

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1320 of 2013.

In the Matter of:

Tariff for procurement of power by the Distribution Licensees and others from Solar Energy Projects.

Petitioner : Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidhyut Bhavan,
Race Course Circle, Vadodara-390007.

Represented By : Learned Advocate Shri M.G. Ramchandran with
Advocate Shri Anand Ganesan alongwith S/Shri K.P.
Jangid and V.T.Patel.

Respondent No. 1 : Madhya Gujarat Vij Company Limited.

Represented By : S/Shri M.P.Trivedi and Umesh Parikh.

Respondent No. 2 : Uttar Gujarat Vij Company Limited.

Represented By : S/Shri R.P.Raval and Kamal Sindhi.

Respondent No. 3 : Paschim Gujarat Vij Company Limited.

Represented By : Shri J.J. Gandhi.

Respondent No. 4 : Dakshin Gujarat Vij Company Limited.

Represented By : Shri R.K.Patel.

Respondent No. 5 : Energy and Petrochemical Department,
Government of Gujarat.

Represented By : Nobody was present.

Respondent No. 6 : ACME Solar Technologies (Gujarat) Pvt. Limited.

Represented By : Learned Advocate Shri Amar N Bhatt with Advocate
Aditya Mehta.

Respondent No. 7 : Adani Enterprises Limited.

Represented By : Shri ManishKarua with Abhishek Chaturvedi.
Respondent No. 8 : AES Solar Energy Gujarat Private Limited.
Represented By : Learned Advocate S/Shri Satish Mukharji, Aniket Prasoon with Shri Sanjeev K.Gupta.
Respondent No. 9 : Astonfield Solar (Gujarat) Private Limited.
Represented By : Shri Sushil K. Vohra.
Respondent No. 10 : Azure Power (Gujarat) Private Limited.
Represented By : Shri Sanjay Bhatia.
Respondent No. 11 : Azure Power (Haryana) Private Limited.
Represented By : Learned Advocates S/Shri Anirban Bhattacharya with Shailendra K. Singh.
Respondent No. 12 : CBC Solar Technologies Private Limited.
Represented By : Nobody was present.
Respondent No. 13 : Dreistaz MySolar24 (P) Limited.
Represented By : S/Shri Chandrakant Gyalu and Jagdish Agrawal.
Respondent No. 14 : ESP Urja Private Limited.
Represented By : Shri Sanjay Bhatia.
Respondent No. 15 : Euro Solar Power Private Limited.
Represented By : Nobody was present.
Respondent No. 16 : Lanco Infratech Limited.
Represented By : Learned Advocate Shri Deepak Khurana with S/Shri S.L. Batta and Parvesh Khetarpal.
Respondent No. 17 : MI MySolar24 (P) Limited.
Represented By : S/Shri Mayur Dave with Jagdish Agrawal.
Respondent No. 18 : Millennium Synergy (Gujarat) Private Limited.
Represented By : S/Shri Vinay Bhatia and Sanjay Bhatia.
Respondent No. 19 : Moserbaer Energy & Development Limited.

Represented By : Learned Advocate Shri Vikas Singh with Advocate Shri Hemant Sahai and Sandip Singhi.

Respondent No. 20 : Palace Solar Energy Private Limited.

Represented By : Learned Advocates S/Shri Anirban Bhattacharya with Shailendra K. Singh.

Respondent No. 21 : PLG Photovoltaic Limited.

Represented By : Nobody was present.

Respondent No. 22 : Precious Energy Services Private Limited.

Represented By : Learned Advocate Shri Vikas Singh with Advocate Shri Hemant Sahai, Sandip Singhi Pravin Dabhi, and Sameek Bhatt.

Respondent No. 23 : Solar Semi-conductor Power Company (India) Private Limited.

Represented By : Learned Advocate Shri Vikas Singh alongwith Sandeep Singhi and Shri K. Srinivas.

Respondent No. 24 : Solitaire Energies Private Limited.

Represented By : Learned Advocate Shri Vikas Singh with Advocate Shri Hemant Sahai, Sandip Singhi Pravin Dabhi, and Sameek Bhatt.

Respondent No. 25: Sunborne Energy Gujarat One Private Limited.

Represented By : Learned Advocate Shri Hemant Sahai and Ms. Magaz Andrabi.

Respondent No. 26 : Sunkon Energy Private Limited.

Represented By : Learned Advocate Shri Mauleen Marfatia with Shri Alkesh Patel.

Respondent No. 27 : Unity Power Private Limited.

Represented By : Shri Chandrakant Soyala and Jagish Agarwal.

Respondent No. 28 : Waa Solar Private Limited.

Represented By : Learned Advocate S/shri K.T. Dave and Amit K. Dave.

Respondent No. 29 : Welspun Urja Gujarat Private Limited.

Represented By : Learned Advocates S/Shri Anirban Bhattacharya
with Sanjeev Kumar.

Respondent No. 30 : Aatash Power Private Limited.

Represented By : Learned Advocate Shri S.P. Majmudar.

Respondent No. 31 : Abellon Clean Energy Limited.

Represented By : Shri Sanjay Shah.

Respondent No. 32 : Alex Astral Power Private Limited.

Represented By : Learned Advocate Shri Sandeep Singhi and Pravin
Dabhi and Shamik Bhatt.

Respondent No. 33 : APCA Power Private Limited.

Represented By : Nobody was present.

Respondent No. 34 : Aravali Infrapower Limited.

Represented By : Nobody was present.

Respondent No. 35 : Backbone Enterprises Limited.

Represented By : Learned Advocate Shri Amar N Bhatt with Advocate
Shri Aditya B. Mehta.

Respondent No. 36 : Chattel Constructions Private Limited.

Represented By : Nobody was present.

Respondent No. 37 : Claris Life Sciences Limited.

Represented By : Nobody was present.

Respondent No. 38 : EI Technologies Private Limited.

Represented By : Nobody was present.

Respondent No. 39 : Emami Cement Limited.

Represented By : Learned Advocate Shri Mihir Thakore with Shri
Sandeep Singhi and Pravin Dabhi, Shamik Bhatt and
Shri S.L. Verma.

Respondent No. 40 : EMCO Limited.

Represented By : Learned Advocate Shri Gaurav Mathur.

Respondent No. 41 : Essar Power Limited.

Represented By : Learned Advocate S/Shri Keyur Gandhi and Nisarg
Desai.

Respondent No. 42 : Ganeshvani Merchandise Private Limited.
Represented By : Nobody was present.

Respondent No. 43 : Ganges Green Energy Private Limited.
Represented By : Nobody was present.

Respondent No. 44 : GHI Energy Private Limited (SPV of Refex).
Represented By : Learned Advocate Deepak Khurana with Avdhesh Dixit.

Respondent No. 45 : GMR Gujarat Solar Power Private Limited.
Represented By : Learned Advocate Shri Amit Kapoor with Ms. Poonam Verma and Visvraav Mukharji.

Respondent No. 46 : Green Infra Solar Energy Limited.
Represented By : Learned Advocate Shri Sanjeev Kumar, Shilendra Kumar Singh and Anirban Bhattacharya.

Respondent No. 47 : GSPC Pipavav Power Company Limited.
Represented By : Nobody was present.

Respondent No. 48 : Gujarat Industries Power Company Limited.
Represented By : Shri P.N. Trivedi.

Respondent No. 49 : Gujarat Mineral Development Company Limited.
Represented By : Shri Vipul R Desai.

Respondent No. 50 : Gujarat Power Corporation Limited.
Represented By : Nobody was present.

Respondent No. 51 : Gujarat State Electricity Corporation Limited.
Represented By : Nobody was present.

Respondent No. 52 : Harsha Engineers Limited.
Represented By : Learned Advocate Shri Amar N Bhatt with Advocate Shri Aditya Mehta.

Respondent No. 53 : Hiraco Renewable Energy Private Limited.
Represented By : Nobody was present.

Respondent No. 54 : Integrated Coal Mining Limited.
Represented By : Learned Advocate Shri Gaurav S Mathur and Ms. Ranjeetha Ramchndran.

Respondent No. 55 : Jaihind Projects Limited.
Represented By : Nobody was present.
Respondent No. 56 : Konark Gujarat PV Private Limited.
Represented By : Learned Advocate S/Shri Keyur Gandhi and Nisrag Desai.
Respondent No. 57 : Louroux Bio Energies Limited.
Represented By : Learned Advocate Shri Sandeep Singhi and Pravin Dabhi and Shamik Bhatt
Respondent No. 58 : MBH Power Private Limited.
Represented By : Nobody was present.
Respondent No. 59 : Mono Steel (India) Limited.
Represented By : Learned Advocate S/Shri Keyur Gandhi and Nisrag Desai.nt.
Respondent No. 60 : NKG Infrastructure Limited.
Represented By : Learned Advocate Shri Gaurav Mathur.
Respondent No. 61 : Pandit Deendayal Petroleum University.
Represented By : Nobody was present.
Respondent No. 62 : Rajesh Power Services Private Limited.
Represented By : Shri Karan Dangayach.
Respondent No. 63 : Rasna Marketing Services LLP.
Represented By : Shri Kamlesh Shah.
Respondent No. 64 : Responsive Sutip Limited.
Represented By : Nobody was present.
Respondent No. 65 : Roha Dyechem Private Limited.
Represented By : Learned Advocate Dipati Sheth.
Respondent No. 66 : S J Green Park Energy Private Limited.
Represented By : Nobody was present.
Respondent No. 67 : Sandland Real Estate Private Limited.
Represented By : Shri Vinay Bhatia.
Respondent No. 68 : SEI Solar Power Gujarat Private Limited.
Represented By : Shri Sanjay Bhatia.

Respondent No. 69 : Solarfield Energy Private Limited.
Represented By : Shri Pranav R Mehta.

Respondent No. 70 : Som Shiva (Impex) Limited.
Represented By : Learned Advocate Shri Parth Contractor.

Respondent No. 71 : Sun Clean Renewable Power Private Limited.
Represented By : S/Shri Deepak Gupta and Vinod Kawatru.

Respondent No. 72 : Surana Telecom & Power Limited.
Represented By : Learned Advocate S/Shri L.K. Baid and Rupesh Kumar.

Respondent No. 73 : TATA Power Renewable Energy Limited.
Represented By : S/Shri Ajay Naik, Bhavesh Bhayani and Dinesh Panchamiya.

Respondent No. 74 : Universal Solar System.
Represented By : Learned Advocates S/Shri Amar N Bhatt, Aditya Mehta and Hemal Doshi.

Respondent No. 75 : Visual Percept Solar Projects Private Limited.
Represented By : Learned Advocate Shri Amit Kapoor with Ms. Poonam Verma and VisvraV Mukharji.

Respondent No. 76 : Yantra eSolar India Private Limited.
Represented By : Learned Advocate Shri Gaurav Mathur.

Respondent No. 77 : ZF Steering Gear (India) Private Limited.
Represented By : S/Shri Manish Amin and Mauleen Marfatia.

Respondent No. 78 : Avatar Solar Private Limited.
Represented By : S/Shri Sidhharth Kohli and Jalsun Dave.

Respondent No. 79 : Taxus infrastructure & Power project Private Limited.
Represented By : Shri Satyan Sharma.

Respondent No. 80 : Ujjawala Power Private Limited.
Represented By : Nobody was present.

CORAM:

Dr. P. K. Mishra, Chairman

Shri Pravinbhai Patel, Member (Technical)

Dr. M. K. Iyer, Member (Finance)

Date: 08/08/2013.

ORDER

1) The present petition has been filed by the petitioner seeking the following reliefs:

- (i) To initiate proceedings for determination of the appropriate capital cost for the Solar Power Projects established by the Project Developers pursuant to the Order dated 29.1.2010 passed by the Commission and re-visit the capital cost approved at Rs 16.50 crores/MW based on the actual reasonable and prudent capital cost incurred by the Solar Power Developers;
- (ii) To take into consideration the actual equity capital deployed for servicing at the rate of 14% post-tax instead of allowing Return on

- Equity on the normative at 30% of the project cost, wherever the actual equity deployed is less than 30% of the project cost;
- (iii) To re-determine the front-loading of tariff in the first twelve (12) years based on the actual cash flow required by the Project Developers to service the debt and equity;
 - (iv) To re-visit the other norms and parameters laid down in the Order dated 29.1.2010 to determine whether the actual achievement of the norms is better than those laid down in the Order dated 29.1.2010;and
 - (v) To pass any such further order or orders as the Commission may deem just and proper in the circumstances of the case.

2) The facts mentioned in brief in the petition are as under:

2.1. The petitioner GUVNL is a bulk purchaser and supplier of electricity and procures power for and on behalf of the State distribution licensees. The Petitioner arranges for the purchase of power from various power producers including Solar Power Projects in the State and makes available such power procured to the said distribution licensees.

- 2.2. The Government of Gujarat notified the Solar Power Policy, 2009 on 06.01.2009, in regard to the promotion of solar power projects in the State. In the said Policy, the Government of Gujarat provided for the sale of energy from the solar power projects to the distribution licensees in the State at a levelised tariff.
- 2.3. The Commission initiated a consultative process of for determination of tariff for procurement of power by the distribution licensees from solar power projects, exercising the powers given under section 61 (h), 62 and 86 of the Electricity Act, 2003, by inviting suggestions from various stakeholders, conducting public hearing and decided the price at which the power generated from solar power projects is to be procured by GUVNL/distribution licensees in the State for meeting the Renewable Power Purchase Obligations (RPP0) of distribution licensees. The Commission had prepared a draft Order and gave publicity by placing it on its website for inviting comments and holding hearings. The Commission held public hearing on 03.12.2009.
- 2.4. The Commission considered the various components of tariff including the capital cost, debt-equity ratio, representation made by prospective Solar Power Developers on the capital cost, suggestions made by the GEDA, GUVNL

and other stakeholders. By Order No. 2 of 2010 dated 29.1.2010, the Commission decided the tariff applicable for the solar power projects commissioned during the control period of two years from the date of the Order i.e. from 29.1.2010 to 28.1.2012.

2.5. The parameters for determination of tariff for the Solar PV Projects and Solar Thermal Projects have been set out in the Order dated 29.1.2010 as under:

“5. Tariff for solar PV and Solar Thermal Power projects

In view of the foregoing discussions, the various parameters considered by the Commission for determination of tariff are given in the table below:

Parameters for determination of tariff

	Parameter (per MW basis)	Solar PV Power Project	Solar Thermal Power Project
Project Cost			
1	Capital cost per MW (Rs lakhs)	1650	1300
2	Debt- Equity ratio	70:30	70:30
3	Interest on loan	10.75%	10.75%
4	Return on Equity	14% p.a.	14% p.a
5	Income-Tax for first 10 years	16.995%	16.995%
6	Income tax from 11 th year onwards	33.99%	33.99%
7	O&M cost (% of the project cost)	0.5% of the capital cost (Rs. 8.25 lakhs) for the first year with escalation of 5% p.a.	1%of the capital cost (Rs. 13 lakhs) for the first year with escalation of 5% p.a.
8	Insurance Charges	0.35% of net asset	0.35% of net asset
9	Net CUF (at 100% grid & m/c availability)	20%	25%
10	Auxiliary consumption	Nil	10%
11	Actual machine availability	100%	100%
12	Actual grid availability	100%	100%
13	Project life (years)	25	25
14	Depreciation	6% for first 10 yrs. And 2% from 11 th year onwards.	6% for first 10 yrs. And 2% from 11 th year onwards.
15	Interest on working capital (i) Receivable of one month (ii) O&M expenses for one month	11.75%	11.75%

2.6. The petitioner GUVNL submitted that the determination of the tariff for Solar PV Project and the Capital Cost of Rs 16.50 Crores per MW, the debt equity ratio of 70:30 and other parameters were decided by the Commission based on certain fundamental premise viz:

- (i) The project cost could not be authentically worked out in the absence of reliable cost data and therefore the fixation of capital

cost at Rs 16.50 Crores per MW was a best judgement assessment at the relevant time. The project developers who had participated in the consultative process had in fact projected a much higher per MW capital cost without evidence in support thereof;

(ii) The project developers had submitted that the project need to be funded with higher infusion of equity capital and therefore the equity ratio should be higher than 30 percent;

(iii) The cash outflow for the project developers, as per the representations made, would be higher in the initial years requiring front loading of tariff and accordingly the levelised tariff of Rs 12.54 Per unit worked out for 25 years was split into two parts, namely, Rs. 15 per unit for the first 12 years, and thereafter tariff of Rs. 5 per unit for the next 13 years.

(iv) The project developers should have a return on equity of 14 percent post tax after meeting the cost and expenses of the project.

2.7. The project cost, the debt equity ratio and the other parameters were decided to enable the project developers to meet the servicing of all cost and expenses of the project and get a return on equity of 14 percent post tax. This was based on the then available perception that the project cost would be legitimately in the region of Rs. 16.50 Crores per MW and there will be equity infusion of not less than 30 percent of the project cost. Further, the Commission has retained the debt equity ratio of 70:30 in determining the

tariff for solar power project for the next control period from 29.01.2012 to 31.03.2015.

2.8. The petitioner, therefore, signed 88 Power Purchase Agreements for 971.5 MW aggregate capacity in two phases (87 PPAs of Solar Photovoltaic having aggregate capacity of 946.5 MW and 1 PPA of Solar Thermal having capacity of 25 MW). Out of the above, 602 MW capacity of Solar PV were established within the control period of the order dated 29.01.2010 i.e. by 28.1.2012 and the 255 MW of the Solar PV capacity was established after 28.1.2012.

2.9. The petitioner submitted that many of the project developers have not invested equity to the extent of 30 percent and rather much less. As per the Tariff Regulations of both the CERC and this Commission, if the equity investment is less than 30 percent, the servicing by return on equity has to be restricted to actual deployment of equity. Accordingly the return of 14 percent post tax need to be allowed for actual deployment of equity or 30 percent of capital cost, whichever is lower and the remaining capital cost need to be serviced as debt on reducing balance. The servicing of equity is therefore to be considered project specific for those projects where the equity deployment is less than 30 percent of the capital cost.

2.10. In the above circumstances, allowing the project cost of Rs. 16.50 Crores/MW as against the actual prudent and reasonable cost of Rs. 12 Crores/MW or thereabout, as established by the actual investment made by many of the developers, results in excessive tariff payment. The project developers are receiving the levelised tariff of Rs 12.54 per unit as against around Rs 9.0 per unit which is the reasonable and prudent tariff. The increased tariff of Rs. 3.54 per unit is a direct burden on the consumers of the State which is an unwanted, unjustified and windfall gain to the project developers.

2.11. In addition to the above, in the case of projects where the deployment of equity is less than 30 percent of the project cost, the return on equity should be restricted to the actual deployment of equity as per the statement in annual accounts. The project developers are not entitled to claim such return on funds deployed through sources other than the equity. The consumers in the state cannot be required to service notional equity and servicing of notional equity, is consistently rejected by all the regulatory commissions.

2.12. The Petitioner has further submitted that the statement of project cost actually deployed also establishes that there is no justification for front loading of tariff in the first 12 years to increase the cash flow of the project developers. The actual repayment of the loan by the project developers of the

debt capital taking into account the depreciation and other benefits clearly shows that the front loading which raises the tariff to Rs 15 per unit is unnecessary. The burden of excessive cash flow is in reality on the distribution licensees rather than a justified requirement of the project developers.

2.13. The petitioner submitted that there is a justified cause for reopening the tariff terms contained in the order dated 29.1.2010 and terms incorporated in the Power Purchase Agreements signed in pursuance of the above order of the Commission in public interest. While the interest of the project developers to the legitimate extent need to be protected and the non-conventional power projects are to be promoted with promotional tariff as they cannot compete with conventional projects, such promotion cannot be extended to result in excessive tariff and windfall gain to the project developers at the cost of public interest.

2.14. The petitioner submitted that the Commission can exercise regulatory powers to intervene in public interest and revise the tariff for purchase of power from solar power projects in the State at a reasonable level balancing the interest of the project developers in preserving their return on equity at 14 percent post tax on the actual equity deployed and at the same time by not

giving windfall or more than required return or servicing of the capital cost incurred beyond the optimum and prudent level. There is also a need to revisit the arrangement in regard to the front loading of tariff for the first 12 years. The exercise of regulatory powers by the Commission is called for to protect public interest.

2.15. The petitioner submitted that the Government of Gujarat formulated the Solar Power Policy for promotion of Solar Power Projects in the State of Gujarat. The Government of Gujarat has been endeavouring to promote Solar Power Projects pro-actively by offering various facilities. The Government of Gujarat is also concerned with the public interest of the consumers getting electricity at a reasonable and economical rate. The payment of unjustified higher tariff for Solar Power Projects by GUVNL and pass through of such tariff to the consumers will seriously affect the consumer interest and accordingly the public interest. The Government of Gujarat is, therefore, an interested party in the above proceedings. The Government of Gujarat has been impleaded as Respondent 5.

3. Many of the respondents have filed reply and contended that the present petition is not maintainable on various grounds as stated below :

- 3.1. The present petition is in gross violation of provisions of the Electricity Act, 2003, GERC (Conduct of Business) Regulations, 2004, various settled principles of Law, Judgments of Hon'ble Supreme Court and Hon'ble Appellate Tribunal for Electricity, principles of Contract Law and Constitution and therefore the same is liable to be dismissed in limine.
- 3.2. The Present Petition is barred by limitation. The Petitioner is indirectly seeking a relief contrary to settled Law. The relief sought through the Petition is in violation of the Doctrine of Legitimate Expectations, Doctrine of Promisory Estoppel. The Petition is also barred by Res Judicata.
- 3.3. The Petition is barred by the order of Hon'ble Appellate Tribunal for Electricity in Appeal No. 75 of 2012.
- 3.4. The present petition is misconceived as the petitioner is seeking to apply principles relating to determination of tariff for distribution company to a Generator. If, the relief sought is granted, then the same would have a tremendous impact on the cash flow of the Respondents.

3.5. Various Regulations framed under the section 61 of the Electricity Act, 2003 are applicable to the project specific tariff only in cases of determination of tariff when the electricity generated from such project is supplied to the Discoms on cost plus basis. In such cases the Discom or Generator has options of projecting a tariff every year and seeking true up subsequently. In the present case, the Commission had applied normative principles and determined a tariff payable for 25 years i.e. the length of solar projects and accordingly PPAs were signed by the Respondents with the Petitioner. The PPAs do not provide for any annual true up. Hence, on this ground also the present petition is not maintainable.

