

SUPREME COURT OF INDIA

Transmission Corp.of A.P Ltd.

Vs.

Sai R.P.Pvt. Ltd.

C.A.No.2926 of 2006

(Dr. B.S. Chauhan and Swatanter Kumar JJ.)

08.07.2010

JUDGEMENT

SWATANTER KUMAR, J.

1. Andhra Pradesh Electricity Regulatory Commission (for short 'Regulatory Commission') was created in furtherance to the provisions of the Andhra Pradesh Electricity Reform Act, 1998 (hereinafter referred to as the 'Reform Act, 1998') enacted by the State legislature which received the assent of the President on 21 st December, 1998 and became effective w.e.f. 1st February, 1999.

The Commission initiated suo motu proceedings for determination of tariff applicable to the Non-Conventional Energy generation projects of Andhra Pradesh, which was to take effect from 1st April, 2004 onwards. After hearing the Non-Conventional Power Project Developers, the Non-Conventional Energy Development Corporation of Andhra Pradesh Ltd. and Transmission Corporation of Andhra Pradesh Ltd. (for short referred to as 'NEDCAP' and 'APTRANSCO' respectively), the Regulatory Commission, vide its detailed order dated 20th March, 2004, arrived at certain conclusions and fixed the energy purchase rates at base unit price of Rs. 2.25 as on 1st

April, 1994 and the escalation index of 5% p.a., but the escalation would be simple and not to be compounded every year. In other words, the base price as on 1st April, 2004 will be Rs.3.37 per kwh.

As these projects have no variable expenses and negligible increase in maintenance cost, the tariff will be frozen for a period of five year, which however, is to be reviewed thereafter. The Regulatory Commission also issued certain instructions to restrict and regulate various operations and other aspects. It restricted the sale, procurement and distribution of electricity by the Developers to any other party except APTRANSCO. After passing of the order dated 20th March, 2004 an application for review was filed by the Developers before the Regulatory Commission. The order was clarified to some extent on this review application vide order dated 7th July, 2004. Aggrieved from both these orders the Developers filed independent appeals under Section 111(1) of the Electricity Act, 2003 collectively against the order dated 20th March, 2004 as modified by order dated 7th July, 2004. These appeals came up for hearing before the Appellate Tribunal for Electricity (for short the 'Tribunal') which decided all these appeals by a common order dated 2nd June, 2006. The Tribunal granted certain relief to the appellants before it, who are the respondents in the present appeals, holding that there was some element of duress in execution of the purchase price agreements. The Power Purchase Agreement (for short 'PPA') was a statutory document and the Regulatory Commission had no authority to interfere with the same. It could not even be altered by the Regulatory Commission. One of the most important finding recorded by the Tribunal was that the Regulatory Commission has neither the power nor jurisdiction to compel the Developers to sell the power generated by them to APTRANSCO and/or DISCOM. Feeling seriously aggrieved from the order of the Tribunal the Transmission Corporation of Andhra Pradesh Ltd. as well as Eastern Power Distribution Company of Andhra Pradesh Ltd. have come up in appeal before this Court under Section 125 of the Electricity Act, 2003. Though the controversy, in the present case, appears to be a narrow one but on examination it is clear that there are various ancillary questions, which need to be decided by the Court, prior to answering the main controversy relating to the jurisdiction and fixation of tariff by the Regulatory Commission. Arguments at great length were addressed by different learned counsel appearing for the parties. Before we notice the facts in detail or even refer to the contentions raised, it will be appropriate to refer to the issues involved in the case as the entire matter revolves around these questions and answers thereto and the relief granted. For better understanding of the same, let us refer to these questions and answers. The comparative table of the points at issue, that were raised, and the answers thereto are as under:

A. Whether a Regulatory Commission has neither the authority and jurisdiction either power nor the authority nor jurisdiction to under the Electricity Act, 2003 compel the Developers to sell the power or under the A Electricity generated by them TO APTRANSCO or Reform Act, 1998 to compel DISCOMS.

the Developers to sell the power generated by them to the State Transmission Utility or Distribution Company? B. Whether the A.P. On the point 'B'. we hold that the Regulatory Commission having Regulatory Commission having approved and regulated the the regulated the purchase price agreed purchase price of power into between the Developer and the terms of

arrangement and TRANSCO in terms of Section 21 (4)(b) PPA entered between and 11 (1)(e) of the Andhra Pradesh APTRANSCO and Developers Electricity Reform Act, 1998 read with in terms of Sec. 21 (4)(B) and Section 86 (1)(b) of 2003 Act cannot re- 11 (1)(e) of A.P. Reform Act fix the regulatory purchase price by read with Sec. 86(1)(b) of 2003 resorting to tariff fixation under Section Act could re-fix the regulatory 62; 64 read with Section 86(1)(a) of 2003 purchase price by resorting to Act, as Section 86(1)(b) being a special tariff fixation under Section 62; provision excludes the applicability of 64 read with Sec. 86(1)(a) of Section 86(1)(a) of the 2003 Act to 2003 Act? private Generators.

C. Whether the A.P. On the point 'C' and 'F', we hold that the Regulatory Commission has Andhra Pradesh Regulatory Commission the power or authority to alter has no power or authority to alter the the policy directions issued by policy direction issued by the State the State Government with Government and the said Commission respect to NCE Developers? has no executive power nor a plenary Whether the Commission power as claimed by it.

could claim executive power with respect to NCE Developers and fixation of price for power generated by NCE Developers and sold to APTRANSCO/DISCOM? D. Whether the plea of The points 'D' & 'E' are answered in estoppel advanced by favour of the appellants and they are Developers is sustainable on substantiated by the appellants.

facts and law? E. Whether the plea of The points 'D' & 'E' are answered in legitimate expectation favour of the appellants and they are advanced by Developers is substantiated by the appellants sustainable? F. Whether the A.P. Electricity On the point 'C' and 'F', we hold that the Regulatory Commission is Andhra Pradesh Regulatory Commission possessed of Executive has no power or authority to alter the Powers to issue policy and policy direction issued by the State executive directions in respect Government and the said Commission of NCE Developers in the has no executive power nor a plenary State? power as claimed by it.

G. Is not the Commission On the point 'G', we hold that the Andhra bound by directions already Pradesh Electricity Regulatory issued by the State in respect Commission is bound by policy directions of NCE Developers as well as already issued by the State Government incentives directed by these long as they are not modified or given to encourage them? altered.

H. Whether Regulatory On the point 'H', we hold that the Commission could alter or Regulatory Commission has no authority change the PPAs entered to alter or change the PPAs entered between the NCE Developers between the NCE Developers and and Electricity Electricity Board/ APTRANSCO Board/APTRANSCO? I. Whether the procurement On the point 'I', we hold that the arrangement / PPA entered is procurement arrangement/PPA is a statutory contract and if so, statutory and the Commission has no whether it could be interfered authority to interfere with the same. by the Commission? J. Whether the Commission is On the point 'J', we hold that the just a regulator to

approve the Commission is just a regulator or PPA entered or whether it approve the PPA entered between the could determine tariff with appellant generator and the respect to NCE Developers? APTRANSCO by examining as to whether the purchase is economical and it is in terms of State Policy. K. Having approved PPA by In the result on the 'K', we hold that the exercise of Regulatory Power, appeals preferred by the NCE is it open to commission to Developers-Appellants in appeal Nos. undertake determination Of 1,2,5,6,7,8,9,10, 12,15,16,17,18,19,20,21, tariff in respect of private 22,34,46,47,52,58, 67 & 80 of 2005 are generation by NCE allowed and the impugned proceedings Developers? of the Regulatory Commission are set aside and there will be a direction to the APTRANSCO, the Transmission Corporation of AP, the Central Power Distributing Company of AP Ltd., the Southern Power Distributing Company of AP Ltd., the Northern Power Distributing Company of AP Ltd. and the Eastern Power Distributing Company Limited of AP Ltd. to continue the Power Purchase and at the same rate at which the power generated by NCE Developers supplied to them are being paid before passing of the impugned order of the Commission dated 20.03.2004 and 07.07.2004 made in R.P. No.84/2003 and O.P. No.1075/2000 with all differences and arrears thereof, up to date and continue to pay at the same rate, until a new PPA is entered by agreement between them in terms of State Government Policy direction, that may be made hereafter and approved by the Regulatory Commission. This Judgment shall be given effect from the date of communication. For payment of tariff difference and arrears, the respondents shall have six weeks from the date of this Judgment, failing which the respondents shall be liable to pay interest at 9% per annum with effect from the month on which the difference in tariff rate remains to be paid ant till date of payment.

L. To what relief, if any? Consequently, the Appeal Nos. 46,48,49 and 50 of 2005 preferred by the AP Transmission Corporation and the four Discoms will stand dismissed as there are no merits in them. The parties shall bear the respective cost throughout.

