyond 31-03-2020 was thus recognized by clause 1 (2) of the Regulation itself, making any consideration of the request of the petitioners herein to be within the power conferred on it by the regulation itself. Making or unmaking of a regulation being within its competence, the Commission’s jurisdiction or power in this regard cannot be prejudiced or diluted by any technicalities of procedure. In any view, the differences in procedure adopted for making a regulation and for the public hearing of a petition, if any, are mere deviations in form and not of substance and cannot substantially divest the Commission of its jurisdiction itself. Therefore, grant of reliefs prayed for in the Original Petition filed under Rule 55 (1) and (2) of the Andhra Pradesh Electricity Regulatory Commission Regulations 2 of 1999 read with clauses 23 to 26 of Regulation 1 of 2015 is within the jurisdiction of the Commission under Section 181 of the Electricity Act, 2003 and Section 54 of the Andhra Pradesh Electricity Reform Act, 1998 subject to previous publication and subsequent notification in the official gazette. Previous publication was already made and notification in the official gazette can be made of this order.

17. By the time Regulation 1 of 2015 was made and brought into force, the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012 were in force as defined in clause 2 (b) thereof and by clause 10 of Regulation 1 of 2015, the capital cost indexation mechanism as prescribed in the said regulations was directed to be considered for arriving at the capital cost of the wind power projects for each year of the control period beyond 2015-16, as indicated in Regulation 1 of 2015. As such, looking at the relevant regulations of the Central Electricity Regulatory Commission on the subject for guidance is an accepted phenomenon and while this Original Petition is pending, the Central Electricity Regulatory Commission made the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 which came into force on 01-04-2017 to be in force for three years since then unless reviewed earlier or extended by the Commission. Similarly, Guidelines for tariff based competitive bidding process for procurement of power from grid connected wind power projects were published by the Ministry of Power, Government of India on 08-12-2017 and the guidelines were stated to have been issued under Section 63 of the Electricity Act, 2003 for long term procurement of electricity through competitive bidding process from grid connected wind power projects of 5 MW and above at one site with minimum bid capacity of 25 MW for intra-State projects apart from the specified inter-State projects. A procurer was defined to mean a distribution licensee or its authorized representative or an intermediary. The appropriate Commission in respect of the projects supplying power to the distribution licensees of one State was stated to be the State Electricity Regulatory Commission. With these guidelines being now in place, the distribution licensees of this State can have recourse to Section 63 of the Electricity Act, 2003 to request the appropriate Commission to adopt the tariff determined through a transparent process of bidding in accordance with the said guidelines, notwithstanding anything contained in Section 62. The scenario confined to Sections 61 and 62 by the time of Regulation 1 of 2015 now encompasses determination of tariff by bidding process under Section 63 also in respect of intra-State grid connected wind power projects. The coming into force of these guidelines under Section 63 from 08-12-2017 and the

Central Electricity Regulatory Commission Tariff Regulations of 2017 from 01-04-2017 thus provides the necessary legal and statutory backing and adds substantial strength to the request of the petitioners herein.

18. The Transmission Corporation of Andhra Pradesh Limited approached the Commission with a request to make material amendments to Regulation 1 of 2015 by a letter dated 30-10-2015 itself but the Commission felt the need to observe the working of the Regulation for a reasonably sufficient time before attempting to make any changes in the regulations and by the time this Original Petition was filed on 06-03-2017, it is not unreasonable to infer that such reasonable time has elapsed. The issues raised in the letter dated 30-10-2015 are substantial and later tariff achieved through competitive bidding process, to the extent comparable, has been sufficiently low. The facts and circumstances therefore make it reasonable and justifiable to have a review of Regulation 1 of 2015 earlier than the control period envisaged by the Regulation. As already stated, without reference to the power of relaxation under clause 23, power to issue orders and practice directions under clause 24, power to amend under clause 25 and power to remove difficulties under clause 26 of Regulation 1 of 2015 or Rule 55 of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 saving the inherent power of the Commission, invoked by the petitioners, the specific provision in Regulation 1 of 2015 and the power to make or unmake regulations themselves confer jurisdiction on the Commission to consider the relief sought for in the Original Petition, if otherwise factually and legally justified. If the guidelines issued by the Central Government exist on the subject, the appropriate Commission shall have to adopt the tariff determined through transparent process of bidding in view of the mandatory language of Section 63 and cannot bar such alternative to a distribution licensee restricting it to procedure under Sections 61, 62 and 64 of the Electricity Act, 2003.