3.6. The Petitioner has been paying invoices of the developers under the PPAs on the basis of the tariff determined through the relevant Tariff Order and incorporated in the PPAs. Therefore, there can be no amendment to the terms of the PPA, including the tariff specified therein pursuant to the Tariff Order without the express consent of all the parties thereto, i.e. including the answering Respondent. In the light of the same, the Petitioner cannot be permitted to reopen issues which have attained finality and subsequent to which the Answering Respondent made investments in the Project.

3.7. The parties have acted upon the PPA and there can be no unilateral amendment to the same. Further, the Petitioner has cleverly used the expression “Revision” in the present Petition for redetermination of tariff, but the same is for all effects, a Petition for Review of the Tariff Order, in the garb of Tariff Determination Petition under section 62 of the Act. In terms of Section 94(1) (f) of the Electricity Act, 2003, GERC has the power only to review and not to revise its own orders.

3.8. In the present case since the Petitioner is aware that a review is not maintainable, not just due to the bar of limitation, but also because of lack of other ingredients required for a review, the Petitioner cannot be allowed to seek a Review in the garb of a section 62 petition.

3.9. The Commission determined the Tariff for Solar PV Generation vide its order dated 29.01.2010 wherein there was no provision for re-opening of tariff based on the actual capital cost. It is submitted that subsequent to the Tariff Order, the Petitioner has entered into a contract with the Answering Respondent wherein no provision for subsequent revision/review of Tariff has been provided.

- 3.10. Since the passing of the Original Tariff Order dated 29.01.2010, almost three and half years have elapsed. Therefore, since the ultimate intent of the petitioner is to seek review of the Tariff Order, the said review is barred by Limitation provided under the Electricity Act, 2003 and the Gujarat Electricity Regulatory Commission (Conduct of Business) Regulations, 2004.
- 3.11. The present Petition is not maintainable as the Petitioner is seeking a relief against a Tariff Determination Process which has not been challenged and has therefore, attained finality. Furthermore, the Petitioner has acted upon the relevant Tariff Order and hence, cannot now seek to resile from the same.
- 3.12. In the case of PTC us. CERC (2010) 4 SCC 603, Hon'ble Supreme Court has specifically held that an existing contract can be overridden only through a Regulation and the same cannot be effected through an Order of the nature that the Petitioner is seeking through the present Petition.
- 3.13. In the present case there is no such Regulation notified by the Hon'ble Commission which provides for subsequent revision of Tariff for existing Solar Projects. Therefore, in view of the Hon'ble Supreme Court's Judgment in the PTC

Case, the relief being sought by the Petitioner cannot be granted through an Order.

- 3.14. The Hon'ble Tribunal in its judgment in Appeal No. 75/2012 has categorically held that the normative Tariff determined by the Commission in its original Tariff Order will be binding on the Solar Power Developers and they cannot seek project wise Tariff determination.
- 3.15. The Hon'ble Appellate Tribunal for Electricity in Appeal No. 29 of 2011 in case of Tarini Infrastructure Limited V/S. GUVNL and others, categorically held that PPAs can only be reopened to incentivise generation and not to the detriment of the Generators.
- 3.16. The relief sought by the Petitioner in the present case is in direct violation of the Doctrine of Legitimate Expectation. The Supreme Court has, in a catena of Judgments, held that if two parties have acted on the basis of a Government Policy, and one of the parties tries to alter its position, the affected party has the legitimate right to seek enforcement of the said policy. Keeping in view the representation of the Government of Gujarat in its Solar Power Policy, Order No. 2 of 2010 dated 29.1.2010 was issued and PPAs were signed. In these PPAs the

Tariff agreed by the Petitioner was as determined by the Commission based on the normative Parameters. Therefore, the Petitioner in the present Petition, contrary to its previous representation, seeking the project-wise Tariff determination, which is not permissible because the project developers have set up the projects based on the agreed tariff which is based on normative Parameter adopted by the Commission.

3.17. The Petition is not maintainable and is barred by Promissory Estoppels. The Petitioner has agreed in the PPA that he will pay the tariff determined by the Commission on normative basis in order No. 2 of 2010 dated 29.1.2010. The Petitioner has neither at the stage of project development nor prior to or after signing of the PPA that informed or represented to the Respondents that the Petitioner would seek project specific tariff determination by the Commission in lieu of the generic tariff determined under the original Tariff Order. Based on the above representation, the Respondents have set up their plant. Hence, the petitioner is barred by the principle of Promissory Estoppels to unilaterally alter its position which is detrimental to the Respondents.

3.18. If the relief sought by the Petitioner is granted, it will significantly affect the cash flow of the Respondents.

- 3.19. The Commission had in its order dated 29.1.2010 categorically held that the power project developers setting up new Solar PV Plant during the control period defined in the order are entitled to single-part levelised tariff determined by the Commission. From the order of the Commission, it is clear that the Commission had passed the order with consideration of normative principles. Hence, the Tariff based on a project specific data on cost plus basis is not permissible.
- 3.20. The present petition is barred by the principle of Res Judicata in terms of Section 11 of the Civil Procedure Code, 1908.
- 3.21. Some of the Project Developers submitted that no details regarding discrepancy of capital cost, equity etc. as compared to those considered by the Commission have been provided in the petition by the Petitioner. Thus, the Petitioner has not made out any case against them. Hence, the Commission may either drop the proceedings against them or dismiss the petition on this ground also as there is no evidence on record against the Respondents.
4. The matter was heard by the Commission on 23rd July, 2013 and 5th August, 2013.

- 4.1. Learned Advocate Shri M.G.Ramchandran on behalf of the Petitioner reiterated the facts as stated in para 2 above. He further submitted that the present Petition is filed by the Petitioner to invoke the Regulatory power of the Commission and to decide the matter in the interest of justice.
- 4.2. The Commission is considering the maintainability of the Petition filed by the Petitioner viz. whether the Petition should be admitted under the Regulatory jurisdiction of the Commission to consider the matters set out and relief sought by the Petitioner. The Commission is not dealing with the merit of the case, namely, whether the relief sought for should be granted to the Petitioner in the facts and circumstances of the case and the matter pleaded by the Petitioner.
- 4.3. The issue of maintainability at the stage of the admission is to be addressed based on averments made in the petition and whether the Respondent has pointed out something which is beyond the jurisdiction of the Commission to entertain the Petition and grant the relief. The maintainability of the petition should not be mixed up with the merits of the case namely whether the relief should be or should not be granted.
- 4.4. The consideration of the issues whether the relief should or should not be granted will arise at the stage of the final decision based on the material placed by all the interested parties.

- 4.5. The maintainability of the petition can be challenged at the initial stage of the admission of the petition only on something fundamental to the petition such as the Commission has no jurisdiction to entertain the petition, the claim made is ex facie time barred, the petitioner has no locus stand, the petitioner cannot be said to be aggrieved party i.e. affected by the subject matter and similar such plea which go to the root of entertaining the petition itself at the time of admission and more particularly in the case of original petition.
- 4.6. He further submitted that it is not open to the Respondents to say that petition should not be entertained or admitted on the ground that ultimately the petition is liable to be rejected or that there is no equity in favour of the petitioner.
- 4.7. He further submitted, to illustrate his contention through examples, that the Commission may not entertain a petition of a billing dispute as such disputes fall within the jurisdiction of Consumer Grievance Redressal Forum constituted under Section 42 (5) of the Electricity Act, 2003. And thereafter the same can appealed before the Electricity Ombudsmen. Similarly, an appeal from an assessment order made by a distribution Licensee in terms of section 126 of the Electricity Act, 2003 is appealable to the appellate authority constituted under Section 127 of the Electricity Act, 2003 and it cannot be challenged before the Commission.

4.8. In support of the above arguments he relied upon the following judgments.

1. Shah Babilal Khimji v/s Jayaben D. Kania and Anr. (1981) 4 SCC 8 at Para 113 page 55.
2. Ramesh B. Desai v/s Bipin Vadilal Mehta AIR, 2006 SC.3672.

4.9. On the issue of maintainability, the plea raised by the Respondents are not that the Commission does not have jurisdiction to entertain the petition but in the fact and circumstances of the case the jurisdiction cannot be exercised. There is no plea advanced by the Respondents on which ground the petition is to be rejected at this stage.

4.10. The Commission exercises Regulatory power relating to electricity and anything which is related to electricity and is between a generating Company and the petitioner representing the distribution companies is within the jurisdiction of the Commission unless it is specifically excluded.

4.11. The Respondents have raised the issue with regard to the fact that the Power Purchase Agreement having been signed between the petitioner and the Solar Power Developers in pursuance of order No. 2 of 2010 dated 29.1.2010, there should not be any change of the terms and conditions decided in the said PPAs as the Solar Power Developers have established the projects relying on The terms

and conditions offered and thus have altered their position. The above plea is not on maintainability of the petition but on merits of the content that in the facts and circumstances prevailing, this Commission should not exercise the power to change the tariff terms and conditions agreed to between the parties particularly on grounds of promissory Estoppels. This relate to exercise of jurisdiction of the Commission on merits.

4.12. The other plea raised by the Respondents on the maintainability of the petition relates to the Petitioner having not given particulars establishing the cause of actions. In this regard, he referred to para 12 to 19 of the Petition and submitted that the foundation or the cause of action for initiation of the proceedings by the Commission has been given in it. The petitioner has pointed out that as against the capital cost of Rs. 16.50 Crores per MW considered by the Commission, the actual capital expenditure incurred in many of the projects is Rs. 11 to 13 Crores per MW. There is, therefore, foundation that many of the projects have been established during the control period with considerable low capital expenditure i.e. about 75% of the capital expenditure considered by the Commission as the basis for deciding.

4.13. The petitioner has pointed out that as against the debt-equity ratio of 70:30 based on which the Commission had determined the tariff in the order no. 2 of

2010 dated 29.1.2010, the actual equity invested by some of the respondents is much less. As per the tariff regulations of the Commission, the servicing of the equity should be only to the extent of actual amount of equity invested and not to the extent of the normative 30 %. There is, therefore, a clear foundation to re-visit the tariff terms and conditions in regard to order no. 2 of 2010 dated 29.1.2010 in which the Commission has in its ruling decided the debt-equity ratio, in terms of tariff policy and terms & conditions of Tariff Regulations, 2005 notified by the Commission, at 70:30. Similarly, for capital cost the Commission has in the said order decided to adopt Rs. 16.50 Crores per MW as capital cost for Solar Photovoltaic Power Project and Rs. 13 Crores per MW for Solar Thermal Power Project.

4.14. The Petitioner has given a list of 10 projects where the total project cost vary between Rs. 11 to Rs. 13 Crores per MW and specific averment has been made in para 13 by the petitioner in the petition.

4.15. Based on the above facts, the petitioner has requested the Commission for revisiting the tariff for the Solar Power Project. The cause of action is stated in the petition. The petitioner is seeking the initiation of the proceedings to consider the implication of the actual and prudent capital expenditure incurred by the Solar Power Developers at only 75% of capital cost of Rs. 16.50 Crores per

MW considered by the Commission; and further the actual equity deployed by the Project Developers being much less than 30%.

4.16. It is not a case of the petitioner seeking to reduce the tariff for the Solar Power Producers Projects and to give them less than what is legitimately due and expected in the case of regulated entities.

