REPORTABLE

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4569 OF 2003

TRANSMISSION CORPORATION OF ANDHRA PRADESH LIMITED ..APPELLANT

VERSUS

M/S RAIN CALCINING LIMITED & OTHERS ..RESPONDENTS

WITH

CIVIL APPEAL NO.5085 OF 2003
CIVIL APPEAL NO.5084 OF 2003
CIVIL APPEAL NO.5052 OF 2003
CIVIL APPEAL NO.5083 OF 2003
CIVIL APPEAL NO.5079 OF 2003
CIVIL APPEAL NO.5057 OF 2003
CIVIL APPEAL NO.5053 OF 2003
CIVIL APPEAL NO.5066 OF 2003
CIVIL APPEAL NO.5064 OF 2003
CIVIL APPEAL NO.5068 OF 2003
CIVIL APPEAL NO.5054 OF 2003
CIVIL APPEAL NO.5071 OF 2003
CIVIL APPEAL NO.5056 OF 2003
CIVIL APPEAL NO.5077 OF 2003
CIVIL APPEAL NO.5063 OF 2003
CIVIL APPEAL NO.5055 OF 2003
CIVIL APPEAL NO.5080 OF 2003
CIVIL APPEAL NO.5062 OF 2003
CIVIL APPEAL NO.5073 OF 2003
CIVIL APPEAL NO.5069 OF 2003
CIVIL APPEAL NO.5081 OF 2003
CIVIL APPEAL NO.5076 OF 2003
CIVIL APPEAL NO.5059 OF 2003
CIVIL APPEAL NO.5065 OF 2003
CIVIL APPEAL NO.5067 OF 2003
CIVIL APPEAL NO.5075 OF 2003
CIVIL APPEAL NO.5058 OF 2003
CIVIL APPEAL NO.5082 OF 2003
CIVIL APPEAL NO.5061 OF 2003

CIVIL APPEAL NO.5072 OF 2003
CIVIL APPEAL NO.5070 OF 2003
CIVIL APPEAL NO.5074 OF 2003
CIVIL APPEAL NO.5060 OF 2003
CIVIL APPEAL NO.5078 OF 2003
CIVIL APPEAL NO.7093 OF 2003
CIVIL APPEAL NO.7103 OF 2003
CIVIL APPEAL NO.7085 OF 2003
CIVIL APPEAL NO.7086 OF 2003
CIVIL APPEAL NO.7080 OF 2003
CIVIL APPEAL NO.7090 OF 2003
CIVIL APPEAL NO.7079 OF 2003
CIVIL APPEAL NO.7084 OF 2003
CIVIL APPEAL NO.7088 OF 2003
CIVIL APPEAL NO.7104 OF 2003
CIVIL APPEAL NO.7091 OF 2003
CIVIL APPEAL NO.7089 OF 2003
CIVIL APPEAL NO.7041 OF 2003
CIVIL APPEAL NO.7083 OF 2003
CIVIL APPEAL NO.7092 OF 2003
CIVIL APPEAL NO.7087 OF 2003
CIVIL APPEAL NO.7042 OF 2003
CIVIL APPEAL NO.7102 OF 2003 &
CIVIL APPEAL NOS.7043-7078 OF 2003

AND
CIVIL APPEAL NO.8969 OF 2003
WITH
CIVIL APPEAL NO. 8970 OF 2003
CIVIL APPEAL NO. 8971 OF 2003
CIVIL APPEAL NO. 8974 OF 2003
CIVIL APPEAL NO. 8978 OF 2003
CIVIL APPEAL NO. 8972 OF 2003
CIVIL APPEAL NO. 8976 OF 2003
CIVIL APPEAL NO. 8975 OF 2003
CIVIL APPEAL NO. 8977 OF 2003
CIVIL APPEAL NOS. 10125-10132 OF 2003
CIVIL APPEAL NO. 1945 OF 2004
CIVIL APPEAL NOS. 1946-1947 OF 2004

AND
CIVIL APPEAL NOS.7029-7062 OF 2008

J U D G M E N T

ARUN MISHRA, J.

1. There are three batches of appeals; most of the questions are common, which arise for consideration. In the first batch of appeals, the question arises for consideration concerning the levy of wheeling charges by the appellant – Transmission Corporation of Andhra Pradesh Limited (APTRANSCO). In the second batch of appeals, the question arises for consideration regarding the competence of the APTRANSCO to levy the grid support charges. Admittedly, the outcome of the third batch of appeals depends on the outcome of the first batch of appeals. In the third batch of appeals, the question arises for consideration as to continuance of incentives in respect of wheeling charges granted as per Government Order issued during the year 1997-1998, had to be continued, and whether Commission had the power to review them.

2. After independence, the electricity generation, distribution and transmission, and other related activities were undertaken by the Andhra Pradesh State Electricity Board (APSEB). After the amendment in 1991 in Electricity (Supply) Act, 1948 (Act of 1948), when liberalization was made in the electricity sector, then APSEB entered into agreements with Private Generators.

3. The Andhra Pradesh State Legislature enacted Andhra Pradesh Electricity Reforms Act, 1998 (the Reforms Act, 1998). The Governor

reserved the same for the assent of the President under Article 254 of the Constitution. The Andhra Pradesh Electricity Regulatory Commission (APERC) was constituted under the Reforms Act, 1998 on 31.3.1999, which started functioning with effect from 3.4.1999.

4. Under the provisions of the said Act, the transmission and distribution and generation were separated, and APTRANSCO came to be established. The Act received the Presidential assent on 21.10.1998 and was published in the Official Gazette on 29.10.1998. On 1.2.1999, the Reforms Act, 1998, was brought into force, and APTRANSCO succeeded APSEB in regards to transmission, distribution, and supply of electricity.

5. The APERC granted License No.1/2000 to APTRANSCO on 31.1.2000, to deal with transmission and bulk supply of electricity. License No.2/2000 was given to APDISCOMS for carrying out distribution function in terms of Section 15 of the Reforms Act, 1998. The licenses granted were subject to the terms and conditions, which required the Licensees to file ARR Proposals to be submitted every year before 31st December, based on the expected revenue calculation and tariffs. Subsequently, four DISCOMS were created on 31.3.2000, which were enjoined with the function of the distribution of electricity. The transmission of electricity is carried out over long distances at extra-high voltage levels from generating stations to urban load centres, while the distribution of electricity is carried out at below 33 KV, 11 KV level.

6. The infrastructure, *i.e.*, transmission lines, State grid, equipment, systems of APSEB, came to be held by APTRANSCO. The higher voltage systems were vested in the APTRANSCO and the lower voltage of APDISCOMs.

7. The APTRANSCO filed Aggregate Revenue Requirement (ARR) for the year 2001-2002, before the Commission set up under the Reforms Act, 1998. On 30.12.2000, each of the Distribution Companies (DISCOMs), along with APTRANSCO, filed their respective joint ARR applications. On 17.1.2001, the APTRANSCO filed Tariff Proposal for the year 2001-02, for its transmission and bulk supply business and jointly with each DISCOM proposal for distribution and rental supply business. The Tariff Proposal also contained a proposal for levy of wheeling charges on persons using the electricity system of licensee in the State. The APTRANSCO proposed a wheeling charge of Rs.1 per Kwh for energy it transmitted through its network. On 24.3.2001, the Commission decided to consider the issue relating to determination of wheeling charges and directed APTRANSCO to file necessary applications and information in this regard. On 24.3.2002, the Commission determined that the wheeling charges for the year 2002-2003 effective from 1.4.2002 would be Paise 50 per Kwh for energy it transmitted through its network. Besides, wheeling charges of 28.4 percent of energy input by the project developer into the licensee's grid being the system loss was also to be

factored. The order of the Commission was questioned before the High Court and the High Court by the impugned judgment and order dated 18.4.2003, allowed the appeal, setting aside the order dated 24.3.2002 of the Commission. Hence, the APTRANSCO and APERC are in appeals.

8. In the case set up by APTRANSCO, it is stated that the reason for carrying out bulk transmission of power at extra high voltages, is for reduction of the Technical Losses (T&D Losses or Aggregate Technical Losses) in the transmission system, which are inevitable, which means that at lower voltage (in distribution), the AT Losses are more for the same quantum of power transmitted. The Technical Losses depend on the distance/length of the transmission lines, *i.e.*, directly proportional to the distance of transmission. Apart from that, there are commercial losses in low tension or distribution network side due to pilferage/theft of power *inter alia* by direct tapping, meter tampering, which also contribute to financial losses to DISCOMs. Thus, total losses are designated as AT&C Losses.

9. It is also the case set up by the APTRANSCO that HT (High Tension or High Voltage) consumers are industrial consumers connected to the grid at various high voltage level and avail the power drawn from the utility as well as from other sources by way of wheeling, now called as Open Access.

10. Before Reforms Act, 1998, the wheeling charges were governed by the respective Government Orders, for example, the G.O. MS No.93 dated 18.11.1997 as amended by G.O. MS No.112 dated 22.12.1998, dealt with wheeling charges for non-conventional energy sources, such as Biomass, Bagasse, Mini-Hydel, Wind, Solar. The G.O. MS No.116 dated 5.8.1995 as amended by G.O. MS No.152 dated 29.11.1995, dealt with wheeling charges applicable for Mini-Power Plants set up by private sector and under Memorandum of Understandings signed with AP Gas Power Corporation (APGPCL) for wheeling of power to its captive consumers it specified the wheeling charges to them for the applied voltage level, *i.e.*, 132 KV, 33 KV, 11 KV, etc., and also the distance of transmission.