2. The above conclusions arrived at by the Tribunal on the factual matrix that the Government of Andhra Pradesh on 18th January, 1997 by GO Ms. No. 93, with the object of encouraging generation of electricity from renewable sources of energy, allowed uniform charges to all such projects. After issuance of the above GO Ms. 93 certain ambiguities were noticed by the concerned parties. This resulted in issuance of GO Ms. No. 112 dated 22nd December, 1998 and vide this GO clarifications were issued to the earlier Government order and it clearly provided for uniform implementation of the proposed scheme to all non-conventional energy developers/generators of power. The Andhra Pradesh Electricity Regulatory Commission was constituted under the said Reform Act, 1998 vide notification dated 3rd April, 1999 and the same Commission performing the duties and functions under the above Act continued to be a Commission under and within the meaning of Electricity Act, 2003 as well. This was done by virtue of Section 185 of the Electricity Act, 2003. State Government of Andhra Pradesh notified the Transmission Corporation of Andhra Pradesh to be the State Transmission utility. We may also notice here that the Electricity Regulatory Commissions Act, 1998 also contemplated under Section 3, constitution of a Central Electricity Regulatory Commission to exercise the powers conferred and functions assigned to it under the Act. In terms of Section 17 of this Act the State Government was also to notify in the official gazette and establish, for the purposes of this Act a Commission for the State to be known as the State Electricity Regulatory Commission. In terms of Section 22 of this Act the functions of the State Commission were defined, which included determination of tariff for electricity, wholesale, bulk,

grid or retail, as the case may be. Under Section 11 of the Reform Act, 1998 it has been spelt out as to what are the functions of the Regulatory Commission, inter alia, it provides to aid and advise to the State Government, in matters concerning electricity generation, transmission, distribution and supply in the State, to issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences, to regulate the purchase, distribution, supply and utilization 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, to require licensees to formulate prospective plans and schemes in cooperation with others for the promotion of generation, transmission, distribution and supply of electricity. Besides these powers, which have been noticed by us, inter alia, the residue clause has been worded very widely to permit the Regulatory Commission to undertake all incidental or ancillary things. Under Section 15, the Regulatory Commission is vested with the power to issue licences and to enter into agreements on specified terms and also to determine the charges and establish tariff in terms of clause (5) of Section 15 of the Reform Act, 1998. It needs to be noticed that the State of Andhra Pradesh was vested with the powers and infact the duty to constitute the Regulatory Commission in terms of Section 11 afore noticed.

3. The Regulatory Commission was constituted as per the provisions of Reform Act, 1998 vide notification dated 3rd April, 1999 and it was to perform all regulatory functions pertaining to the electricity industry in the State of Andhra Pradesh. It was commonly agreed before us during the course of argument that it is the Electricity Regulatory Commission for the State of Andhra Pradesh for all intent and purposes under the Reform Act, 1998 as well as the Electricity Act, 2003. We must notice, at this stage itself, that the Tribunal has entertained the doubt that since no independent notification was issued under Section 17 of Electricity Regulatory Commission Act, 1998, therefore, it could not exercise the powers vested in the Regulatory Commission under that Act. This may not be the correct position in law. The Regulatory Commission was constituted under the Reform Act, 1998 and an appropriate notification in that behalf was issued. The Electricity Regulatory Commission Act, 1998 stood repealed by the Electricity Act, 2003.

The Electricity Act, 2003 specifically recognized and accepted the Commissions constituted under the enactments specified in the schedule to the Act as appropriate Commission. In entry 3 of the said schedule, Reform Act, 1998 has been specifically noticed. In other words, the Regulatory Commission constituted under the Reform Act, 1998 became the appropriate commission under the Electricity Act, 2003 as well.

4. In exercise of its powers, the Regulatory Commission claims to have issued licences to Transmission Corporation as well as DISCOM for bulk and retail supply of electricity w.e.f. 1st April, 2001.

Vide order dated 20th June, 2001 made in OP No. 1075 of 2000, the Regulatory Commission directed generators of Non-Conventional Energy to supply power exclusively to APTRANSCO. The Non-Conventional Energy Developers were not permitted to sell the energy generated by them to

3rd parties. By the same order the Regulatory Commission also approved the rate which was prevailing earlier for such supply at Rs. 2.25 per unit with 5% escalation per annum from 1994-95 being the base year. After coming into force of the Electricity Act, 2003, Regulatory Commission issued notice on 23rd October, 2003 inviting objections from various Developers and Generators to the proposals of APTRANSCO and NEDCAP in regard to fixation of price to be paid by APTRANSCO for the quantum of electricity purchased from non-conventional energy projects w.e.f. 1st April, 2004. The objections, if any, were to be filed on or before 5th November, 2003. NEDCAP and DISCOM were to submit proposals for review of incentives. The proposal had been received for review by the Regulatory Commission from APTRANSCO. Within the extended time the Developers, individually as well as acting through their Association, filed various objections in response to the notice dated 23rd October, 2003. All the parties were granted hearing by the Regulatory Commission which, then, passed the order dated 20th March, 2004, reducing the price payable by APTRANSCO to Non-Conventional Energy Developers towards the supply of electricity. Some of the Developers moved to the Andhra Pradesh High Court by filing a Writ Petition No. 7222 of 2004 in which interim order dated 15th April, 2004 came to be passed directing APTRANSCO to continue to pay to NCE Developers for the power that may be supplied by them as per the earlier rates prevalent on 1st April, 2004. By order dated 27th April, 2004, the High Court disposed of the batch of the Writ Petitions while issuing the direction to the Developers to approach the Regulatory Commission and seek review of its order dated 20th March, 2004. The Regulatory Commission was also directed to take up the review petition and dispose of the same within 8 weeks. Till then, the interim order dated 15th April, 2004 was to remain in force. This resulted in filing of the Review Petitions before the Regulatory Commission. In the meanwhile the Govt. of Andhra Pradesh ordered that APTRANSCO shall cease to engage in trading relating functions and that the PPAs entered with the Developers shall vest in DISCOM(s) w.e.f. 10th June, 2004 in terms of Section 39 read with Section 172(b) of the Electricity Act, 2003. The Review Petitions filed by the Developers before the Regulatory Commission came to be dismissed by different orders passed on 5th July, 2004 and 10th July, 2004 respectively. The Review Petition filed by APTRANSCO also came to be dismissed on 11th July, 2004. This resulted in approaching the High Court again, by nine of the developers, filing Writ Petition No. 16621 of 2004. The High Court, vide its order dated 16th September, 2004, permitted the implementation of the revised tariff by APTRANSCO. It further directed that 50% of the differential amount between the old and the revised tariff shall also be paid for the actual power supplied. By GO 58 dated 7th June, 2005, an approval scheme came to be framed under the Reform Act, 1998 to transfer and distribute the assets and contracts of bulk supply and trading business of APTRANSCO to DISCOM which was in furtherance to the earlier decision of the State of Andhra Pradesh. Ultimately these Writ Petitions came to be disposed of with the direction that the Developers shall approach the Tribunal and the interim order shall continue to be in force for a period of 8 weeks from 15th June, 2005 or till the Tribunal passes order on the interim application, whichever is earlier. Same interim order was passed by the Tribunal during the pendency of the appeal which, were filed before it.

5. As is obvious from the above narrated facts and again, it is not in dispute that the Regulatory Commission passed an order dated 20th June, 2001 which, in fact, attained finality and its correctness was never been questioned by any of the parties including the present appellants. Thus, the order dated 20th June, 2001 is of some significance and certainly of some definite relevancy. The proceedings were initiated suo motu by the Regulatory Commission against all the Developers of Non-Conventional Energy including mini hydro projects. The Regulatory Commission noticed, in its order dated 20th June, 2001 that Govt. of India issued guidelines regarding promotional and

fiscal incentives to be given by the State Governments for power generation through Non-Conventional Energy sources. The Govt. of Andhra Pradesh issued order No. 19 dated 16th March, 1996 under which it accorded certain incentives in respect of the Developers with whom NEDCAP had entered into the memorandum of understanding. A review of these incentives was taken after which GO Ms. 93 dated 18th November, 1997 was issued, as already noticed and it was decided to provide uniformity to all the projects based on renewable sources of energy like Waste, Wind, Bio-mass, Co-generation, Municipal Waste and Mini Hydro projects.

6. The Regulatory Commission had passed an order dated 6th March, 2000 giving certain directions including that the Developers could sell the power generated by them to third party upto 17th November, 2000. The rates were indicated, as we have already noticed, and that there would be reviewed with regard to purchase price with reference to each Developer on completion of 10 years from the date of the commission of the project. After noticing various objections that had been raised by the Developers it was stated that the Regulatory Commission was not attempting to stop any incentive while referring to the statistics and the market conditions. It was specifically noticed that permitting Non-Conventional Energy Developers to make third party sales would not, at all, be in the interest of organized growth of electricity industry and it would create discrimination between the industrial consumer drawing power from Non-Conventional Energy Developers and the industrial consumers drawing power from APTRANSCO and these two would have to pay two different rates. It also noticed that there will be undue enrichment of the Developers as they were permitted to establish their generation plants with definite benefits which were carried out for years together. While holding that the Regulatory Commission had jurisdiction, it also noticed that the rate approved by the Regulatory Commission on the basis of guidelines issued by the Ministry of Non-Conventional Energy Sources are much higher than the rate permitted by the State Government and in comparison to other States they were favourable to the NCE developers. This reasoning persuaded the Regulatory Commission to pass the following directions:

"29. The existing incentives under G.O. Ms. No. 93, dated 18.11.1997, which are continued under the orders of the Commission from time to time till 24.06.2001 under our letter No. 2473, Dated 24-04- 2001 are extended for the time being till 24-07- 2001. The temporary extension has been given to enable the developers to finalise agreements/arrangements relating to supply of power to APTRANSCO prior to 24-07-2001). With effect from the billing month of August 2001, all generators of non-conventional energy shall supply power to APTRANSCO only as per the following terms:

(i) Power generated by non-conventional energy developers is not permitted for sale to third parties.

(i) Developers of non-conventional energy shall supply power generated to APTRANSCO/DISCOMS of A.P. only.

(i) Price applicable for the purchase by the supply licensee should be Rs. 2.25 per unit with 5% escalation per annum with 1994-95 as the base year.

APTRANSCO is simultaneously directed to arrange payment for the supply of power purchased from developers of non-conventional energy by opening a Letter of Credit in favour of the suppliers of power.

30. A suo motu review of the incentives to take effect from 1st April, 2004, will be undertaken by the Commission after discussions with all the concerned parties. There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price will be reworked on the basis of return on equity. O&M expenses and the variable cost.

