APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 95 OF 2017, APPEAL NO. 105 of 2017
AND
APPEAL NO.173 OF 2017

Dated : 12th April, 2018

PRESENT :HON'BLE MR. JUSTIC N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 95 OF 2017

IN THE MATTER OF:

1. Green Energy Association
Sargam, 143, Taqdir Terrace,
Near Shirodkar High School,
Dr. E. Borjes Road,
Parel (E),
Mumbai-400 012 **... Appellant**

Versus

1. Central Electricity Regulatory Commission
3rd and 4th Floor,
Chanderlok Building
36, Janpath,
Delhi-110001

... Respondent

Counsel for the Appellant(s) **:** Mr. Sanjay Sen, Sr. Adv.
Ms. Mandakini Ghosh
Ms. Ritika Singhal
Mr. Saransh Shaw
Mr. Parinay Deep Shaw

Counsel for the Respondent(s) **:** Mr. Nikhil Nayyar
Mr. Divyanshu Rai for R-1

APPEAL NO. 105 of 2017

IN THE MATTER OF:

1. Indian Wind Power Association (NRC)
World Trade Centre,
513 & 514, Barakhamba Lane,
New Delhi - 110001 ... **Appellant**

Versus

1. Central Electricity Regulatory Commission (CERC)
3rd & 4th Floor, Chanderlok Building, 36,
Janpath, New Delhi- 110001

2. Power System Operation Corporation Limited
B-9 (1st Floor), Qutab Institutional Area,
Katwaria Sarai, New Delhi -110016 ... **Respondent(s)**

Counsel for the Appellant(s) **:** Mr. Vishal Gupta
Mr. Kumar Mihir
Mr. Abhishek Rai

Counsel for the Respondent(s) **:** Mr. Nikhil Nayyar
Mr. Divyanshu Rai for R-1

APPEAL NO. 173 OF 2017

IN THE MATTER OF:

1. Uttar Pradesh Sugar Mills Co-Gen Association,
403, Chintels House
Station Road,
Lucknow - 226 001
Through its Secretary ... **Appellant**

Versus

1. Central Electricity Regulatory Commission (CERC)
3rd & 4th Floor, Chanderlok Building, 36,
Janpath, New Delhi- 110001
Through its Secretary ... **Respondent**

Counsel for the Appellant(s) **:** Mr. Vishal Gupta
Mr. Avinash Menon

Counsel for the Respondent(s) **:** Mr. Nikhil Nayyar
Mr. Divyanshu Rai for R-1

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

Appeal No. 95 of 2017

1. The present appeal under sub section (1) and (2) of Section 111 of the Electricity Act, 2003 has been preferred by Green Energy Association (hereinafter referred to as the **'the Appellant'**) against the impugned order dated 30.03.2017 passed by the Central Electricity Regulatory Commission (hereinafter referred to as **"Central Commission/ CERC"** in Petition No. 02/SM/2017 determining the forbearance and floor price for the REC framework. The Petition was initiated by the CERC to determine the forbearance and floor price of the REC framework, to be made effective from 01.04.2017, in accordance with the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 **"CERC REC Regulations"**.

APPEAL NO. 105 of 2017

2. The Appellant herein Indian Wind Power Association is filing the instant appeal under Section 111 of the Electricity Act, 2003 challenging the order dated 30.03.2017 passed by the Central Electricity Regulatory Commission (hereinafter referred as the "Central Commission") in a *suo motu* proceeding in Petition No. 02/SM/2017 (hereinafter referred as "the

Impugned Order") whereby the Central Commission determined Forbearance and Floor Price for the REC framework to be applicable from 1st April 2017. The appellant has contested that vide its said Order, the Central Commission has drastically reduced the REC floor and forbearance price without considering the provisions of the Electricity Act, National Tariff Policy and its own Regulations on REC framework.

APPEAL NO.173 OF 2017

3. The Appellant herein Uttar Pradesh Sugar Mills Co-Gen Association is filing the instant appeal under Section 111 of the Electricity Act, 2003 against the judgment and Order dated 30.03.2017 passed by the Central Electricity Regulatory Commission (hereinafter referred as the "Central Commission") in a *suo motu* proceeding in Petition No. 02/SM/2017 (hereinafter referred as "the Impugned Order") wherein the Central Commission determined Forbearance and Floor Price for the REC framework to be applicable from 1st April 2017. The appellant is aggrieved that the Central Commission, has by way of the Impugned Order , without considering and adhering to the provisions of the Electricity Act, National Tariff Policy and its Regulations on REC framework wrongly proceeded to reduce the REC floor and forbearance price by a sizeable portion and that too, with retrospective effect.

4. Brief Facts of the Case(s)

4.1 CERC has periodically determined the forbearance price and the floor price for both Solar and Non-Solar RECs through its *suo-motu* orders. The previous forbearance price and the floor price for Non-Solar RECs determined by the CERC were Rs. 3300 and Rs. 1500 per REC respectively and for Solar RECs Rs. 5800 and Rs. 3500 respectively. The

said price was valid till 31.03.2017, and has been consequently decreased by the CERC vide the Impugned Order. The members of the Appellant association are claiming to be adversely affected by such downward revision and may force the uncertain future of becoming NPAs.

4.2 The CERC in the Impugned Order has deviated from its usual practice of calculating the floor and forbearance price by taking the CERC benchmark capital cost. CERC in all its previous Orders for determination of floor and forbearance price of RECs has taken into account the tariff determined for Solar PV and thermal plants in its own tariff Orders. The said methodology has been followed by CERC for the past six years and was also used for determining floor and forbearance price in the Previous REC Order.

4.3 CERC in the Impugned Order, for the first time, has used Bid Discovered Tariff for all States and Union Territories (UTs) in India. The Appellants have alleged that CERC has failed to provide any cogent reasoning for such a departure and ignored its own Tariff Orders which have been passed for determination of Solar PV and thermal plants and using bid-discovered tariff as reference tariff for determining floor and forbearance cost of RECs is in violation of Regulation 9 of the CERC REC Regulations.

4.4 CERC has taken reference of the tariff derived in the various bids under the Solar Park policy in the Impugned Order. The Scheme for Development of Solar Parks and Ultra Mega Solar Power Projects has been introduced by MNRE. The scheme aims to provide a huge impetus to solar energy generation by acting as a flagship demonstration facility to encourage project developers and investors, prompting additional projects of similar nature, triggering economies of scale for cost-reductions, technical improvements and achieving large scale reductions in GHG

emissions. MNRE on 12.12.2014 sanctioned setting up of at least 25 solar parks each with a capacity of 500 MW and above with a target of over 20,000 MW of solar power installed capacity in a span of 5 years with considerable Central Financial Assistance (CFA).

4.5 CERC in the Impugned Order has relied on Solar PV tariff discovered in auctions from the period January 2016 to February 2017 to arrive at an average bid tariff of Rs 4.65/kWh. It is the contention of the Appellant that CERC in doing so has relied on tariff discovered with respect to projects under the Solar Park Scheme and failed to take into account the differences between the solar projects set-up under the Solar Park Scheme and the other Solar Projects set-up under the REC framework, which form the majority of REC solar plants. The said differences, if taken into account result in a sharp rise in the average Solar PV tariff. Therefore the average bid tariff used by CERC is not reflective of the cost of generation of different renewable energy technologies falling under solar category, across States in the country which is to be considered by CERC while determining the price of RECs under Regulation 9 of the REC Regulations. Further, while referring to the price discovery for the calculation of the floor and forbearance price it is also to be noted that the average project size per bidder is 75 MW whereas under REC mechanism average project size is 2 MW. The said difference in the project size further diminishes the economies of scale.

4.6 The Appellants state that the Impugned Order is flawed as it departs from the earlier methodology of following the CERC RE tariff as a reference while determining the REC pricing. In the present scenario, if the difference between the tariff and APPC; and project viability tariff and APPC is calculated with the solar tariff of Rs.5.68 per KWh as determined by the CERC in Order dated 30.03.2016 in Petition No. SM/03/2016, then

the table for calculation of floor and forbearance Price will change drastically. Most importantly, if the previous CERC methodology for determining the forbearance price and floor price based on the **highest** difference between RE tariff and APPC and Project viability tariff and APPC is retained, the REC pricing band would be at 3.4.

4.7 As per the Appellants, the Impugned Order has dealt an adverse blow to the REC Industry. The members of the Appellant associations are facing erosion of 70% of its net worth while some members are on the verge of being declared a NPA due to drastic reduction in REC pricing. The importance of setting up and promoting a robust REC market cannot be denied and becomes clearer from a perusal of Para 1.7 of the statement of objects and reasons of CERC REC Regulations, wherein it has been reiterated that the concept of REC helps in addressing the mismatch between the availability of Renewable Energy sources.

4.8 It is submitted by the Appellants that the large number of pending RECs is not just a result of non-compliance by the obligated entities, but also the 'inaction of the SERCs. The SERCs have allowed waiver as well as carry-forward of the shortfall in RPO compliance by the obligated entities even though RECs were available in the market. It is further submitted that the REC market is already struggling to stay afloat and such decisions will cumulatively obliterate the demand for RECs. The Solar and No~-Solar Power developers who have opted for the REC mechanism and in turn subsidized their power cost in the hope of recovering their costs through RECs, will not be able to recover costs or keep the power subsidized.

4.9 The appellants allege that the CERC by the Impugned Order has refrained from protecting the unsold REC inventory by providing a vintage multiplier or by creating separate markets for RECs issued till 31.03.2017 and RECs issued post 31.03.2017. The CERC has been guided by the

misinformation that REC trading has increased and showing an upward trend. Hence allegedly REC prices have been aligned to present market conditions. However, the truth of the matter is that solar REC trading has not improved/picked up as believed by CERC.

4.10 The appellants are aggrieved by the Impugned Order passed by the CERC to the extent of downward revision of REC prices (Floor/Forbearance prices) and have preferred these Appeals.

5 . QUESTIONS OF LAW:-

The questions of law, which are raised by the Appellants, in all the three Appeals are summarized as below:

(a) Whether CERC has acted in contravention of Electricity Act, 2003 and the CERC REC Regulations by lowering the floor and forbearance price of the Solar & Non-solar RECs?

(b) Whether CERC has acted in a reasonable & justifiable manner in changing the methodology for determining the floor and forbearance price for RECs?

(c) Whether CERC has failed to take into account the status of RPO compliances by the obligated entities on a pan-India level and huge inventory of unsold RECs?

(d) Whether CERC, putting an end to the Vintage Multiplier, has acted in contravention of Article 14 of the Constitution of India?

(e) Whether the CERC failed to protect the financial viability of existing RE generators by further reducing the REC prices and possibility of projects being NPAs?

(f) Whether the Impugned Order is flawed as it only benefits the defaulting obligated entities at the cost of the RE generators?

6. <u>The learned senior counsel, Shri Sanjay Sen, appearing for the Appellant has filed the following written submissions in Appeal No. 95 of 2017</u> :-

6.1 The CERC induced the Appellant generators to invest in solar generating stations under the REC scheme. As a result, after commissioning the solar

plants, the Appellant generators have sold electricity on a real time basis to Distribution Licensees at conventional energy rates (being APPC), or to third party under Open Access at negotiated rates. While, part of tariff was recovered at the time of sale, the recovery of renewable energy component of the energy was deferred so as to be recovered from the sale of REC at a price between forbearance and floor price determined by the Central Commission. Recovery of this renewable energy component/ attribute cannot now be denied or taken away.

6.2 Had the Central Commission not fixed the floor price, the Appellant generators would not have participated in the REC scheme so as to sell electricity on a real time basis at APPC and recover the renewable energy component of tariff on a deferred basis at the REC floor price. Since electricity has already been sold at conventional rate by the Appellant generators, the Central Commission does not have the ability to now deny the floor price for recovery of balance part of tariff.

6.3 The Central Commission at the time of introduction of RECs through a regulatory intervention provided both the forbearance price and the floor price. These regulatory interventions/ orders were issued in the exercise of Jurisdiction vested in the Central Commission under Proviso to Regulation 9(1) and Regulation 9(2). The first such Order was passed on 01.06.2010. The second order was passed on 23.08.2011 and the third order was passed on 30.12.2014. Clearly at each stage the Central Commission represented to the Appellant generator that they will recover the floor price, should they decide to set-up solar generating stations & participate in the REC scheme. The Appellant generators have acted upon such representation and have changed their position irreversibly by setting-up the solar generating stations and participating in the REC scheme.

6.4 The Central Commission was fully aware that REC market was not a real market (as is commonly understood), but was based on a fiction of breaking up the cost of power between brown component and green component and compliance of RPO by Obligated Entities. This aspect is also recognized by this Hon'ble Tribunal in paragraph 29 of its Order dated 16.04.2015 in Indian Wind Power Association, v. Gujarat Electricity Regulatory Commission &Ors., Appeal No. 258 of 2013 & Appeal No. 21 of 2014 & IA-28 of 2014. Since RECs were based on compliance, for the Central Commission to now argue on market reality basis is wrong and without any merit.

6.5 RECs cannot be compared with any commodity such as shares or goods sold in the free market. Had it been so, there would have been no requirement to have intricate regulatory interventions from time to time. Shares do not have any floor or forbearance price determined by either capital market regulator or the stock exchanges. Similarly any good/stock available in a store is not regulated in a manner in which RECs are. If the RPO were not mandatorily introduced, RECs would not have existed in the first place. REC is a fiction for the reason that renewable energy attributes are traded at prices determined on basis of the principles provided in Regulation 9(2) of the REC Regulations, 2010. These principles cannot now be ignored and casually denied as if RECs are equivalent to a common commodity such as soaps or shampoo.

6.6 The Central Commission having admitted that the REC floor price represents the recovery of cost of generation, i.e. it is a component of tariff, the Central Commission failed to make an enquiry on whether or not the generator has recovered the cost of generation in a reasonable manner as provided in section 61 of the Electricity Act, 2003. The Impugned Order is motivated with the urge to clear old REC stock without addressing the issue of non-compliance of RPO Regulations by

the Obligated Entities, which led to accumulation of unsold RECs. Therefore, to abandon the viability principle for determination of REC floor price in favour of an alleged market liability, based on admitted non-compliance of mandatory regulations, is unacceptable.

6.7 The Impugned Order benefits the defaulter as it gives incentive to a defaulting Obligated Entity who, in violation of mandatory regulations is not buying REC at the price on which they were generated. Now such defaulter can buy RECs at a much lower price, at the cost of generator who has not recovered the cost of generation.

6.8 The Central Commission has by passing the Impugned Order affected vested rights. The Impugned Order has retrospective effect for the reason that electricity was sold on real time basis at conventional energy prices, while the recovery of renewable energy attributes was deferred. The renewable energy component was attributed a certain value on the date of sale of electricity. The Appellant generators therefore have a vested right to recover cost at the floor price. To deny the same now after duration of 4 years by changing the goal post constitutes denial of tariff of the renewable energy component of the past. Hence the Impugned Order has retrospective effect for which it is wrong and is required to be set-aside.

6.9 The Regulation 9 stipulates that the price of RECs shall be discovered in the power exchange and it is only the proviso which provides for the Central Commission to set a floor and a forbearance price. In this context, it is argued by Respondents that the proviso is not a Rule. A proviso cannot be elevated to a right. This argument is wrong for the reason that the proviso was inserted along with the Rule for purposes enumerated in the Statement of Reasons. The reason why the proviso was introduced was to ensure “threshold level of revenue certainty”.

6.10 Further, the proviso is taken forward and the manner in which the proviso will be worked out is in Regulation 9(2), which is a substantive

regulation. Therefore, it is not correct to say that the proviso is not a Rule. If that argument is accepted, then there is no scope for Regulation 9(2) to exist. Regulation 9(2) is not a proviso.

6.11 Reliance in this context is placed on the Constitutional Bench Judgment of the Hon'ble Supreme Court in ***Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver, reported in (1968) 1 SCR 148***. Reliance is also placed on the Judgment of the Hon'ble Supreme Court ***in S. Sundaram Pillai v. V.R. Pattabiraman, reported in (1985) 1 SCC 591.***

6.12 In any event, whether it is a proviso or not, it is a substantive regulation that vests jurisdiction on the Central Commission to provide for floor price and forbearance price. In exercise/ discharge of such jurisdiction, floor price and forbearance price were introduced.

6.13 The Central Commission in its order dated 01.06.2010 proceeded to determine the floor price of RECs based on the viability principle. In this context, the Central Commission considered the following aspects:

a) RE target
b) Additional RE capacity addition
c) Additional generation at State level using specific RE technology
d) Cost of generation/ RE tariff
e) average power purchase cost

The present determination in the impugned order is at variance with Regulation 9(2). On this ground also the order requires to be set aside.

6.14 Therefore, the proviso has been worked out and implemented through orders. So, there is no merit in the argument that it is a proviso and not a Rule, because the proviso has been acted upon. Once it is acted upon and the floor price has been set in various orders issued from time to time, under the REC scheme the Appellant generators were induced to sell the brown component of power at conventional rates with an assurance of recovery under "the revenue certainty principle at the floor price". Pursuant to the inducement, parties have changed their position and have

indeed sold power at conventional energy rates and are now awaiting recovery of the balance component of tariff through the REC mechanism.

6.15. It is too late for Central Commission to now say that the proviso is not a Rule because Central Commission has acted upon the proviso for a period of over six (6) years resulting in parties investing under the REC scheme and selling power by splitting the brown and the green components, where the recovery of costs for the green component is linked to sale of REC.

6.17. The Central Commission itself admitted that since the generators had not recovered the cost of generation on account of inability to sell the RECs, extension of the validity period of the RECs were given from time to time. The recognition that there is a vested right in the floor price is intrinsic in the orders issued by the Central Commission on REC pricing including Order dated 30.12.2014 in Petition No. 16/SM/2014. If there was no vested right to recover tariff, what was the need to introduce a vintage multiplier. It has been pointed out that vintage multiplier was issued by a regulatory order of the Central Commission and not through regulations. Regulations came subsequently. The Regulations introducing the Vintage Multiplier became effective on 01.01.2015, while the order providing Vintage Multiplier is dated 30.12.2014.

6.17 Thus, the vested right of the Appellant generators cannot be taken away by the Central Commission. Doing so would be contrary to established principle of promissory estoppel. Reliance in this context to support the contention of the Appellant that the Central Commission was bound by the principle of promissory estoppel is placed on the following Judgments:

i) Union of India v. Godfrey Philips India Ltd., reported in (1985) 4 SCC 369, wherein it was held as under:

"11. The resultant position was summarised by this Court in Motilal Sugar Mills case [(1979) 2 SCC 409: 1979 SCC (Tax) 144 : (1979) 2 SCR 641].

ii) The doctrine of promissory estoppel as explained above was also held to be applicable against public authorities as pointed out in Motilal Sugar Mills case [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] . This Court in Motilal Sugar Mills case [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] quoted with approval the observations of Shah, J. in Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council [(1970) 1 SCC 582 : AIR 1971 SC 1021 : (1970) 3 SCR 854].

iii) ***The Court refused to make a distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned. There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel.***

iv) State of Punjab v. Nestle India Ltd., reported in (2004) 6 SCC 465, wherein it was held as under:

The Court directed an exemption to be granted on the basis of the principles of promissory estoppel even though Rule 8 of the Central Excise Rules, 1944 required exemption to be granted by notification.

v) Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, reported in (2007) 5 SCC 447 at page 495, wherein it was held as under:

"121. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive

instructions. The appellants had undoubtedly been enjoying the benefit of (sic exemption from) payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants.

128. In MRF Ltd. [(2006) 8 SCC 702] it was held that the doctrine of promissory estoppel will also apply to statutory notifications.

It is opined that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved.

6.18 The regulatory scheme also represented to the investors that the Obligated Entities who are required to buy renewable power will purchase such renewable power or RECs within a defined timeframe in order to achieve this, each State Commission was required to adopt its own RPO regulation in terms of the draft model regulation proposed by the Forum of Regulators. However, after the investments were made, the Central Commission and other regulatory institutions including the Appellate Tribunal realized that the Obligated Entities were not purchasing RECs and as a result the REC inventory remained unsold. In this context, reference may be made to the following orders passed by the Central Commission as well as this Hon'ble Tribunal from time to time, i.e., 09.12.2012 in petition no. 266/SM/2012; order dated 11.12.2013 in petition no. 266/ SM/ 2012, order dated 16.04.2015 in appeal no. 258 of 2013.