11. The incentive/concessional wheeling charges allowed in Government Orders mentioned above were to be reviewed by the State Government in the year 2000, but by the time the APERC was constituted, which was vested with the function of tariff determination in terms of Section 26 of the Reforms Act, 1998.

12. In the second batch of appeals, the question involves as to grid support charges, which are levied on the HT consumers, who have rated Contracted Maximum Demand (CMD) and Captive Power Plant (CPP) capacity to meet their demands. When private Generators came into existence, these consumers derated CMD from the APTRANSCO network and obtained the remaining demand from private Generators (these

Generators are respondents in wheeling charges batches). After such deration, the service of grid support became a component for which APTRANSCO was required to be compensated as CPPs running in parallel obtains benefits to keep the system and grid up and running, it is important to invest and maintain the system periodically and the grid support cannot be given free to a nexus of third party private Generators and HT consumer. The significant benefit which a CPP gets is in case of outage of CPP generator power is drawn from the grid, and in case of tripping, the entire load is transferred on to the grid. Such disturbance is catered by way of grid support and equipment installed by the APTRANSCO/DISCOM and involves investment through public exchequer.

13. The grid support charges are not governed by any Government Order or Incentive Scheme of the Government prior to Reforms Act, 1998, or after that. The grid code is the basis for the levy of the grid support charges, which came to be approved by APERC on 26.5.2001. By way of levy of grid support charges, there is no restriction whatsoever on the installation of additional CPPs. The additional CPPs put an additional load on the grid, and corresponding charges are paid towards grid support. There is no embargo for setting up additional new CPPs. In case of expansion of industry, additional duty for additional units have to be paid as additional CPPs tantamount to additional burden on

grid and which further obtains additional service from the grid, thus grid support charge is levied after taking into account all sorts of supply agreements from DISCOMs/Third Party Generators. The grid acts as a cushion/big buffer when the generation from CPP is idled due to sudden outage in the load, thereby mitigating the forced tripping of the CPP, and this support is known as grid support and CPPs running in parallel are known as running with Parallel Grid Support.

14. The Commission vide order dated 8.2.2002, held that grid support charges would be payable at the rate of 50 percent of prevailing demand charges on the differential of CPP capacity and CMD. The agreement entered into by the State Electricity Board provided in clauses 9 and 10 that the Board could have fixed the grid support charges unilaterally as agreed by these HT consumers. However, when the Reforms Act, 1998 came into existence, APTRANSCO in the interest of consumers applied to the Commission, and after hearing the objections, the Commission has passed the order on 8.2.2002. The High Court has set aside the order passed by the Commission. Hence, the appeals have been preferred by the APTRANSCO and APERC.

15. The third batch of appeals is concerned with the tariff orders passed in the years 2004-05, 2005-06, and 2006-09, which have been challenged by Non-Conventional Energy Developers and Gas Based Developers. The APTRANSCO held the bulk supply license until 2005,

and after that, APDISCOMs became the bulk suppliers. The APERC passed the orders mentioned above in exercise of powers conferred under Section 62 of the Electricity Act, 2003, and the appeals were preferred before the APTEL under Section 111 of the Electricity Act, 2003. The issue is limited whether incentive as per the Government Orders of 18.11.1997 and 22.12.1998 to be continued in perpetuity, or the Commission could have reviewed them.

16. The APERC was constituted under the Reforms Act, 1998, and came to be treated as State Regulatory Commission under the proviso to Section 82 of the Electricity Act, 2003. The functions of the State Commission are provided in Section 86 of the Electricity Act, 2003. One of them is to facilitate the intra-State transmission and wheeling of electricity read with Section 62 of the Act, which *inter alia* provides that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Act for transmission of the electricity under Section 62(1)(b) and wheeling of electricity under Section 62(1)(c).

17. In the first batch of appeals, it has been pointed by the APTRANSCO that there are six categories of Generators.

(a) In the first category, eight Generators have pre-existing agreements entered into before the Reforms Act, 1998 as APERC was not in existence, and, in these agreements, there was no clause providing tariff fixation by APERC.

(b) Categories 2 to 5 are of those Generators who have agreements either post Reforms Act, 1998, or their agreements have been amended and restated in terms of Reforms Act, 1998. Thus, they are indisputably governed by the Reforms Act, 1998, and tariff fixation is in accordance therewith.

(c) The last category is the ones who do not have any agreement of wheeling charges with APSEB because they are scheduled consumers of Generators/Developers, each of them having an HT supply agreement with APSEB. The Generators/Developers are either Gas Based, Coke Based, Mini Hydel Power Plants, Non-Conventional Plants.

18. The Government Order MS No.116 dated 5.8.1995, dealt with fixation of wheeling charges. The permission was granted by the said Government Order to set up a mini-power plant. Clause 4 provided that the pricing arrangement is subject to fixation of tariff by the Regulatory Commission ultimately. Clause 5 provided that any duties or taxes that may be imposed by the Government or by the State Electricity Board, shall automatically apply to the Scheme. As per clause 8, the Scheme shall operate within the framework of the Electricity (Supply) Act, 1948, and the Rules made thereunder. The said Government Order dated 5.8.1995 was amended vide Government Order MS No.152 dated 29.11.1995. Para 4 of the Government Order dated 29.11.1995 provided that wheeling charges may be collected from the developers in kind and

as a percentage of the energy delivered at the interconnection point. The proposed rates of wheeling charges were also specified.

19. The Government Order MS No.93 dated 18.11.1997, dealt with wheeling charges for non-conventional energy sources. The Government allowed uniform incentives to all projects based on the renewal source of energy viz. Wind, Biomass, Co-generation, Municipal Waste, and Mini Hydel.

20. On 22.12.1998, the Government amended Order MS No.93 dated 18.11.1997. It was decided that the incentives scheme shall be watched for 3 years, and after that State Electricity Board shall come up with suitable proposals concerning the continuance of the incentives.

21. The Commission, while determining the wheeling charges, considered the assessment of the network charges and transmission loss and various other factors included in the agreement in the post Reforms Act, 1998 and pre-Reforms Act, 1998 scenario. The High Court has held that the State Commission constituted under the Reforms Act, 1998, has no power to levy charges for wheeling the energy generated by the Generating Companies to their consumers. It has also been held that under the Reforms Act, 1998, the powers of the Commission under the Reforms Act, 1998 are more like judicial function exercisable by a Civil Court, but not legislative. The High Court has also held that wheeling

charges are irrational, illogical, and suffers from serious infirmities. It has also been held that after the expiry of the term of the agreement, the Government alone is competent to fix wheeling charges since it is in the realm of the policy direction. The agreements entered into by the State Electricity Board are statutory agreements, and they are binding. The Commission has no power to revise the wheeling charges under the guise of fixing tariff under Section 26 of the Reforms Act, 1998. The wheeling charges is a matter of policy and not for the Commission to fix. The wheeling charges do not fall under Section 26 of the Reforms Act, 1998. It is not proper to revise the wheeling charges like a tariff for the sale of energy. The State Government, as well as the State Electricity Board, are bound by the principles of promissory estoppel. The joint application filed by APTRANSCO and DISCOMs was not maintainable. Any alteration or modification can be made after due opportunity of hearing to the affected persons. Since Government Companies were giving subsidy to farmers of the State, it was not proper to impose wheeling charges.

IN RE: COMPETENCE OF APERC TO DETERMINE WHEELING CHARGES

22. The first question for consideration is the competency of the APERC to levy wheeling charges under the Reforms Act, 1998.

23. The Reforms Act, 1998 has been enacted with a view to provide for the constitution of an Electricity Regulatory Commission, restructuring

of the electricity industry, rationalization of generation, transmission, distribution and supply of the electricity avenues for participation of private sector, taking measures conducive to the development and management of the electricity industry in an efficient, economic and competitive manner and for matters connected therewith and incidental thereto. Section 2(a) defines "area of transmission" thus:

> "2.(a) **"area of transmission"** means the area within which the holder of a transmission licence is for the time being authorised by licence to transmit energy in accordance with the conditions prescribed;"

"Transmission licence" has been defined under Section 2(o). "Licence," as defined in Section 2(d), means a licence granted under Section 15. The definition of "transmit" has been given under Section 2(p). Sections 2(d) and 2(p) are extracted hereunder:

> "2.(d) **"licence"** means a licence granted under section 15 of this Act;"

> 2.(p) **"transmit"** in relation to electricity, means the transportation or transmission of electricity by means of a system operated or controlled by a licensee which consists, wholly or mainly, of extra high voltage and extra high tension lines and electrical plant and is used for transforming and for conveying and/or transferring electricity from a generating station to a sub-station, from one generating station to another or from one sub-station to another or otherwise from one place to another;"