31. However, if any developer wishes to raise any specific issue with reference to this order, he will be entitled to apply to the Commission in the manner provided in the regulations."

7. After passing of this order by the Regulatory Commission the parties executed PPAs. These agreements were signed on the lines of the directives given in the order of Regulatory Commission. In fact, it was stated that the agreements were required to be and were actually approved by the Regulatory Commission. In terms of Clause 5 of the PPA these agreements were enforceable subject to obtaining consent of the Regulatory Commission as per Section 21 of the Reform Act, 1998. Obviously, the rates and conditions specified in the earlier proceedings of 11th November, 1999, 1st April, 2000, 27th January, 2001 and 13th July, 2001 were accepted by the parties.

Some of the clauses of the PPA, which have also been heavily relied upon by the learned counsel for the parties, read as under:

"ARTICLE 2 PURCHASE OF DELIVERED ENERGY AND TARIFF 2 All the Delivered Energy at the interconnection point for sale to APTRANSCO will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the Project.

Title to Delivered Energy purchased shall pass from the Company to the APTRANSCO at the Interconnection Point.

3 The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to APTRANSCO at Rs. 2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year upto the year 2003- 2004. Beyond the year 2003-2004, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O & M expenses and the Variable Cost."

8. Besides the above clauses it also provided other terms and conditions under different articles, which are not necessary for us to be noticed at this stage. It required to be noticed with some significance that no disputes of any kind were raised by the Developers till and after passing of the order dated 20th March, 2004.

The order of 20th June, 2001 read in conjunction with the PPAs executed by the parties controlled the entire field and all the persons including the Regulatory Commission as well as the State therein.

9. This period of nearly three years, thus, was free of grievances and objections and the order of 2001 appears to have been implemented willingly by the parties. There was execution of the PPAs completely bringing the matter between the parties into the realm of contract. Thereafter, the Regulatory Commission in terms of its 2001 order appears to have initiated suo motu proceedings for determination of tariff for non-conventional energy projects of Andhra Pradesh with effect from 1st April, 2004. The Regulatory Commission, in its order dated 20th March, 2004 has also noticed the background facts of the case and the determination of rates earlier.

It had given notice to all the developers and other shareholders to submit their views and objections on the above issues. After hearing the parties, the Regulatory Commission considered the proposal for tariff. The proposal submitted by APTRANSCO and NEDCAP were as under :

"APTRANSCO's Tariff Proposals Particulars Unit Tariff (Levelised Tariff Year-on-year escalation over the life of the project) Existing New Plants Existing New Plants Rs/kWhr.

Rs/kWhr.

Mini Hydel 2.42 2.31 --- --- Bagasse 2.23 2.25 2% 2% Biomass 2.27 2.27 2% 2% Waste to Nil 2.66
--- 1% Energy Wind 2.52 2.55 --- --- NEDCAP Tariff proposals:

Bagasse Rs. 2.62 - Ist year Rs. 2.48 - 10th year Biomass Rs. 3.27 - Ist year Rs. 3.77 - 10th year Mini Hydel Rs. 2.96 - Ist year Rs. 2.26 - 10th year Wind Farm Rs. 4.54 - Ist year Rs. 3.19 - 10th year Waste to Energy Rs. 2.99 - Ist year Rs. 3.19 - 10th year 10. Objections to the above proposals were also received.

Interestingly and rightly so, the Regulatory Commission before analyzing the proposal and objections, noticed:

"20....as mentioned herein above, the Commission, in this order is not examining any issues concerning the direction contained in the order dated 20.6.2001 that the NCE Developers shall not sell electricity to third parties and they are required to sell electricity only to APTRANSCO. The Commission, in this order, is dealing with only those NCE Developers who had accepted the order dated 20.6.2001 and voluntarily agreed to sell electricity to APTRANSCO on the terms and conditions contained in the order dated 20.6.2001"

11. While the Regulatory Commission undertook the review of prices in relation to sale of electricity by Non-Conventional Energy developers, it specifically referred to order in O.P. No. 1075 of 2000, which, in turn, provided for review of sale price and incentives given earlier to the said developers with effect from 1st April, 2004. It also noticed that the PPAs signed by the APTRANSCO and NCE Developers include provisions for such review by the Regulatory Commission with effect from 1st April, 2004. It took the view that review of the price at which APTRANSCO shall purchase power from the NCE developers is within the jurisdiction of the Regulatory Commission under Section 21(4) of the Reform Act, 1998 and also under Section 86(1) of the Electricity Act, 2003. Referring to Section 61 of the Electricity Act, 2003 which cast obligation upon the Regulatory Commission to frame tariff regulations specifying the terms and conditions for determination of tariff, in para 21 of that order, the Regulatory Commission framed the following issues:

"Issues for consideration on merits:

The Commission has considered inter alia, the following issues:

(i) Whether the tariffs and incentives should be uniform for all the categories of NCE projects as provided earlier in MNES guidelines, GoAP orders and APERC's order OP. No. 1075/2000 dated 20.6.2001 or should they be different for different categories of NCE projects.

(i) Whether the tariff should be a single part tariff or a two part tariff.

(i) Whether the tariff should be project specific or uniform for all project falling in a category.

(i) Whether there should be a cap on tariff when a project exceeds the expected minimum performance.

(i) Social and environmental considerations.

(i) Control period."

12. The Regulatory Commission decided tariff fixation in relation to Bagasse based co-generation plants, Bio-mass power generation and Mini hydel projects separately. The specific issue raised by the objectors was that the benchmarking of capital cost should be based on market trends, confirmed through competitive bidding from time to time. Though APTRANSCO accepted this in principle, but stated that they expect a detailed procedure from the Regulatory Commission for an effective competent bidding. The tariff basis was questioned as well as it was submitted that tariff beyond threshold limit should be limited to the variable cost and incentives only and not the full tariff. This was opposed by APTRANSCO which preferred a single time tariff in entire energy purchase. While taking into consideration the applicability of depreciation and its extent the tariff was fixed and the Regulatory Commission drew the following conclusion:

"81. The tariffs arrived at along with escalation under each category will be applicable as detailed in the respective paragraphs under each category. The aforementioned tariffs are, however, also subject to the following:

"i. In regard to tariff for Bagasse based co- generation projects, where the Plant Load Factor during a settlement period exceeds 55% (the level at which the fixed cost is expected to be recovered), only incentive of 21.5 paise/unit and variable cost as indicated in para (47) above shall be paid for every unit delivered in excess of the 55% PLF.

ii. As regards to tariff for Biomass based power projects, where the Plant Load Factor during a settlement period exceeds 80% (the level at which the fixed cost is expected to be recovered), only incentive of 21.5 paise/unit and variable cost as indicated in para (63) above shall be paid for every

unit delivered in excess of 80% PLF.

ii. The tariff for mini-hydel power projects is exclusive of Royalty.

ii. In the case of tariff for mini-hydel power projects, where the PLF during settlement period exceeds 35%, only an incentive of 21.5 paise/kwh shall be paid for every unit delivered in excess of 35%.

ii. The tariffs authorized above will be applicable w.e.f. 1.4.2004 to all NCE power plants of respective categories for sale to APTRANSCO.

ii. The above tariff structure is valid for control period of five years with effect from 1.4.2004. Thereafter, the Commission will review the prices and incentives after consultation with the Developers and licensees.

ii. A further review of the individual projects will be undertaken on completion of 10 years from the date of commissioning of the project, by which time the loan is expected to have been substantially repaid, and the purchase price will be based on O & M expenditure, return on equity, variable cost and residual depreciation, if any.

ii. For those developers' having captive consumption who supply excess energy to APTRANSCO after meeting their internal consumption, the current practice of meter reading at the interconnection point and grossing up for auxiliary consumption in order to arrive at PLF will be misleading as it will not take into consideration the captive consumption. The incentive payments begin after threshold PLF. In order to ascertain the PLF levels, APTRANSCO should make arrangements for authenticated meter reading at the generator terminals so that the two-tier tariff is properly implemented.

ii. Developers will be entitled to dispatch 100% of the available capacity without reference to Merit Order Dispatch subject, however, to any system constrains."

13. After arriving at this conclusion the Regulatory Commission also specifically clarified that as and when, however, trading function of APTRANSCO is segregated and vested in new entity pursuant to the Electricity Act, 2003, the terms and conditions contained therein shall be binding on

the new entity in the same manner as was applicable to APTRANSCO.

14. As is clear from the order itself that it dealt with, primarily, the question of refund/fixation of tariff in relation to various generation projects. It decided no other matter and even these findings were subsequently questioned by the Developers before the High Court and in furtherance to the order of the High Court dated 15 th July, 2004, Review Petitions were filed, which finally resulted in filing of the appeals before the Tribunal.

15. We may notice here that vide notification dated 28th May, 2004, the State Government ordered that APTRANSCO shall cease to engage in trading relating functions and that the PPAs entered with the Developers shall vest in DISCOM w.e.f. 10th June, 2004 in terms of Section 39 read with Section 172(b) of the Electricity Act, 2003.

On 9th June, 2004, the Central Government also authorized the State Transmission Utility to engage in bulk purchase and sell it to DISCOM for a period of one year from 10th June, 2004. With this background, the appeals which were filed before the Appellate Tribunal came up for hearing and some appeals were also filed by DISCOM with APTRANSCO as a party. Appeals from both sides came up, heard and decided by the order dated 2nd June, 2006 impugned in the present case.