6. 19 In fact, the Appellant Association has filed multiple cases before this Hon'ble Tribunal as well as respective State Commissions against waiver and carry-forward of RPO allowed by State Commissions. These matters which are till date pending are reflective of the situation of RPO non-compliance in the Nation. The Appellant Association today is being made

to suffer due to the inaction of respective State Commissions and the Obligated Entities.

6.20 The Ministry of Power notified the i.e. Ujwal Discom Assurance Yojana Scheme ("UDAY Scheme") vide Office Memorandum No. 06/02/2015-NEF/FRP, dated 20.11.2015 for financial revival of State owned DISCOMS, which have a cumulative debt of over Rs 4.37 lakh crore. Paragraph 9 of the Uday Scheme provides that the State owned Distribution companies opting for UDAY Scheme will comply with the Renewable Purchase Obligation (hereinafter "RPO") outstanding since 1st April, 2012, within a period to be decided in consultation with the Ministry of Power, and fix a period within which the DISCOMS will meet their RPO targets before becoming eligible to avail the benefits of the Scheme. However, the Ministry of Power has signed MOUs with State Governments and respective DISCOMS without deciding a timeline for compliance of RPO in violation of Paragraph 9 of the UDAY scheme.

6.21 The Central Commission in the Impugned Order has while acknowledging the fact that RECs continue to remain unsold on account of failure/ default of the Obligated Entities, failed to appreciate that the old solar projects linked to the REC scheme had not recovered the cost of power which is attributable to the cost of Renewable energy component.

6.22 The Central Commission has failed to analyze the under recovery of cost for sale of electricity on account of stranded REC inventory. The Central Commission has taken a stand in complete departure from its earlier stand/ representations made to investors of solar projects to hold as follows:

> **"The Commission has considered the suggestions and feels that if at this juncture, a multiplier is provided, there would be sudden surge in stock of RECs on the exchange and this shall imply that the existing inventory shall face even greater difficulty in getting cleared. It is also understood that investing in a market comes**

with its own risks and the Commission believes that such risks are accounted for by investors. The Commission feels that the market must reflect the current ground realities."

6.23 The Central Commission has now moved from the viability principle adopted by it to a principle allegedly linked to market/ ground realities. The present finding of the Central Commission is without any analysis of the ground reality concerning old solar projects, who have not recovered the cost of power generation and sale. In fact, the several of the members of the Appellant association are on the verge of bankruptcy on account of their failure to discharge the debt-service obligation.

6.24 For the reasons stated above, to suggest that the Central Commission is merely providing a floor price as an industry regulator is wrong because the floor price was provided with a particular object/ purpose. The floor means the minimum assured recovery. Why would an industry regulator promise a minimum assured recovery.

6.25 It is the case of the Appellant that they are entitled to recover tariff under the statute. They have recovered part of the tariff by sale of brown energy, while the balance tariff had to be recovered through the REC route, the minimum tariff that is available under the REC route is the floor price. This cannot be denied by the regulator. Therefore, the argument made that price fixation cannot be an inducement is wrong because the REC scheme itself is an inducement, which induces splitting of tariff. Based on the floor price, the generator has sold power at conventional power rates. It is clarified that the component of tariff cannot be a concession. The right to recover tariff is a right protected under the statute. Once the regulator recognizes that tariff has not been recovered, which he has in several orders granting extension of RECs, he has a duty thereafter, to ensure recovery of tariff for those projects who have participated in the REC scheme.

6.26 The Central Commission has relied upon the current solar tariff that has been discovered in the auctions conducted during January 2016 to February 2017. This approach is wrong as the Central Commission itself in its order dated 23.08.2011 had rejected the NVVN discovered solar tariff (through bids) and had relied upon the tariff determined by Central Commission in terms of the Central Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2010 and the subsequent amendments. However, in the Impugned Order, Central Commission goes back and picks up tariff discovered in auctions. This somersault, particularly when vested rights are affected is not permissible.

6.27 Further, Central Commission has deviated from its established practice of consulting with Forum of Regulators in contravention of Regulation 9(1) of the REC Regulations, 2010, which was followed even in the previous *Suo-Motu* Orders. There has been no real consultation with Forum of Regulators and Central Commission has only consulted with POSOCO in a limited manner.

6.28 Further on the issue of Project Specific Tariff Regulation, it is necessary to clarify that Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 were notified on 17.04.2017,i.e., after the impugned order was issued on 30.03.2017.

6.29 In light of the aforesaid submissions, it is respectfully submitted that the present Appeal be allowed and the impugned order be set aside. The matter necessarily has to be remanded back to the Central Commission to determine the floor price in a manner that ensures viability of the old generators who have already sold their power before revision of the floor price and/ or removal of the Vintage Multiplier.

7. **The learned counsel, Shri Vishal Gupta, appearing for the Appellant has filed the common written submissions in Appeal Nos. 105 of 2017 and 173 of 2017 as follows:-**

7.1 The Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 dated 14.01.2010 (hereinafter referred as "**the REC Regulations**") in exercise of its powers conferred under sub-section (1) of Section 178 and Section 66 read with clause (y) of sub-section (2) of Section 178 of the Electricity Act, 2003 for the development of market in power from Non-Conventional Energy Sources by issuance of transferable and saleable credit certificates.

7.2 Considering the above scheme, objective and intent, the REC Regulations act as a self – contained and uniform pan-India code for all matters related to recognition and issuance of REC for renewable energy generation. The REC Regulations further lay down that there shall be two categories of certificates, viz., solar certificates issued to eligible entities for generation of electricity based on solar power as a renewable energy source; and non-solar certificates, issued to eligible entities for generation of electricity based on renewable energy sources other than solar. It further provides that the solar certificate shall be sold to the obligated entities to enable them to meet their renewable purchase obligation towards solar power; Whereas, non-solar certificates shall be sold to the obligated entities to enable them to meet their obligation for purchase from renewable energy sources, other than solar. The members of the Appellants' Association in the instant Appeals are covered under the non-solar category.

7.3 Regulation 5 of the REC Regulations as amended from time to time stipulates eligibility of generating companies and registration certificates. The salient points are as under:

(a) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in the renewable energy certificates (RECs) if it fulfils the following conditions:

- It has obtained accreditation from the State Agency;
- It does not have any power purchase agreement for the capacity related to such generation to sell electricity, with the obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under section 62 or adopted under section 63 of the Act by the Appropriate Commission.
- It sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.
- It does not sell electricity generated from the plant, either directly or through trader, to an obligated entity for compliance of the renewable purchase obligation by such entity.

7.4 Regulation 7 of the said REC Regulations provide that the eligible entities shall apply to the Central Agency for Certificates within three months after corresponding generation from eligible renewable energy projects and the application for issuance of certificates may be made on fortnightly basis, i.e., on the first day of the month or on the fifteenth day of the month. The said regulation also stipulates that the Certificates shall be issued to the eligible entity after the Central Agency duly satisfies itself that all the conditions for issuance of Certificate, as may be stipulated in the detailed procedure, are complied with by the eligible

entity. The Certificates are to be issued by the Central Agency within fifteen days from the date of application by the eligible entities.

7.5 The Certificates are to be issued to the eligible entity on the basis of the units generated and injected into the Grid; and duly accounted in the Energy Accounting System as per the Indian Electricity Grid Code or the State Grid Code, as the case may be, and the directions of the authorities constituted under the Act to oversee scheduling and dispatch and energy accounting, or based on written communication of distribution licensee to the concerned State Load Dispatch Centre with regard to the energy input by renewable energy generators which are not covered under the existing scheduling and dispatch procedures. Each Certificate issued represents one Megawatt hour of electricity generated from renewable energy source.

7.6 The aforesaid REC Regulations also prescribe in Regulation 8 that unless otherwise specifically permitted by the Central Commission by order, the Certificates shall be dealt only through the Power Exchange and not in any other manner. The Certificate issued to eligible entity by the Central Agency may be placed for dealing in any of the Power Exchanges as the Certificate holder may consider appropriate, and such Certificate shall be available for dealing in accordance with the rules and byelaws of such Power Exchange. Provided that the Power Exchanges shall obtain prior approval of the Central Commission on the rules and byelaws including the mechanism for discovery of price of the Certificates in the Power Exchange. Further, the RE Certificate once issued are to remain valid for three hundred and sixty five days from the date of issuance of such Certificate.

7.7 Regulation 9 of the REC Regulations *inter alia* provide that the price of Certificate shall be as discovered in the Power Exchange, provided that the Central Commission may, in consultation with the Central Agency

and Forum of Regulators from time to time provide for the floor price and forbearance price separately for solar and non-solar Certificates.

7.8 Considering the above statutory framework, the Central Commission vide Suo-Motu order dated 01.06.2010 in petition No. 99/2010 determined the Forbearance and Floor Price for control period of 2 years i.e. upto FY 2011-12.

The Forbearance and Floor Price determined in terms of the above order dated 01.06.2010 for non-solar category REC for a control period of two years i.e., upto FY 2011-12, was as under:

REC Price	**Non-Solar REC (Rs./MWh)**
Forbearance Price	3,900
Floor Price	1,500

7.9 Pertinently, the principle followed for determining the forbearance and floor price for REC under the above order was continued by the Central Commission upon expiry of the earlier control period vide another *suo-motu* order dated 23.08.2011 in petition no. 142/2011. The Central Commission once again determined the forbearance and floor price for REC framework for the next control period i.e. from 1st April 2012 onwards.