19. The doctrine of *promissory estoppel* is attempted to be brought into picture and the Hon'ble Member observed in his opinion that "Commission being a statutory body constituted under the Electricity Act, it is not an

instrumentality of a State and hence principle of *promissory estoppel* does not apply". It is difficult to be persuaded to concur with the reason so given on the applicability of the principle of *promissory estoppel* but it is well settled that there can be no estoppel against a statute and if the period for which Regulation 1 of 2015 were to be in force were to be restricted to 31-03-2017 in exercise of the power conferred by clause 1 (2) of Regulation 1 of 2015, which is a subordinate legislation or the plenary power conferred to make a regulation under Section 181 of the Electricity Act, 2003 and Section 54 of the Andhra Pradesh Electricity Reform Act, 1998, there can be no estoppel of any sort against such statutory power. Even on fact, when Regulation 1 of 2015 itself declares that the Regulation remaining in force is subject to the same being reviewed earlier by the Commission, no investor or stakeholder can invoke any irrevocable and unequivocal promise to keep the regulation alive upto 31-03-2020, which estops the petitioners from restricting such period. Every investor / stakeholder was positively made aware of the possibility of the regulation being reviewed earlier to 31-03-2020, which leaves no basis for claiming any *promissory estoppel*. If Regulation 1 of 2015 applies upto 31-03-2017 and public notice of this Original Petition filed on 06-03-2017 was given to every interested person / stakeholder in accordance with the prescribed procedure, no investor can claim to have invested in any wind power project subsequent to 31-03-2017 in the hope of getting the benefits of Regulation 1 of 2015, in which event any *promissory estoppel* will not arise even remotely. The pendency of the Original Petition from 06-03-2017 upto date before the Commission cannot also taken aid to raise any such plea as it is well settled that no litigant can derive any benefit from mere pendency of a case in a Court as the act of the Court shall prejudice no one. The distribution licensees cannot suffer any disadvantage due to the time consumed in the adjudicatory process.

20. Under the above circumstances, the period of Regulation 1 of 2015 being in force should be restricted to 31-03-2017. In the matter of 41 Power Purchase Agreements of Southern Power Distribution Company of Andhra Pradesh Limited decided on 13-12-2017 and in *suo motu* O.P.No.15 of 2017 decided on 30-03-2017, the orders themselves state that they are subject to

any further or final orders that may be passed by this Commission in accordance with law in this Original Petition and O.P.No.5 of 2017 and O.P.No.1 of 2017 and accordingly those two orders shall be regulated by this order. The guidelines of the Central Government under Section 63 shall be available to the distribution companies of the State and subject to the same, any Power Purchase Agreements entered into by the distribution licensees of the State of Andhra Pradesh on or after 01-04-2017 shall be processed by the Commission in accordance with law with the Central Electricity Regulatory Commission Tariff Regulations of 2017 being considered as providing salutary guidelines for the purpose.

21. Therefore, while broadly in agreement with the reliefs proposed to be granted in the order of the Hon'ble Member, the result of the Original Petition has to be accordingly expressed with precision and clarity on the above lines.

Sd/-

(JUSTICE G. BHAVANI PRASAD)

per the Commission

In the Result,----

- (a) In exercise of the powers conferred on the Commission by Section 181 of the Electricity Act, 2003, Section 54 of the Andhra Pradesh Electricity Reform Act, 1998 and clause 1 (2) of The Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulations, 2015, Regulation 1 of 2015, it is hereby declared that the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulations, 2015, Regulation 1 of 2015 shall be deemed to have remained in force upto 31-03-2017 and shall be deemed to have ceased to be in force with effect from 01-04-2017;
- (b) The petitioners are at liberty to procure power through a transparent process of bidding in accordance with the guidelines for tariff based

competitive bidding process for procurement of power from grid connected wind power projects formulated and issued by the Ministry of Power, Government of India dated 08-12-2017 under Section 63 of the Electricity Act, 2003;

- (c) The petitioners are also at liberty to procure power from wind power projects in accordance with Sections 61, 62, 64 and 86 (1) (b) of the Electricity Act, 2003 and Sections 21 and 26 of the Andhra Pradesh Electricity Reform Act, 1998 and rules, regulations, practice directions and orders issued there under until an appropriate regulation in that behalf is made by this Commission and any Power Purchase Agreement or tariff there under for such procurement shall be guided by the principles contained in the provisions of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017;
- (d) The order of the Commission dated 13-12-2017 in the matter of 41 Power Purchase Agreements between Southern Power Distribution Company of Andhra Pradesh Limited and various wind power developers and the order of the Commission in O.P.No.15 of 2017 dated 30-03-2017 shall be subject to this order as already stated in the said two orders respectively;
- (e) This operative portion of this order shall be notified and published in the official Gazette of the State of Andhra Pradesh;

A N D

This Original Petition is ordered accordingly.

This order is corrected and signed on this the 13th day of July, 2018.

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman