

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Suo Motu Petition No. 18/SM/2015

**Coram:
Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of Order: 22nd August 2017

In the matter of

Suo-motu petition in the matter of declaration of commercial operation of Units 20 to 50 of Mundra Ultra Mega Power project developed by Coastal Gujarat Power Limited.

And

In the matter of

1. Managing Director,
Coastal Gujarat Power Ltd.
34, SantTuka Ram Road, Carnac Bunder,
Mumbai-400 021
2. Managing Director,
Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan, Race Course,
Vadodara – 390 007, Gujarat
3. Managing Director,
Maharashtra State Electricity Distribution Company Ltd.
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai-400051, Maharashtra
4. The Chairman and Managing Director,
Ajmer Vidyut Vitaran Nigam Ltd.
Hathi Bhata, Old Power House, Jaipur Road,
Ajmer-305001, Rajasthan
5. The Chairman and Managing Director,
Jaipur Vidyut Vitaran Nigam Ltd.
Vidyut Bhawan, Janpath,
Jaipur-302005, Rajasthan
6. The Chairman and Managing Director,



Jodhpur Vidyut Vitran Nigam Ltd.
New Power House, Industrial area,
Jodhpur-342003, Rajasthan

7. The Chairman and Managing Director,
Punjab State Power Corporation Ltd.
The Mall, Ablowal,
Patiala-147 001, Punjab
8. Managing Director,
Uttar Haryana Bijli Vitaran Nigam Ltd.
C-16, Vidyut Sadan, Sector-6, Room No. 329,
Panchkula-194 109, Haryana
9. Managing Director,
Dakshin Haryana Bijli Vitaran Nigam Ltd.
Vidyut Sadan, Vidyut Nagar, Hissar-125 005
10. General Manager,
Western Regional Load Despatch Centre (WRLDC)
Plot No. F-3, Central Road,
MIDC Area, Marol, Andheri (East), Mumbai-400093
11. M/s Black & Veatch Consulting Private Ltd.
Pride Parmar Galaxy,
10/10 + A 3rd Floor, Sadhu Vaswani Chowk,
Pune-411 001, Maharashtra **.....Respondents**
12. Shri M.C. Bansal
Energy Consultant,
E-5/85, 1st Floor, Arera Colony
Bhopal-462016, Madhya Pradesh **....Proforma Respondent**

Parties Present:

- 1) Shri Amit Kapoor, Advocate, CGPL
- 2) Shri Kunal Kaul, Advocate, CGPL
- 3) Ms. Raveena Dhamija, advocate, CGPL
- 4) Shri Gautam Chawla, Advocate, WRLDC
- 5) Shri Deep Rao Palepu, Advocate, WRLDC
- 6) Ms. Pragya Sing, WRLDC
- 7) Ms. Divya Chaturvedi, Advocate, B & V
- 8) Shri M.G. Ramachandran, Advocate, GUVNL
- 9) Shri M.C. Bansal, Proforma Respondent
- 10) Shri Venkatesh, Proforma Respondent
- 11) Shri Shashank Khurana Agarwal, Proforma Respondent
- 12) Shri Bijay Mohanty



ORDER

On the basis of the complaint made by Shri M. C. Bansal, a retired Chief Engineer from Madhya Pradesh State Electricity Board, received through Security and Exchange Board of India Limited (SEBI), the Commission initiated a Suo Motu Petition under Regulation 24 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter "Conduct of Business Regulations" or "CBR") and directed issue of notices to Coastal Gujarat Power Limited (CGPL), Distribution Companies of the Procurer States, Independent Engineer as well as WRLDC to explain the facts and circumstances leading to the declaration of commercial operation of Units 20 to 50 of the Mundra UMPP. Further, the Commission in exercise of its power under Regulation 74 (d) of the Conduct of Business Regulations directed all concerned, namely, CGPL, the Distribution Companies of the Procurer States, M/s Black & Veatch (Independent Engineer) and WRLDC to place on record all the relevant documents relating to the Performance/Commissioning Test and the Commercial Operation of Units 20 to 50 of Mundra UMPP and scheduling of power from these units, and in particular, the following information:

- a) The procedure prepared by the Independent Engineer for conducting Performance/Commissioning Test.
- b) The performance of the Units 20 to 50 of Mundra UMPP during the Performance/Commissioning Test.
- c) The details alongwith a copy each of correspondence between CGPL and WRLDC regarding the Performance / Commissioning Test and declaration of COD.