7.10 By the above stated REC pricing order dated 23.08.2011, the Central Commission determined forbearance and floor applicable from 1st April 2012 onwards for a control period of 5 years (i.e., upto FY 2016-17) in order to reduce regulatory uncertainty and provide comfort to investors and lenders. The Central Commission had at the time also appreciated the need for long term visibility for certainty and comfort for financial closure of the projects. The Forbearance and Floor Price determined in terms of the above order dated 23.08.2011 for non-solar category REC

for a control period of five years i.e., FY 2012-13 to FY 2016-17, was as under:

REC Price	Non-Solar REC (Rs./MWh)
Forbearance Price	3,300
Floor Price	1,500

7.11 The Floor Price which guarantees recovery of the cost of generation considering the basic minimum requirement for ensuring viability of renewable energy project set up by the members' of the Appellants' Association was pegged at the same level without any variation or change.

7.12 The Central Commission however vide the impugned Order dated 30.03.2017 for the control period starting 01.04.2017, has much to the prejudice of the members' of the Appellants' Association not only reduced the Forbearance and Floor Price for the REC framework, but done so with retrospective application and thereby made it applicable on all existing renewable energy projects set up at an earlier point in time which continue to have unsold RECs. The reduced Floor and Forbearance price as per the impugned Order is as under:

REC Price	Non-Solar REC (Rs./MWh)
Forbearance Price	3,000
Floor Price	1,000

7.13 This reduction is moreover, also based on a totally new methodology for determination of floor and forbearance price of REC in significant departure to the principle followed uniformly under the previous REC pricing orders.

7.14 It is the Appellants' contention in these appeals that the reduction of REC pricing by adopting new methodology and making it applicable retrospectively is improper and without considering and / or adhering to the provisions of the Electricity Act, National Tariff Policy and the REC

Regulations, which stood acted upon and recognise a vested right in favour of the members' of the Appellants' Association to have their existing renewable energy projects continue to be governed under and/or in terms of the principles followed in earlier REC Pricing Orders dated 01.06.2010 and 23.08.2011.

7.15 By way of the impugned Order dated 30.03.2017, the Central Commission has failed to appreciate in proper perspective the well acknowledged fact that the existing renewable energy projects already had sizeable unsold inventory of REC caused solely on account of lack of Renewable Purchase Obligation (RPO) enforcement by the States. These renewable energy projects were set-up by generators assuming the floor and forbearance price at a particular level.

7.16 The failure of regulators to enforce compliance of RPO is being borne by these generators for no fault of theirs; Whereas, the benefit of price reduction is being given to obligated entities that have repeatedly failed to follow the requirement of the law and have not fulfilled their RPO obligations. The effect of the impugned Order is that these obligated entities will be able to meet their past obligations at a much lower cost. The Central Commission despite acknowledging in the impugned Order that there has been lack of RPO enforcement has however, inter-alia, observed as under:

"Analysis & Decision:

10. Many stakeholders have objected to the loss of value of existing inventor. Losses to the tune of INR 1855 crores have been estimated. They have highlighted that the benefit of the price reduction will primarily go to those obligated entities that have not followed the requirement of law so far and have not fulfilled their RPO obligations. Few stakeholders have also suggested that this floor price should be applicable to future inventory only. Alternatively, others have suggested to protect the value of the inventory of RECs accumulated by the RE projects by providing an appropriate vintage multiplier on the inventory. Some generators have argued that they are unable to recover a

component of their tariff and have also lost earnings by way of interest on such money, while those RE generators that have PPAs are able to recover full RoE as well. Many developers have pleaded that their projects will become unviable.

*11. The Commission has analysed the demand supply situation of REC market**. Currently, REC inventory to the tune of 1.85 crores is pending for trade at the power exchange, of which 1.37 crores are non-solar RECs while 48 lakhs are solar RECs. This has historically been due to lack of RPO enforcement.** However, over the past few months, the demand for RECs has increased, and is showing a positive trend. Specifically, months of January and February have seen several Discoms purchase RECs from the market, pushing up the volume of RECs sole to over four times the preceding months:*

….
*12. **The Commission is of the view that the price of trading must also reflect the current market situation. If the green component is unreasonably priced, the obligated entitled would get further disinterested from the REC market, and the REC inventory will continue to pile up. Hence, the REC price must move with the market price of renewable power.***
…
14. Accordingly, the Commission has decided to align the REC floor and forbearance prices with the prevailing market conditions, in terms of tariffs, APPC, etc."

7.17 The Central Commission by reducing the floor price of non solar RECs completely lost sight of the recognized fact that the determination of REC floor price and forbearance price is a determination of opening of tariff for the generating companies and any such determination cannot have retrospective effect. The Central Commission in Para 35 of the impugned order has stated as follows: -

"35. That, the revised floor price (Rs. 1000/- per MWh for solar and non solar) shall be applicable to all RECs in the market."

7.18 The above makes it clear that the Central Commission while noting in Para 11 that REC inventory to the tune of 1.85 crores is pending for trade, applied floor price as determined in the impugned order applicable to all

the RECs in the market, making the said price applicable to the RECs issued in the past as well and thereby making the order retrospective in operation.

7.19 The appellants are aggrieved by such retrospective application of the price of REC as it has the effect of reducing the tariff for these generators. A generator participating in REC mechanism recovers the cost of generation by a two part tariff, one by selling physical component of electricity at APPC rate to the Distribution licensees of the State and the other part by sale of RECs at the power exchanges. This fact has been recognized by the Central Commission in its counter affidavit filed in the above mentioned appeals.

7.20 The RECs issued to the renewable energy generators before passing of the impugned order were to be traded at a floor price of Rs. 1500 per MWh which would have resulted in recovery of cost of generation for the said generating companies. However, due to a huge inventory of RECs remaining unsold in the past 3 years before the passing of the impugned order these generating companies could not recover their cost of generation. The reduction in floor price of RECs and making it applicable to all the RECs in the market which includes the RECs issued to these generating companies before the passing of the impugned order clearly results in these generating companies being forced to sell RECs at the floor price of Rs. 1000 per MWh which means they will not be able to recover the cost of generation.

7.21 It is relevant to point out that detailed submissions were made about this aspect before the Central Commission by the Appellant in its submissions. The said submissions may be read as part and parcel of the instant submissions. A perusal of Para 12 of the impugned order clearly shows that the Central Commission has gone on factors which are extraneous to Regulation 9 (2) of the REC Regulations which provides

for guiding principles for determination of floor price and forbearance price of RECs.

7.22 During the course of hearing it has been submitted on behalf of the Central Commission that since Regulation 9 (1) provides for price of RECs to be determined at the power exchanges, the Central Commission is entitled to look at the market realities of RECs. The said submission is totally erroneous as once the Central Commission chooses to exercise its powers under the proviso to 9 (1) for determination of floor price and forbearance price of RECs, it has to function under Regulation 9 (2) and Regulation 9 (1) has no relevance in this regard. It is only when the Central Commission chooses not to exercise its powers under the proviso to Regulation. 9 (1) the floor price and forbearance price is totally dependent on the market realities and the Central Commission will not determine the floor price or the forbearance price of the RECs.

7.23 During the course of hearing it has been submitted on behalf of the Central Commission that it has the discretion to determine or not to determine the floor price and no one has the right to ask the Central Commission to necessarily determine the floor price or the forbearance price of RECs. It is submitted that this submission is totally flawed as the Central Commission has already chosen to exercise its powers under the Regulation 9 (1) and it is not a case where the Appellants are seeking a direction from the Hon'ble Tribunal against the Central Commission to exercise powers under the proviso. The Central Commission having exhausted its powers under the proviso to Regulation 9(1) cannot submit that it has a discretion to exercise such powers.

7.24 Further, no submissions have been advanced on behalf of the Central Commission as regards to the retrospective application of the floor price and forbearance price determined under the impugned order. It is submitted that the mandate to promote generation of electricity from

renewable energy sources continues under Electricity Act, 2003 and there was no occasion for the Central Commission to reduce the floor price of the old RECs which already stood determined under the 2011 order. The reduction in the floor price of old RECs by the impugned order which results in generating companies not being able to recover even their cost of generation runs completely contrary to the objects of the Electricity Act, 2003 to promote generation of electricity from renewable energy sources.

7.25 The Central Commission further failed to appreciate that the previous fixation of floor and forbearance price under the earlier REC pricing orders along with the statutory obligation to promote renewable energy sources and enforcement provision with respect to renewable purchase obligation together form a composite scheme and establish a vested right in renewable energy generators and a corresponding duty on the obligated entities and therefore the reduced price, as has been fixed by the Central Commission vide the impugned Order dated 30.03.2017, even if otherwise valid, can only apply to new RECs. The members of the Appellants' Association are further aggrieved as the Central Commission completely failed to appreciate that neither the Electricity Act, 2003 nor its own REC Regulations empowered it in any manner to give retrospective effect and application to REC pricing order and change dispensation for all existing RECs under a broad sweep.

7.26 The Central Commission failed to appreciate that while notifying the REC Regulations, it was never envisaged that RECs will not be traded or the REC market will remain stagnant. It is for this reason, the validity of RECs was originally only for a period of 365 days. However, due to poor RPO compliance, the obligated entities failed to buy RECs and RECs started accumulating and admittedly, at the time of passing of the impugned Order, approximately 1.85 crores RECs remained unsold

which led to a situation where the validity of RECs was extended to about three years and vide the impugned Order, the same has been further extended till 31.03.2018.

7.27 The Central Commission has however failed to appreciate that the application of the impugned Order on all RECs will lead to a situation where the existing renewable energy generators will not be able to recover their viability tariff for their projects rendering them financially unviable and force them into bankruptcy. Pertinently, in the earlier pricing orders, validity was extended but floor price was kept firm-uniform, unlike the impugned Order.

7.28 Section 61(h) of the Electricity Act further mandates that even while fixation of tariff promotion of renewable energy must be kept into account. Therefore the defaulting obligated entities which failed to fulfil their respective renewable purchase obligation ought not to have been permitted to pass through the penalty to their consumers. Any penalty for non-fulfilment of renewable purchase obligation cannot be levied in a pass through manner. However the Central Commission has failed to appreciate the same. The liability crystallised on the obligated entities cannot be done away with by using the impugned Order as that would then defeat the entire objective of introducing the RPO mechanism and REC mechanism in the first place.

7.29 The Central Commission in terms of judicial precedent well set by this Hon'ble Tribunal in Appeal No. 258 of 2013 vide judgement and Order dated 16.04.2013 and OP No. 1 of 2013 vide judgment and Order dated 20.04.2015 ought to have at the very least censured and /or passed strictures against the obligated entities for their non-compliance instead of reducing the Floor and Forbearance Price by inter-alia observing that otherwise these obligated entities would be disinterested.

7.30 The Central Commission has by way of the impugned Order dated 30.03.2017 not provided a vintage multiplier for any technology, which has adversely impacted the backlog of existing inventory of RECs as well as future REC for projects which made investments early on. The Central Commission has wrongly held that if a multiplier is provided there would be sudden surge in stock of RECs on the exchange and/or that it may imply the existing inventory facing even greater difficulty in getting cleared. The Central Commission has further without appreciating the true market scenario erroneously observed that investing in a market comes with its own risks and that such risks are accounted by investors

7.31 The Central Commission had in fact provided a vintage multiplier to solar RE Generators vide its order dated 30.12.2014 in Petition No. SM/016/2014. However, this objective has been ignored this time around by way of the impugned order as despite reducing the Floor Price, the Central Commission has not provided a vintage multiplier to protect the RE Generators. In the circumstances, the Central Commission has reduced the Floor Price without considering the actual market and ground realities.

7.32 The reasoning of the Central Commission is erroneous and completely ignores the difficulties being faced by the generators on account of lack of compliance of RPO by obligated entities. The Central Commission has further failed to appreciate that even the National Tariff Policy notified on 28.01.2016 under clause 6.4 specifically provides for linking of a REC project with the timing of its commissioning and should have considered the change of prices of RE based technologies with passage of time by providing higher or lower number of RECs for the same level of generation based on year of commissioning of various RE projects.

7.33 The Central Commission has not considered the lack of RPO compliance, sizeable inventory of unsold RECs of existing renewable energy projects

and the minimum viability requirement for these projects considering their cost of generation at the time they were set-up would have weighed in the mind of the Central Commission as important factors to consider and consequently the reduced floor price ought not to have been made applicable on the existing renewable energy projects an particularly on the unsold inventory of such projects.

7.34 While determining the REC floor and forbearance prices for non-solar technologies the Central Commission has also wrongly assigned weightage to various technologies on the basis of their respective installed capacity in MW terms as it does not represent the actual share of that technology in the REC market. It is a known fact that the Capacity Utilisation Factor (CUF) are different for different RE technologies. As per its own RE tariff Regulations, the Central Commission has specified CUF as 23%, 70%, 80% and 45% for Wind, Cogeneration, Biomass and Small Hydro based RE generating plants, respectively Considering the above CUF, the REC generated from Wind power projects are far less than the REC generated from a biomass power project of similar capacity. Therefore to get a more realistic scenario of REC market, it was necessary for the Central Commission to consider REC generated figures for various technologies and accordingly weightage should have been assigned while determining the REC floor and forbearance price.

7.35 The Central Commission has further arbitrarily changed the methodology used for determination of floor and forbearance price which was earlier based on the National RPO target set up under the NAPCC issued by the Government of India, the tariff determined by the Central Commission under its RE tariff Regulations and Average power procurement Cost (APPC) of various state distribution licensees. In the impugned Order dated 30.03.2017 the Central Commission while determining the REC pricing has wrongly considered and used the RE tariff determined by a

few state commissions and APPC. Further Central Commission has not given any relevance to the national target for RPO defined under NAPCC. It is submitted that this approach is contrary to a national level framework promulgated in the form of REC and therefore is liable to set-aside.

7.36 The Central Commission arbitrarily discontinued the practice of using technology specific tariff determined under its various orders for the purpose of determination of REC Prices. It is pertinent to point out here that the Central Commission vide its order dated 29.04.2016 in Petition No. SM/ 03/2016 *suomoto* determined the tariff for various RE Technologies. The Tariff so determined was applicable to the projects till 31.03.2017 and therefore, the same would have continued to apply for the determination of REC Price. This Approach would have been consistent with the Central Commission's REC regulations.

7.37 The Central Commission has further failed to appreciate that many of the State Commissions have still not determined the APPC and the distribution licensee of such states are signing REC based PPAs as per their own whims and fancies. To make things worse, some of the State Commissions have put a cap on APPC prices and therefore the generators are not even getting the APPC prices as per the definition provided in the REC Regulations. Similarly, in some states, the distribution licensees executed PPAs at constant APPC. These important and prevalent market scenarios have not been considered in the impugned Order.

7.38 The Central Commission vide the impugned order has further prejudiced the RE Generators by inter alia directing its staff to examine the need for floor price going forward after duly factoring in the current and emerging market conditions. It is stated that taking away/ removing the floor price would virtually lead to a situation where the obligated entities would be reluctant to comply with their Renewable Purchase Obligation in

anticipation of further reduction in the REC prices. This will lead to a situation of speculation in the market, adversely affect the competition and incentivise further default by the obligated entities.

7.39 The impugned Order dated 30.03.2017 being contrary to the Electricity Act, 2003, National Tariff Policy as well as the REC Regulations ought to be set-aside and the instant appeals be allowed.

8. <u>The learned counsel, Shri Nikhil Nayyar, on behalf of the Central Electricity Regulatory Commission has filed the following written submissions in the batch of Appeal No.95 of 2017, Appeal No. 105 of 2017 & Appeal No. 173 of 2017</u>

8.1. **Broadly** four issues have arisen during the course of arguments by the counsel for the Appellants and the '**Central Commission**'.

- **Vested right to get a fixed Floor Price**
- **Promissory Estoppel**
- **Vintage Multiplier**
- **Methodology and Principles of Determination of Floor and Forbearance Price**

<u>Vested Right To Get A Fixed Floor Price</u>

8.2 The Central Commission in exercise of its powers under Section 66 read with Section 178 (2) (y) of the Electricity Act, 2003 (hereinafter referred to as the '**Act**') notified the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certification for Renewable Energy Certificate) Regulations, 2010 (hereinafter referred to as the "REC Regulations"). Regulation 9(1) of the REC Regulations provides that:

"9. Pricing of Certificate

(1) The price of Certificate shall be as discovered in the Power Exchange:

Provided that the Commission ***may, in consultation with the Central Agency and Forum of Regulators from time to time*** *provide for the floor price and forbearance price separately for solar and non-solar*

Certificates." (Emphasis Supplied)

8.3 The limited role of the Central Commission to provide for the Floor and Forbearance Price for RECs flows from the Proviso to Regulation 9. The proviso uses the word '***may'***; thereby making such fixation of Floor and Forbearance Prices discretionary. The proviso cannot control the main provision in manner that Appellants can claim a vested right to get a specific Floor Price.

8.4 The Central Commission after due consultation with the Central Agency (POSOCO-NLDC) and Forum of Regulators passed the Impugned Order providing for the Floor and Forbearance Prices for both Solar and Non-Solar RECs.

8.5 The mandate of the Central Commission is reflected in Sections 61 and 66 of the Act. Section 61provides that the Central Commission shall be guided by the principles and methodologies specified by the Central Commission including safeguarding of consumers' interest, commercial interest, promotion of co-generation from renewable sources, reflection of cost of supply of electricity etc. Section 66 provides for the development of the market. Thus, the Central Commission is required to take a holistic view of the market and balance the interests of all the stakeholders. Appellants' reliance on these provisions to claim a vested right to a fixed Floor Price is misconceived.

8.6 REC is not issued with a fixed price on it. It is issued to an eligible entity on the basis of the units of electricity generated from a renewable energy source. An REC merely represents one Megawatt Hour of electricity generated from a renewable energy source. **(See Regulation 7(4) & (5)).** Pricing of an instrument cannot be *dehors* the cost of the commodity it represents. It is a market based instrument and its pricing is governed by the cost, demand and supply of the electricity generated from renewable

energy source.

8.7 A comparison of REC Floor and Forbearance Price over the years since the inception of REC framework, as provided in the table below, shows a consistent downward trend:

Solar REC Floor and Forbearance Prices

Year	Order	Floor Price (Rs/ Mwh)	Forbearance Price
FY 2010- FY 2012	Petition No.99/2010(SM)dated 01.06.2010	12,000	17,000
FY 2012-30.12.2014	Petition No. 142/2011(SM)dated 23.08.2011	9,300	13,400
01.01.2015-31.03.2017	Petition No.06/2014(SM)dated 30.12.2014	3,500	5,800
01.04.2017 onwards	Petition No.02/2017(SM)dated 30.03.2017	1,000	2,400

Non-Solar REC Floor and Forbearance Prices

Year	Order	Floor Price (Rs/Mwh)	Forbearance Price (Rs/Mwh)
FY 2010- FY 2012	Petition No.99/2010(SM)dated 01.06.2010	1,500	3,900
FY 2012- FY 2016	Petition No. 142/2011(SM)dated 23.08.2011	1,500	3,300
01.04.2017 onwards	Petition No.02/2017(SM)dated 30.03.2017	1,000	3,000

This downward fluctuation has been on account of drastic reduction in the cost of generation. The pricing of RECs is therefore not static and the

Commission must take into account sectoral realities. Thus, the Appellants cannot claim a vested right to a fixed Floor Price.

8.8 The Appellants have attempted to create an impression that the Central Commission has changed the Floor Price and Forbearance Price retrospectively. In this regard, it is clarified that the proviso to the Regulation 9(1) stipulates that the Central Commission may provide from ***time to time*** the Floor and Forbearance Price. Moreover, it is merely a progressive reflection of the cost of supply of electricity through solar and non-solar sources of renewable energy, as mandated under Section 61(d).

8.9 The Appellants cannot claim a vested right to get a specific Floor Price beyond the Control Period which ended on 31.03.2017 in this case mandated under the REC Regulations. The Appellant's contention that just because the Central Commission extended the validity period of the RECs due to large unsold inventory of RECs, they should be permitted to sell at the same fixed Floor Price is untenable. The period of validity of the REC and its price are entirely different concepts and the two cannot be mixed up.

8.10 The suggestion to link the validity of the REC with the viability of the project, i.e. to provide for a control period for a total life of the project to enable viability access and financing, the Central Commission rejected the same as far back as in 2010. The same has been brought out in the reply to Appeal No. 95 of 2017 as under:

"Not envisaged in this order. As per the CERC regulation on REC, the Commission may, in consultation with the Central Agency and Forum of Regulators from time to time provide for the floor price and forbearance price separately for solar and non-solar Certificates."

Thus it is too late in the day to seek a linkage between project viability and life of the REC.

Promissory Estoppel

8.11 At the outset, it is submitted that the Appellants in the Appeals Nos. 105 and 173 of 2017 have not taken the plea of Promissory Estoppel in their respective appeals. The said Appellants have merely adopted the oral submissions made by the Appellant in Appeal No. 95 of 2017.

8.12 The Appellant in Appeal No. 95 of 2017 has pleaded in Paragraph 7.16 of its appeal that the Central Commission "guaranteed" that a minimum return would be protected by the floor price of the RECs. It is further stated that, therefore, the members of the Appellant Association proceeded to invest into the REC scheme on the basis of the guarantee put forth by the Central Commission in its order dated 01.06.2010. It is submitted that the said Appellant has selectively relied on the Commission's views as provided in the Appendix to this order. In any event, such clarifications cannot be considered as a representation to invoke the doctrine of Promissory Estoppel. A tariff fixation exercise or use a particular methodology in such an exercise cannot be considered as a representation or a guarantee to attract the said doctrine. As explained above, under the REC Regulations, the provision of Floor Price and Forbearance Price is itself discretionary. There cannot be a plea of Promissory Estoppel against legislation, more so against a provision providing discretionary power.

8.13 There is no averment or pleading in Appeal No. 95 of 2017 to show how the members of the Appellant Association altered their position in view of the so called representation by the Commission. The written representation made by the Appellant to the Central Commission prior to the passing of the impugned order also merely talk about deviation from the usual practice. A change in methodology cannot be considered as a

deviation from an alleged promise or representation. The impugned fixation of the floor and forbearance price is in accord with Regulation 9(2) of the REC Regulations and no argument has been made demonstrating any infraction of this regulation in the fixation of the floor and forbearance price.

8.14 The Appellants have failed to demonstrate that the Central Commission made any specific assurance on the basis of which they have altered their position. Thus, it is submitted that the doctrine of Promissory Estoppel cannot be invoked in the instant case.

8.15 The rule of pleadings in a case where the doctrine of Promissory Estoppel is invoked has been explained by the Hon'ble Supreme Court in ***Bannari Amman Sugars Ld. v. CTO (2005) 1 SCC 625***wherein it has held that:

"19. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must forever be present in the mind of the court."

8.16 In fact, giving a financial rebate or concession does not attract the doctrine of Promissory Estoppel as such a concession is defeasible right and can be withdrawn in exercise of the very power under which the such concession is given.

- ***Shree Sidhbali Steels Ltd. v. State of UP &Ors.*, (2011) 3 SCC 193 at Paras 48-49**
- **Kothari *Industrial Corporation Ltd. v. TN Electricity Board and Anr.*, (2016) 4 SCC 134 at Para 11**

Vintage Multiplier

8.17 The Appellants in Appeal No. 95 of 2017 have tried to portray that the Central Commission introduced Vintage Multiplier in case of the solar generating companies by its order dated 30.12.2014in Petition No.06/2014(SM). However, it is clarified that the said order merely suggests the amendment of the Regulations which was done on the same date. The Central Commission through the Third Amendment to the REC Regulations, which came into effect from 1.1.2015,introduced the Vintage Multiplier in case of the solar generating companies registered under the REC framework prior to 1.1.2015. Sub-Clauses (7) and (8) of Regulation 7 of the REC Regulation provides as under: -

"7. The Commission shall determine through a separate order, the quantum of Certificate to be issued to the eligible entities being the solar generating companies registered under REC framework prior to 1st January, 2015 for one Megawatt hour of electricity generated and injected into the grid or deemed to be injected (in case of self-consumption by eligible CGP) into the grid as per the following formula:

Vintage Multiplier=Floor Price of Base Year/Current Year Floor Price

Where,

i. 'Base Year' means the year 2012-13 being the year in which the floor price was determined for solar REC for a period of five years.

8. The vintage multiplier as specified in Clause (7) of this Regulation was made applicable to the solar generating companies registered under REC framework prior 1st January, 2015 and shall be applicable for the existing and future solar RECs ***for the period from 1st January, 2015 up to 31st March, 2017****, after which such projects shall be eligible for one REC for one megawatt hour of electricity generated." (*emphasis supplied*)*

8.18 The Vintage Multiplier was issued by the Central Commission by way of an amendment by exercising its legislative power. Regulation 7(8) categorically provided that the Vintage Multiplier was applicable till

31.03.2017. The Appellants were well aware of this time frame. They enjoyed the benefits and did not choose to challenge this amendment. Appellants have no right to get the Vintage Multiplier extended after the statutory period provided in the REC Regulations.

8.19 Appellants in Appeal No. 95 of 2017 have strongly relied on the ***"****Explanatory Memorandum for the Draft Central Electricity Regulatory Commission(Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) (Third Amendment) Regulations, 2014"*to create an incorrect impression that the Vintage Multiplier was to be provided for a period of 12 years. However, it is clarified that the notified amendment merely provides the Vintage Multiplier till 31.03.2017.

8.20 Appellants have further relied on the National Tariff Policy to argue that the Central Commission is bound to prescribe a vintage based multiplier. However, it is respectfully submitted that such an argument is untenable as the Tariff Policy merely provides that:

"(iv)…Similarly, considering the change in prices of renewable energy technologies passage of time, the Appropriate Commission may prescribe vintage based REC multiplier"

8.21 Thus, it is clear that the Central Commission has the discretion to provide a Vintage Multiplier which, depending upon the other factors, may or may not decide to exercise. The Central Commission was of the view in 2014 that such a multiplier was necessary and accordingly, the REC Regulations were amended. However, for the reasons recorded in the Impugned Order, the Central Commission has decided not to continue the Vintage Multiplier.

8.22 The Appellants cannot seek a mandamus in an appeal under Section 111 of this Act to amend the Regulations to extend the applicability of Vintage Multiplier. It is settled law that even the Hon'ble High Courts,

under Article 226, do not have the power to issue a mandate to direct the executive to make a subordinate legislation in a particular manner. (See ***State of U.P. v. Mahindra & Mahindra Ltd.* (2011) 13 SCC at Para 10).**

Methodology and Principles of Determination of Floor And Forbearance Price.

8.23 The Central Commission derives its power to provide for Floor and Forbearance Price from Regulation 9. Regulation 9 provides that the Central Commission shall determine the Floor and Forbearance Price after consultation with the Central Agency and Forum of Regulators and shall be guided, *inter alia*, by the principles provided under Regulation 9(2). None of the Appellants have demonstrated how the Impugned Order violates Regulation 9(2).

8.24 The Central Commission vide its letter dated 06.03.2017, sent through e-mail, sought views, comments and suggestions on the Draft Order from the State Electricity Regulatory Commissions and the Central Agency i.e. National Load Despatch Centre. Comments received from the Central Agency have been duly recorded in the Stakeholders comments in Section II of the Impugned Order. The relevant extract is reproduced below:

"POSOCO has submitted that revision in REC Forbearance and Floor Price is a much awaited step to increase the redemption of RECs by the buyers."

8.25 The Central Commission has provided for the Floor and Forbearance Price in accordance with the principles enshrined under Regulation 9(2), after duly considering the viability of solar projects in 17 States by comparing the average bid tariff with the respective State APPC and Minimum Project Viability requirement (MPVR).

8.26 It is submitted that the issue of deviation from usual practice of calculating the floor and forbearance price was raised by various

stakeholders before the Commission. The Commission adequately dealt with this contention and held that:

"17. IWPA has commented that the earlier approach of considering tariffs based on CERC RE Tariff Regulations should be used for the sake of uniformity and consistency.

The Commission clarifies that the REC Regulations provide for incorporating state level variations, as the developers would compare the total revenue under REC framework vis-à-vis the FIT prevalent in the respective state. Particularly, Regulation 9(2) clause (a) and (b) are as below:

"The Commission while determining the floor price and forbearance price, shall be guided inter alia by the following principles:

(a) Variation in cost of generation of different renewable energy technologies falling under solar and non - solar category, across States in the country:

(b) Variation in the Pooled Cost of Purchase across States in the country;"

Thus, the methodology used by the Commission is in consonance with Regulation 9 of the REC Regulations.

8.27 The Appellants have not brought to notice of this Hon'ble Tribunal that the Central Commission has done away with the practice of issuing generic tariff for solar and wind for FY 2017-18 and onward. Thus, the earlier practice of using Commission notified tariff as reference price for the determination of floor and forbearance price of REC is of no relevance now. This is the reason for the change in methodology. The Central Commission in the Impugned Order has considered the data on solar prices discovered through auctions, unlike in the past when the solar energy sector was in infancy and no such data was available.

8.28 The contention that floor price is a component of tariff is also misleading. It is submitted that REC projects generally have the two sources of revenue viz., (i) from sale of electricity component and (ii) from the sale

of REC. However, both these revenue sources flow from "market determined price" and not from the "cost based regulated tariff" of the output/product they sell. In other words, for neither of these revenue sources, tariffs are determined by the regulator. The project developers depend on market forces for both.

8.29 Pertinently, cost recovery is guaranteed by the regulator only in cases of project specific tariff determination, wherein detailed cost analysis is undertaken by the regulator in respect of each such project. REC's is not a project specific tariff determination mechanism. It is a market based instrument and the investors choose the scheme with due knowledge of the risks and rewards associated with the scheme. The CERC determines floor and forbearance prices based on the market realities and with due regard to the need for balancing the interests of consumers and investors. Such prices are generic in nature and cannot be expected to address the special circumstances of every project.

8.30 The argument regarding the difference in the project size of the solar projects diminishing the economies of scale is misleading. The Central Commission has duly examined the viability of solar projects in 17 States, by comparing the average bid tariff with the respective State APPC. Majority of the States enlisted do not need any floor price support, as Minimum Project Viability requirement (MPVR) is negative in those States. Thus, with a floor price of Rs.1/unit, smaller projects with tariff greater than the large projects are still viable in these States. All the members of the Appellant Association in Appeal No. 95/2017have projects registered in Madhya Pradesh. For Madhya Pradesh, the floor price based on MPVR is determined as Rs.0.44/unit. Hence, there is sufficient buffer to account for large scale efficiencies.