The APERC is constituted under Section 3. Section 5 deals with the conditions of appointment as a member of the Commission. As per Section 5(3)(a), persons who are considered for appointment as members must have experience of generation, transmission, distribution or supply of electricity, manufacture, sale or supply of any fuel for the generation of

electricity and other matters specified therein. The proceedings, powers, and functions of the Commission are dealt with in Part-III of the Act. Section 10 deals with the powers of the Commission for the inquiry. The Commission has the power vested in Civil Court under CPC while trying a suit in respect of matters as specified in Section 10(1) and other provisions of Section 10. Section 11 deals with the functions of the Commission. The provisions of Section 11(1) are inclusive, and certain functions have been specified in clauses (a) to (l) of sub-Section 1 of Section 11, which are as under:

> "11. (1) Subject to the provisions of this Act, the Commission shall be responsible to discharge amongst others, the following functions, namely:-
>
> (a) to aid and advise, in matters concerning electricity generation, transmission, distribution and supply in the State;
>
> (b) to regulate the working of the licensees and to promote their working in an efficient, economical and equitable manner including laying down standards of performance for the licensees in regard to services to consumers;
>
> (c) to issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences;
>
> (d) to promote efficiency, economy, and safety in the use of the electricity in the State including and in particular in regard to quality, continuity, and reliability of service and enable to meet all such reasonable demands for electricity;
>
> (e) to regulate the purchase, distribution, supply and utilisation of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected;
>
> (f) to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers;
>
> (g) to collect data and forecast on the demand and use of electricity

and to require the licensees to collect such data and forecast;

(h) to require licensees to formulate perspective plans and schemes in co-ordination with others for the promotion of generation, transmission, distribution, and supply of electricity;

(i) to regulate the assets, properties, and interest in properties concerning or related to the electricity industry in the State;

(j) to lay down a uniform system of accounts among the licensees;

(k) to regulate the working of licensees and promote their working in an efficient economical and equitable manner; and

(l) to undertake all incidental or ancillary things."

(emphasis supplied)

24. Section 12 of the Reform Act, 1998 deals with the general powers of the State Government regarding power to issue policy directions on matters concerning electricity of the State, including overall planning and coordination. Section 12 is extracted hereunder:

"12. (1) The State Government shall have the power to issue policy directions on matters concerning electricity in the State including the overall planning and co-ordination. All policy directions shall be issued by the State Government consistent with the objects sought to be achieved by this Act and accordingly shall not adversely affect or interfere with the functions and powers of the Commission including but not limited to determination of the structure of tariffs for supply of electricity to various classes of consumers:

(2) If any dispute arises between the Commission and the State Government as to whether or not a question is a matter of policy or whether a policy direction issued by the State Government adversely affects or interferes with the exercise of the functions of the Commission, the same shall be referred by the State Government to a retired judge of the Supreme Court in consultation with the Chief Justice of the Supreme Court whose decision thereon shall be final and binding.

(3) The State Government shall be entitled to issue policy directions concerning the subsidies to be allowed for supply of electricity to any class or classes of persons or in respect of any area in addition to the subsidies permitted by the Commission while regulating and approving the tariff structure provided that the State Government shall contribute the amount to compensate such concerned body or unit affected by the grant of the subsidies by the State Government to the extent of the subsidies granted. The Commission shall

> determine the amounts and the terms and conditions and time frame on which such amounts are to be paid by the State Government.
>
> (4) The State Government shall consult the Commission in relation to any proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Commission on all such matters."

25. The Constitution and functions of APTRANSCO are provided in Section 13. It is the primary function of APTRANSCO to determine the electricity requirements. APTRANSCO shall own the extra high voltage transmission system. The licence is required for transmission and supply as per Section 14. Grant of licences by Commission is dealt with in Section 15. Licensee can transmit electricity in a specified area of transmission and supply the electricity in a specified area of supply, including bulk supply to licensees or any person. Section 15(1) of the Reforms Act, 1998 is extracted hereunder:

> "15. (1) The Commission may on an application made in such form and on payment of such fee, as may be prescribed, grant a licence authorising any person to,-
>
> (a) transmit electricity in a specified area of transmission; or
>
> (b) supply electricity in a specified area of supply including bulk supply to licensees or any person."

26. Reorganization of State Electricity Board is dealt with in Part-VII of the Reforms Act, 1998. Section 26 deals with the licensee's revenues and tariffs. Section 26(1) provides that each licence under the Act has to observe methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover according to the terms of its licence and in designing

tariffs to collect those revenues. As per Section 26(2)(a), the Commission shall be bound by the parameters provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 read with Sections 57 and 57-A of the said Act and consider various factors as enumerated in sub-Section 26(2)(b) and as provided in Section 26(2)(c) the interest of the consumers. In case it departs from the specified parameters in the Sixth Schedule to the Electricity (Supply) Act, 1948, while determining the licensees' revenue and tariffs, it shall record the reasons thereof in writing. Section 26 is extracted hereunder:

> "26. (1) The holder of each licence granted under this Act shall observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect those revenues.
>
> (2) The Commission shall subject to the provisions of sub-section (3) be entitled to prescribe the terms and conditions for the determination of the licensee's revenue and tariffs by regulations duly published in the Official Gazette and in such other manner as the Commission considers appropriate:
>
> Provided that in doing so the Commission shall be bound by the following parameters:--
>
> (a) the financial principles and their applications provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 read with sections 57 and 57-A of the said Act;
>
> (b) the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments performance of licence conditions and other matters which the Commission considers appropriate keeping in view the salient objects and purposes of the provisions of this Act; and
>
> (c) the interest of the consumers.
>
> (3) Where the Commission, departs from factors specified in the Sixth Schedule of the Electricity (Supply) Act, 1948 while determining the licensees' revenues and tariffs, it shall record the reasons therefor in writing:

(4) Any methodology or procedure specified by the Commission under sub-section (1), (2), and (3) above shall be to ensure that the objectives and purposes of the Act are duly achieved.

(5) Every licensee shall provide to the Commission in a format as specified by the Commission at least 3 months before the ensuing financial year full details of its calculation for that financial year of the expected aggregate revenue from charges which it believes it is permitted to recover pursuant to the terms of its licence and thereafter it shall furnish such further information as the Commission may reasonably require to assess the licensee's calculation. Within 90 days of the date on which the licensee has furnished all the information that the Commission requires, the Commission shall notify the licensee either—

(a) that it accepts the licensee's tariff proposals and revenue calculations; or

(b) that it does not consider the licensee's tariff proposals and revenue calculations to be in accordance with the methodology or procedure in its licence and such notice to the licensee shall,--

(i) specify fully the reasons why the Commission considers that the licensee's calculation does not comply with the methodology or procedures specified in its licence or is in any way incorrect, and

(ii) propose a modification or an alternative calculation of the expected revenue from charges, which the licensee shall accept.

(6) Each holder of a supply licence shall publish in the daily newspaper having circulation in the area of supply and make available to the public on request the tariff or tariffs for the supply of electricity within its licensed area and such tariff or tariffs shall take effect only after seven days from the date of such publication.

(7) Any tariff implemented under this section, -

(a) shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor or power factor, the consumer's total consumption of energy during any specified period, or the time at which supply is required; or paying capacity of category of consumers and need for cross-subsidisation;

(b) shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and

(c) shall satisfy all other relevant provisions of this Act and the conditions of the relevant licence.

(8) The Commission also shall endeavour to fix tariff in such a manner that, as far as possible, similarly placed consumers in different areas pay similar tariff.

(9) No tariff or part of any tariff required by sub-section (6) may be amended more frequently than once in any financial year ordinarily except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by regulations. At least three months before the proposed date for implementation of any tariff or an amendment to a tariff the licensee shall provide details of the proposed tariff or amendment to a tariff to the Commission, together with such further information as the Commission may require to determine whether the tariff or amended tariff would satisfy the provisions of sub-section (7). If the Commission considers that the proposed tariff or amended tariff of a licensee does not satisfy any of the provisions of sub-section (7), it shall, within 60 days of receipt of all the information which it required, and after consultation with the Commission Advisory Committee and the licensee, notify the licensee that the proposed tariff or amended tariff is unacceptable to the Commission, and it shall provide to the licensee an alternative tariff or amended tariff which shall be implemented by the licensee. The licensee shall not amend any tariff unless the amendment has been approved by the Commission.

(10) Notwithstanding anything contained in sections 57-A and 57-B of the Electricity (Supply) Act, 1948, no Rating Committee shall be constituted after the date of this enactment and the Commission shall secure that licensees comply with the provisions of their licences regarding their charges for the sale of electricity (both wholesale and retail) and for the connection to and use of their assets or systems in accordance with the provisions of this Act.

Explanation:-

In this section,-

(a) "the expected revenue from charges" means the total revenue which a licensee is expected to recover from charges for the level of forecast supply used in the determination under sub-section (5) above in any financial year in respect of goods or services supplied to customers pursuant to a licensed activity; and

(b) “tariff” means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type or types of customers specified in the tariff notification.”

Explanation attached to Section 26 makes it clear that tariff means a schedule of standard prices or charges for specified services that are

applicable to all such specified services provided to the type or types of customers specified in the tariff notification.

27. It is submitted on behalf of the appellants – APTRANSCO, Commission that transmission is regulated under the Reforms Act, 1998. The decision of the High Court is contrary to the provisions contained in Sections 11 and 13 and other provisions of Reforms Act, 1998. The Commission has the power to determine the tariff. Under the Reforms Act, 1998, certain powers are a combination of adjudicatory and inquisitorial, and some are legislative.