16. Now with this factual background, we shall proceed to examine the issues of law raised in the present appeals before this Court. As already noticed, in paragraph 40 of the impugned judgment, the Tribunal had framed as many as 12 points for determination which were answered by it in paragraph 114. The points formulated by the Tribunal, in fact, can be categorized in the following principal heads:

(i) Matters relating to jurisdiction of the Commission for fixation of tariff and sale of generated electricity to third party;

(i) Correctness of tariff fixation on merits of the case;

(ii) Is the principle of estoppel attracted in the present case, if so, to what extent? (i) Does the plea of duress need to be accepted as per settled principles and with reference to the facts of the case? (i) What is the effect of order dated 20.6.2001 having attained finality and even not being questioned in the present proceedings? (i) What orders can be made by this Court to deal with these appeals to do complete justice between the parties?

17. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Section 11(1)(c)&(e) is expected to fix the tariff as well as the terms of licence. There are three different legislations in course and the Regulatory Commission has been constituted under the Reform Act, 1998 which in turn would be the Commission as contemplated under the Electricity Regulatory Commission Act, 1998 and the Electricity Act, 2003. In terms of first proviso to Section 82(1) of the Electricity Act, 2003 the State Electricity Regulatory Commission established by the State Government under Section 17 of the Electricity Regulatory Commission Act, 1998 and the enactment specified in the schedule shall be the State Commission for the purposes of this Act. Even in terms of Section 185(3) of the Electricity Act, 2003 the said authority would be deemed to be an appropriate Commission for all purposes and intent as the Reform Act, 1998 has been specifically mentioned in entry 3 of the Schedule to the Electricity Act, 2003. In other words, as already noticed the Regulatory Commission constituted by the said notification would be the appropriate Commission under all these Acts and is required to perform the functions as contemplated under Sections 11, 17 and 82 of the respective Acts. The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialized performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the Courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialized body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies. We would prefer to leave this question open to be considered by the appropriate authority at the appropriate stage.

We do not consider it appropriate to go into the merit or de-merit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/authority.

Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the Courts refrain from adverting into this arena.

18. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review

the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention.

The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra virus the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscious of the Court making it necessary for the Court to intervene. Even in these cases the scope of jurisdiction is a very limited one. This Court in the case of Association of Industrial Electricity Users v. State of Andhra Pradesh [(2002) 3 SCC 711], while dealing with the provisions of tariff fixation in terms of the provisions of the Reform Act, 1998, observed that even where the Act did not envisage classification of consumers according to the purpose for which electricity is used, Sub-Section(9) of Section 26 of that Act does state that the tariff rate relatable to classification of consumers would be permissible, of course, depending upon various factors stipulated in Section 26(7) of the Act.

The Court finally held as under:

"11. We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an Appellate Authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

19. Similarly, in the case of West Bengal Electricity Regulatory Commission v. CESC Ltd. [(2002) 8 SCC 715], this Court was concerned with determination of tariff by the State Commission, the applicability of principles of natural justice and the scope of interference by the High Court in distinction to the power exercisable by the appellate authority. Stating it to be a function in the nature of legislative power, the Court felt that the principles of natural justice were not attracted and the power of judicial review could hardly be invoked. The Court held as under:

"39. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable (see Shri Sitaram Sugar Co. Ltd. v. Union of India SCC, para 45), the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned.

Therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to the consumers or not.

xxx xxx xxx xxx

44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the Regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act.

The Regulations so framed have been placed before the West Bengal Legislature, therefore they have become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power."

20. In view of the above settled position of law we are of the considered opinion that the present case is one where this Court should examine determination of tariff on merits and particularly, in view of the directions that we propose to pass finally in this case.

21. The issue relating to jurisdiction, again, would have to be divided into two different parts. Firstly, whether the Regulatory Commission could exercise the powers for determination and/or re-fixing the price by resorting to tariff fixation powers under the Act and secondly, with regard to sale of generated electricity by the Generators to parties other than State Transmission Utility or Distribution Company. In regard to first part of this issue the Tribunal in its order, while answering issue B, held that Regulatory Commission has no jurisdiction to re-fix the regulatory purchase price by resorting to tariff fixation methods specified under the provisions of law. Similarly, it also answered issue A in the negative and against the Regulatory Commission. The primary reason recorded by the Tribunal is that the original fixation of purchase price for energy generated by NCE Developers is in terms of the policy directions issued by the State and it was not within the jurisdiction and scope of the powers conferred upon the Regulatory Commission under the Reform Act, 1998. It was considered by the Tribunal that policy decision of the State could not have been set at naught on the assumption that the Regulatory Commission is vested with executive powers. Also that Regulatory Commission had proceeded on the basis that it has power to review the rate/incentives given to developers or it has power to issue executive directions. The Tribunal also felt that PPAs are final and binding and there is assumption of power on the part of the Regulatory Commission that they have authority to fix tariff with respect to power generators by taking recourse to provisions of Sections 62, 64 read with Section 86(1) of Electricity Act, 2003.

22. Before we proceed to examine the various provisions under different Acts afore referred, let us once again refer, in precise form, the necessary facts. From the record it appears that on 7th September, 1993 the Ministry of Non-Conventional Energy Sources, New Delhi had written a letter to the Chief Secretary of the different States informing them that under the new strategy and action plan of the ministry special emphasis is sought to be given to generation of grid quality power from non-conventional energy sources, noticing that the average cost of power generation from non-conventional energy sources compares quite favourably with new coal thermal/gas based projects and captive diesel generating sets. While in future the costs of the former are expected to drop, costs of conventional electricity generation will only increase. Referring to the fact that Central Government has introduced several fiscal and other promotional incentives to attract private sector participation in the generation and supply of energy from non-conventional energy sources and consequently the States had also introduced measures such as wheeling and banking, buy back, third party sale, capital subsidies, industry status, sales tax exemption etc., it had also been noticed that they were to vary in operation from State to State. In this background the Ministry had drawn up guidelines which was enclosed to that letter and asked all States to work towards a uniform policy pertaining to the non-conventional energy sources. A minimum buy back price of Rs. 2.25 per unit had been proposed and it required the States to consider that these guidelines were not exhaustive. Other matters, including additional incentives, attractive packages could be formulated by the State and accordingly the States were required to take further steps. The very opening part of the guidelines dealt with the operative period and it was stated that "The Scheme of promotional and fiscal incentives will come into operation with immediate effect and will remain in force for a period of five years." Besides this eligibility, facilities and tax relief etc. were also indicated. The transmission of Electricity was to be undertaken by the State Electricity Board and even the third party must be HT consumer of the Board unless the stipulation was specifically relaxed. SEB was to purchase the electricity from the producer at the minimum specified rate without any restriction on time or quantum of electricity. Importantly, Clause 3(iii) of the policy guidelines suggested that the producer will have the option to sell the electricity generated by him to a third party at mutually agreed rates but within the State as per clause 1(i). On or before 14 th February 1994 two projects, namely wind farm and mini hydel projects were transferred from Andhra Pradesh State Electricity Board to NEDCAP by the Government of Andhra Pradesh. Later, vide letter dated 25th November, 1994 the guidelines as indicated in the letter of 7th September, 1993 were further clarified by the Government of India, in relation to fixation of purchase price for power produced from non-conventional energy. As per the guidelines commenting or clarifying the earlier guidelines it was stated that the base price applicable to non-conventional energy based power projects based on solar, wind small hydro, biomass etc. shall be equal to the base price of the year in which the PPAs are signed, clause 2 of the guidelines reads as under:

"A promoter / developer shall be entitled to receive the base price set out in PPA for all electrical energy delivered from his project to the State grid for the duration of the Power Purchase Agreement. The rate shall be equal to base price in the year of signing of PPA, escalated at a rate of 5% per year for a period of 10 years, from the date of signing of the Power Purchase Agreement. From the end of the 10 years, and for the remaining duration of the Power Purchase Agreement, the new purchase price shall be equal to the purchase price at the end of the 10th year, or the High Tension (HT) tariff prevalent in the State at that time which is higher."

23. In furtherance of the decision of the Govt. of India and the guidelines published, the Govt. of Andhra Pradesh issued two different GOs on which, the Tribunal as well as all the parties before us have placed heavy reliance. They read as under:

ENERGY (RES) DEPARTMENT G.O.MS. NO: 93 DATED: 18-11-1997 ORDER:- "In the reference 1st read above, the Ministry of Non-Conventional Energy Sources, Government of India have issued guidelines for promotional and Fiscal incentives to be given by State Government for power generation from Non-Conventional Energy Sources. The incentives are envisaged to encourage power generation in the Non- Conventional Sector which are renewable and encouragement from the Government for this Sector is necessary in view of the fact depletion of fossilfuels. Further, the Renewable/ Non-Conventional Energy Sources are least pollution-effecting.

In the G.O. third read above, the Government have accorded certain revised incentives in respect of the Developers with whom Non- Conventional Energy Development Corporation of Andhra Pradesh had already entered into Memoranda of Understanding based on the guidelines existing prior to 15th November, 1995.

While reviewing the incentives made available to the sectors, certain representations were received from some of the Non-Conventional Energy Developers, and they have requested for extending the benefits available to other sectors.

A review of the incentives made available to various sectors of non-conventional energy was made in the presence of official from Non-Conventional Energy Development Corporation of Andhra Pradesh and Andhra Pradesh State Electricity Board, duly keeping in view the guidelines of Ministry of Non- Conventional Energy Sources, Government of India, dated: 13-9-1993, a view was taken to make available the incentives to all the Non- Conventional Energy Sources uniformly.

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 :

S.No. Description

1. Power PurchaseRs. 2.25 price

2. Escalation 5% per annum with 1997-98 as base year and to be revised on 1st April of every year upto the year 2000 A.D.