4.17. The Solar Power Developers cannot be allowed to seek servicing of the capital cost not actually and reasonably deployed by them. Every Tariff Regulation notified by the Commission, where the tariff is determined based on the capital cost and not based on the competitive bidding under Section 63 of the Electricity Act, 2003, provides for the actual capital expenditure being serviced and not any estimated capital expenditure. The Regulations framed by the Commission also provide for the actual capital expenditure to be serviced through tariff, or otherwise there will be unintended windfall profit to the Project Developers. This cannot be approved in a regulatory set up.

4.18. Section 86 (1) (e) of the Electricity Act, 2003 provides for promotion of electricity generation from non-conventional energy sources. The said section does not provide that the non conventional energy projects should be given tariff for servicing the notional capital expenditure as per the normative principles. The contentions raised during the hearing that in the case of the non-conventional

energy source based projects, the Commission should not go into the question of actual capital expenditure is wrong. The Tariff policy referred to by the Respondents clearly provides for the scope and limitation of promotional tariff or concessional tariff allowed to the non-conventional energy project. The basis is that non conventional project cannot compete with the conventional project for some time. In order to enable the non-conventional project to enter into an appropriate power purchase agreement, the tariff should be compensatory enough and should not be compared with the conventional projects.

4.19. Based on the above, he submitted that non- conventional energy projects should get a remunerative tariff commensurate with the capital expenditure incurred by them and should not be compared with the conventional project. It does not say that non-conventional projects should be allowed an excessive tariff as in the present case, for servicing the capital cost 25% more than the cost actually incurred by them. The contentions raised by the Respondents are contrary to the scheme of the Regulatory Tariff under the Electricity Act, 2003.

4.20. The provision of 70:30 as Debt-Equity Ratio has been incorporated to provide a ceiling on the equity to be serviced in excess of 30% with a clear stipulation that if the actual equity is less than 30% only the actual equity shall be entitled to

return on equity of the specified percentage. The remaining amount should be treated as Debt only.

4.21. The order dated 29.01.2010 passed by the Commission is not for adoption of tariff under Section 63 of the Electricity Act, 2003 in pursuance to a tariff based Competitive Bidding process. In a tariff based Competitive Bidding Process, the individual elements of tariff are not relevant. In that case, there is no independent examination of Debt: equity ratio or capital cost etc. However, in any tariff determination process based on the capital cost, the actual capital expenditure incurred and the actual debt equity deployment are most relevant.

4.22. Plea of the respondents that the capital expenditure approved by the Commission at Rs. 16.50 Crores per MW and the Debt- Equity Ratio as 70:30 are normative and ought not to be inferred is wrong. At the time when the Commission determined the applicable capital expenditure to be Rs. 16.50 crores per MW, the actual capital expenditure which might be incurred was not known. It was an estimate or an assumption, and based primarily on the representation given by the various Solar Power Developers. The reference to the Central Commission's Order determining the capital expenditure was also an estimated cost only, as the Central Commission had again based its estimate on the representation given by the Solar Power Developers.

- 4.23. The actual capital expenditure was not known, when order No. 2 of 2010 dated 29.01.2010 was passed. The Commission proceeded on the plea that the actual capital expenditure would be in the region of Rs. 16.50 crores per MW. In the circumstances, there is a case for re-visiting the tariff to consider the actual capital expenditure as the basis.
- 4.24. The order of the Commission dated 29.01.2010 clearly provides that the Debt Equity Ratio was taken as 70:30. The Commission had referred to the Tariff Regulations, 2005 providing for the Debt-Equity ratio of 70:30. The Regulations also stipulate that in case the actual equity is less than 30%, the actual debt and equity shall be considered for tariff determination. It is not open to the Respondents to plead that while the normative 70:30 would apply, the other essential consequences of actual equity being less would not be given effect to.
- 4.25. The only issue which arise for consideration of the Commission at this stage is whether the Commission can interfere with the Power Purchase Agreement signed in pursuance of the Order dated 29.1.2010 in exercise of its powers and consider the actual capital expenditure and actual Debt-Equity Ratio. As a consequence of the above, the other issue is whether the Commission can re-design the tariff i.e. levelised instead of front loaded.

4.26. It is now well settled by various decisions of the Hon'ble Supreme Court of India and Hon'ble APTEL that in exercise of its regulatory jurisdiction, the Commission can, in public interest, interfere with the concluded Power Purchase Agreement and even vary its orders. The petitioner referred to a number of such authorities. The relevant extracts from the authorities has been filed.

4.27. It is submitted that if the orders passed by the Commission and the concluded Power Purchase Agreements can be re-visited to enable the increase in the tariff to the Project Developers, then all the more reasons exist for re-visiting the tariff if the Project Developers making excessive and windfall profit unintended at the time of the passing of the Order dated 29.01.2010. The order dated 29.01.2010 was on the basis of the estimated capital expenditure of Rs. 16.50 Crores per MW, whereas the actual expenditure is in the region of Rs. 11 to Rs. 13 crores per MW. The order dated 29.01.2010 determines the tariff applicable on the basis of Debt Equity ratio of 70:30 whereas the actual Debt Equity Ratio is with much less equity deployment. It is, therefore, in the public interest for the Commission to initiate proceeding to consider the various implications.

4.28. In the case of PTC India Limited V/s. CERC Hon'ble Appellate Tribunal's power to entertain the appeal on the aspect of trading margin regulations, the Hon'ble Supreme Court was considering the difference between the appealable order

and regulations. The observation made is in the context of the above. The observation cannot be taken to mean that in exercise of regulatory power the Commission cannot revisit the tariff determined as was held in a number of other decisions. In the PTC India Case the Hon'ble Supreme Court referred in paras 68 and 69 to the decision in the case of City Biard Mussorie v. UPSEB ((1985) 2 SCC 16 wherein it was held that even in the absence of regulations the regulatory authority can decide on tariff. In any event after the hearing the Commission can also specify the regulation, if the same is considered necessary. This aspect is an implementation issue, which would arise after the initiation of the proceedings.

4.29. The Petitioner is not seeking intervention of the Commission to review the order No.2 of 2010 dated 29.1.2010. The Petitioner has not submitted that there is an error on face of record or there is new material available to the Petitioner which was not available with him when earlier order was passed by the Commission for determination of the Tariff.

4.30. The Petitioner wants revision of the Tariff agreed in the PPA between Petitioner and the Respondents by way of redetermination of the Tariff with consideration of the relevant facts of individual cases of the Respondents.

4.31. The Hon'ble Supreme Court and Hon'ble APTEL have in a numbers of Judgments decided that the Regulatory powers provided to the Regulatory authorities have wider than that of the adjudicatory power. In the present case the petitioner has requested to the Commission to reconsider and re-determine the tariff of Solar Power Projects set up by the Respondents because they have incurred less cost and deployed less equity than approved by the Commission and they are obtaining huge profit than normatively decided by the Commission. Therefore, in the interest of the consumer as well as public at large, it is necessary to re-determine the tariff of Solar Power Projects based on the actual cost incurred by them as well as equity deployed by them and with consideration of other financial and technical parameters of the project.

4.32. In support of his arguments as stated above, he referred to the following judgments of Hon'ble Supreme Court of India and APTEL.

1. V.S.Rice and Oil Mills V. State of A.P. (1964) 7 SCR 456.
2. PTC India Ltd. V. Central Electricity Regulatory Commission (2010) 4 SCC 603.
3. Cellular Operators Assn. of India V. Union of India (2003) 3 SCC 186.

4. Tata Power Company Limited V. Reliance Energy Company Ltd. (2009) 16 SCC 659.
5. Tarini Infrastructure V. Gujarat Urja Vikas Nigam Limited (2012) Indian Law APTEL 158).
6. Techman Infra Ltd. V. Himachal Pradesh Electricity Regulatory Commission & Ors (Judgment dated 18.09.2009 in Appeal No. 50 of 2008.
7. Uttar Haryana Bijili Vitran Nigam Ltd. V. Haryana Electricity Regulatory Commission & Ors. 2012 ELR (APTEL) 1085.
8. Konark Power Projects Limited, Karnataka V. Bangalore Electric Supply Company Limited, Bangalore & Anr. 2012 ELR (APTEL) 0429).
9. M/s. Sunstar Overseas Limited, New Delhi V. Kerala State Electricity & Anr. Board (Decision dated 7.8.2008 in DP No. 69 of 2008).
10. Uttar Pradesh Power Corporation Limited V. National Thermal Power Corporation Limited and others (2009) 6 SCC 235.
11. Cellular Operators Assn. of India V. Union of India (2003) 3 SCC 186:
12. V.S.Rice and Oil Mills V. State of A.P. (1964) 7 SCR 456
13. Deepak DTheatre V. State of Punjab 1992 Supp (1`) SCC 684.
14. State of U.P. V. Maharaja Dharamander Prasad Singh, (1989) 2 SCC 505
15. Hotel & Restaurant Assn. V. Star India (P) Ltd. (2006) 13 SCC 753.
16. K.Ramanathan V. State of Tamil Nadu (1985) 2 SCC 116.

- 4.33. Based on the above contentions, he submitted that there are sufficient reasons to admit the petition and thereafter decide the matter on merit.
5. In response to the submission made by the petitioner, the Learned Advocates appearing on behalf of the Respondents have contended that the present petition is not maintainable on various grounds as stated in para 3 above. The contentions advanced by the Learned Advocates for the Respondents are stated below:
- 5.1 The present proceedings are adjudicatory in nature and not in the Regulatory jurisdiction since the Commission has neither been called upon to determine a generic tariff under section 86 of the Electricity Act, 2003 nor is it determining project specific Tariff under Section 62 of the Electricity, 2003 at the behest of any of the Respondent Solar Developers. In the present proceedings, the Commission is required to decide as to whether the Solar Tariff Order No.2 of 2010 dated 29.1.2010 as framed by the Commission should be reviewed /re-visited and the tariff re-determined on the basis of the material presented by the Petitioner.
- 5.2 Neither the Electricity Act, 2003 nor GERC (Conduct of Business) Regulations 2004 provide for revision of and /or re determination of Solar Tariff Order.

- 5.3 Regulations 72(3) of the GERC (Conduct of Business) Regulations, 2004 provide for review of an order within prescribed period of 60 days from the date of such order . In the present case, the petitioner has filed a petition with delay of more than 3 years without any condonation of delay application and is thus not maintainable and hence is liable to dismiss.
- 5.4 The Petitioner having failed to either prefer an appeal or review within remedial jurisdiction under the Electricity Act, 2003 cannot be permitted to reopen/re-agitate/revisit issues which have attained finality. Right to review is not right to appeal where questions decided are open to challenge. Review is possible on limited ground, mentioned in order 47 of the Civil Procedure Code, 1908.
- 5.5 Section 86 of the Electricity Act, 2003 spells out functions of the Commission. Section 86 (1) (a) provides for determination of tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk and retail, as the case may be, where section 86 (1) (b) provides for regulation of electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from generating companies or licensee or from other sources through Agreements for purchase of power.
- 5.6 The Government of Gujarat vide its notification dated 6.1.2009 notified the Solar Policy, 2009 aimed to promote Solar energy based generation within the State of

Gujarat and also to assure the Project Developers to facilitate and assist in setting up the Power Plant and provide promotional incentives/benefit to the Project Developer. The said policy also provided the Tariff to be paid to the Project Developers. The Commission passed an order No. 2 of 2010 dated 29.1.2010 under Section 61(h), 62(1)(a) and 86 (1)(e) of the Electricity Act, 2003 and it did not exercise the jurisdiction under section 61(d) or section 86(1)(b). Based on the order of the Commission, the Government of Gujarat made amendment to the Solar Power Policy and issued Notification dated 22nd June 2010 accepting the tariff order of GERC and amended the relevant provision of the Solar Power Policy. Based on the assurance given in the Solar Power Policy of the Government of Gujarat and Tariff rates determined by the Commission, the Respondents entered into the Power Purchase Agreement with the Petitioner. In some of the cases, the Respondents have also signed supplemental PPA with the Petitioner.