28. The tariff fixation is generally a legislative function as held in *Ashok Soap Factory v. Municipal Corporation of Delhi*, (1993) 2 SCC 37 thus:

> **"29.** Apart from that the fixation of tariff is a legislative function and the only challenge to the fixation of such levy can be on the ground of unreasonableness or arbitrariness and not on demonstrative grounds in the sense that the reasons for the levy of charge must be disclosed in the order imposing the levy or disclosed to the court, so long as it is based on objective criteria."

With respect to tariff fixation as legislative function reference has also been made to decisions of this Court, in *Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board*, (1997) 7 SCC 251, *Oil and Natural Gas Commission v. Association of Natural Gas Consuming Industries of Gujarat,* (1990) Supp. SCC 397, *Rohtas Industries Ltd. v. Chairman, Bihar State Electricity Board*, (1984) Supp. SCC 161.

29. The Commission exercises the powers of a regulator. This Court has considered the concept of regulatory power in various decisions, namely, *K. Ramanathan v. State of Tamil Nadu,* AIR 1985 SC 660 = (1985) 2 SCC 116; *V.S. Rice and Oil Mills v. State of Andhra Pradesh,* AIR 1964 SC 1781; *Deepak Theatre, Dhuri v. State of Punjab,* AIR 1992 SC 1519; and *D.K. Trivedi & Sons v. State of Gujarat,* AIR 1986 SC 1323. This Court has also held in the decisions mentioned above that regulatory powers are extensive, and they include whatever needs to be done for achieving the objects and purposes of the Act.

30. It is further submitted on behalf of APTRANSCO that cost is involved in the maintenance, operation, upgradation, and transmission of electricity through the transmission and distribution system and network, for which infrastructure has to be created. Losses take place during transmission, which has to be accounted for, and transition loss is the loss of the system and has to be borne by the respondents.

31. Whereas, respondents submitted that in the case of drawl of the contract before 1998, APERC could not have gone into as it did not have jurisdiction in those cases. Even otherwise, where the agreements have been amended or entered after the Reforms Act, 1998, the Commission has no power to fix the wheeling charges as that is not explicitly provided under the provisions of the Reforms Act, 1998.

32. It was submitted on behalf of the licensees that proviso to Section 82(1) of the Electricity Act, 2003 provides for State Commission thus:

> "**82. Constitution of State Commission.**- (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:
>
> Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:
>
> Provided further that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) or under the enactments specified in the Schedule, may, on the recommendations of the Selection Committee constituted under sub-section (1) of section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government."

On the strength of the provisions mentioned above, it was submitted that actions of the State Commission, as notified under the Electricity Regulatory Commission Act, 1998 (for short, "the Central Act"), would be saved to the extent they are not inconsistent with the provisions of the Electricity Act, 2003. Since APERC is the not State Commission under the Central Act, it cannot be held to possess the jurisdiction to levy wheeling charges. It is the State Commission which has the relevant authority under the Electricity Act, 2003. Section 22(1)(b) of the Central Act, specifically provide that State Commission is required to determine the tariff payable for the use of the transmission

facilities in the manner provided in Section 29. Section 29(2) requires that the State Commission shall determine by regulation the terms and conditions for the fixation of the tariff. Thus, the emphasis has been laid on the aspect that APERC's order is not at par with a regulation which is necessary as per the Central Act. The APERC did not possess jurisdiction to levy wheeling charges and in any event, not by way of passing an order in the absence of regulation. The APERC has erred in saddling the generators with the costs of distribution since the generators supplying electricity to scheduled consumers do not utilize the distribution networks. Therefore, without prejudice to the submission that the wheeling charges under the agreement could not be disturbed, the determination of wheeling charges qua electricity wheeled by generators of electricity for transmission to their scheduled consumers should only be based on the transmission charges. Transmission loss is also amounted to 8 percent out of 28.4 percent system losses, the rest being the distribution losses. In Section 11(e) of the Reforms Act, 1998 the words "generation" and "transmission" are conspicuously missing. Whereas Section 22(1)(b) of the Electricity Regulatory Commissions Act, 1998, speaks explicitly of the determination of tariff payable for the use of transmission facilities by the State Commission to be constituted under the Central Act. There is no such provision in the Reforms Act, 1998.

33. According to licensees under the Central Act, the State Commission is vested with the power to determine the tariff payable for the use of transmission facilities. Reliance has been placed on *PTC India Limited v. Central Electricity Regulatory Commission,* (2010) 4 SCC 603, wherein this Court has laid down in the context of determination of tariff under the Electricity Act, 2003, that only Regulations made under the said Act could override the existing contractual relationship, which cannot be done only on the basis of an order of the Commission. It is contended that till date no regulations as required under Section 54(k) of the Reforms Act, 1998 have been framed, though Schedule V provided parameters of fixation of the wheeling charges under Section 43 of the Act of 1948, this Section had been rendered inapplicable as per Section 56(iii)(vi) of the Reforms Act, 1998. The guiding principles of a general or special order are absent in the Reforms Act, 1998. Under Section 15(4)(a) read with Section 15(5) of the Reforms Act, 1998, the tariff would have to be determined by mutual agreement, not by way of tariff order. The concluded agreements cannot be covered by the expression "enter into" used in Section 24(4) of the Reforms Act, 1998.

34. In our opinion, the Commission constituted under the Reforms Act, 1998, has the power to determine the wheeling charges. We are not at all impressed by the submission raised by learned Senior Counsel appearing on behalf of respondents-Companies. The State Commission

constituted under the Reforms Act, 1998 has the power to deal with the transmission. The expression "area of transmission" is defined under Section 2(a). Grant of transmission licenses by the Commission is dealt with in Section 15. The "licensee" or "licence holder" is a person holding a licence under Section 14 to transmit or supply energy, including APTRANSCO, as defined under Section 2(e). "Transmission licence" means a licence granted under Section 15(1)(a), and "transmit" has also been defined in Section 2(p). The Commission has extensive and pervasive power to deal with the transmission.

35. Section 11 of the Reforms Act, 1998 deals with the functions of the Commission. Under Section 11(1)(a), the Commission shall aid and advise in matters concerning electricity generation, transmission, distribution and supply in the State. Section 11(1)(b) empowers the Commission to regulate the working of the licensees and to promote their working in an efficient, economical, and equitable manner. Thus, it has to act as a Regulator in the matter of working on the licensees. The Commission under Section 11(1)(c) has the power to issue licences in accordance with the provisions of the Act. Section 11(1)(d) also empowers the Commission to promote efficiency, economy, and safety in the use of the electricity. Under Section 11(1)(e), the Commission has the power to regulate the purchase, distribution, supply, and utilization of electricity, the quality of service, the tariff, and charges payable. The

wheeling charges are part of tariff, and the provisions of Section 11 are inclusive and primarily dealing with the generation, transmission, and distribution. These three processes suggest that Section 11 does include in its ken the power to fix the wheeling charges relating to the generation, transmission, distribution, supply, and utilization of electricity. The distribution is not possible without transmission. Section 13 deals with APTRANSCO and the works connected with it. Licensing of transmission and supply are dealt with in Section 14 for transmitting electricity and supply of electricity. It provides that license is necessary unless exemption is granted under the Electricity Act, 1948.

36. Section 26 of the Reforms Act, 1998, provides that each licensee holding license, granted under the Act, shall observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue. The Commission shall subject to the provisions of Section 26(3), be entitled to prescribe the terms and conditions for the determination of the licensee's revenue and the tariffs and for that it may also frame the regulation and the Commission shall be bound by the parameters of financial principles and their applications provided in the Sixth Schedule to the Electricity Act, 1948 read with Sections 57 and 57-A. Thus, the licensee is required to submit a calculation of annual expected aggregate revenue, and the Commission has the power to fix the tariff for the licensees that would include the

licence for transmission also. The Commission, while fixing the wheeling charges, has to act upon the settled principles as specified in the order and in consonance with the provisions contained in Sections 11, 15, and 26.

37. The 'tariff' means the amount that the licensee is permitted to recover from its tariff in any financial year, as determined by the Commission in accordance with the provisions of section 26. In the terms of licence, 'tariff' has been dealt with in Clause 22.3 as under: -

> "a) The amount that the Licensee is permitted to recover from its tariffs in any financial year is the amount that the Commission determines in accordance with the provisions of section 26 of the Act.
>
> b) The Licensee shall establish a tariff as approved by the Commission, for the Licensee's Transmission and Bulk Supply Business and shall calculate its charges in accordance with this Licence, the Regulations, the orders of the Commission and other requirements prescribed by the Commission from time to time.
>
> c) Save as otherwise directed by the Commission, the Licensee may publish a combined tariff for its Transmission and Bulk Supply Business reflecting the tariff charges and the other terms and conditions contained in the approved tariffs referred to in Paragraph 22.3(b)."

38. As to the question of fixing of wheeling charges, the High Court has erred in holding that the Commission has no power to fix the wheeling charges. It is the regulator for transmission, and considering the various provisions mentioned above, it is apparent that the Commission had the power to fix the wheeling charges.