3. Wheeling Charges 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 March.

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.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH) V.S. SAMPATH SECRETARY TO GOVERNMENT ENERGY (RES) DEPARTMENT G.O. Ms. No. 112 Dated: 22.12.1998 ORDER:

"In the Government Order cited, certain uniform incentives were extended to the Developers of Power Projects using wind, biomass co-generation, Municipal wastes and mini hydel for promotion of and to encourage generation of electricity from renewable sources of energy. In order to remove certain ambiguities in the implementation of uniform incentives scheme and also to ensure that the incentives contemplated are channelled for promotion and development of non- conventional energy sources, in keeping with the spirit of Government Order cited, the following amendments are issued:

In the Government Order cited, certain uniform incentives were extended to the Developers of Power Projects using wind, biomass co-generation, Municipal wastes and mini hydel for promotion of and to encourage generation of electricity from renewable sources of energy. In order to remove certain ambiguities in the implementation of uniform incentives scheme and also to ensure that the incentives contemplated are channelled for promotion and development of non- conventional energy sources, in keeping with the spirit of Government Order cited, the following amendments are issued:

1. The uniform incentives specified in G.O. Ms. No.93, dated 18.11.1997 shall be available only to the power projects where fuel used is from non-conventional energy sources which are on the nature of renewable sources of energy.

1. The operation of the incentives scheme shall be watched for a period of 3 years and at the end of 3 years period from the date of G.O. Ms. No.93 the Andhra Pradesh State Electricity Board shall come up with suitable proposals for review for further continuance of the incentives in the present form or in a suitable modified manner to achieve the objectives of promotion of power generation through non-conventional sources.

1. Though there is a provision for banking and third party sale, in the absence of conferring the status of licences under Section 3 of the Indian Electricity Act, the Entrepreneurs/ Developers of non-conventional energy power may be handicapped in effecting third party sales to the needy and contracted consumers.

Therefore, it is hereby ordered that the Entrepreneurs/Developers covered by G.O.Ms. No.93, dated 18.11.1997 who made the third party sale of energy shall be deemed to be licencees for the purpose under Section 3 of the Electricity Duty Act, 1930 read with Section 28 of Indian Electricity Act."

(BY ORDER AND IN THE NAME OF GOVERNOR OF ANDHRA PRADESH) S. SAMPATH
SECRETARY TO GOVERNMENT

24. These were the declarations or representations stated to have been made by the State to the Developers. The PPAs between Transmission Corporation of Andhra Pradesh Ltd. and the Developers were executed somewhere in May 1999 and some of the agreements even prior thereto. However, despite all the above guidelines and GOs, the Regulatory Commission passed an order on 20th June, 2001 determining the tariff as well as defining other rights and obligations between the parties including that the generators were not permitted to make sale in favour of third party. After the passing of this order the Developers entered into PPAs between the period August 2001 to 2002 and confirmed the acceptance and implementation of the order of 20th June, 2001. While providing different clauses relating to various facets of sale and distribution of generated power, PPAs under Articles 2.1 and 2.2, which we have already reproduced, contemplate specifically that the purchase of energy by APTRANSCO will be at the tariff provided under Article 2.2. Article 2.2 determines the rate at Rs. 2.25 per unit with escalation at 5% per annum with 1994-1995 as base year which is to be revised on 1st April of every year upto the year 2003-2004, beyond which the purchase price by APTRANSCO will be decided by the Regulatory Commission. Still a further review of purchase price is contemplated on completion of 10 years from the date of commissioning of the project when it will be reworked. In other words, there are specific stipulations provided under the PPAs, as well as in the order dated 20th June, 2001, for revision/review of purchase price. Clause 2.3 further clearly says that tariff is inclusive of all taxes, duties and levies. In other words, all the documents

afore stated provide for a review including the guidelines issued by the Govt. of India.

25. At this stage, we may notice that these guidelines are general guidelines and every State was required to act as per its own needs, convenience and by taking a general view, as to, which are the most practical and affordable projects and how they should be carried on by the State. To give meaning to the guidelines that they were 'absolutely mandatory', will not be in conformity with the law relating to interpretation of documents as well as according to the canons of exercise of executive and administrative powers. These guidelines were certainly required to be moulded by the State to meet their requirements depending on various factors prevailing in the State.

26. Now we will proceed to refer to the various legal provisions relating to purchase price and/or tariff regulations. The principal central legislation in this regard is the Indian Electricity Act, 2003.

Under Section 3, a national electricity policy and plan has to be prepared by the Central Government which has to be notified. This plan itself can be reviewed or revised by the appropriate authority under the Act. Section 8 of the Electricity Act, 2003 requires every State to notify and constitute, for the purposes of this Act, a Commission for the State to be known as Electricity Regulatory Commission of that State. Section 86 of this Act spells out the functions of the State Commission. Under Section 86(1)(a) it is to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk and retail, as the case may be. It is also to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State as per Section 86(1)(b). Section 86(1)(d) empowers this Commission to issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State. Besides its advisory functions it has also been given the general /residue powers to do all other functions in terms of Section 86(1)(k). Sections 61 to 64 of the Electricity Act, 2003 place an obligation upon the appropriate Commission to determine the tariff in accordance with the provisions of this Act. An application for determination of tariff shall be made by the generating company under Section 64 and the tariff has to be determined by the appropriate Commission and it is also required to specify the terms and conditions for determination of the tariff as per the factors and the guidelines specified under Section 61 of the Act.

27. The Reform Act, 1998 was enacted, primarily, with the object of constituting two separate corporations; one for generation and other for transmission and distribution of electrical energy. The essence was restructuring, so as to achieve the balance required to be maintained in regard to competitiveness and efficiency on the one part and the social objective of ensuring a fair deal to the consumer on the other. This Act is also intended for creation of a statutory regulatory authority. Section 3 of the Act requires the State Govt. to establish by notification a Commission to be known as Andhra Pradesh Electricity Regulatory Commission. This was done by notification dated 3rd April, 1999. As already noticed, section 11 detailed the functions of the Regulatory Commission and

primarily it had advisory as well as regulatory functions. In terms of Section 11(1)(c) it was required to issue licenses in accordance with the provisions of the Act and determine the conditions to be included in the license. However, 11(1)(e) gave it much wider power and duty to regulate the purchase, distribution, supply and utilization 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. In terms of Section 11(1)(l) it was to undertake all incidental or ancillary things to the functions assigned to it under the provisions of the Act. Section 12 of the Act vests the State Govt. with 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 Govt.

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 Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers. The State Govt. is further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Regulatory Commission on all such matters. Thus the scheme of these provisions is to grant supremacy to the Regulatory Commission and the State is not expected to take any policy decision or planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. This provision also clearly implies that fixation of tariff is the function of the Regulatory Commission and the State Govt. has a minimum role in that regard. Chapter VII of this Act deals with tariff. In terms of Section 26(2), the Regulatory Commission, in addition to its power of issuing licence, is entitled to fix terms and conditions for determination of the licensee's revenue and tariffs by regulations which are to be duly published.

The expression `tariff' has not been defined in any of the Acts, with which we are concerned in the present appeals, despite the fact that the expression `tariff' has been used repeatedly in both the Acts.

Under the Electricity Act, 2003 `tariff' has neither been defined nor explained in any of the provisions of the Act. Explanation (b) to Section 26 of the Reform Act, 1998 states what is meant by `tariff'.

This provision states that `tariff' means a schedule of standard price or charges or specified services which are applicable to all such specified services provided to the type or types of customers specified in the `tariff' notification. This is an explanation to Section 26 which deals with licenses, revenues and tariffs. In other words, this explanation may not be of greater help to the Court in dealing with the case of generating companies. Similarly, the expression `purchase price' has neither been defined nor explained in any of the afore-stated Acts.

28. Therefore, in the absence of any specific definition in any of these Acts we will have to depend upon the meaning attached to these expressions under the general law or in common parlance.

The expression `tariff' has been explained in the Law Lexicon with legal Maxims, Latin terms and Words & Phrases (Second Edition 1997) as "determination, ascertainment, a table of rates of export and import duties, in which sense the word has been adopted in English and other European languages and as defined by the law dictionaries the word `tariff' is a cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kind of merchandise, with the duties or customs to be paid for the same as settled by the authority or agreed between the several princes and States that hold commerce together."

29. It has also been explained as a schedule, system, or scheme of duties imposed by the Government of a country upon goods imported or exported; published volume of rate schedules and general terms and conditions under which a product or service will be supplied; a document approved by the responsible regulatory agency listing the terms and conditions including a schedule of prices, under which utility services will be provided. The expression `purchase price' has to be given its limited meaning, i.e. the price paid for purchasing a good and in the context of the present case, price at which generated electricity will be sold to the specified agencies. The term `purchase price' indicated in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible. Purchase price ultimately would form part of the tariff, as tariff relatable to a licensee or a consumer would have essentially taken into account, the purchase price. The purchase price may not include tariff but tariff would always or is expected to include purchase price.