- d) Observations / comments of the Procurer States on the performance of Units 20 to 50 of the Mundra UMPP during the Performance / Commissioning Tests and on the Final Test Certificate issued by Independent Engineer.
- e) The correspondence between CGPL and Procurer States with regard to the Performance / Commissioning Test, acceptance of the Final Test Certificate of the Independent Engineer and declaration of commercial operation of Units 20 to 50 of Mundra UMPP.
- f) Details of the discussion held in the meeting under the aegis of CEA on 29.05.2015 and the outcome thereof, alongwith minutes of the meeting, if any.
- g) Any other material or submission that the respondents intend to make which is of relevance to the issue under consideration in the present proceedings.

2. In response to the Suo Motu Petition, CGPL, POSOCO, Independent Engineer, Distribution Companies of Gujarat and Shri MC Bansal have filed their replies.

3. CGPL in its preliminary submission has raised the issue of locus standi of Shri MC Bansal and also the jurisdiction of the Commission to initiate the proceedings. As regards the jurisdiction of the Commission, CGPL has submitted that the Commission's power to initiate Suo Motu proceedings flows from Sections 142 and 146 of the Electricity Act, 2003 (2003 Act) read with Regulation 24 of the Conduct of Business Regulations and in terms of the said provisions, Suo Motu powers can be invoked only if there is a violation of provisions of the 2003 Act, rules and regulations made thereunder and/or any order or directions issued by the Commission. CGPL



has submitted that there is no statutory provision qua commissioning of a generating station and therefore, there is no occasion to pursue the present proceedings. CGPL has submitted that as the issue relating to the declaration of commercial operation is a contractual issue amongst the Procurers and the generating company, and no dispute has been raised by the Procurers qua declaration of commercial operation of Units 20 to 50 of Mundra UMPP, the present proceedings are not maintainable.

4. As regards the locus standi of Shri M C Bansal, CGPL has submitted that Mr. Bansal is neither a party to the PPA nor a beneficiary/resident of the five procuring States who avail supply of electricity from Mundra UMPP. Consequently, Mr. Bansal is not an aggrieved/affected/interested party and the dispute qua the commissioning of the Units 20 to 50, if any, is at best a contractual dispute which can only be raised by the contracting parties and the same is not an issue of public interest or morals or violation of the statutory provisions. CGPL has submitted that Mr. Bansal has been added as a proforma respondent in the Commission's order dated 30.12.2015 which was passed Suo Motu without giving CGPL any opportunity to place its objections in this regard and therefore, there is no logic for making Mr. Bansal a party to the present proceedings, even if the Commission continues with the present proceedings.

5. During the hearing, learned counsel for CGPL submitted the following with regard to the maintainability of the present proceedings and jurisdiction of the Commission to initiate the present proceedings:

- (a) The substantive power to initiate Suo-Moto proceedings by this Commission flows from Sections 142 and 146 the 2003 Act read with



Regulation 24 of the CBR. From the perusal of these provisions, it is evident that Suo-Moto power can be invoked by this Commission only if there is a violation of provisions of the 2003 Act, rules and regulations made thereunder and/or any order or directions issued by the Appropriate Commission.

(b) The 2003 Act and the rules and regulations made thereunder do not provide for any procedure relating to commissioning of a Unit and/or a generating station. The issue/ dispute, if any, relating to the declaration of Commercial Operation is a contractual issue/ dispute amongst the procurers and the generating companies. This is also evident from Paras 1 and 2 of the Commission's Explanatory Memorandum to the draft Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2015 and Paras 13.1 and 20(a) of the judgment of the Appellate Tribunal for Electricity (Appellate Tribunal) dated 31.3.2016 titled Sasan Power Limited v. CERC & Ors. Admittedly, no dispute has been raised by the Procurers qua declaration of commissioning of Units 20 to 50 of Mundra UMPP.

(c) It is a settled law that this Commission being a statutory body created under the 2003 Act, is obligated to act within the four corners of the said Act and does not have jurisdiction akin to a Writ Court so as to entertain Public Interest Litigations. The 2003 Act does not envisage filing of a Public Interest Litigation (or invoking an adjudicatory function on behalf of others) for adjudication of disputes. This position has been settled by the Appellate Tribunal in the case of Bharat Jhunjhunwala v. UPERC in I.A. No. 392, 393, 394 and 399 of 2012 in DFR No. 1844 of 2012 dated 20.12.2012 wherein it was held that there is no provision in the 2003 Act for filing PIL against the orders of the State Commission and



accordingly, the IAs were dismissed. Further, this Order of the Appellate Tribunal was confirmed by the Hon'ble Supreme Court in its Order dated 19.08.2013 in the Case of *Bharat Jhunjhunwala v. Uttar Pradesh Electricity Regulatory Commission*, in Civil Appeal No. 7303-7304 of 2013 wherein it was held that "since the Public Interest Litigation was not maintainable before the U.P. Electricity Regulatory Commission, we find no reason to entertain these appeals, which are, accordingly, dismissed..."

(d) In any event, consumer interest is duly taken care of by this Commission, the Procurers, WRLDC and CGPL and therefore, Mr. Bansal ought not to be permitted to abuse the process of law by making scurrilous allegations or participating in the present proceedings.

(e) In the absence of a dispute regarding the Commissioning of Units 20 to 50 of Mundra UMPP being raised by the Procurers and in light of the Appellate Tribunal's Judgment dated 7.4.2016 in the Compensatory Tariff batch matters, this Commission does not have jurisdiction to initiate and/ or adjudicate upon the present Petition. The present proceeding is non-maintainable/ non-est and ought to be dismissed in limine.

6. Mr. Bansal in his reply to the maintainability of the present petition raised by CGPL has submitted as under:

(a) The contention of CGPL that Mr. Bansal being the Proforma Respondent and not being an aggrieved/affected/interested party cannot initiate the present Suo Motu proceeding is based on incorrect understanding as the Proforma Respondent did not approach the Commission to initiate the present proceeding. The present proceeding was initiated by the Commission after



SEBI approached and requested the Commission to take necessary action on the issue of irregularities in commissioning of CGPL as CGPL itself has said that this issue falls within the jurisdiction of the Central Commission. CGPL in its own communication dated 15.12.2014 to Bombay Stock Exchange had categorically admitted that this Commission is not only an appropriate forum but is also empowered to entertain and adjudicate issues of irregularities, if any, in the process of commissioning of Mundra CGPL. Under the settled principle of Doctrine of Estoppel, CGPL cannot change its stand as per its convenience and is estopped from contesting the locus of Proforma Respondent or the power of Commission to initiate proceedings on the same issue.

(b) CGPL is supplying electricity to Procurers in different States who are further supplying electricity to group of consumers. Not only event of COD of Mundra UMPP directly affects tariff payable by the Procurers but also in the event of delayed commissioning, CGPL will be liable to pay damages to the Procurers as per terms of the PPA and the same will have a bearing at the time of tariff determination of the Procurers (Distribution Companies) in those States. Under Section 79 (1)(b) of the 2003 Act, one of the important functions assigned to the Commission is to regulate the tariff of generating companies and in exercise of the said power, the Commission can look into the irregularities in COD of the units of Mundra UMPP.