39. The Andhra Pradesh Electricity Regulatory Commission (Business Rules of the Commission), Regulations, 1999 (for short, "the 1999 Regulations"), have been framed in exercise of powers conferred by Section 9, Sub-Section 2 and Section 54, Sub-Section (2)(a) of the Reforms Act, 1998 and they have been amended by Regulations of 2000. The Regulations reflect a broad spectrum of powers and various functions relating to fixation of the tariff. Regulation 45-A deals with expected revenue from charges and tariff proposals. Regulation 45-B deals with the fuel surcharge adjustment formula. The submission raised on behalf of respondents that the Commission could not fix wheeling charges when there was no regulation in vogue**.** Be that as it may. The section itself provides the guidelines apart from the fact that regulation also exists.

40. Concerning the concluded contract, it has been submitted on behalf of APTRANSCO that Clause 15 of the Contract dealt with subsequent Governmental actions. Wheeling of energy has been dealt with under Clause 2 of the Modified Power Wheeling and Purchase Agreement entered into between Andhra Pradesh State Electricity Board and licensee before 1998. As per Clause 2.4, compensation for the provisions of Firm Wheeling Service, the Board shall be entitled to deduct from the wheeled energy, the applicable wheeling charges, and the charges shall be 15 percent to 20 percent of the wheeled energy.

Following is the Clause 2.4:

> "2.4 As compensation for the provisions of Firm Wheeling Service, the Board shall be entitled to deduct from the wheeled Energy the applicable wheeling charge, which charges shall be fifteen percent (15%) of the wheeled energy for scheduled consumers receiving power at a voltage of 132 KV and above, seventeen and one half percent (17.55) of the Wheeled Energy for scheduled Consumers receiving power at a voltage of less than 132 KV and greater than 1 KV and twenty percent (20%) of the Wheeled Energy for scheduled consumers receiving power at a voltage of 11 KV. The wheeling charges payable under this paragraph 2.4 shall be the sole and exclusive consideration payable to the Board for the provisions of Firm Wheeling Service."

Modified Power Wheeling and Purchase Agreement had been entered into by the Board and the licensee in the exercise of statutory power, and the Commission has the power to fix the tariff and charges.

41. A Constitution Bench of this Court in *PTC India Ltd. v. Central Electricity Regulatory Commission* (supra), has held that tariff fixation under the Electricity Act, 2003, is a legislative function in its character. Section 178 of the said Act deals with the making of Regulation by the Central Commission under the authority of subordinate legislation. The same is broader than section 79 (1), which enumerated the regulatory function of the Central Commission in specified areas. A regulation under section 178, as a part of the regulatory framework, intervenes and even overrides the existing contracts between the regulated entities since it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

This court further observed that in the absence of regulation, the Commission has the power of fixation of the tariff. It is not dependent upon the framing of the regulation. This Court has laid down thus:

> "**25.** The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of the tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for the supply of electricity by a generating company to a distribution licensee or transmission of electricity or wheeling of electricity or retail sale of electricity.
>
> **26.** The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff following the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62, and 64, indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.
>
> *** *** ***
>
> **55.** To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court, which we have discussed hereinafter. For example, under Section

79(1)(*g*), the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(*g*) has to be in consonance with such regulation.

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57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(*j*), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(*j*) have to be in conformity with Section 178.

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

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66. While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not bypassing an order under Section 79(1)(*j*) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.

71. This judgment in *Jagdamba Paper Industries (P) Ltd. v. Haryana SEB,* (1983) 4 SCC 508, is important from another angle also. It indicates that regulations under Section 79 of the 1948 Act were to be in the nature of subordinate legislation, therefore, all contracts had to be in terms of such regulations. In the present case also, if one examines the terms and conditions of the licences, power to fix trading margin is expressly contemplated by such terms. The said judgment further held that the Board is a statutory authority and has to act within the framework of the 1948 Act. If the act of the Board is not in consonance or in breach of some statutory provisions of law, rule, or regulation, it is always open to challenge in a petition under Article 226 of the Constitution.

79. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the inter-State trading of electricity can be done by making of regulations under Section 178 of the 2003 Act. Power to fix the trading margin under Section 178 is, therefore, a legislative power and the notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. <u>These Regulations make an inroad into contractual relationships between the parties. Such is the scope and effect of the impugned Regulations, which could not have taken place by an order fixing the trading margin under Section 79(1)(*j*).</u> Consequently, the impugned Regulations cannot fall

within the ambit of the word "order" in Section 111 of the 2003 Act.

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92. (*i*) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(*ii*) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation."

(emphasis supplied)

42. The regulations which came up for consideration in the case of *PTC India Ltd.* (supra) are extracted hereunder:

"CENTRAL ELECTRICITY REGULATORY COMMISSION

NOTIFICATION

New Delhi, 23-1-2006

No. L-7/25(5)/2003-CERC.—Whereas the Central Electricity Regulatory Commission is of the opinion that it is necessary to fix trading margin for inter-State trading of electricity.

Now, therefore, in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, the Central Electricity Regulatory Commission hereby makes the following Regulations, namely—

1. *Short title and commencement.*—(1) These Regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

(2) These Regulations shall come into force from the date of their publication in the Official Gazette.

2. *Trading Margin.*—The licensee shall not charge the trading margin exceeding four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access, and transmission losses.

Explanation.—The charges for the open-access include the transmission charge, operating charge, and the application fee.

A.K. Sachan, Secy."

43. Under Regulation 42 of the 1999 Regulations, the Commission has the power to frame model conditions for the supply of power to be adopted by the licensee. Regulation 42 of the 1999 Regulations is extracted hereunder:-

> "**42. Model conditions of supply of power**
> 1). (i) The Commission may check, from time to time, the model conditions of supply to be adopted by the licensee, with such variations as the Commission may direct, and the licensee shall furnish to the Commission the finalised conditions of supply for approval.
>
> (ii) The licensee shall always keep in his office an adequate number of printed copies of the sanctioned conditions of supply and shall, on demand, sell such copies to any applicant at a price not exceeding normal photocopying charges.
>
> 2). (i) The Commission may pass such orders as it thinks fit in accordance with section 28 to 31 of the Act for the contravention or the likely contravention of the licence terms or conditions by the licensee.
>
> (ii) Subject to the provisions of Section 28 to 31 of the Act and the procedure prescribed therein, the Commission may follow as far as possible the general procedure prescribed in Chapter II of these Regulations in dealing with a proceeding arising out of a contravention or likely contravention by a licensee."

44. The Commission also has the power to amend licenses granted under Regulation 45 of the 1999 Regulations. Regulation 45 is extracted hereunder:

> "**45. Amendment of the licence granted**
> (1) Application by the licensee or the local authority concerned for alteration or amendment to the terms and conditions of the licence granted in terms of Section 19 of the Act shall be made in such form as may be directed for the purpose by the Commission. The application shall be supported by affidavit as provided in Chapter II of the Regulations.
>
> (2) Unless otherwise specified in writing by the Commission, each application for amendment or alteration in the licence shall be accompanied by a receipt of such fee as the Commission may require, paid in the manner directed by the Commission.

(3) Unless otherwise specified in writing by the Commission, the procedure prescribed in these Regulations for grant of licence, in so far it can be applied, shall be followed while dealing with an application for amendment or alteration of the licence."

45. The Regulations of 1999 have been amended in the year 2000 by the first amendment Regulations, 2000. As per Regulation 45-A of the Regulations, 2000, inserted by amendments to Chapter IV-A of the Conduct of Business Regulations, it is open to the Commission to fix a tariff. The same is extracted hereunder:

45-A. Expected revenue from charges and tariff proposals:

(1) Subject to the provisions of the Act, each year, at the time required by the licence or otherwise as may be directed by the Commission, each licensee (Transmission and Bulk Supply or Distribution and Retail Supply, as the case may be) shall file with the Commission, in the format as may be specified by the Commission, statements containing calculation for the ensuing financial year the expected aggregate revenue from charges under its currently approved tariff and the expected cost of providing services.

(2) If a Licensee carries on more than one business, namely, Transmission and Bulk Supply or Distribution and Retail Supply, the statement referred to in clause (1) above shall be given separately for each of the separate businesses of the licensee and in such manner in respect of each such business as the Commission may direct.

(3) The statements referred to in clause (1) above shall contain the following details:

(i) the licensee's demand forecast by customer or consumer category for the ensuing financial year and the basis of the forecast;

(ii) a calculation of expected aggregate revenue that would result from the above demand during the same period under the currently approved tariff by customer or consumer category;

(iii) a calculation of the licensee's estimated costs of providing the service required by the level of demand indicated in sub-clause (i) above for each customer or consumer category during the same period calculated in accordance with the financial principles and

their applications in the Sixth Schedule to the Electricity (Supply) Act, 1948 or such other principles the Commission may prescribe from time to time;

(iv) The licensee's proposal to deal with the divergence between the expected aggregate revenue and the expected cost of services including proposal, if any, for revised tariff to be charged in the ensuing year, the proposed scheme for reduction in losses, changes in the tariff structure for any specific category of consumer;

(v) In case the Licensee carries on any business or services other than those licensed under the Act, the Licensee shall give separate revenue and expense statements together with such details as the Commission may require in respect of such business or services; and

(vi) Such other information as the Commission may direct from time to time.