30. The Regulatory Commission is vested with very vast powers and functions. Section 11 of the Reform Act, 1998 declares fixation of tariff as one of the primary functions of the Regulatory Commission in general more particularly, to the specified consumers under Section 26 of the Reform Act, 1998. While under the Electricity Act, 2003, Sections 61 and 62 read with Section 86 (1)(a)(b) deal with fixation of tariffs in relation to production, distribution and sale of generated power to the end consumer. These provisions clearly demonstrate that the Regulatory Commission is vested with the function for determining the tariff for generation, supply, transmission and billing of electricity etc., as well as regulation of electricity purchase and procurement process of distribution licensees, including price at which electricity shall be procured from the generating companies. With these specific powers in the statute book itself, it cannot be said that procurement of power from the generating companies will not fall within the ambit of powers and functions of the Regulatory Commission. It, as already noted, is a common body performing functions, duties and exercising powers under all these three Acts. This Court had the occasion to deal with somewhat similar issues in the case of PTC India Ltd. v. Central Electricity Regulatory Commission [(2010) 4 SCC 603]. The Court was, amongst others, dealing with the provisions of Sections 61 to 63 of the Electricity Act, 2003 and regulation making power of the Regulatory Commission. The Court was concerned with other issues as well including the powers of the Tribunal in relation to judicial review etc. but it will be of assistance to us to notice that the Court referred to different kinds of delegated legislations under the provisions of Electricity Act, 2003 and with regard to the

power of the Regulatory Commission and the scope of the term `tariff' the Court held as under:

"23. Section 52 of the 2003 Act deals with trading of electricity activity. Under Section 52(1), the appropriate Commission may specify the technical requirement, capital adequacy requirement and creditworthiness for being an electricity trader. Under Section 52(2), every trader is required to discharge its duties, in relation to supply and trading in electricity, as may be specified by the appropriate Commission.

24. The standards of performance of licensee(s) may be specified by the appropriate Commission under Section 57 of the Act.

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 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 supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for 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 in accordance with 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, Section 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.

27. Section 66 confers substantial powers on the appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests.

Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the appropriate Commission for the performance of statutory functions under the 2003 Act."

31. Similarly, another Bench of this Court in the case of Tata Power Company Ltd. v. Reliance Energy Ltd., [2009 (7) SCALE 513], was primarily, concerned with the role of the generating companies and their right to make choice to sell power to any person or licensee and while referring to the concept of open access, the Court in para 59 of the judgment referred to the issues arising in the case which read as under:

"Although before us a large number of contentions had been raised, the core questions, which arise for our consideration, are:- (A) Whether recourse to Section 23 of the Act can be taken for issuance of any direction to the generating company? (B) Whether the Commission while applying the provisions of Section 86(1)(b) of the Act could also take recourse to Sections 23 and 60 thereof? (C) Whether equitable allocation of power generated by a generating company is permissible?"

32. In the present case we are, primarily, concerned with the answers given by the Court to questions (A) and (B) framed therein, the discussion on the subject and finally the relevant conclusions drawn by the Court in para 140 to 142. The Court elaborately discussed the matter including the fact that some generating companies had entered into PPAs while other had not. The Court, amongst others, declare the following conclusions (of which we refer only the relevant portions):

"7) if regulatory clause is sought to be applied in relation to allocation of power, the same would defeat the de-licensing provisions.

Generating companies have the freedom to enter into contract and in particular long term contracts with a distribution company subject to the regulatory provisions contained in the 2003 Act.

8) PPA for a long term is essential for increasing and decreasing the capacity of generation of electricity by the generating company, which purpose by the 2003 Act must be allowed to achieve.

13) Section 86(1)(b) of the 2003 Act clearly shows that the generating company indirectly comes

within the purview of regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission but the same would not mean that while exercising the said jurisdiction, the Commission will bring within its umbrage the generating company also for the purpose of issuance separate direction."

33. In addition to the statutory provisions and the judgments afore referred, 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 GO Ms. 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. One of the relevant consideration for determining the question in controversy is to examine whether the matter falls within the statutory or contractual domain. From various provisions and the documents on record it is clear that Regulatory Commission is vested with the power to revise tariff and conditions in relation to procurement of power from generating companies. It is also clear from the record that in terms of the contract between the parties, the APTRANSCO had reserved the right to revise tariff etc. with the approval of the Regulatory Commission.

34. With some emphasis, the parties had argued the question relating to 'estoppel' and 'legitimate expectation' with reference to the facts of the present case. The contention is raised that by the GOs issued by the State Government as well as the letters of the ministry a representation was made by the Government to the generating companies and they, having altered their positions, have a right to compel the State Government and the Regulatory Commission to abide by those terms for ever and it is their legitimate expectation that State is required to comply with those conditions and no other.

35. For proper analysis of the submissions made by the parties, it is necessary for us to examine on what premises the appellants had claimed and the Tribunal has accepted the plea of estoppel.

Admittedly, this all begins with the letter dated 7th September, 1993 issued by the Government of India, Ministry of Non-Conventional Energy Sources, New Delhi to the Chief Secretary of the respective States. In this letter, the new strategy action plan of the Ministry in relation to generation of grid quality power from non-conventional energy sources was mentioned in some elaboration and the Ministry had referred to the fact that it had drawn certain guidelines and also indicated the minimum buy-back price of Rs. 2.25 per unit which was proposed by the Ministry and it was based upon the average cost of generation, as noticed by the authorities, at the relevant point of time.

These guidelines were to constitute an attractive package to encourage private sector and the respective States were required to examine and alter or amend the same as conducive to a particular State. Hereafter, a letter dated 25th November, 1994 was again issued by the Ministry to the

Managing Director of the Non- Conventional Energy Development Corporation, Andhra Pradesh annexing the guidelines which were subject to be amended. These guidelines itself showed that Electricity Board, which was the competent authority at that relevant point of time, to announce a 'base purchase price' every year for electrical energy purchased by the Board from the non-conventional energy based projects. These guidelines contemplated that the base price shall be escalated at a minimum rate of 5% every year. Clause 2 of the Guidelines stipulated that the promoter or a developer shall be entitled to receive the base price set out in the PPA for all electrical energy delivered for the duration of the PPA. The rate shall be equal to the base price in the year of signing of PPA, escalated at the rate of 5% per year for a period of ten years from the date of signing. Thereafter new purchase price will be fixed as per the tariff prevalent in the State at the relevant time. Thereafter, the Andhra Pradesh Government has issued GO Ms. No. 93 dated 18th November, 1997 referring to certain incentives required to be given to the projects. These incentives only referred to the power purchase price, escalation of 5% with base year 1997-98, wheeling charges, third party sales allowed to a limited extent. These, again, were the guidelines which, in fact, we have referred to in great detail above and were primarily intended to guide the States in taking the respective decisions in that behalf. Again vide GO. Ms. No. 112 dated 22nd December, 1998 referring to the extension of all these uniform incentives, certain amendments were carried out to GO Ms. No. 93 dated 18 th November, 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 GO Ms. No. 93 dated 18th November, 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 Non-conventional Energy Developers for extension of benefits as afore-referred in relation to all non-conventional energy resources uniformly. Thereafter, the parties took up the matter for annual consideration, which exercise was undertaken by them in terms of the guidelines issued by the State and the Central Government. State of Andhra Pradesh reiterated the incentives and directed that the same would continue for a period of three years in terms of GO Ms. No. 93, whereafter it will be reviewed.

The incentives relied upon, on the basis of the guidelines and the issued Government orders are primarily, related to fixation of purchase price of the generated power from Non-Conventional developer/generators and sale of such energy to third parties. In the meanwhile, Regulatory Commission had been established under the provisions of the Reform Act, 1998. This Regulatory Commission was to take over all the functions of the said Electricity Board as well as other authorities for generation, distribution and other matters relating to electricity in the State. This resulted in initiation of suo motu proceedings by the Regulatory Commission for determination and fixation of tariff, which after hearing the parties finally passed the order dated 20th June, 2001. This order as we have already noticed was accepted by all the parties and has not been questioned till date.

This order provided for certain variations in the incentives, which as already noticed, are related to the fixation of tariff or purchase price and as stipulated, the Commission considered all objections at some length and ordered that power generated by Non-conventional Energy Developers is not permitted to be sold to third parties and price was kept at Rs. 2.25 per unit price with 5% escalation

per annum with 1994-95 as the base year. The parties had entered into agreements i.e. PPAs at different times after passing of this order between June, 2001 to August, 2001 and even thereafter. Thus, at that time, the entire matter between the parties was controlled by the PPAs which fully contemplated that all the delivered energy at the interconnection point for sale to TRANSCO will be purchased at the tariff provided under Article 2.2 which in turn confirmed the order of 20th June, 2001 in that regard and it was stated that the matter will be reviewed in April, 2004 and it could also be reviewed after 10 years from the date of commissioning of the project. This PPA as well as the order passed by the Regulatory Commission in the year 2001 remained in force without being questioned in any manner whatsoever before any competent forum and in any case, not to any benefit of respondents. Then came the order dated 20th March, 2004 passed by the Regulatory Commission again, by initiating suo motu proceedings. In this order, the Commission had retained the basic unit price of 2.25 as on 1st April, 1994 and the escalation index of 5% per annum which was to be simple and not compounded every year.

In other words, on 1st April, 2001 the price was 3.37/kwh in relation to Wind Power Purchasers. Except varying this price, the order of 2004, in turn, had reiterated the contents of the order of 2001 which, as already noticed, has attained finality. Another factor which we may notice is that in its order dated 7th July, 2004, while clarifying its order dated 20th March 2004, the Commission has clearly observed:

"12. It is relevant to clarify that by the order dated 20-03-2004, the Commission is not mandating in any manner those NCE developers who have not accepted the earlier order dated 20-06-2001 passed by the Commission, while their challenge to the order is pending the decision by the High Court. However, such of the NCE developers who had accepted the earlier order dated 20-06-2001 and have been selling electricity generated by them to APTRANSCO cannot challenge the jurisdiction of the Commission to review the terms as per the stipulation contained in the order dated 20-6-2001."

36. 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 to the letters and orders of 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. 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 Generator 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 20th June, 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 Regulatory Commission had no jurisdiction and that fixation of tariff does not include purchase price for buy back of the generated power.

37. 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 vigor and vitality but it is still developing and expanding.