(c) The Commission has been conferred with power to initiate Suo Motu proceeding by virtue of Regulation 24 of Conduct of Business Regulations,



which stipulates that “Commission may initiate any Proceedings Suo Motu or on a Petition filed by any affected or interested person”. “Proceeding” as defined in the Conduct of Business Regulations means and includes proceedings of all nature that the Commission may hold in the discharge of its function under the 2003 Act. Thus, the scope of powers of this Commission is wide enough to cover and initiate the present petition. The petition cannot be challenged on the ground that petition must be filed by affected or interested person only. SEBI is also the responsible regulator and has brought the matter on the request of CGPL itself before this Commission.

(d) Perusal of the Statement of Objects and Reasons, preamble and the provisions of the 2003 Act would reveal that protection of consumer interest is one of the important facets and objectives for the enactment of the 2003 Act. In *Sujatha Touring Talkies v. State of Karnataka*, [AIR 1986 Kar 21], the Hon’ble High Court of Karnataka has held that the meaning of the word “regulate” as envisaged in Section 79(1)(b) of the 2003 Act has very wide meaning comprehending all facets not only specifically enumerated in the 2003 Act but also embraces within its fold the powers incidental to the Regulation envisaged in good faith in the interest of the general public. There are also a catena of cases wherein the Hon’ble Supreme Court has emphasized the broad interpretation of power to regulate. In *Subramanian Swamy vs. State of T.N.*, [(2014) 5 SCC 75], the Hon’ble Supreme Court has held that the word “Regulate” has different set of meanings and must take its colour from the context in which it is used having regard to the purpose and object of the legislation.” In *Jiyajeerao Cotton Mills Ltd. vs. M.P. Electricity*



Board, [1989 Supp (2) SCC 52], the Hon'ble Supreme Court has held that "the word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied." In D.K. Trivedi & Sons vs. State of Gujarat, {1986 Supp SCC 20}, the Hon'ble Supreme Court has held that the word 'regulate' means "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings." In Uttar Pradesh Power Corporation Ltd. v. National Thermal Power Corporation Ltd., {(2009) 6 SCC 235}, the Hon'ble Supreme Court has expressly held that "the concept of regulatory jurisdiction provides for revisit of the tariff as well."

(e) In terms of Regulation 19(1) of the CBR, the Commission can appoint any person to assist the Commission.

7. In response to the reply of Mr. Bansal with regard to the maintainability of the petition, learned counsel for CGPL submitted as under:

(a) Mr. Bansal's contention that CGPL has submitted itself to the jurisdiction of this Commission and therefore, the same cannot be challenged now is not correct, since it is a settled law that grant of jurisdiction is a legislative function and the same cannot be conferred by mere acceptance, acquiescence or consent of the parties or by a court order. In this regard, reliance was placed on the judgments in (a) Municipal Committee, Hoshiarpur vs. Punjab Electricity Board [(2010) 13 SCC 216 (Para 16)]; (b) Veer



Kunwar Singh University Ad hoc Teachers Association v. Bihar State University Service Commission [(2009) 17 SCC 184 (Para 32)]; and (c) Rajasthan SRTC v. Zakir Hussain [(2005) 7 SCC 447 (Para 21)].

(b) The Appellate Tribunal in its judgment dated 31.3.2016 in Appeal No. 233 of 2014 has held that acceptance of COD of a power plant is an issue between the Procurers and the generating company and there is no question of any public interest or public policy or morals or statutory regulations being violated. The commissioning tests for Units 20 to 50 of Mundra UMPP were conducted without any glitches/trippings/interruption. The Procurers have accepted the commercial operation of Units 20 to 50 of Mundra UMPP and are availing power generated from these units. During the operating period, CGPL has made available 95% of its contracted capacity to the Procurers but also scheduled and generated the said capacity on various occasions for sustained periods.

(c) Mr. Bansal has relied upon a number of Judgments of the Hon'ble Supreme Court on "power to regulate" on the assumption that this Commission has the regulatory power even in case of an Section 63 of the 2003 Act. However, the Full Bench of the Appellate Tribunal in its Judgment dated 7.4.2016 in Compensatory Tariff batch matters has held that in case of competitive bidding under Section 63 of the 2003 Act, PPA is the controlling document, which sets out the rights and obligations of the respective parties in respect of generation and sale of electricity. The regulator does not have overreaching powers de-hors the bidding document [Paras 152 and 157 of



the said judgment]. Further, Section 79(1)(f) of the 2003 Act entrusts adjudicatory power in term of which this Commission can decide the rights and obligations of the parties before it in accordance with the existing contractual arrangement [Para 156 of the said judgment]. Admittedly, no dispute qua Commissioning of units 20 to 50 of Mundra UMPP has been raised by the Procurers in terms of the provisions of the PPA. Therefore, there is no power, either regulatory or adjudicatory, to initiate the present proceedings.

(d) Mr. Bansal is not an aggrieved party as it is neither a party to the PPA nor a beneficiary/resident of the five Procuring States who avail supply of electricity from Mundra UMPP. It is settled in various judgments that a party claiming to be aggrieved in the matter is required to demonstrate the legal injury or violation of a legal harm caused to it. Mr. Bansal has failed to demonstrate how he is aggrieved or interested in the Commercial Operation of Units 20 to 50 of Mundra UMPP especially when he is not a consumer of the five procuring states which receive supply of power from Mundra UMPP.

(f) Mr. Bansal's reliance on Regulation 19 of the Conduct of Business Regulations is misplaced as he has not been appointed by the Commission to represent the consumer interest.

Analysis and Decision:

8. Having heard CGPL and Mr. Bansal on the preliminary issues of maintainability and jurisdiction of the Commission, we proceed to decide the issue whether the



proceedings in the present form are maintainable and whether the Commission has the jurisdiction to look into the alleged irregularities in the COD of Units 20 to 50 of Mundra UMPP.

9. The first objection of CGPL is that the power to initiate Suo Motu proceedings is only traceable to Sections 142 and 146 of the 2003 Act and in the absence of violations of any provisions of the 2003 Act, rules and regulations made thereunder and/or any order or directions issued by the Appropriate Commission, the present proceedings are not maintainable. In other words, CGPL has submitted that Suo Motu proceedings cannot be initiated by this Commission unless there is violation of the 2003 Act, rules, regulations made thereunder or directions of the Commission. Sections 142 and 146 of the 2003 Act are extracted as under:

“Section 142. Punishment for non-compliance of directions by Appropriate Commission: In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for everyday during which the failure continues after contravention of the first such direction.

Section 146. Punishment for non-compliance of orders or directions: Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence:

Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under section 121.”

Under Section 142 of the 2003 Act, proceedings for non-compliance with the



provisions of the Act or rules or regulations made thereunder or non-compliance of the order of the Commission can be initiated on the basis of a complaint filed by any person in this regard or the Commission is otherwise satisfied. The Commission may impose the fine on any person for non-compliance after giving an opportunity of being heard. Under Section 146 of the 2003 Act, failure to comply with the order or directions given under the Act is punishable with fine or imprisonment or both. The Appellate Tribunal in its judgment dated 31.7.2009 in Appeal No. 53 of 2009 (Bihar State Electricity Board & another Vs. Central Electricity Regulatory Commission) has held that Section 146 deals with offences which can be dealt with by criminal court through trial and not by the Commission. Though appeal has been preferred against the said judgment, there is no stay. Section 142 vests plenary powers in the Commission for imposing penalty for non-compliance with the provisions of the 2003 Act or rules or regulations made thereunder or orders of the Commission. Power under Section 142 is exercised only when the Commission is satisfied that there is prima facie case of non-compliance and proceedings are held before imposing penalty. Though, there is no other provision in the 2003 Act which empowers the Commission to start Suo Motu proceedings for investigation and enquiry into a complaint, there are provisions under the CBR which enable the Commission to initiate proceedings for fact finding before taking cognizance of any offence of non-compliance. The CBR which was enacted under the Electricity Regulatory Commission Act, 1999 (ERC Act) has been saved in terms of Section 185 (2) of the 2003 Act when the ERC Act was repealed. Section 142 does not exclude operation of any other provisions in the 2003 Act and therefore, the provisions of the CBR pertaining to Suo Motu proceedings shall not be ousted or restricted by Section 142 of the 2003 Act.