(4) The licensee shall furnish to the Commission such additional information, particulars, and documents as the Commission may require from time to time after such filing of revenue calculations and tariff proposals.

(5) The Commission may, from time to time, issue guidelines for filing statement of revenue calculations and tariff proposals, and unless waived by the Commission, the licensee shall follow such guidelines issued by the Commission.

(6) Unless otherwise directed by the Commission, the Commission shall hold a proceeding on the revenue calculations and tariff proposals given by the licensee and may hear such persons as the Commission may consider appropriate for making a decision on such revenue calculations and tariff proposals.

(7) The procedure of hearing on the revenue calculations and tariff proposals of the licensee shall be in the manner as the Commission may decide from time to time.

(8) Upon hearing the licensee and such other parties as the Commission considers appropriate and upon making such other inquiry, the Commission shall make an order and notify the licensee of its decision on the revenue calculations and tariff proposals, as provided in subsection (5) of section 26 of the Act.

(9) While making an order under clause (8) above or at any time thereafter, the Commission may direct the publication of the tariff that the licensee shall charge the different consumers or customers and categories thereof in the ensuing financial year.

(10) The licensee shall publish the tariff or tariffs approved by the Commission in the newspapers having circulation in the area of supply as the Commission may direct from time to time. The

> publication shall, besides such other things as the Commission may require, include a general description of the tariff amendment and its effect on the classes of the consumers.
>
> (11) The tariffs so published under clause (10) above shall become the notified tariffs applicable in the area of supply and shall take effect only after such number of days as the Commission may direct, which shall not be less than seven days, from the date of first publication of the tariffs.
>
> (12) The licensee shall raise bills for the energy supplied or transmitted or services rendered to the consumers in accordance with the notified tariff.
>
> (13) No tariff determined and notified as above may be amended more frequently than once in any financial year except that tariff rates shall be adjusted in accordance with any fuel surcharge adjustment formula incorporated in the tariff with the approval of the Commission. Provided that the consequential orders which the Commission may issue to give effect to subsidy the State Government may provide under Sections 12 (3) and/or 27 (1) of the Act shall not be construed as amendment of tariff notified. The Licensee shall, however, give appropriate adjustments in the bills to be raised on the consumers for the subsidy amount in the manner the Commission may direct."
>
> (emphasis supplied)

46. Under regulations, various agreements have also been amended, and there is plenary power under the regulations to prescribe the tariff and charges concerning Transmission and Bulk Supply or Distribution and Retail Supply as provided in Regulation 45-A(2).

47. Fuel Surcharge Adjustment Formula has been given in Regulation 45-B and Subsidies under Regulation 45-C. Under Regulation 45-A(8), it is clear that upon hearing the licensee and such other parties as the Commission considers appropriate and upon making such other inquiry, the Commission shall make an order and notify the licensee of its decision on the revenue calculations and tariff proposals, as provided in

section 26(5) of the Reforms Act, 1998. Thus, on the strength of the decision in *PTC India Ltd.* (supra), it is clear that the contracts which were entered into stand superseded under the Reforms Act, 1998, by the regulations framed in the year 1999 as amended in the year 2000. Thus, the submission raised on behalf of the licensees that the concluded contracts are binding and estoppel was created and concerning the power of regulatory Commission to determine the wheeling charges is untenable. The commission can exercise the power of fixation of such charges, which power is legislative. The statutory contracts have been superseded by the regulations which have been made. No estoppel is created. It was not the subject matter of policy reserved for the Government under section 12 of the Reforms Act, 1998. As per section 26 (5), the exercise of fixation of charges can be done. There is no question of the applicability of promissory estoppel. There is no violation of principles of natural justice as the objections were invited, and the licensees were heard.

48. In *V.S. Rice and Oil Mills v. State of Andhra Pradesh,* AIR 1964 SC 1781, this Court has dealt with the question of the validity of an agreement entered into for the supply of electricity under specified rates for ten years and exercise of regulatory powers to increase the rate under the statute enacted after the agreement was upheld. The relevant portion is extracted hereunder:

"21. That takes us to the next question as to whether the impugned notified orders are invalid because they contravene the provisions of Articles 19(1)(f) and (g) of the Constitution. The impugned orders have been notified by virtue of the power conferred on the respondent by Section 3(1) and may, therefore, be treated as law for the purpose of Article 19. We may also assume in favour of the appellants that the right to receive the supply of electricity at the rates specified in the agreements is a right which falls within Article 19(1)(f) or (g). Even so, can it be said that the impugned notified orders are not reasonable and in the interests of the general public? That is the question which calls for an answer in dealing with the present contention. It is true that by issuing the impugned notified orders, the respondent has successfully altered the rates agreed between the parties for their respective contracts and that, prima facie, does appear to be unreasonable. But, on the other hand, the evidence shows that the tariff which was fixed several years ago had become completely out of date and the reports made by the Accountant-General from time to time clearly indicate that the respondent was supplying electricity to the appellants at the agreed rates even though it was incurring loss from year to year. Therefore, it cannot be said that the impugned notified orders were not justified on the merits. The prices of all commodities and labour charges having very much increased; meanwhile, a case had certainly been made out for increasing the tariff for the supply of electrical energy. But it would not be possible to hold that the restriction imposed on the appellants' right by the increase made in the rates is reasonable and in the interests of the general public solely because the impugned orders have saved the recurring loss incurred by the respondent under the contracts. If such a broad and general argument were accepted, it may lead to unreasonable and even anomalous consequences in some cases. This question, however, has to be considered from the point of view of the community at large; and thus considered, the point which appears to support the validity of the impugned orders is that these orders were passed solely for the purpose of assuring the supply of electrical energy and that would clearly be for the good of the community at large. Unless prices were increased, there was risk that the supply of electrical energy may itself have come to an end. If the respondent thought that the agreements made with the appellants were resulting in a heavy loss to the public treasury from year to year, it may have had to consider whether the supply should not be cut down or completely stopped. It may well be that the respondent recognised its obligation to the public at large and thought that supplying electrical energy to the consumers who were using it for profit-making purposes, at a loss to the public exchequer would not be reasonable and legitimate, and it apprehended that the legislature may well question the propriety or wisdom of such a course; and so, instead of terminating the contracts, it decided to assure the supply of electrical energy at a fair price, and that is why the impugned notified orders were issued. We ought to make it clear that there has been no suggestion before us that the prices fixed by the impugned notified orders are, in any sense, unreasonable or excessive, and it is significant that even the

> revised tariff has to come into operation prospectively and not retrospectively. Therefore, having regard to all the circumstances, in this case, we are disposed to hold that the change made in the tariff by the notified orders must be held to be reasonable and in the interests of the general public."

49. Licensees have relied upon *Indian Aluminium Company v. Kerala State Electricity Board,* (1975) 2 SCC 414, dealing with the power of the State Electricity Board under section 49 (1) to fix the tariff which did not enable the Board to nullify an agreement entered into by it as permitted under section 49 (3) thereof. In our opinion, the power of fixation of tariff under section 49 (1) of the Electricity Supply Act of 1948 and agreement entered into under section 49 (3) are different connotations. The provisions of the Reforms Act, 1998, empower the Commission to fix tariffs and charges for transmission, distribution, and the like. The entire power is given to the Commission, and the Constitution Bench of this Court has held in *PTC India Ltd.* (supra) that once regulations have been framed, they make an inroad into the concluded contract also. Thus, the decision is of no help. Section 49 (3) of the Electricity Supply Act, 1948 authorises the Board to fix different tariffs to supply electricity. The question in the present case is different.

50. Reliance has been placed on the decision of this court in *Karnataka Power Transmission Corporation Ltd. v. Amalgamated Electricity Co. Ltd.,* (2001) 1 SCC 586, in which section 394 (2) of the Companies Act, 1956 relating to rights and entitlement, obligations and commitments of the

transferee company by virtue of scheme of arrangements sanctioned by the Companies Court. It was held that the transferee company becomes legally bound and obliged to discharge all commitments. The decision is distinguishable and is based upon different provisions dealing with a different situation.

51. The arguments raised by respondents that the policy decision of the State Government has force of direction in terms of section 78 (A) of the Electricity Supply Act, 1948, in order to promote and develop such generation, in pursuance to the guidelines issued by the Central Government in view of international treaties and conventions to which India is a party. It was further urged that the Central Government has taken a decision to invite private participation to augment energy generation, and there is a thrust on the development of renewable energy. The State Government had the power under section 12 of the Reforms Act, 1998 also, and the policy decision binds the Commission.

52. The submission is stated to be rejected as policies are always subject to legislative interventions, and once the State Government has made statutory provision, it has to prevail, and we find that no such policy was contemplated to continue for all the times to come. The policy has culminated into the Reforms Act, 1998 itself, and the same indicates the obligations of the Government for reforms displayed in the statutory form for establishment of Commission and separation of distribution and

transmission. Reforms have been made only because of the policies, and once they found statutory expression, they are bound to be followed.

53. A submission was also raised concerning vested rights and concluded contracts that have already taken care of by the decision of *PTC India Limited* (supra) and discussion mentioned above.