5.7 The Electricity Act, 2003 contains separate provisions for the performance of dual functions by the Commission. i.e. the determination of terms and conditions of tariff has been left to the domain of the Commission under Section 61 of the Electricity Act, 2003 whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. 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 Electricity Act, 2003 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.

5.8 Section 61 to 64 of the Electricity Act, 2003 place an obligation on the Commission to determine the tariff in accordance with the provisions of the Act. Therefore, when the Commission determines a generic tariff under section 86 of the Electricity Act, 2003, it is also empowered to determine actual tariff on project specific basis under section 62 of the Electricity Act, 2003 but only as provided by the Electricity Act, 2003, and thus the same can only be done if the generating company approaches the Commission with an application under section 64 and none else.

5.9 Neither the Electricity Act, 2003 nor any Regulations framed thereunder provide for re determination or revision of the Solar Tariff Order once determined under Section 61 (h), 62 and 86 of the Electricity Act, 2003 read with Section 61 & 62 of Electricity Act, 2003. The Solar Tariff Order No.2 of 2010 dated 29.1.2010 cannot be revisited under the existing scheme of Electricity Act,2003 without undergoing a legislative amendment.

- 5.10 Neither the Electricity Act, 2003 nor The GERC (Conduct of Business) Regulations, 2004 provide for revision of the tariff in the PPAs. In the absence of a specific Regulation to that effect, inroads cannot be made into executed contracts.
- 5.11 Once the Commission has determined the tariff under Section 62 read with 86(1) (e), the same can be modified either by review under Section 94 or by Appeal made under Section 111 of the Electricity Act, 2003.
- 5.12 The Power Purchase Agreement between two parties cannot be reopened unless there are specific Regulations to that effect framed by the Commission. Moreover, power Purchase Agreement can be reopened only for the purpose of giving thrust to non-conventional Energy Project and not for curtailing their incentives.
- 5.13 The Solar Tariff Order 1 of 2010 provides for redetermination of Tariff only when the Project Developer seeks Project Specific Tariff for not availing the Accelerated Depreciation as provided under the Income Tax Act, 1961
- 5.14 The Commission was cognizant of all the parameters for tariff determination in the year 2010 as well as in the year 2012; and the provisions regarding Reduction of Tariff on year to year basis, specifically mentioned in the Solar Tariff Order, 2012 dated 27.1.2012, was consciously left out in the Solar Tariff Order No. 2 of 2010 dated 29.1.2010.

- 5.15 The Commission while passing the generic tariff order No.2 of 2010 dated 29.1.2010 decided normative parameters based on data available during the relevant time and the same cannot be disturbed at this stage.
- 5.16 The Respondents have set up the Solar Power Plant based on the promise/representation of the Petitioner that he agreed to pay the Tariff determined by the Commission and, any variance in the Tariff agreed between the parties is not permissible. Now, the Petitioner is estopped from his action based on which the Respondents have set up their Solar Power Plant. The principle of promissory estoppels is attracted in this case.
- 5.17 The Commission had issued a discussion paper on 1.11.2009 and invited comments & suggestions from the stakeholders. The Commission had also carried out public hearing on the said discussion paper and after considering the comments & suggestions of the stake holders, the Commission passed Order No. 2 of 2010 dated 29.1.2010. In the Tariff Order the Commission had considered the various normative parameters like :
- I. Capital cost Rs. 16.5 Crores.
 - II. Debt Equity Ratio 70:30.
 - III. Interest on Loan : 10.75% Per Annum.
 - IV. Depreciation @ 7% for initial 10 Years and remaining will be spread out on the project life.
 - V. Return on Equity 14% + Income Tax payable.
 - VI. Interest on working capital 11.5%.

5.18 Based on the aforesaid parameters, the Commission had determined the tariff, which is accepted in the PPA by the parties and also acted upon for more than two years. Thereafter the petitioner has now approached the Commission by the way of the present petition, which suffers from the delay, latches and also against the principles laid down in National Electricity Policy as well as Tariff Policy and the provision of Electricity Act, 2003 which state for promotion of renewable energy base generation. Hence on this ground also the present petition is not maintainable.

5.19 The Hon'ble Appellate Tribunal has in its Judgment In the Appeal No 75 of 2012 filed against the Petitioner laid down various principles and clarified the position of PPA and sanctity of the Commission's tariff order. The declared Law laid down by the Hon'ble Tribunal is as follows.

- i. The normative Tariff determined by the Commission in its Tariff order will be binding on all Solar Project Developers and Projects specific determination will not be permitted for Solar Developer developing their project pursuant to original Tariff Order.
- ii. Once the Commission adopts normative principle of tariff determination for promotion of Solar Energy and passed a tariff order which remains

unchallenged, the same attains finality and cannot be subjected to redetermination specially in view of the fact that there was no stipulation either under the PPA or under the Tariff Order for any subsequent revision of tariff and the parties including the petitioner acted upon the PPA.

- iii. That the PPA's can only be reopened to incentivize generation and not detrimental to the Generators.

5.20 The Petitioner's reliance on the Judgment in case of UPPCL V. NTPC Ltd and others is not applicable because para 40 of the said Judgment states that the CERC's powers to make additions and alterations can be exercised either when an application is filed by the generating company or by the Commission on its own motion.

5.21 The tariff policy provides that once the normative Parameters is decided for Tariff Determination, it is not permissible to true up the tariff decided by the Commission on an annual basis.

5.22 The Tariff Regulations notified by the Commission are not applicable in the present case. Hence, the true up desired by the Petitioner based on the actual cost, equity deployed, loan obtained etc. is not permissible.

- 5.23 The order No. 2 of 2010 dated 29.1.2010 has attained finality. Hence, the same cannot be altered by the Commission. The Commission has no jurisdiction to alter the same.
- 5.24 The Petitioner and the Respondents entered into Power Purchase Agreements and the same can be amended only if the same is permissible under the Regulations framed by the Commission. In the present case, there is no stipulation either in regulations or PPAs executed between the parties. Hence, the amendment in the PPA is not permissible.
- 5.25 The Petitioner has raised the issue of larger public interest in the present petition for reopening / redetermination of the tariff. However, the same is not permissible as the tariff agreed between the parties is based on the tariff determined by the Commission after due process of law.
- 5.26 The Petitioner desires to the reopen the PPA and redetermination of tariff based on indirect Regulation which is by way of advance plea of public interest is not permissible.
- 5.27 The Respondents relied upon the following judgments in support of their above arguments.
- i. K.Ajit Babu and Ors. Versus Union of Indian and Others; 1997 (6) SCC 473.

- ii. PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603.
- iii. Southern Petrochemicals Industries Co. Ltd. v. Electricity Inspector and ETIO and Ors. AIR 2007 SC 1984
- iv. Kusuman Hotels (P) Ltd. v. Kerala Seb. 2008) 13 SCC 213
- v. M/s. Pawan Alloys and Casting Pvt. Ltd. Meerut Vs. U.P. State Electricity Regulatory Board and others, (1997) 7 SCC 251
- vi. V.S. Rice and Oil Mills v. State of A.P.; (1964) 7 SCR 456
- vii. PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603
- viii. Cellular Operators Association of India and Ors. Vs. Union of India (UOI) and Ors; (2003) 3 SCC 186
- ix. Tata Power Company Ltd. vs. Reliance Energy Limited and Ors. (2009) 6 SCC 659
- x. M/s. Sunstar Overseas Ltd., New Delhi v/s. Kerala State Electricity Board, D.P.No. 69 of 2008
- xi. U.P.Power Corporation Ltd. Vs. National Thermal Corporation Ltd. and Ors; (2009) 6 SCC 235
- xii. Deepak Theatre V/s. State of Punjab and others; 1992 Supp (1) SCC684
- xiii. State of U.P. v. Maharaja Dharmendar Prasad Singh; (1989) 2 SCC 505
- xiv. Hotel & Restaurant Assn. V. Star India (P) Ltd.; (2006) 13 SCC 753
- xv. K Ramanathan v. State of Tamil Nadu; (1985) 2 SCC 11.
- xvi. Indian Aluminum Co. v. Kerala State Electricity Board – (1975) 2 SCC 414
- xvii. Union of India v. Wing Commander R.R. Hingorani [(1987) 1 SCC 551]
- xviii. Satyadhan Ghosal v. Smt. Deorajin Debi

- xix. Order passed by the Hon'ble APTEL in Appeal No 78 of 2011, Uttar Haryana Bijli Vitran Nigam Ltd Versus Haryana Electricity Regulatory Commission & Ors.
- xx. Order passed by the Hon'ble APTEL in Appeal No. 35 of 2011, Konark Power Projects Ltd. Village Ballarpur, Bugudanahalli District Tumkur Karnanataka V/s. Baglore Electric Supply Company Ltd., K.R.Circle, Bangalore,
- xxi. Order passed by the Hon'ble APTEL in Appeal No. 50 OF 2008, Techman Infra Ltd. vs. Himachal Pradesh Electricity Regulatory Commission, Appeal No. 50 of 2008
- xxii. Order passed by the Hon'ble APTEL in Appeal No. 29 of 2011, Tarini Infrastructure v. Gujarat Urja Vikas Nigam Limited
- xxiii. Hon'ble APTEL order in Appeal No. 111 of 2012, Gujarat Urja Vikas Nigam Limited Versus Gujarat Electricity Regulatory Commission & Ors.

6. The Commission considered the submissions made by the parties. The Respondents raised the preliminary issue that the present petition is not maintainable and the same be rejected. The Respondents have also raised the issue that the Commission has no jurisdiction to entertain the present petition. We, therefore, proceed to decide the above issues.

6.1 The present petition has been filed by the Petitioner for re-determination of the tariff of the Solar Power Project. The Respondents have signed the Power Purchase Agreement with the Petitioner and also agreed to supply the electricity

generated from their project at the tariff rate determined by the Commission. The Petitioner seeks re-determination of tariff as project specific tariff of the Respondents' projects. The main ground for the re-determination advanced by the Petitioner is that the Project Developers have incurred project costs much less than Rs. 16.50 Crores per MW considered by the Commission in its order No. 2 of 2010 dated 29.1.2010. Moreover, the Project Developers have deployed equity less than 30% but enjoying the return of equity of 14% on the 30% of normative capital cost of Rs. 16.50 Crores, which is a burden on the consumers of the State. The same is objected to by the Respondents stating that the contentions of the petitioner are not valid and the present petition is in the form of a review petition which is not permissible.