10. The present proceedings have been initiated under Regulations 24 and 74 of the CBR. Regulation 24 of CBR provides that the Commission may initiate proceedings suomotu or on a petition filed by any affected or interested person. Regulation 74 of the CBR provides that the Commission may make such order or orders as it thinks fit for collection of information, inquiry, investigation, entry, search, seizure, and without prejudice to the generality of its power with regard to certain procedural matters as enumerated in clauses (a) to (f) of the said regulations. Mundra UMPP was set up under Case 2 competitive bidding carried out in accordance with the Guidelines issued by the Central Government under Section 63 of the 2003 Act. This Commission has approved the tariff of Mundra UMPP in accordance with the PPA in terms of Section 63 of the Act. The PPA is a self-contained contractual document which deals with all aspects of Mundra UMPP including the procedure to be followed for commercial operation of the units and generating station of Mundra UMPP. Therefore, any allegation about the non-compliance of the provisions of the PPA if brought to the notice of the Commission needs to be first investigated in accordance with the applicable provisions of the CBR. The complaint made by Mr. M. C. Bansal into alleged irregularities in the COD of the Units of Mundra UMPP was received through the Ministry of Corporate Affairs and Member SEBI. After preliminary enquiry from CGPL and WRLDC, the Commission considered it necessary to investigate into the full facts of the case. Accordingly, the present proceedings were initiated for the purpose of investigation into alleged irregularities in the COD of the Units of Mundra UMPP. In our considered view, the present proceedings initiated for collection of factual information and views of all concerned persons with regard to the COD of the Units of Mundra UMPP under Regulation 24 read with Regulation 74 of the CBR is within



the competence and jurisdiction of this Commission. In fact, Tata Power Limited, the holding company of CGPL in response to the query of BSE Limited, in its reply vide letter No. BJ/SH-L2/187 dated 15.12. 2014 had submitted as under:

“c. With regard to allegations contained in the Complaint in relation to comply with the provisions of the PPA to meet the commercial operation requirements, please note that the Complainant has mentioned that the issue is of a technical nature and we believe that neither the Securities and Exchange Board of India (“SEBI”) nor neither of BSE Limited or National Stock Exchange of India Limited are the correct forums to raise such grievances. In case of any irregularities in the process of commissioning of Mundra, Complainant is within its right to approach Central Electricity Regulatory Commission in accordance with and pursuant to the applicable provisions of the Electricity Act, 2003.....”.

Both Tata Power and CGPL have accepted that investigations into the irregularities in the COD of the Units of Mundra UMPP can be dealt with by this Commission in accordance with the applicable provisions of the 2003 Act. Therefore, when investigation is being carried out by the Commission in terms of the applicable provisions of CBR which has been saved under Section 185(2) of the 2003 Act, CGPL cannot oppose the course of the proceedings on the ground that it is not maintainable.