54. There is no question of attracting the equitable principles of promissory estoppel for which reliance has been placed on *Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd.,* (1983) 3 SCC 379, *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Ors.,* (1979) 2 SCC 409, *Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board & Ors.,* 1997 (7) SCC 251, *Andhra Pradesh Electricity Regulatory Commission v. R.V.K. Energy Private Limited & Anr.,* (2008) 17 SCC 769, where the law laid down, cannot be said to be applicable in this case. There was no unequivocal promise in this case, and statutory provision can make inroad and supersede the contracts.

55. Submissions were raised concerning the repugnancy of the Reforms Act, 1998. We find that once the Reforms Act, 1998 has been enacted, it has to prevail, and vires of provisions have not been questioned. The submissions raised concerning the repugnancy, on merits, have no legs to stand given the provisions contained in the Reforms Act, 1998. The question of repugnancy rightly had also not been

raised before High Court and cannot be raised in this Court as an afterthought.

56. Reliance has also been placed on *Binani Zinc Limited v. Kerala State Electricity Board & Ors.,* (2009) 11 SCC 244, on the following observations:

> "31. The State Electricity Boards are entitled to frame tariff in terms of the provisions contained in the 1948 Act. The tariff so framed is legislative in character. The Board, as a statutory authority, is bound to exercise its jurisdiction within the four corners of the statute. It must act in all fields, including the field of framing tariff by adopting the provisions laid down in the 1948 Act or the Rules and the Regulations framed thereunder."

In *Binani Zinc Limited* (supra), the Court has dealt with the power of the Electricity Board and observed that tariff has to be fixed within the four corners of the statute. There is no dispute with the proposition mentioned above, but it does not help the respondents on the merits of the case concerning powers and jurisdiction of the Commission under Reforms Act, 1998.

57. Concerning the interpretation of the agreement, reliance has been placed on *Adani Power (Mundra) Ltd. vs. Gujarat Electricity Regulatory Commission & Ors.*, AIR 2019 SC 3397, in which this Court has observed that clauses in the agreement ought to be given a plain, literal, and grammatical meaning of the expression. There is no dispute with the proposition mentioned above, however, the provisions of the Reforms Act,

1998 are clear, candid, and empowers the Commission to determine the charges.

58. The High Court has also held that joint applications were not maintainable. The APTRANSCO held Licence No.1/2000 for transmission and bulk supply and as per clause 20 read with clause 22, it is incumbent upon the APTRANSCO to refer the table of tariffs or even system charges/losses incurred under the system. Thus, a joint application is nothing, but an obligation under the licence, and no prejudice has been caused by submitting the joint application. Thus, the decision of the High Court, to the contrary, is found to be meritless. The issue of maintainability of joint application has also been dealt with by the Commission elaborately.

59. The reason given for holding the joint application to be maintainable is that there is an integrated transmission distribution system in the State. The system is entirely owned and controlled by the APSEB initially, and after reforms, it has come into control of APTRANSCO till 31.3.2001. The present application is the first of its kind for the determination of applicable wheeling charges to the transmission distribution system. The objection is technical, and in case joint petitions are maintained, it has no adverse effect so long in substance as the Commission has decided to proceed to determine the issue relating to transfer DISCOMS and representative units and has

determined tariffs which are fair to the consumers availing the wheeling services. The approach of the Commission, thus, could not be faulted by the High Court. Therefore, the decision of the High Court in this regard is also faulty and unsustainable.

60. Coming to merits of fixation of charges, while passing the order, the Commission has fixed the wheeling charges thus:

> 9.12 The wheeling charge leviable from 01.04.2002 for the F.Y. 2002-2003 is accordingly worked out as below.
>
> Calculation of Wheeling Charges for 2002-03:
>
> a) In cash :

Particular of Expenditure	Amt. Rs.Crs.
Wages and salaries	490.65
Administration and General Expenses	105.20
Repairs and Maintenance	185.66
Rent Rates and Taxes	5.13
Approved Loan interest	5609.31
Security deposit interest	31.37
Legal Charges	0.97
Audit and other fees	2.23
Depreciation	508.59
Other Expenses	39.30
Contribution to staff pension and gratuity.	64.95
Contribution to Contingency Reserve	21.45
Sub Total of Expenditure	2015.81
Reasonable Return	82.37
Total Gross Revenue Required	2098.18
Less Non-Tariff Income 529.86	
NET REVENUE REQUIREMENT	1568.32
Million Units (Gross)	41954
Network Charges including reasonable 37 ps/ kwh return	(1568.32 Crs 41954 MU
Wheeling Charges (External) 3 ps/kwh	(Based on Information)
Balancing and ancillary Charges	10 ps/ kwh

Total Wheeling Charges in ps/ unit.	50 ps/ kwh (Total of above three charges)

b) In-kind:

In addition, wheeling charges in kind of 28.4 % of energy input by the project developer into the Licensee's grid being the system loss are leviable."

61. The High Court could not have interfered with the findings on merits taken by the experts without entering into the various aspects considered by the Commission. Thus, the finding on merits as to the determination of charges being illegal and improper in any manner, cannot be said to be sustainable. The High Court has not gone into various reasons, and the details considered by the Commission and once the expert body has determined specific tariffs, it is not for the courts to interfere ordinarily in such matters. We find the determination to be proper and do not suffer from any infirmity or illegality. The Commission has made an elaborate discussion for arriving at the figure mentioned above. The recovery network charges, tariff structure, and the question of wheeling charges in cash or kind have also been considered. Various relevant factors have been taken into consideration. The nature of the arrangement between APTRANCO and DISCOMS and *inter se* DISCOMS has been considered while deciding issue No.4.

62. The use of the system cannot be isolated from losses in the system as they form an integral part of the system. All persons using the system should bear the system losses, whether technical or non-technical.

Incidentally, the terms of a licence issued by APTRANSCO and DISCOMS specifically refer to deliver such electricity, adjust losses of electricity to a designated point. Technical losses in the system to be taken into account as these are also an integral part of the system. It is an integrated system where the electricity is supplied on displacement basis rather than direct conveyance of the particular electricity which is generated, the technical losses up to the voltage level at which the electricity is delivered along cannot be measured. The technical losses of the total system need to be taken into account as it is impossible to determine from which source electricity is being supplied to which particular customer. The electricity from all sources gets combined in the system and loses its identity. As investment in the system has also been made, it was evident that requisite charges have to be paid.

IN RE: GRID SUPPORT CHARGES

63. With respect to Grid Support Charges, it has been conceded by the learned counsel for the parties that the decision in the aforesaid batch of matters as to wheeling charges has to govern grid support charges as we have upheld the order of the Commission with respect to wheeling charges, the order of the High Court has to be set aside.

64. Any Government Order or Incentive Scheme does not govern the Grid Support Charges. Grid Code is the basis for levy of the Grid Support Charges, which came to be approved by the Commission on 26.5.2001.

The same is also reflected in the impugned order. Thus, in case of installation of another CPP, that would be an additional load on the grid, and there is no embargo for setting up additional grid CPP in the form of expansion as grid acts as cushioning. The Grid Support Charges can be levied, and the order dated 8.2.2002 of the Commission is, thus on the parity of the reasonings, has to be upheld considering the provisions of Section 21 (3) of the Reforms Act, 1998. Under section 11 read with section 26 of the Reforms Act, 1998, all fixed charges under the distribution and Grid Support Charges are leviable only at the instance of a distribution company, and because of the discussion above, the Commission has the powers to determine it. In the agreements also there is a power where the Board could have fixed the Grid Support Charge unilaterally, but because of Reforms Act, 1998 came to be enacted, the application was filed in the Commission. After that, the Commission has passed the order in accordance with the law. We find no fault in the same. Thus, the order of the Commission concerning the Grid Support Charges has to be upheld. The judgment and order of the High Court are liable to be set aside concerning wheeling charges as well as Grid Support Charges.

IN RE: INCENTIVES TO NON-CONVENTIONAL ENERGY

65. The question involved in the third batch of appeals is whether incentives to be continued to the non-conventional energy. The tariff orders were passed in the years 2004-05, 2005-06, and 2006-09 by the

APERC in exercise of the power conferred under Section 62 of the Electricity Act, 2003. The appeals were preferred before the APTEL under Section 111 of the Electricity Act, 2003. The main question for consideration was whether Government Orders issued on 18.11.1997 and 22.12.1998, by the Andhra Pradesh Government, extending specific incentives to the producers of electricity from non-conventional energy resources, are binding and Doctrine of Promissory Estoppel against the Government and Commission was bound to give effect to them.

66. The Government Order dated 18.11.1997, encourages renewable energy/non-conventional energy sources. The Government decided to provide specific incentives, thus:

> "The Government, after careful examination of the recommendations and with a view to encourage generation of electricity from renewable sources of energy hereby allow the following uniform incentives to all the projects based on renewable sources of energy viz. Wind, Biomass, Co-generation, Municipal Waste, and Mini Hydel:

Sl.No.	DESCRIPTION	
1.	Power Purchase Price	Rs.2.25/-
2.	Escalation	5% per annum with 1997-98 as base year and to be revised on 1st April of every year up to the year 2000 A.D.
3.	Wheeling Chargers	2%
4.	Third-Party sales	Allowed at a tariff not lower than H.T. Tariff of A.P.S.E. Board.
5.	Banking	Allowed upto 12 months
	(a) Captive Consumption	Allowed throughout the year on 2% banking charges
	(b) Third party sale	Allowed on 2% banking charges from August to

This order issues with the concurrence of Finance & Planning (Fin.) Department vide their U.O. No.46291/351/EBS-EFES&T/97, dated 18.11.1997."