In India, the law is more or less settled that where the Government makes a promise knowing or intending that it would be acted upon by the promissory and in fact the promissory has acted in reliance of it, the Government may be held to be bound by such promise. It is a settled canon of law that doctrine of promissory estoppel is not really based on principle of estoppel but is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can also be the basis of a cause of action. Even if we assume that there was a kind of unequivocal promise or representation to the respondents, the reviews have taken place only after the period specified under the guidelines and/or in the PPAs was over. This is a matter which, primarily, falls in the realm of contract and the parties would be governed by the agreements that they have signed. Once these agreements are signed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel.

38. Following the judgment of this Court in the case of *Union of India v. M/s. Indo-Afghan Agencies Ltd.* [(1968) 2 SCR 366], this Court in the case of *Century Spinning and Manufacturing Company Ltd. v. The Ulhasnagar Municipal Council* [(1970) 1 SCC 582] held that if the promise is made in regard to a present or existing fact, the principle of estoppel can be enforced against the Government. But a promise in relation to a future transaction or act may not fall within the ambit of promissory estoppel. This law was further discussed with some elaboration by the Court in the case of *Motilal Padampat Sugar Mills. Co. Ltd. v. State of Uttar Pradesh* [(1979) 2 SCC 409], where the Court after considering the position of law in England and United States and comparing the same to the Indian Law, laid down the basic concept of promissory estoppel that would determine its enforceability. In the case of *Pawan Alloys v. UPSEB* [(1997) 7 SCC 251], the Court, though had enforced the principle of promissory estoppel against the Board, but certain basic facts of that case needs to be noticed by us. The appellants in that case had neither expressly nor impliedly stated that it has the power to withdraw the incentives and rebate at a time prior to the expiry of three years for which it was granted. Secondly, none of the private parties had voluntarily or even by remotest choice agreed to give up the benefits given to them by clear representation held out by the Board. As is obvious, the power of the Board to increase the general tariff was accepted, but the incentive of rebate was de horse the tariff and thus, promissory estoppel was enforceable against the Board.

39. Another very important dictum of the Court in this judgment was that the power of the Board to fix general tariff as well as discharge of other related functions was held to be quasi-judicial in character. This power of the Board is exercised under the statute as a power-cum-duty and is independent of granting or declining any rebate. In the present case the order dated 20th June, 2001 was fully accepted by the parties without any reservation. After the lapse of more than reasonable time of their own accord they voluntarily signed the PPA which contained a specific stipulation prohibiting sale of generated power by them to third parties. The agreement also had renewal clause empowering TRANSCO/APTRANSCO/Board to revise the tariff. Thus, the documents executed by these parties and their conduct of acting upon such agreements over a long period, in our view, bind them to the rights and obligations stated in the contract. The parties can hardly deny the facts as they existed at the relevant time, just because it may not be convenient now to adhere to those terms. Conditions of a contract cannot be altered/avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. Such conduct, would be hit by *allegans contraria non est audiendus*.

40. Lastly, we may refer to a more recent judgment of this Court.

In the case of *Kusumam Hotels (P) Ltd. v. Kerala Seb* [(2008) 13 SCC 213], where the Court discussed in some elaboration the different judgments of this Court on the subject and then declined to enforce the principle of promissory estoppel as there was no foundational facts and also indicated that the Government can alter, amend or rescind its policy decision in public interest, the Court held as under:

"27. Yet again in U.P. Power Corpn. Ltd. v. Sant Steels & Alloys (P) Ltd., it was held:

(SCC p.800, para 27) "27. In this background, in view of various decisions noticed above, it will appear that the Court's approach in the matter of invoking the principle of promissory estoppel depends on the facts of each case. But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot be stated to be fair and reasonable.

When the State Government makes a representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the representations so made bona fide make investment and thereafter if the State Government resiles from such benefits, then it certainly is an act of unfairness and arbitrariness. Consideration of public interest and the fact that there cannot be any estoppel against a statute are exceptions."

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36. The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only."

41. In our country, the law of promissory estoppel has attained certainty. It is only an unambiguous and definite promise, which is otherwise enforceable in law upon which, the parties have acted, comes within the ambit and scope of enforcement of this principle and binding on the parties for their promise and representation. It will be difficult for the Court to hold that the guidelines can take the colour of a definite promise which in the letters of the Central Government itself were proposals to the State Government. Besides that, if for the sake of argument, we treat the State letters/circulars as promise or representations to the private parties like the respondents, even then, they led to the execution of a definite contract between the parties which will purely fall in the domain of contractual law. These contracts specifically provided for review and when reviewed in the year 2001 parties not only accepted the order but executed contracts (PPAs) in furtherance of it. In these

circumstances, we are unable to accept the argument that the State or the Regulatory Commission or erstwhile State Electricity Board were bound to allow same tariff and permit third party sales for an indefinite period. To this extent, authorities, in any case, would not be bound by the principle of estoppel.

42. Now, we will proceed to examine the merits or otherwise of the findings recorded by the Tribunal that the PPAs executed by the parties, were result of some duress and thus, it will not vest the authorities with the power to review the tariff and other granted incentives. PPAs were executed prior and subsequent to the issuance of the order dated 20th June, 2001. Different persons executed the contracts at different times in full awareness of the terms and conditions of such PPA. To frustrate a contract on the ground of duress or coercion, there has to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically. From the record before us, nothing was brought to our notice to state the plea of duress and to prove the alleged facts which constituted duress, so as to vitiate and/or even partially reduce, the effect of the PPAs. On the one hand, the Tribunal appears to have doubted the binding nature of the contracts stating that it contained unilateral conditions introduced by virtue of Order and approval of the Regulatory Commission, while on the other hand, in para 53 of the Order, it proceeded on the presumption that PPAs are final and binding and still drew the conclusion that the Regulatory Commission could not revise the tariff. Even in the order, no facts have been pointed out which, in the opinion of the Tribunal, constituted duress within the meaning of the Contract Act so as to render the contract voidable. Another aspect of the entire controversy is that none of the generators had challenged the agreements and in fact, except in arguments before the Tribunal no case was made out for the purposes of vitality of the contract or any part thereof. On the contrary, all the generators under all the branches of Non-Conventional Energies, have accepted the contract and proceeded on the basis that the said contracts are binding and still the Regulatory Commission does not have any power or jurisdiction to revise the tariff or deal with the concessions. If the contracts are a result of duress and cannot be given effect, the results could be disastrous for both the sides. If a contract suffers from the defect of undue influence or duress, as the case may be then the consequences in law should follow. It is a settled canon of law that when the consent to agreement is caused by undue influence the agreement is a contract voidable at the option of the parties whose consent was so caused. Even if such party had received any benefit under the terms of the contract the Court could still pass orders as to the voidability or otherwise of the contract but upon such terms and conditions as the Court may deem just. Undue influence or duress is said to be subtle of the fraud whereby mysteries burden over the mind of a victim by insidious approaches.

Firstly, there are no facts on record, much less, supported by any documentary or any other evidence to sustain the plea that the contracts (PPAs) are a result of undue influence or duress by the State or its agencies upon the generators. Secondly, the generators have already taken benefit of that contract which was based on the policy of the State as well as the order of the Regulatory Commission. Having attained those benefits, it will hardly be of any help to the appellants, particularly, in the facts and circumstances of the case, to substantiate, justify or argue the plea of duress.

43. In the case of *Birla Jute Manufacturing Co. v. State of M.P.* [(2002) 9 SCC 667], the Supreme Court was concerned with a case where validity of undertaking given under duress was the plea taken by the appellant. This pleading on the same merits and noticing the material, like the present case, the Court held as under:

"2. Learned counsel, appearing for the appellant urged that the undertaking given by the appellant Company was under duress and, therefore, it is not an undertaking in the eyes of law and the appellant is not liable to pay the water charges under such circumstances. There is no material before us to come to this conclusion that the undertaking given by the appellant was under duress. On the contrary we find that the appellant had given the solemn undertaking voluntarily. We, therefore, find no merit in the appeal."

44. The Tribunal in paras 45-47 of its order has used the expression "out of compulsion some of the developers entered into Power Purchase Agreement with APTRANSCO accepting the terms and conditions set out in order dated 20th June, 2001". We are afraid that there is hardly any material on record to substantiate such a finding. What was the compulsion and what were the facts which persuaded the Tribunal to take such a view are conspicuous by their very absence. A compulsion leading to execution of a contract is a matter entirely based upon facts. It is difficult for this Court, originally, to infer duress or compulsion in absence of specific pleadings and materials in that behalf. It may also be noticed at the cost of repetition that the order dated 20th June, 2001 was never questioned by any of the parties to any favourable results. Even in these proceedings there is no challenge to the said order which, admittedly, has been acted upon and has attained finality. The power generators/Non-Conventional Energy developers have executed the PPAs without any protest and, in fact, did nothing to challenge such agreements or any part thereof, till passing of the impugned order of 2004. There were some proceedings, without questioning the validity and effectiveness of the order dated 20th June, 2001, carried out by some of the generators before the Andhra Pradesh High Court. Certain interim directions were passed in those proceedings, as already noticed, but finally all proceedings culminated into dismissal of the Writ Petitions and/or reference back to the Regulatory Commission for grant of a hearing as per the directions contained in the order of the High Court.

45. Another important aspect of the case is that the learned counsel appearing for the respondents, particularly, in Appeal No. 2926 of 2006 had stated that they are not arguing in support of the plea of estoppel and duress as decided by the Tribunal in their favour. They had mainly concentrated their submissions on jurisdiction of the Regulatory Commission with respect to withdrawal of incentives and fixation of tariff. These are the contracts which have been executed prior and after the issuance of the order dated 20th June, 2001 and have been acted upon by the parties without any reservation. In view of the fact that no challenge was made to the order dated 20th June, 2001, execution of PPAs and the conduct of the respondents over the long period and particularly, while keeping in mind the statutory provisions we are unable to sustain the plea of duress in favour of the respondents.