11. The next objection of CGPL is that the 2003 Act and the rules and regulations made thereunder do not provide for any procedure relating to commissioning of a Unit and/or a generating station and the issue/dispute, if any, relating to the declaration of Commercial Operation is a contractual issue/ dispute amongst the procurers and the generating companies. CGPL has submitted that no dispute has been raised by the Procurers qua declaration of commissioning of Units 20 to 50 of Mundra UMPP. CGPL has relied upon paras 13.1 and 20(a) of the judgment of the Appellate Tribunal dated 31.3.2016 titled as Sasan Power Limited v. CERC &Ors. We have considered the submissions of CGPL. The judgment of the Appellate Tribunal was



taken up in appeal before the Hon'ble Supreme Court in Civil Appeal Nos. 5881-82 of 2016 (All India Power Engineer Federation & Others Vs Sasan Power Limited & Others) and other related appeals. The Hon'ble Supreme Court in its judgment dated 8.12.2016 has set aside the judgment of the Appellate Tribunal dated 31.3.2016. The Hon'ble Supreme Court in its judgment dated 8.12.2016 examined the issues whether acceptance of the performance test by the Procurers which did not conform to the technical parameters laid down in Schedule 5 of the PPA amounted to waiver and whether in such cases, amended tariff is required to be accepted by the Commission or not. In para 30 of the judgment, the Hon'ble Supreme Court observed as under:

“30. All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.”

The Hon'ble Supreme Court set aside the judgment dated 31.3.2016 of the Appellate Tribunal with the following observations:

“48. We thus find that the Appellate Tribunal is wholly incorrect in accepting the case of waiver put forward by learned counsel for Sasan, and is equally incorrect in absolving the independent engineer for the test certificate given by him on 30.3.2013. We, therefore, set aside the Appellate Tribunal's judgment, and reinstate the judgment dated 8.8.2014 of the Central Electricity Regulatory Commission.”

In the present case, the issue which has been raised is whether the COD has been declared in terms of Article 6.3.1 read with Schedule 5 of the PPA on account of alleged irregularities in the mandatory duration of testing in terms of the PPA. In the light of the judgment of the Hon'ble Supreme Court in Civil Appeal Nos. 5881-82 of 2016, this matter needs to be examined by this Commission as it involves public



interest, even though tariff is governed in terms of the PPA under Section 63 of the 2003 Act.

12. CGPL has further submitted that this Commission being a statutory body created under the 2003 Act, is obligated to act within the four corners of the said Act and does not have jurisdiction akin to a Writ Court so as to entertain Public Interest Litigations. Mr. Bansal has submitted that he did not approach the Commission to initiate the present proceeding. On the contrary, the present proceeding was initiated by the Commission after SEBI approached and requested to the Commission to take necessary action on the issue of irregularities in commissioning of CGPL as CGPL itself informed the BSE Limited that the issue falls within the jurisdiction of the Central Commission. In our view, the present proceeding is not in the nature of Public Interest Litigation as the Commission after preliminary enquiry of the alleged irregularities highlighted in the complaint of Mr. Bansal decided that the matter needs to be investigated further with the involvement of all concerned parties and accordingly, initiated the proceedings. The Hon'ble Supreme Court in Sasan matter has held that issue of compliance with the provisions of Article 6.3.1 read with Schedule 5 of the PPA involves public interest as it affects tariff payable by the consumers and therefore, needs to be accepted by the Commission. Therefore, the Commission is well within its jurisdiction to investigate whether CGPL has complied with the provisions of Article 6.3.1 read with Schedule 5 of the PPA as non-compliance of the said provisions in the PPA has implication for tariff and based on the results of investigation can take further action including issue of appropriate directions for compliance as may be considered necessary.