6.2 It is an admitted fact that the Government of Gujarat issued the Solar Power Policy, 2009 dated 6.1.2009 with a view to promoting Solar Energy Based Generation in the State of Gujarat. The said policy also envisages that the State Government provide some incentives to the Project Developers. Moreover, the State Government specified Tariffs in the said policy which would be payable to the Solar Power Project Developers. The said policy also provides that the Commission will determine the tariff payable to the Solar Power Projects developers whenever the same is supplied to the Distribution Licensee. The said

policy provides that in case of inconsistency between the tariff determine by the Commission and The tariff stated in the policy, the tariff determined by the Commission shall prevail. Thus, the tariff determined by the Commission is payable by the Distribution Licensees whenever they purchase the electricity from the Solar Power Project Developers as per the provision of the policy. The same is also in consonance with the provisions of the Electricity Act, 2003.

- 6.3 The Commission issued a draft order No 3 of 2009 and invited comments and suggestions on the said discussion paper from the public at large. After receipt of objections/suggestions from the Stakeholders and public hearing, the Commission determined the tariff vide order No 2 of 2010 dated 29.1.2010 payable by the Distribution Licensee for purchase of the electricity from the Solar PV Power Project or Solar Thermal Power Project.
- 6.4 On the basis of the above tariff, the Petitioner and the Respondents executed Power Purchase Agreements and in terms of Article 5.2 of PPA, agreed to purchase/sale the electricity generated from the Solar Power Projects of the Respondents at the tariff rate determined by the Commission. Article 5.2 of the PPA also provides that if the Solar Power Project is not commissioned during the control period of Order No.2 of 2010 dated 29.1.2010, tariff determined by the

Commission for the subsequent control period is required to be considered and the tariff whichever is lower between tariff agreed between the parties in the PPA and the tariff determined by the Commission for the new control period will be payable by the Petitioner to the Respondents.

6.5 The order No. 2 of 29.1.2010 was passed by the Commission under Section 61(h), 62(1)(a) and 86 (1) (e) of the Electricity Act, 2003. In the said order the Commission had in para 7.2 of the said order decided the control period of the said order as 2 years from the date of issuance of the order which reads as under:

“ 7.2 Control period

The Commission had proposed a control period for this order as the period from the date of final order of the Commission to 31.12.2011.

Suggestions of the Objectors

M/s Essar Power Ltd. has suggested that the control period should be kept 18 to 24 months for erection and commissioning of the plant to avoid any uncertainty for developer on the tariff after completion of the control period. It is suggested that the control period could be extended till March 2014. M/s Abengoa has suggested the control period be extended upto 31.12.2012.

Commission's Ruling

It has been observed that the capital cost of the solar power project might reduce drastically as time elapses. However, since the gestation period for Solar PV projects is about 6 months and that for Solar Thermal Projects is 18-24 months, the Commission decides that the control period for this order will be 2 years.”

From the above it is clear that the tariff decided in the said order would be applicable to the project commissioned during the two years i.e. from 29.1.2010 to 28.1.2012. There is no provision made in the said order that the said order will be reviewed if there is deviation in any of the normative Parameters considered by the Commission. Moreover, the said order is passed under Section 61 (h), 62 and 86 (1) (e) of the Electricity Act, 2003. Hence, the question emerges as to whether the re-determination of tariff sought by the petitioner in the present petition is permissible in Law or not. Further, any change in the said order is permissible either through a review of the order or an appeal filed against the same and any judgment pronounced on it.

- 6.6 We note that the tariff determined under Order No. 2 of 2010 dated 29.1.2010 passed by the Commission can be altered only if it is challenged under Section 94 (1) (f) of the Electricity Act, 2003 read with Order 47, Rule 1 of the Civil Procedure Code, 1908, and Regulation 72 of the GERC (Conduct of the Business)

Regulations, 2004 notified by the Commission, or an appeal filed under Section 111 of the Electricity Act, 2003 before the Hon'ble Appellate Tribunal for Electricity. The Petitioner has filed a petition for re-determination of tariff for the Solar Power Projects with a plea that the Solar Power Project Developers have incurred costs lower than the those considered by the Commission. Moreover, they have also invested equity less than 30% decided in the tariff order by the Commission. As the Petitioner has filed a petition for re-determination of tariff before the Commission on the above ground, it falls in the category of review petition. Hence, it is necessary for the petitioner to show the fulfillment of the ingredients provided for a review petition. In the present case, the Petition is filed by the Petitioner after more than 3 years. As per Regulation 72 of the GERC (Conduct of Business) Regulations, 2004 notified by the Commission, a petition for review of an Order/ Judgement is permissible within 60 days. For any delay in filing a review petition the same is required to be filed with delay condonation application. In such a case, the Commission has to first decide the issue regarding condonation of delay. The petition can be heard on merits, only if the Commission decides to condone the delay. In the present case, the petitioner has not filed any condonation of delay application. Hence, there is no question of condonation of delay. On this ground, the present petition is not maintainable.

6.7 We also note that the Petitioner has contended that some of the Project Developers have incurred capital cost within range of Rs. 11 to 13 Crores per MW, while the Commission has considered the capital cost of Rs. 16.50 Crores per MW. Similarly, the Commission has considered the debt-equity ratio as 70:30. However, some of the Project Developers have deployed equity less than 30%. Hence, they are entitled to the return on equity only on the equity deployed by them and not the notional 30% of equity of Rs. 16.50 Crores per MW considered by the Commission. The aforesaid arguments of the Petitioner are not valid and maintainable in the present Petition before the Commission, as the above ground for re-determination of the tariff is a ground for appeal. It is well settled principle of review of an order is that an erroneous decision is not reviewable but it can be appealable. The above grounds imply that the Commission had erred in its decision on capital cost as well as equity on which return on equity is payable to the Solar Power Project Developers. Hence, it is of the nature of an error in the decision of the Commission, which is a ground for appeal before the Hon'ble Appellate Tribunal for electricity. On this ground also the present petition is not maintainable.

6.8 The Petitioner has contended that the present petition is filed under the Regulatory Power of the Commission to regulate the tariff decided by the

Commission. In this regard, we note that the regulatory powers in respect of power procurement by the distribution licensees have been vested with the State Commission under section 86(1) (b), whereas the power for determination of tariff are under section 86(1) (a). Further, the Commission has issued the order No 2 of 2010 dated 29.1.2010 in exercise of its power under section 86 (1) (a). The SERCs are empowered to carry out various functions like statutory function of tariff determination, functions to frame regulations, which is a sub-legislative function, adjudicatory function to adjudicate the dispute between the licensees and generating companies etc. When the SERC carries out one function under the relevant provision of the Act, it should not utilize the power provided in it for other functions .Hence, when the Commission carries out the statutory function of the tariff determination, it should not utilize the regulatory power at the same time. Therefore, the re-determination of tariff and reopening of the PPAs under regulatory power sought by the petitioner is not warranted. On the above observations, we decide that the prayer sought by the Petitioner on the ground that the Commission has power to re-open the PPA and re-determine the tariff under the Regulatory Powers under which Order No.2 of 2010 determined by the Commission is not valid. On this ground also, the present petition is not maintainable.

6.9 The Commission had passed the Order No.2 of 2010 dated 29.1.2010 and the Petitioner accepted the Tariff decided by the Commission in the said order. Based on the said tariff order the petitioner had signed the Power Purchase Agreements with the Project Developers and agreed to pay the tariff decided by the Commission as stated in Article 5.2 of the PPA. Many of the Solar Power Project Developers have set up Power Projects, and have started to supply the electricity to the Petitioner and raised bills as agreed in the PPA. The Petitioner has also paid the bills against the invoices issued by the Respondents for supply of the electricity and the same is still continuing. Thus, the Petitioner has acted upon the decision of the Commission in Order No. 2 of 2010 dated 29.1.2010 and subsequent order No. 1 of 2012 dated 27.1.2012. Once the Petitioner has acted upon the order of the Commission, he is not permitted to raise the dispute on the same ground which was decided through earlier order by the Commission. In the present case, the Petitioner seeks re-determination of Tariff due to variance in capital cost and equity and other parameters of the tariff decided in earlier order No.2 of 2010 by the Commission. Once, the capital cost and Debt Equity Ratio are decided by the Commission on a normative basis and the tariff decided by the Commission on these norms is accepted by the Petitioner, who also

signed the PPAs with the Respondents, it is not relied for the Petitioner to dispute the same can be.

6.10 It is a settled Law that the Principle of Res Judicata applies when a judicial decision attains finality on any issue between two parties in earlier proceedings and then both the parties would not be allowed to canvass the issue again in future proceedings between the same parties. In other words, the Court having decided the issue in one way or other at the earlier stage will not allow the parties to reagitate the matter at a subsequent stage of the same proceedings.

6.11 The Hon'ble Supreme Court of India in the case of Satyadhan Ghosal V. Smt. Deorajin Debi (1960) 3 SCR 590 held as under:

“7. The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass

the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?

6.12 Therefore, the instant Petition of the Petitioner is barred by Res Judicata in as much as the orders No.2 of 2010 dated 29.1.2010 has attained finality. Hence the Petitioner seeking the redetermination of tariff which has already been

determined by the Commission is not permissible. On this ground also, the present petition is not maintainable.

6.13 On a harmonious construction of Section 62 read with Section 64 of the Electricity Act, 2003 it becomes clear that although the tariff fixation like price fixation is legislative in character, the same under the Electricity Act, 2003 is made appealable under Section 111. This provision, namely, Section 61, 62 & 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision making and specifying terms & conditions for tariff determination.

6.14 Another aspect is that Power Purchase Agreements can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentive. The Hon'ble Appellate Tribunal has in its order dated 31.5.2012 in Appeal No. 29 OF 2011 Tarini Power Private Limited V/s. GUVNL in para 23 of the said judgement decided the above ratio which reads as under:

-----“ 23.....*The question that has surfaced is whether the Commission has a legal mandate to promote non-conventional energy projects by giving tariff in accordance with the law and whether the law recognizes determination of generic tariff because it has been repeatedly argued not without un-justification*

that tariff should be determined on the basis of hard costs and according to the provisions of the Act. It is to be taken note of the fact that completion certificate was issued by an Independent Engineer entrusted with supervision of construction work on 18.2.2010, while the PPA was executed on 29.1.2008. The appellant was perhaps not unreasonable in arguing that the costs incurred till the date of the completion of the project could not get reflected in the agreement that basically followed the generic tariff order dated. 14.6.2007 in respect of which the proceedings really had originated in the year of 2005 which again followed non-statutory guidelines of the year of 2000. It is argued by the learned Advocate for the appellant that increase in the total capital cost has to be regarded in determining the tariff for the two projects and the same should be taken as the basis of tariff determination along with the increase in reliability. A chart has been given in the Memo of Appeal where capital cost is shown to had gone up to Rs.62.00 crore as against Rs.35.00 crore as was shown in the DPR and the debt : equity ratio with escalation of cost has been shown at Rs.33.00 crores as debt and Rs29 Cr equity as against Rs.24 crore as debt & 11 crore as equity. There has also been a variation / increase in interest in term loan. It is argued that the indicated price, as agreed to by the parties at the time of execution of the PPA cannot be regarded as tariff as the same has not been determined by the

Commission and the appellant is entitled to a tariff determined in terms of the guidelines fixed by Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009. The learned Advocate for the appellant has referred to the decision of this Tribunal in Techman Infra Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission (Appeal No. 50& 65 of 2008) where it has been held that the Commission should take into account the variation in the Capital Cost so that the developer gets its due and are attracted to the development of hydro-power. Reference has been also made to the decision in Rithwik energy Systems Vs. Transmission Corporation of Andhra Pradesh 2008 ELR (APTEL) 237 where this Tribunal held : “ Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives”. In this decision, there has been made a reference to National Electricity Policy pertaining to non-conventional sources of energy that provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the sources.“

Thus, The Hon'ble Appellate Tribunal Electricity has in Appeal No. 29 of 2011 held that Power Purchase Agreement can be re-opened only for the purpose of incentivising generation based on non-conventional energy projects and cannot be permitted to curtail the incentive if any already given/granted.