46. The main emphasis of the judgment of the Tribunal is that the Government had framed the policy under which, incentives were given and as such, the Regulatory Commission had no power and authority to fix tariffs or amend or alter the policy decision of the State. We have already held that in law and in face of the contract between the parties the Regulatory Commission is the Authority to fix the tariff which includes within its ambit the purchase price of the Non-conventional Energy under the policy of the State. It appears that the Tribunal has taken a narrower view of the jurisdiction vested in the Regulatory Commission which is discharging its statutory functions under all the three Acts in accordance with law. In terms of Section 12 of the Reform Act, 1998, which has been referred to by the Tribunal, the power of the Government had been stated. The power available to the Government to issue policy directions has two restrictions. Firstly, the policy direction has to be on the matters related to electricity in State including overall planning and coordination. Secondly, all such policy directions have to be issued by the State Government in consonance with the object sought to be achieved by this Act and accordingly shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariff for supply of electricity to the consumers. Powers vested in the Regulatory Commission to frame regulations under Section 54 also intend that regulations are to be framed with an object to ensure proper performance of its functions under the Act.

In other words, both the State and the Regulatory Commission, are supposed to exercise their respective powers only for the purposes of furthering the cause of the Act. The Commission discharging its statutory functions within the ambit of Sections 11, 12 and 26 of the Reform Act, 1998 as well as Sections 61, 62 and 86(1)(b) of the Electricity Act, 2003 renders advisory functions to the State. All these provisions, examined and analyzed cumulatively, do not support the approach adopted by the Tribunal that the functions of the Regulatory Commission in fixing tariff/purchase price was contrary to or distinctive of the said policy. This cannot be supported either on the basis of the statutory provisions of the various Acts as well as with reference to the various documents on record including the order dated 20th June, 2001 and the PPAs signed by the parties at different stages. We are also unable to contribute to the view of the Tribunal that the Regulatory Commission has acted in contradiction or conflict with the State policy. The State was certainly not intending to provide incentives and concessions with assurance of buy-back to enable the Non-Conventional Energy developers/generators to sell generated powers to third parties. It must be kept in mind that the policy of the Government of India as well as the State of Andhra Pradesh was for encouraging the developers/generators of Non-conventional Energy to generate electricity for the benefit of public at large with buy back of power being one of the basic features of this policy. Such parameters are obviously subject to change in larger public interest. All these issues, in fact, lose much significance because of the fact that parties have, by and large, entered into the field of contract simpliciter and their rights are controlled by the contracts executed between them. There is no challenge to these contracts and, therefore, it may be hardly permissible for the Court to go behind these contracts and permit questioning of the statutory jurisdiction vested in the Regulatory Commission.

47. In the case of BSES Ltd. v. Tata Power Co. Ltd. [(2004) 1 SCC 195], the Court clearly held that after creation of the Regulatory Commissions under the provisions of the Electricity Regulatory Commission Act, 1998, the Commission has clear power and jurisdiction to fix tariff. The Court

should not adopt an interpretation which should neither be strict nor narrower so as to oust the jurisdiction of the Regulatory Commission, as it would defeat the very object of enacting the said Act. The reliance placed by the respondents upon the judgment of this Court in the case of Andhra Pradesh Electricity Regulatory Commission v. R.V.K. Energy Private Limited [(2008) 17 SCC 769] is, again, of not much help to them. In that case also, the Court had upheld the exercise of statutory power by the Regulatory Commission. Of course, the Court held that the regulatory power u/s 11(1)(e) of the Reform Act, 1998 does not ordinarily extend to prohibition or positive direction for entire supply to APTRANSCO alone. Such prohibition may be resorted to in exceptional situations. It reiterated the principle that the Government policy as well as the Regulatory Commission should act in consonance with the object of the Act.

48. The appellants have referred and relied upon the policy directions and guidelines framed by the Central Government while the respondents have relied upon these documents as well as the circulars issued by the State of Andhra Pradesh. The respondents have raised the plea of estoppel against the Regulatory Commission on the basis of the averment that the State had framed policies, which the Regulatory Commission instead of implementing, has acted contrary thereto. There is no doubt that before the formation of the Regulatory Commission it was the State Electricity Board which was performing all the functions in relation to generation as well as distribution of electricity. The Board was directly under the control of the State and the State, in exercise of its general executive powers, had framed policies to encourage Non-conventional Energy developers and producers to come into the field of generation of electricity and had issued the Government orders which we have discussed in some detail above. Strange enough, the State of Andhra Pradesh was neither impleaded as a party to the proceedings before the Regulatory Commission nor before the Tribunal. In fact, the Tribunal has referred to various acts and deeds of the State and consequences thereof, but did not consider it appropriate to implead the State Government as a party to the proceedings. We are of the considered view that presence of the State Government before the Tribunal could have certainly been appropriate, inasmuch as the State would have placed before the Appellate Authority and the Regulatory authorities, its views in regard to revision of incentives as well as the purchase price. We are also constrained to observe that the State of Andhra Pradesh was a necessary, in any case, a proper party in these proceedings. This itself would be a ground for this Court to remit the matter to the Competent Authority, in addition to the other reasons recorded in this judgment.

49. In the present case, the restriction with regard to third party sales was not only creation of a directive issued or approval granted by the Regulatory Commission, but was actually in furtherance to the contract entered into between the parties. Rights and liabilities arising from a binding contract cannot be escaped on the basis of some presumptions or inferences in relation to the facts leading to the execution of the contract between the parties. The jurisdiction of the Regulatory Commission, in the facts of the case, arises not only from the statutory provisions under the different Acts but also in terms of the contract executed between the parties which has binding force. Lastly, but with great emphasis, it was argued on behalf of the respondents that enforcement of the purchase price at the rate determined by the Regulatory Commission along with complete prohibition on the right of the Non-conventional Energy Generator/Developers to sell generated power to the third parties would compel them to shut down their projects. The rates are so unfair that it would result in extinguishment of the power generating units from the State of Andhra Pradesh on the one hand, while on the other, it is bound to prejudicially affect the larger public interest.

According to the respondents they have invested large sums of money in developing these generating units and it will be unfair to compel their closure, particularly, when for all these years they have supplied electricity generated by them solely to APTRANSCO or its predecessors.

50. We find some substance in this submission and are of the view that it is a matter of some concern, even for the State Government.

All these projects, admittedly, were established in furtherance to the scheme and the guidelines provided by the Central Government which, in turn, were adopted with some modification by the State Government. The State Electricity Board implemented the said scheme and initially had permitted sale of generated electricity to third parties, however, subsequently and after formation of the Regulatory Commission which, in turn, took over the functions of the State Electricity Board, the incentives were modified and certain restrictions were placed. The reasons for these restrictions have been stated in the affidavit filed on behalf of the appellants which, as already noticed by us, is not a matter to be examined by this Court in exercise of its extra-ordinary jurisdiction. These matters, essentially, must be examined by expert bodies particularly, when such bodies are constituted under the provisions of a special statute.

51. The basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the regulatory responsibilities of the Regulatory Commission from the Government and of harmonizing and rationalizing the provisions of the existing laws relating to electricity in India, on the other hand. The object and reasons of Electricity Act, 2003 as well as the Reform Act, 1998 are definite indicators of such legislative intent. The basic objects of these enactments were that the said Regulatory Commission may permit open access in distribution of energy as well as to decentralize management of power distribution through different bodies. The Reform Act, 1998 stated in its objects and reasons that the set-up of power sector in force, at that time, was virtually integrated and functional priorities were getting distorted due to resource-crunch. This has resulted in inadequate investment in transmission and distribution which has adversely affected the quality and reliability of supply. The two corporations proposed thereunder were to be constituted to perform various functions and to ensure efficiency and social object of ensuring a fair deal to the customer.

These objects and reasons clearly postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency in performance and economic utilization of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as the Regulatory Commission. The policy decisions of these constituents are to be in conformity with the object of the Act. Thus, it is necessary that the Regulatory Commission, in view of this object, take practical decisions which would help in ensuring existence of these units rather than their extinguishment as alleged.

52. In view of our above detailed discussion, we dispose of these appeals with the following order:

(a) The order of the Tribunal dated 2nd June, 2006 is hereby set aside.

(a) We hold that the Andhra Pradesh Electricity Regulatory Commission has the jurisdiction to determine tariff which takes within its ambit the 'purchase price' for procurement of the electricity generated by the Non-conventional energy developers/ generators, in the facts and circumstances of these cases.

(b) We hereby remand the matters to the Andhra Pradesh Electricity Regulatory Commission with a direction that it shall hear the Non-conventional energy generators afresh and fix/ determine the tariff for purchase of electricity in accordance with law, expeditiously.

(c) It shall also re-examine that in addition to the above or in the alternative, whether it would be in the larger interest of the public and the State, to permit sale of generated electricity to third parties, if otherwise feasible.

(d) The Andhra Pradesh Electricity Regulatory Commission shall consider and pronounce upon all the objections that may be raised by the parties appearing before it, except objections in relation to its jurisdiction, plea of estoppel and legitimate expectancy against the State and/or APTRANSCO and the plea in regard to PPAs being result of duress as these issues stand concluded by this judgment.

(e) We make it clear that the order dated 20th June, 2001 passed by the Andhra Pradesh Electricity Regulatory Commission has attained finality and was not challenged in any proceedings so far. This judgment shall not, therefore, be in detriment to that order which will operate independently and in accordance with law.

(f) We also hereby direct that State of Andhra Pradesh shall be added as a party respondent in the proceedings and the Andhra Pradesh Electricity Regulatory Commission shall grant hearing to the State during pendency of proceeding before it.

53. In the facts and circumstances of the case parties are left to bear their own costs.