13. The next contention of CGPL with regard to maintainability is that the Appellate Tribunal in Compensatory Tariff matter had held that the Regulator does not have overarching powers de-hors the bidding document and Section 79(1)(f) of the 2003 Act entrusts adjudicatory power in term of which this Commission can decide the rights and obligations of the parties before it in accordance with the existing contractual arrangement. In the absence of a dispute regarding the Commissioning of Units 20 to 50 of Mundra UMPP being raised by the Procurers and in light of the Appellate Tribunal's Judgment dated 7.4.2016 in the Compensatory Tariff batch matters, this Commission does not have power, either regulatory or adjudicatory, to initiate the present proceedings. We have considered the submissions of CGPL. It is pertinent to mention that the judgment of the Appellate Tribunal dated 7.4.2016 in Appeal No. 100 of 2013 and other related appeals was challenged before the Hon'ble Supreme Court in Civil Appeal No.5399-5340 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission & Others) and related appeals which were disposed of by the Hon'ble Supreme Court through a common judgment dated 11.4.2017. The judgment of the Appellate Tribunal dated 7.4.2016 and consequential order dated 6.12.2016 issued by this Commission have been set aside. The following observations of the Hon'ble Supreme Court with regard to the regulatory jurisdiction of the Commission are noteworthy and are extracted as under:

“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good



reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”

As per the above observations of the Hon’ble Supreme Court, this Commission in exercise of its regulatory power under Section 79(1)(b) of 2003 Act can deal with an issue for which no guidelines have been issued by the Central Government under Section 63 of the 2003 Act or the guidelines issued do not deal with the given situation. In the present case, the PPA between CGPL and Procurers has been entered into in accordance with the guidelines issued by the Central Government under Section 63 of the 2003 Act and the PPA contains specific provisions with regard to the COD of the units of Mundra UMPP. The allegations being investigated in the present proceedings are that the CODs of Mundra UMPP have been declared without fully complying with the provisions of the PPA and the said CODs have been accepted by the Procurers. After being aware of the alleged irregularities in the COD of the Units of Mundra UMPP, the Commission is well within its power and jurisdiction to initiate proceedings suomotu in terms of Section 79(1)(b) of the 2003 Act and applicable provisions of CBR to investigate into the extent of non-compliance of the provisions of the PPA and issue suitable directions for compliance, if non-compliance with the requirements of the PPA is established and may impose penalty for non-compliance, if warranted.



14. CGPL has further submitted that Mr. Bansal is not an aggrieved party as he is neither a party to the PPA nor a beneficiary/resident of the five Procuring States who avail supply of electricity from Mundra UMPP. CGPL has further submitted that in this case, consumer interest is duly taken care of by this Commission, the Procurers, WRLDC and CGPL and therefore, Mr. Bansal ought not to be permitted to abuse the process of law by making scurrilous allegations or participating in the present proceedings. It may be noted that based on the allegations brought out in the complaint, the Commission has initiated the present proceedings Suo Motu to investigate into the veracity of the allegations. Regulation 19(1) of CBR provides that the Commission may appoint any officer or any other person to represent consumer's interest if considered necessary in the proceedings before it. Thus, it is the discretion of the Commission to allow a person to represent consumer interest, irrespective of whether he is an aggrieved/affected party or not. Mr. Bansal has been arrayed as a Proforma Respondent in the proceedings to assist the Commission. We are of the view that no prejudice will be caused to CGPL if Mr. Bansal is allowed to participate in the present proceedings and to assist the Commission.

15. In the light of the above discussion, we hold that the present proceedings under Regulation 24 read with Regulation 74 of the CBR are maintainable and the Commission has the necessary jurisdiction under Section 79(1)(b) read with the Competitive Bidding Guidelines and adjudicatory provisions in the PPA to look into the alleged irregularities in the COD of the Units of Mundra UMPP and issue appropriate directions as may be considered necessary.



16. In the meanwhile, Energy Watchdog has filed an IA No. 50/2017 in the present proceedings to be allowed to participate as an intervenor in the matter. Notice is issued in the said IA on its admissibility. Decision with regard to Energy Watchdog being allowed as an intervenor shall be taken after hearing CGPL and Procurers.

17. CGPL, Procurers, WRLDC and Independent Engineer have made their submissions on merit. However, all parties are directed to make their final submissions, by 11.9.2017.

18. The matter shall be taken up for final hearing on 28.9.2017.

sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K.Singhal)
Member

sd/-
(GireeshB.Pradhan)
Chairperson