6.15 The only exception in the Solar Tariff Order dated 29.01.2010 which permits reopening of the PPA for re-determination of tariff provided in para 5 of the order which reads as under:

“5 “Tariff for PV and Solar Thermal Power Projects.

-----The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and Rules. For a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts.....”

6.16 The Commission has envisaged only one situation wherein individual project developers can approach the Commission for specific tariff determination of their project only when the said developer does not get the benefit of accelerated depreciation. For every other developer this Commission has determined tariff through generic tariff order dated 29.1.2010. This principle was

upheld by Hon'ble Appellate Tribunal for Electricity in Appeal No. 111 of 2012 order dated 30th April ,2013.

6.17 Further, the State Government issued Solar Power Policy, 2009 dated 6.1.2009 for promotion of Solar Power based energy generation. The Commission had determined the tariff for Solar Power Project based generation and issued Tariff Order No.2 of 2010 dated 29.1.2010. Consequently, the tariff specified in the Solar Power Policy, 2009 was revised by the state government through a notification dated 22.6.2010 , and incorporated the tariff as decided by the Commission in its order dated 29.1.2010 in the Policy. The Amendment dated 22.6.2010 further provides that the said policy will continue up till 2014. Thus, through the Solar Power Policy, 2009 and the amendment to it dated 22.6.2010, the state government promised to pay the tariff decided by the Commission vide order No 2of 2010 dated 29.1.2010.

6.18 Undoubtedly, to encourage participation in the field of Solar Energy based generation which was in nascent stage of technology some incentives were provided in the Solar Power Policy 2009 as well as in the Tariff Order passed by

the Commission. The Petitioner and the Respondent Agreed to the tariff in the Power Purchase Agreement based on the Solar Power Policy and Tariff Order passed by the Commission. Thus, investment was made by the Respondents based on the assurance given by the Petitioner in the Power Purchase Agreement. The only exception provided in the Tariff Order was that the power Project developers who are not getting the benefit of Accelerated Depreciation are entitled to approach the Commission for re-determination of tariff. Once the Petitioner accepted that he would pay the tariff to the Respondents as decided by the Commission in its Tariff Order and based on such promise the Respondents have set up their Power Plants and created rights to avail the tariff as decided by the Commission, the Petitioner is estopped from denying the same on the ground of public interest or larger interest of the consumer. The Doctrine of Promissory Estoppel is applicable against the Petitioner. The Petitioner who is a government company and who executed the Power Purchase Agreement based on the Tariff decided by the Commission as well as accepted in the Solar Power Policy notified by the State Government is expected to act in accordance with the promise given by him.

6.19 The PPA executed by the Petitioner and the Respondents and their conduct of acting upon such agreement over a long period bind them to the rights and obligations stated in the Agreement. The parties have adhered to the Terms & Conditions after signing the PPA up till now. Conditions of the Contract cannot be altered/ avoided on presumption or assumption of the parties. The parties to the contract are not at liberty to amend/alter the terms of contract saying that the terms 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.

6.20 The PPA had no renewal/ revision/review clause empowering the Commission to revise the tariff except for the exception mentioned and that too at the behest of the Project Developer who had not got the benefit of Accelerated Depreciation under the Income Tax Act, 1961. The Hon'ble Appellate Tribunal in passing the judgment in Appeal No. 75 of 2012 has expressly held that the Project wise tariff determination will not be permitted for Solar Developers developing the projects pursuant to the Original Tariff Order. It is pertinent to mention herein that The Tribunal in the Judgment in Appeal No. 75 of 2012 has categorically held that the normative Tariff determined by the Commission in its Original Tariff Order

will be binding on all Solar Power Developers and they cannot seek project wise Tariff Determination. The relevant extracts of the Judgment of the Hon'ble APTEL are reproduced as follows:

"17.The tenth issue is regarding option for Project Specific Tariff.

17.1 According to Shri Vikas Singh, learned Senior Advocate for the Appellant, the State Commission has determined only generic tariff for Solar PV Projects, without giving any option for getting project specific tariff determined. It has however, given an option of getting project specific tariff determined for Hybrid Solar Projects. Some projects which were started in previous control period and could not be commissioned in that control period have incurred higher capital costs than that considered in the impugned order. Thus, they do not have an option to get the project specific tariff determined. In this regard, they refer to the findings of the Tribunal in Appeal nos. 50 & 65 of 2008 dated 18th Sept. 2009 in the case of Techman Infra Ltd. Vs. HPERC & others.

17.2 According to GUVNL as per the impugned order option to project specific tariff will be available to solar power developers who have not signed any Power Purchase Agreement with the utility and it is for the members of the Appellant Association to apply for any project specific tariff before the State Commission and justify the same.

17.3 According to the learned counsel for the State Commission the developers sought to be protected by the Appellant, have defaulted in the commissioning deadline dated 30.1.2011 provided in the Power Purchase Agreement and have also missed the original tariff control period provided in order dated 29.1.2010. However, majority of the solar power developers have already commissioned their projects within the control period i.e. from 29.1.2010 to 28.1.2012. The control period of the first tariff order for solar power projects came to an end on 28.1.2012. The impugned tariff order determines tariff applicable to solar power projects for the next control period i.e. 29.1.2012 to 31.3.2015 and the new tariff has been determined while taking into account the current cost trends. The State Commission has however, allowed project specific tariff for systems with thermal storage because the storage capacity for such plants will vary. Moreover, the variations on account of technologies and materials used for storage make it difficult to fix generic cost. Storage and hybrid technologies have implication on various costs associated with capital operation and maintenance, auxiliary consumption and capacity utilization factor. Therefore, it is not possible to decide capital cost of such systems having varying storage capacity on a generic basis. Similarly in case of systems based on hybrid, the capital cost will vary depending upon the technology used. The proportionate usage of different technologies may also vary and affect the final tariff for such power plants. The Appellant is attempting to equate its case with the aforesaid technologies which is not correct. In case of Solar PV Power projects no such variations are found, therefore, a normative tariff has been fixed by the State Commission.

17.4 We are in agreement with the submissions made by the learned counsel for the State Commission. There is absolutely no case for the State Commission to determine the project wise tariff afresh for the projects which signed Power Purchase Agreement based on the first tariff order and failed to commission their projects during the control period. The findings of the Tribunal in Appeal nos. 50 & 65 of 2008 in respect of Hydro Projects will not be applicable in this case. In case of Hydro Projects the capital cost could vary depending on the geological conditions and inflows of water with respect to the norms assumed in the generic tariff. Such variables are not relevant in case of Solar PV projects. Thus, findings of the Tribunal in Techman case will not be applicable to the present case.

17.5 Therefore, we find no force in the contention of the Appellant regarding determination of project specific tariff. Accordingly, this issue is decided against the Appellant.”

In view of above finding of the Hon’ble Tribunal it is abundantly clear that the prayer of the Petitioner to re-open the PPAs with Solar Power Developers who have commissioned their projects subsequent to the original Tariff Order No. 2 of 2010 dated 29.1.2010 is not permissible.

6.21 Hon’ble Supreme Court of India had in the case of Delhi Clothes and General Mills Ltd. Vs. Union of India (1988) 1 SCC 86 has held that if a private party alters

its position based on a representation, then it is not necessary for the party to prove any damage or detriment as long as the party has simply altered its position.

"...24. *The concept of detriment as we now understand it is whether it appears unjust, unreasonable or inequitable that the promisor should be allowed to resile from his assurance or representation, having regard to what the promisee has done or refrained from doing in reliance on the assurance or representation.*

25. *It is, however, quite fundamental that the doctrine of promissory estoppel, cannot be used to compel the public bodies or the Government to carry out the representation or promise which is contrary to law or which is outside their authority or power. Secondly, the estoppel stems from equitable doctrine. It, therefore, requires that he who seeks equity must do equity. The doctrine, therefore, cannot also be invoked if it is found to be inequitable or unjust in its enforcement.*

26. *We may also state that for the purpose of invoking the doctrine, it is not necessary for the company to show that the assurance contained in Exhibit C-5 was mainly responsible for establishing the factory at Kota. There may be several representations to one party from different authorities in regard to different matters. Or, there may be several representations from the same party in regard to different matters. As in the instant case, there was one representation by the Rajasthan Government to supply power to the company at concessional rate. There was another representation from the same government to exempt the company from payment of tax for certain period.*

There may be other representations from the same or some other authorities. If those representations have been relied upon by the company, the court would compel those parties to adhere to their respective representations. It is immaterial whether each of the representations was wholly responsible or partly responsible for locating the factory at Kota. It is sufficient if the company was induced to act on that representation.

27. *The last and final aspect of the matter to which attention should be drawn is that for the purpose of finding whether an estoppel arises in favour of the person acting on the representation, it is necessary to look into the whole of the representation made. It is also necessary to state that the representation must be clear and unambiguous and not tentative or uncertain. In this context we may usefully refer to the following passage from Halsbury's Laws of England⁸:*

“1595. Representation must be unambiguous.— To found an estoppel a representation must be clear and unambiguous, not necessarily susceptible of only one interpretation, but such as will reasonably be understood by the person to whom it is made in the sense contended for, and for this purpose the whole of the representation must be looked at. This is merely an application of the old maxim applicable to all estoppels, that they “must be certain to every intent ...”

Thus, in the aforesaid judgement the Hon'ble Supreme Court of India has decided the application of principle of Promissory Estoppel in cases of the assurance given by the government and its institution. The said principle is applicable in the present case also.

6.22 The Hon'ble Supreme Court has in case of Punjab Communication Limited V/s. Union of India (1999) 4SCC 727 held as under ;

26. The principle of "legitimate expectation" is still at a stage of evolution as pointed out in de Smith's Administrative Law (5th Edn.) (para 8.038). The principle is at the root of the rule of law and requires regularity, predictability and certainty in the Government's dealings with the public. Adverting to the basis of legitimate expectation its procedural and substantive aspects, Lord Steyn in Pierson v. Secy. of State² (All ER at p. 606) goes back to Dicey's description of the rule of law in his Introduction to the Study of the Law of the Constitution (10th Edn., 1959, p. 203) as containing principles of enduring value in the work of a great jurist. Dicey said that the constitutional rights have roots in the common law. He said:*

"The 'rule of law', lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants, thus the constitution is the result of the ordinary law of the land."

This, says Lord Steyn, is the pivot of Dicey's discussion of rights to personal freedom and to freedom of association and of public meeting and that it is clear that Dicey regards the rule of law as having both procedural and substantive effects. "[T]he rule of law enforces minimum standards of fairness, both substantive and procedural." On the facts in Pierson² the majority held that the Secretary of State could not have

maintained a higher tariff of sentence than recommended by the judiciary when admittedly no aggravating circumstances existed. The State could not also increase the tariff with retrospective effect.