8.31 The Central Commission is responsible for balancing the interests of the

consumers and the interests of generators. The Central Commission cannot keep the prices of RECs artificially high and burden the consumers with high costs of electricity. Moreover, if the prices of the RECs are kept artificially high without aligning them with the market reality and current cost of electricity, the obligated entities will not purchase the RECs and try to fulfil their RPO by other means. This defeats the mandate of Central Commission under Section 61 and Section 66.

8.32 The Appellants have argued that the obligated entities have not fulfilled their Renewable Purchase Obligations. The Central Commission is not liable for compliance of these obligations by State Commissions and Obligated Entities. The demand for renewable energy including that for RECs gets generated through RPO which is squarely in the realm of the State Commissions. Even then the Central Commission has always played a pro-active role and has been persuading the State Commissions through Forum of Regulators (FoR) at regular intervals to enforce RPO compliance.

8.33 The Central Commission has, thus, passed the Impugned Order in accordance with the Act, REC Regulations and the National Tariff Policy. Thus, these appeals are liable to be dismissed by this Hon'ble Tribunal.

9. The key provisions under Statutory Framework for Promotion of Renewable Energy Sources are being brought out as under for reference:

9.1 The Electricity Act, 2003 provides that the co-generation and generation of Electricity from non-conventional sources to be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying for purchase of electricity from such sources, a percentage of the total consumption of

electricity in the area of a distribution licensee. The provisions under Section 61 & 86(1)(e) of the Act are important in this regard which inter-alia stipulate that the State Commissions while specifying the terms and conditions for determination of tariff shall be guided by promotion of co-generation and generation of electricity from renewable sources of energy.

9.2 The National Electricity Policy issued by the Central Government under Section 3 of the Act provides that the State Commission shall specify for purchase of Electricity from non-conventional sources of energy a percentage of the total consumption of electricity in the area of distribution licensee. The share of electricity for non-conventional sources needs to be increased as prescribed by the State Commission. It further provides that it will take some time before non-conventional technology to compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential tariff to promote these technologies.

9.3 The National Tariff Policy notified by the Central Govt. among others, stipulates that the Appropriate Commission shall fix minimum percentage for purchase of energy from non-conventional sources taking into account the availability of such sources in the region and its impact of retail supply tariff.

9.4 The National Action Plan on Climate Change also lays emphasis on development of renewable energy sources and recommends that in order to accelerate the large scale development of renewable energy a dynamic renewable purchase obligation at national level has to be targeted with annual percentage increase in a trajectory so as to reach around 15 percentage RPO target by 2020 at national level.

9.5 The various provisions under the statutory framework/guidelines, mandate that the State Commission shall fix the RPO taking into account

the availability of such sources in the regions and its impact on retail supply tariff. However, within the RPO, the State Commission shall also reserve a minimum percentage of purchase from the solar energy which will go up gradually and achieve trajectory formula set by the Central Government in a time bound manner.

9.6 Generally, it is desirable to have purchase of energy from renewable resources more or less in same proportion in different states. However, as the renewable resources are concentrated in some states compared to others on account of geographical and/or other topographical factors, the distribution licensees in states having deficient renewable energy resources would be unable to fulfil their RPO as mandated by SERC. Keeping this in view, an appropriate mechanism is required to be evolved so as to attain equitable RPO in all the States throughout the country. The Central Commission, with a view to alleviate the difficulties, notified the Central Electricity Regulatory Commission (terms & conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 dated 14.01.2010. These regulations have been brought out by the Central Commission in exercise of its powers conferred under sub-section 1(1) of Section 178 & Section 66 read with Clause (y) of sub-section 2 of Section 178 of the Act for the development of market in power from non-conventional energy sources by issuance of transferable and saleable credit certificates.

9.7 Through such mechanism, the renewable energy generators can sell electricity to the local distribution licensee at the rate of conventional energy and recover the balance cost by selling the renewable energy certificates (RECs) to other distribution licensees/obligated entities in order to meet their RPO. REC is issued only to RE generators for generation of renewable energy and as an alternative mode provided to the RE generators for recovery of their costs. One REC is issued for 1

MWH of energy from renewable energy sources injected into the grid or consumed by a captive consumer. REC can be purchased by the obligated entities to meet their RPO under Section 86(1)(e) of the Act and purchase of REC would be deemed a purchase of renewable energy for RPO compliance.

9.8 REC is an alternative to physical procurement of renewable energy. The distribution licensees as well as other persons consuming electricity generated from conventional captive generating plant or procuring electricity from conventional generating stations through open access and third party sale or obligated entities who have to meet their RPO. These obligated entities have option to meet their RPO mandated under Section 86 (1)(e) of the Act and the Regulations either by directly procuring energy from renewable sources of energy in physical form or purchasing REC, as deemed procurement of renewable energy. Both have to be considered for fulfilling the RPO specified under Section 86(1)(e). An obligated entity has option to fulfil its RPO either by fully procuring renewable energy in physical form or fully by purchasing REC or partly in physical form and partly REC. However, the option has to be exercised based on sound economic principles. In case of distribution licensees, the State Commission while approving compliance of RPO has to consider that the distribution licensee has exercised its option prudently.

9.9 In terms of various provisions of the Act and policies framed there under, the Forum of Regulators (FOR), a statutory body formed under section 166(2) of the Electricity Act, 2003 prepared a detailed report on promotion of renewable energy sources, which, inter alia provides for renewable energy certificate mechanism to enable states to meet their obligations while encouraging generators to set up generation facilities based renewable resources in the most optimal locations.

10. CERC Regulations for promotion of Renewable Energy Generation:

10.1 The Commission had notified the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (hereinafter Principal REC Regulations) vide notification dated 14th January, 2010. As mentioned in the Statement of Reasons issued along with the regulations, the concept of renewable energy certificate seeks to address the mismatch between availability of renewable energy sources and the requirement of obligated entities to meet their renewable purchase obligations. The Commission had further clarified that the REC mechanism aimed at promoting investment in the renewable energy projects and to provide an alternative mode to the RE generators for recovery of their costs.

10.2 Subsequently, the Commission made two amendments in the Regulations (notifications dated 1.10.2010 and 11.07.2013) to provide clarity on applicability of the regulations to eligible entities and bring in certain essential checks and balances in the REC related processes. The third Amendment to Regulations was notified by the Commission on 01.01.2015.

10.3 The Commission also approved the procedures for accreditation, registration issuance and redemption of RECs. Further, the Commission approved the rules/ bye laws and mechanism for REC price discovery on power exchanges. The Forum of Regulators (FOR) approved the Model Regulations on Renewable Purchase Obligations, its compliance and Implementation of REC Framework for the State Electricity Regulatory Commissions (SERCs).

10.4 The REC trading on the power exchanges started during the month of March, 2011. Ever since, the non-solar REC and solar REC trading sessions have been taking place regularly.

10.5 The volume of RECs available in the market has been increasing over the time whereas the demand for RECs has been comparably low. This has resulted in REC trading at low profile and piling up of unsold inventory of RECs in the market. The setting up of RPO targets and its enforcement is perceived to be weak thereby leading to non-compliance by the obligated entities in meeting their annual RPO targets. This has been acknowledged by the Central Commission at various occasions that there is a fundamental challenge in not just implementing the REC mechanism but also the RPO compliances and development of renewable energy in the country. In order to improve the efficacy of the REC framework, it has been felt by the Commission that certain features of the REC mechanism such as enabling framework for eligibility of distribution licensees for REC, long term feasibility of floor and forbearance prices, validity of REC issued, frequently of trading sessions, has been reviewed in order to accelerate the RE capacity addition.

10.6 As per the CERC REC Regulations, the eligible RE generators mainly fall under three categories:

i) RE generator selling electricity to a distribution utility at Average Pool Purchase Cost determined by the respective SERCs (can be termed as APPC route);

ii) Captive Generation Plant for meeting captive electricity requirement (CGP route);

iii) RE generator selling electricity to an open access consumer (OA route).

As per information collated by FOR from various states in the past, it has been found that among the three routes available for renewable energy generators, the REC capacity is presently dominated by RE generators operating under CGP or OA route. One of the key reasons attributed to the dominance of the CGP & OA route in REC market can be related to the different level of pricing framework for electricity component under

the above three routes. Under the APPC route, the RE generator is eligible only for APPC price determined by respective SERC which is reported to be lower than the electricity reference price levels under CGP or OA routé. This issue of higher realisation by sale/consumption of electricity under OA/CGP route has been raised by different State Commissions / stakeholders from time to time.

11. **We have heard the learned counsel appearing for the Appellants and the learned counsel appearing for the Respondent Commission and gone through carefully their stand in the written submissions and after thorough evaluation of the relevant material on records, the following common issues emerge in the Appeals for our consideration:**

(i) Whether the impugned order has been passed in contravention of the existing statutes, law, policy, regulations, etc., relating to RE generation/RECs

(ii) Whether change in methodology for determining the floor & forbearance prices, discontinuation of vintage multipliers, etc. is reasonably justified?

(iii) Whether the huge inventory of unsold RECs and RPO compliance by obligated entities have been taken into account by CERC?

(iv) Whether a specific REC price, financial security, etc. can be claimed as vested rights?

As the issues arising out of the three Appeals are common, we will decide them in this common judgment.