67. The Government issued another GO MS No.112 dated 22.12.1998, making precise clarification that the benefits shall be available only to the power projects where fuel used is from non-conventional energy sources, which are of the nature of renewable sources of energy. The Scheme shall be watched for three years. After that, the State Electricity Board shall come up with suitable proposals for the continuance of incentives in the present form or modified form.

68. The Commission had passed the tariff orders dated 22.3.2005 and 23.3.2006 for the years 2004-05, 2005-06, and 2006-09. The APTEL vide impugned judgment and order has allowed the appeals and has held that effect of the policy decisions dated 18.11.1997 and 22.12.1998, which had a statutory flavor, had not been taken away by the provisions contained in the Electricity Act, 2003. The policy has created vested rights in favour of entrepreneurs, and these vested rights could not have been taken away. The rights created by GOMS No.93 dated 18.11.1997, would continue to operate until and unless they are withdrawn in accordance with law. The Doctrine of Promissory Estoppel is attracted, though the Commission has the power to regulate wheeling charges. It needed to address the question. The Commission has lost sight of the

spirit behind G.O. MS Nos.93 and 112, dated 18.11.1997 and 22.12.1998, respectively. Aggrieved by the decision of APTEL, the APTRANSCO has preferred the appeals.

69. To consider the applicability of Promissory Estoppel, it has to be seen whether the aforementioned Government Orders contained an unequivocal commitment to extend benefits. On the contrary, the benefit was confined only to three years. The Commission under the provisions of the Reforms Act, 1998 extended it from time to time and the last such extension came to an end on 28.7.2001. The Commission decided not to extend the benefit by the impugned order determining the tariff.

70. This Court in *Transmission Corporation of Andhra Pradesh Limited & another v. Sai Renewable Power Private Limited & others,* (2011) 11 SCC 34, has considered the abovementioned G.O. MS dated 18.11.1997 and 22.12.1998, in which APERC undertook the review of tariff applicable to the producers of electricity from non-conventional energy resources. In the year 2003, the Commission undertook a further review of the tariff. Contrary to the expectations of the producers of electricity from non-conventional energy resources, the Commission vide order dated 20.3.2004, has reduced the amount of tariffs. The producers from non-conventional energy resources challenged this order before the APTEL, which vide order dated 2.6.2006, declared the order dated 20.3.2004 of the Commission as valid. One of the grounds raised before

the Tribunal was that purchase price of ₹2.25 per unit was fixed based on the Central Government letter dated 7.9.1993 and Andhra Pradesh abovementioned G.O. MS. Therefore, the Commission could not back out from the promise made in these Government communications. The plea found favour with the Tribunal. The Tribunal's order dated 2.6.2006 was challenged in the appeals, which were decided by this Court. One of the issues before this Court was whether the Commission was estopped from passing an order, which would be contrary to the provisions of the Government communications dated 7.9.1993, 18.11.1997, and 22.12.1998. The appeals were allowed by this Court, and this Court held that the Tribunal fell in error of law in concluding that Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so-called incentives. There was no unequivocal commitment to the respondent/ purchasers/ generators/ developers to bind the State for all times to come. There was no definite, unambiguous representation, hence plea of estoppel was not attracted. This Court has observed:

> **"68.** In addition to the statutory provisions and the judgments aforereferred, we must notice that all the PPAs entered into by the generating companies with the appropriate body, as well as the orders issued by the State in GOMs Nos. 93 and 112, in turn, had provided for review of tariff and the conditions. The Tribunal appears to have fallen in error of law in coming to the conclusion that the Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so-called incentives. Every document on record refers to the power of the authority/Commission to take a review on all aspects including that of the tariff.

74. Again, vide GOMs No. 112 dated 22-12-1998, referring to the extension of all these uniform incentives, certain amendments were carried out to GOMs No. 93 dated 18-11-1997. Clause 2 of this order referred that the operation of the incentive scheme shall be watched for a period of three years and at the end of three years the Electricity Board shall come up with suitable proposals for review for further continuance of the incentives in that form, or to be modified suitably. Keeping these guidelines in mind, the State of Andhra Pradesh vide GOMs No. 93 dated 18-11-1997, while referring to the guidelines issued by the Government of India for promotional and fiscal incentives, noticed the various representations which were received from the non-conventional energy developers for extension of benefits as afore referred in relation to all non-conventional energy resources uniformly.

80. On the basis of this factual matrix, the respondents claimed that the State Government and the Regulatory Commission both were bound to continue the incentives as were provided to them in furtherance of the letters and orders of the Central as well as the State Governments discussed above. They have a legitimate right to expect that these incentives were to be continued indefinitely in the same manner, and the authorities concerned are estopped from altering the rates and/or imposing the condition of no sale to third parties. We are unable to find any merit in this contention. In our view, the Tribunal has erred in law in treating these inter se letters and guidelines between the Government of India, State Government and the Commission/the State Electricity Board as unequivocal commitments to the respondent/purchasers/generators/developers so as to bind the State for all times to come. For the principle of estoppel to be attracted, there has to be a definite and unambiguous representation to a party which then should act thereupon and then alone, the consequences in law can follow.

81. In the present case, the policy guidelines issued by the Central Government were the proposals sent to the State Government, which the State Government accepted to consider, amend or alter as per their needs and conditions and then make efforts to achieve the objects of encouraging non-conventional energy generators and purchasers to enter into this field. These are the matters, which will squarely fall within the competence of the Regulatory Commission/the State Electricity Board at the relevant points of time. Besides that, there was no definite and clear promise made by the authorities to the developers that would invoke the principle of promissory estoppel. Undoubtedly, to encourage participation in the field of generation of energy through non-conventional methods, some incentives were provided, but these incentives under the guidelines, as well as under the PPAs signed between the parties from time to time, were subject to review. In any case, the matter was completely put at rest by the order of 20-6-2001 and the PPAs voluntarily signed by the parties at that time, which had also provided such stipulations. If such stipulations were not acceptable to the parties, they ought to have raised objections at that time or at least within a reasonable time thereafter. The agreements have not

> only been signed by the parties, but they have been fully acted upon for a substantial period. We have already referred to various statutory provisions where the Regulatory Commission is entitled to determine the tariff. In this situation, we are unable to agree with the view taken by the Tribunal that the Regulatory Commission had no jurisdiction and that fixation of tariff does not include purchase price for buy-back of the generated power.
>
> **82.** The principle of promissory estoppel, even if it was applicable as such, the Government can still show that equity lies in favour of the Government and can discharge the heavy burden placed on it. In such circumstances, the principle of promissory estoppel would not be enforced against the Government as it is primarily a principle of equity. Once the ingredients of promissory estoppel are satisfied, then it could be enforced against the authorities, including the State, with very few extraordinary exceptions to such enforcement. In the United States, the doctrine of promissory estoppel displayed remarkable vigour and vitality, but it is still developing and expanding. In India, the law is more or less settled that where the Government makes a promise knowing or intending that it would be acted upon by the promisee and in fact the promisee has acted in reliance of it, the Government may be held to be bound by such promise."
>
> (emphasis supplied)

71. Concerning aforesaid Government Orders dated 18.11.1997 and 22.12.1998, this Court already held that plea of promissory estoppel is not attracted, and there was no unequivocal promise. We are of the opinion that there was no material change in the facts and circumstances of the case to attract the plea of promissory estoppel based on Government orders mentioned earlier. The Tribunal has passed an order, by which it had temporarily extended the period to 24.7.2001. In the impugned order dated 24.3.2002, the objection raised of the non-conventional energy developers regarding wheeling charges was dealt with and it was stated that non-conventional energy have to pay the wheeling charges without discrimination and it was also stated that if Government wants to pay any subsidy, it may pass fresh order to

compensate the licensee. The Government has, after that, never given any subsidy, for subsidy care is taken by the statutory provision contained in the Electricity Act, 2003. Section 65 of the Electricity Act, 2003, provides that if State Government requires grant of any subsidy to any consumer in the tariff determined by the State Commission under Section 62, the State Government shall, notwithstanding, any direction which may be given under Section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct. Subsidy/incentive is governed by Section 65, and the Government has not issued any such direction to continue the incentives in the form of subsidy. It was open to the Government to do so because of the order passed by the Commission, but it has not extended such benefit. No command can be given to State to grant subsidy.

72. Thus, we find that the order of APTEL based on the Doctrine of Promissory Estoppel for continuing the benefit of Government Orders dated 18.11.1997 and 22.12.1998, cannot be said to be in accordance with the law. The order of APTEL is liable to be set-aside, and that passed by the APERC has to be restored.

73. Resultantly, we have to allow the appeals. The judgment and order passed by the High Court relating to wheeling charges and grid support charges and that passed by the APTEL regarding continuance of

incentive as per G.O. MS dated 18.11.1997 and 22.12.1998, are set aside. The appeals are allowed, and the orders passed by APERC are restored. No costs.

.....J.
(Arun Mishra)

.....J.
(M.R. Shah)

New Delhi;
November 29, 2019.

.....J.
(B.R. Gavai)