27. The basic principles in this branch relating to "legitimate expectation" were enunciated by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service³ at pp. 408-409. It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further when he said that they had a legitimate expectation that they would continue to enjoy the benefits of

the trade union membership. The interest in regard to which a legitimate expectation could be had must be one which was protectable. An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to a class of persons.

37. The above survey of cases shows that the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision-maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. The judgment in Raghunathan case²⁰ requires that reliance must have been placed on the said representation and the representee must have thereby suffered detriment.

38. The more important aspect, in our opinion, is whether the decision-maker can sustain the change in policy by resort to Wednesbury principles of rationality or whether the court can go into the question whether the decision-maker has properly balanced the legitimate expectation as against the need for a change. In the latter case the court would obviously be able to go into the proportionality of the change in the policy.---

---40. The judgment of Sedley, J. has since been overruled in R. v. Secy. of State for the Home Deptt., ex p Hargreaves²³. In that case, the facts were that the eligibility for "home leave" of prisoners was initially one-third of the term of sentence as per the earlier decision of the Government of 1994 (accepting Lord Woolf's Report, 1990) and Hargreaves would attain that eligibility by 12-4-1995 to put in his application. But the Home Secretary felt that the scheme was being

abused and therefore he modified the eligibility to one-half of the period of sentence by notice dated 20-4-1995. This postponed Hargreaves' eligibility to 12-4-1996. Though the applicant had "become eligible" by 20-4-1995, the courts rejected his plea of legitimate expectation because eligibility merely enabled consideration of the application for home leave. The case was similar to Findlay which related to a change in parole policy and which was held valid. It was held that the change in home-leave policy did not violate the earlier policy. In the Court of Appeal, Hirst, L.J. described the principle laid down by Sedley, J. as based on "heresy" and stated:

"On matters of substance (as contrasted to procedure) Wednesbury provides the correct test. It follows that ... his (Sedley, J.'s) ratio insofar as he propounds a balancing exercise to be undertaken by the court should, in my opinion, be overruled."

The result is that a change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness. We have noticed that in Hindustan Development Corpn. case also it was laid down that the decision-maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of the policy is for the decision-maker and not for the court. The legitimate substantive expectation merely permits the court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.-----

----42. Thus both in ex p Hargreaves (in which the challenge failed) and ex p Unilever (in which the challenge succeeded), the protection for substantive legitimate expectation was based on Wednesbury unreasonableness. In sum, this means that the judgment whether public interest overrides the substantive legitimate expectation of individuals

will be for the decision-maker who has made the change in the policy and the courts will intervene in that decision only if they are satisfied that the decision is irrational or perverse (see 1997 Public Law, p. 375 "Wednesbury Protection of Substantive Legitimate Expectation" by Christopher Forsyth). The observations of this Court in Hindustan Development Corpn. case; in M.P. Oil Extraction case and in S. Raghunathan case are more or less to a similar effect, though no specific reference was made to the Wednesbury rule.-----"

6.23 The Hon'ble Supreme Court has in case of National Buildings Construction Corpn. v. S. Raghunathan, (1998) 7 SCC held as under ;

'.....18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel.

19. Lord Scarman in R. v. IRC, ex p Preston laid down emphatically that unfairness in the purported exercise of power can amount to an abuse or excess of power. Thus the doctrine of "legitimate

expectation” has been developed, both in the context of reasonableness and in the context of natural justice.

20. Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service² laid down that the doctrine of “legitimate expectation” can be invoked if the decision which is challenged in the court has some person aggrieved either (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.-----

-----24. In Food Corpn. of India v. Kamdhenu Cattle Feed Industries⁴ it was held that in all State actions, the State has to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. It was further observed that there is no unfettered discretion in public law and a public authority possesses powers only to use them for public good. It was further observed as under: (SCC p. 76, para 8)

“8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation

forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

25. *In Union of India v. Hindustan Development Corpn.* the meaning of the words "legitimate expectation" was again considered. Quoting from the case of *Attorney General for New South Wales v. Quin* the following lines:

"To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law."

the Court observed as under: (SCC p. 549, para 35)

If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is 'not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits', particularly when the element of speculation and uncertainty is inherent in that very concept."

26. This doctrine was reiterated in M.P. Oil Extraction v. State of M.P. in which it was also laid down that though the doctrine of "legitimate expectation" is essentially procedural in character and assures fair play in administrative action, it may, in a given situation, be enforced as a substantive right....."

Thus, the private parties dealing with the government have legitimate expectation to be dealt with regularity and certainty. The Hon'ble Supreme Court has In the above two judgements further held that if a right had been enjoyed previously by private parties, then the parties have a legitimate expectation to enjoy the same unless the right has been withdrawn with a rationale behind it.

6.24 In the present case, the petitioner and the State Government and the Commission are state within the meaning of Article 12 of the Constitution of India. Further, based on the order No.2 of 2010 dated 29.1.2010 of the Commission and the Solar Power Policy of the state government, the PPAs were signed by the Respondents, who developed the Solar Power Projects. Therefore, computation of tariff has been represented by the State and based on it the Solar Power project Developers have acted upon, and as such based on the Doctrine of Legitimate Expectations, the Respondents have a right to seek the enforcement of the said representation. Once a contract is executed by the parties, it is not permissible to re-open the contract with consideration of change in the cost of the project without consideration of the risk involved in the project.

6.25 It is a settled economic principle, as recognized by Judicial precedents, that each project involves a bundle of risks and where an investor assumes such bundle of risks, he is entitled to whatever returns that he is able to make including benefits of efficiencies that he may be able to generate. It is not permissible to selectively evaluate and examine one element of a project in isolation while ignoring all other elements and risk. The Petitioner is seeking to do precisely the same by focusing on capital cost per MW but ignoring other risks that were involved in the development of the Project like variation in Foreign Exchange Rate, variation in interest on loan, possibility of achieving lower CUF etc.

6.26 We note that Hon'ble Supreme Court in the case of Union of India V/s. Wing Commander R.R. Hingorani (1987) 1 SCC 551 held as under:

“8..... In the facts and circumstances of the present case, the respondent had given a declaration in his application for allotment that he had read the Allotment of Government Residences (General Pool in Delhi) Rules, 1963 and that the allotment made to him shall be subject to the said Rules as amended from time to time. According to sub-rule (3) of SR 317-B-1 1 the allotment was to continue till the expiry of the concessional period of two months under sub-

rule (2) thereof after 11-6-1970, the date of transfer and thereafter it would be deemed to have been cancelled. It is not disputed that the respondent continued to remain in occupation of the premises unauthorisedly from 11-8-1970 even after his transfer outside Delhi. He was not entitled to retain any accommodation either from the general pool or the defence pool once he was transferred to a place outside Delhi. The respondent retained the flat in question at his own peril with full knowledge of the consequences. He was bound by the declaration to abide by the Allotment Rules and was clearly liable under SR 317-B-22 to pay damages equal to the market rent for the period of his unauthorised occupation. Before an estoppel can arise, there must be first a representation of an existing fact distinct from a mere promise made by one party to the other; secondly that the other party believing it must have been induced to act on the faith of it; and thirdly, that he must have so acted to his detriment. In this case, there was no representation or conduct amounting to representation on the part of the Government intended to induce the respondent to believe that he was permitted to occupy the flat in question on payment of normal rent or that he was induced to change his position on the faith of it. If there was any omission, it was on the part of the respondent in concealing the fact from the Director of Estates that he had

been transferred to a place outside Delhi. There was clearly a duty on his part to disclose the fact to the authorities. There is nothing to show that he was misled by the Government against whom he claims the estoppel. It is somewhat strange that the High Court should have spelled out that the respondent being a Squadron Leader was an employee of the Central Government and therefore the Government of India to whom the Curzon Road Hostel belongs must have had knowledge of the fact of his transfer. The entire judgment of the High Court proceeds upon this wrongful assumption.'

6.27 In the present case, there was representation from the Petitioner to the Respondents that he agreed to pay the Tariff decided by the Commission in its order based on which the PPA was signed by the parties and the Project Developers set up the plants by putting faith in the petitioner. Now the petitioner has acted against it which is detrimental to the Respondents because the Petitioner desires revision in the Tariff. Therefore, this is a fit case where the Doctrine of Promissory Estoppels is applicable. On this ground also the present petition is liable to be rejected and dismissed.

6.28 The petitioner has contended the issue of the public interest in the present petition and on that ground the Petitioner seeks re-opening of the PPA and re-determination of the Tariff. On the issue of public interest, the relevant sections of the Electricity Act, 2003 are section 65 and 108 of the Electricity Act, 2003. Section 65 of the Electricity Act, 2003, which are reproduced below.

Section 65

65.If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance in the manner as may be specified , by the State Commission the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard.

Section 108

108. (1). In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter policy involving public interest, the decision of the State Government thereon shall be final.

From the reading of the above sections, it transpires that if the State Government desires to grant subsidy to a particular category of the consumers for public interest the Commission may allow the same. Similarly, under Section 108 of the Electricity Act, 2003 the Government is empowered to pass an order and direct the Commission in the matter of Policy involving the public interest. Thus, the aforesaid sections of the Act do not provide any power to the Commission to reopen a PPA and to re-determine the tariff decided by the Commission as pleaded by the petitioner. On this ground also the present petition is not maintainable.

6.29 The Petitioner has also invoked the protection of consumer interest stating that they should not be burdened with the higher tariff for the Solar Power Projects. We note that the Power Purchase Agreements were signed by the Petitioner with the Respondents with consideration of tariff determined by the Commission and its impact on the consumers in the tariff rate. Thus the petitioner was fully aware of the impact of signing of the PPAs and has so far incorporated this

impact in their ARRs. There is no additional burden, over and above that anticipated at the time of signing the PPAs. As such, it is not permissible to re-open and re-determine the tariff on this account. Hence, the plea advanced by the petitioner to re-open the PPA and re-determine the tariff to protect the consumers' interest is not valid and same is rejected.

6.30 The Petitioner has accepted the normative parameters based tariff determined by the Commission. In case of generic tariff determined by the Commission as a promotional measure for the renewable sources of electricity, it is not permissible to true up based on the actual parameters of the tariff. The PPAs signed between the parties also do not provide for the same. Hence, the plea of the petitioner for re-determination of tariff which is in the form of the true up is not permissible.

6.31 We also note that the Petitioner has submitted some details of 10 Solar Power Projects. However, he has impleaded 75 Solar Power Project Developers as respondents. The Petitioner has not given any details about the remaining Solar Power Developers. Even in cases of the 10 Solar Power Projects, the Petitioner does not seem to have taken any steps nor interacted with the parties to the

PPAs within the framework of such PPAs. The details given are one sided. In the absence of any details of the Solar Power Developers who have either set up the Solar Power Projects in variance of the normative Parameters of The tariff determined by the Commission and in the absence of specific cases and cause of action, it is not permissible to take any decision against such 75 Solar Project Developers whose details are not provided by the petitioner. The case put up on such Project Developers is not maintainable on this ground also.

7. Considering the above facts, we decide that the present petition is not maintainable on the ground of delay, various other reasons as enumerated above, and as such dismiss it.
8. We order accordingly.
9. With this order, the present petition stands disposed of

Sd/-
[Dr. M. K. IYER]
Member (Finance)

Sd/-
[SHRI PRAVINBHAI PATEL]
Member (Technical)

Sd/-
[Dr. P. K. MISHRA]
Chairman

Place: Gandhinagar.

Date: 08 /08/2013.