12. Our Findings & Analysis :

Issue No.1:-

12.1 The Appellant(s) have contended that the CERC at the time of introduction of RECs' through a regulatory intervention provided both the floor and forbearance prices. These regulatory interventions/orders were issued in the exercise of jurisdiction vested in the Central Commission under proviso to Regulation 9(1) & 9(2). At each stage of

the orders, CERC represented to the appellate generators that they will recover the floor price, should they decide to set up RE generating stations and participate in the REC scheme? The Appellants have further submitted that : had the Central Commission not fixed the floor price, the Appellant generators could not have participated in the REC scheme. The members of the Appellants' Association have further submitted that the Central Commission has completely failed to appreciate that neither the Electricity Act, 2003 nor its own regulation empowered it in any manner to give retrospective effect in application to REC pricing order and change dispensation for all existing RECs under a broad sweep. The appellants have cited the Section 61(h) of the Act which mandates that while fixing the tariff, promotion of renewable energy must be kept into account. In fact, the obligated entities have failed to fulfil their respective RPO and the Central Commission has failed to appreciate the same. They have claimed that the liability crystallised on the obligated entities cannot be done away by using the impugned order as that would then defeat the entire objective of introducing the RPO/REC mechanism. In view of the statements made by the Appellants, they allege that the impugned order dated 30.3.2017 is contrary to the Electricity Act, National Electricity Policy, National Tariff Policy as well as the REC Regulations and ought to be set aside by the Tribunal.

12.2 ***Per contra,*** the Central Commission has submitted that it derives its power to provide for floor and forbearance price from Regulation 9 which stipulates that the Central Commission shall determine the floor and forbearance price after consultation with the Central agency and Forum of Regulators and shall be guided, inter-alia, by principles provided under Regulation 9(2). The Central Commission has further brought out that before passing the impugned order, it had sought views,

comments, suggestions etc. on the draft order from all stakeholders including State Commissions, Central Agency NLDC etc. The comments received from the Central Agency have been duly recorded in the stakeholder's comments in Section II of the Impugned Order. The relevant extract of Central Agency (POSOCO) is as ***" POSOCO submitted that revision in REC Forbearance and Floor Price is a much awaited step to increase the redemption of RECs by the buyers."*** The Central Commission has reiterated that it has passed the impugned order in accordance with the Electricity Act, National Electricity Policy, National Tariff Policy, REC Regulations etc. and as such, the question of any contravention of the existing statutory frameworks does not arise. Moreover, none of the appellants had demonstrated how the impugned order violates the statutory framework including REC Regulation 9(2).

Our Findings:

12.3 We have gone through the written submissions of the Appellants as well as the Central Commission and analysed the same with respect to the provisions of the statutory framework namely the Electricity Act, National Electricity Policy, National Tariff Policy, REC Regulations, etc.. We have noted the deliberations and analysis brought out in the impugned order dated 30.03.2017 and found that the impugned order has been passed adhering to the REC Regulations and in a transparent manner. The Central Commission has invited views and suggestions from all stakeholders and duly analysed the same before arriving at the concluding remarks. The REC Regulations have been notified by the Central Commission in exercise of its powers under Section 66 read with Section 178(2) (y) of the Electricity Act, 2003 and the operating regulation provides as under:-

"9. Pricing of Certificate

(1) The Price of Certificate shall be as discovered in the Power Exchange:

Provided that the Commission ***may, in consultation with the Central Agency and Forum of Regulators from time to time*** *provide for the floor price and forbearance price separately for solar and non-solar Certificates".*

12.4 It would be evident from the above provisions under the regulations that the price of RE certificates is market driven and dynamic in nature. The fixation of floor and forbearance prices for solar as well as non-solar RE have to be provided by the Central Commission from time to time in consultation with POSOCO, the Central Agency and also viewing into market realities at the power exchange. As mentioned in the statement of reasons issued along with the regulations, the concept of REC seeks to address the mismatch between availability of RE sources and the requirement of obligated entities to meet their RPO. It has been clarified by the Central Commission that the REC mechanism is basically aimed at promoting the development of renewable energy sources and to provide an alternative mode to the RE generators for recovery of their project costs through brown & green components. **In view of these facts, we observe that the Central Commission has passed the impugned order in accordance with various statutory framework such as the Act, Electricity / Tariff Policies, REC Regulations, etc. and does not cause to show any violation thereof.**

Issue No.2:-

12.5 The Appellants have alleged that the CERC in the impugned order had deviated from its usual practice of calculating the floor and forbearance prices by taking into account, CERC benchmark capital cost. This practice has been continued by CERC for several years. However, the Central Commission for the first time has used bid discovered tariff in all

states and UTs' in India. The Appellants have submitted that the Commission has not provided any cogent reasoning for such a departure and ignored its own tariff orders which have been passed for determination of solar PV and solar thermal plants. The Appellants have contended that such discovery of tariff has been based on large scale and ultra mega solar power projects which have been introduced by MNRE to provide a huge impetus to solar energy generation and triggering economies of scales for cost reductions, technical improvements etc.. The Appellants have further submitted that the average bid tariff used by CERC coming from large scale solar plants is not reflective of the cost of generation of different renewable energy technologies and smaller RE projects ranging up to 2 MW. The Appellants have pointed out that the Central Commission vide its order dated 29.4.2016 in Petition No.SM/03/2016 determined the tariff for various RE technologies. The tariff so determined was applicable up to 31.03.2017 and, therefore, the same would have continued to apply for the determination of REC price. This approach would have been consistent with the Central Commission's REC Regulations. The Appellants have further claimed a vested right in the specific floor price as well as the Vintage Multiplier. They have alleged that the vested interest of the Appellants cannot be taken away and by doing so would be contrary to established principle of promissory estoppels. Reliance has been placed on some of the judgments of Hon'ble Supreme Court to support their contention, as stated supra.

12.6 **Per contra,** the Central Commission has submitted that a tariff fixation exercise or use of particular methodology in such an exercise cannot be considered as a representation or a guarantee to attract the Doctrine of Promissory Estoppel. It has been clarified from time to time that under the REC Regulations, the provision of floor price and forbearance price is discretionary in nature. As such, there cannot be a plea of Promissory

Estoppel against the legislation more so against a provision providing discretionary power. A change in methodology cannot be considered as a deviation from an alleged promise or representation. The fixation of the floor and forbearance price is in accordance with Regulation 9(2) of the REC Regulations and no argument has been made administering any infraction of this Regulation in the fixation of floor and forbearance prices. Further, the Appellants have failed to demonstrate that the Central Commission made any specific assurance on the basis of which they have altered their position. The Central Commission have cited various judgments of the Hon'ble Supreme Court wherein the rule of pleadings invoking the Doctrine of Promissory Estoppel has been explained. Thus, the Central Commission has categorically indicated that the Doctrine of Promissory Estoppel cannot be invoked in the instant case.

12.7 The Central Commission has further brought out that the Appellants in the Appeal No.95 of 2017 have tried to portray that the Commission introduced vintage multiplier in case of the solar generating companies by its order dated 30.12.2014 in Petition NO.06/2014 (SM). However, the said order merely suggests the amendment of regulations which was done on the same date. The Central Commission through the third amendment to the REC Regulations which came into effect from 1.1.2015 introduced the vintage multiplier in case of the solar generating companies registered under the REC framework prior to 1.1.2015. The vintage multiplier as specified in the Clause 7 of the Regulation was stipulated to be applicable for the existing and future solar RECs for the period from 01.0.1.2015 upto 31.03.2017. The Central Commission has further submitted that the vintage multiplier was specified by way of an amendment by exercising its legislative power. The Appellants were well aware of timeframe and they enjoyed the benefits and did not choose to challenge this amendment. Now, the Appellants have no right to get the vintage

multiplier extended after the expiry of statutory period provided in the REC Regulations. The Appellants in Appeal No.95 of 2017 have strongly relied on the explanatory memorandum for the draft REC Regulations, 2014 to create an incorrect impression that the vintage multiplier was to be provided for a period of 12 years. However, the notified amendment (3rd Amendment) merely provides the same till 31.3.2017. The Central Commission has further contended that it has the discretion to provide the vintage multiplier considering many other factors and also, may not decide to provide for the same. The Central Commission was of the view in 2014 that such a multiplier was necessary and accordingly, REC Regulations were amended. However, for the reasons recorded in the impugned order. The Central Commission has now decided not to continue the vintage multiplier.

12.8 The Central Commission has reiterated that the Appellants cannot seek a *mandamus* in an Appeal under Section 111 of the Electricity Act, 2003 to amend the REC Regulations to extend the viability of vintage multiplier. The Commission has further cited that it is a settled law that even the Hon'ble High Courts under Article 226 do not have the power to issue a mandate to direct the executive authority to make a subordinate legislation in a particular manner. ***(State of U.P. vs. Mahindra & Mahindra Ltd. (2011) 13 SCC)*** The Central Commission has further indicated that it has provided for the floor and forbearance prices in accordance with principles enshrined under Regulation 9(2) after duly considering the viability of solar projects in 17 states by comparing the average bid tariff with the respective State APPC and Minimum Project Viability Requirement (MPVR). It is further submitted by the Commission that the issue of deviation from usual practice of calculating the floor and forbearance price was raised by various stakeholders before the Commission and the same were adequately dealt with as recorded

under Para 17 of the impugned order. It is further brought out by the Commission that it has done away with a practice of issuing generic tariff for solar and wind power for Financial Year 2017-18 and onwards. Thus, the earlier practice of using Commission notified tariff as a reference price for determination of floor and forbearance price of REC is of no relevance now. This is a reason for changing the methodology. The Commission has also added that it has considered the data on solar prices discovered through auctions/bids unlike in the past when the solar energy sector was in infancy and no such date was available.

Our Findings:

12.9 The Appellants have repeatedly emphasised that the Central Commission in impugned order has deviated from its usual practice of calculating the floor and forbearance prices considering its own benchmark capital cost without assigning any cogent reasoning. It has used bid discovered tariff in specifying the floor price of RECs. The Central Commission has clarified that a tariff fixation exercise or use of a particular methodology in such an exercise cannot be considered as a representation or a guarantee. In fact the provision in the REC Regulations for specifying floor and forbearance price is discretionary in nature and any change in methodology cannot be termed as a deviation from an alleged promise or representation. Further, the Vintage Multiplier in case of solar was introduced by the Central Commission through its third amendment to the Regulations and was valid up to 31.03.2017. The Appellants were well aware of the timeframe and did not choose to challenge the amendment and now after completion of the statutory period provided in the REC Regulations are claiming vested right. Going through various material placed before us, it is relevant to note that the Central Commission has done away with a practice of issuing the generic tariff for RE projects

from 2017-18 onwards and accordingly the earlier practice of using Commission notified tariff as a reference price for determination of floor and forbearance price of REC is of no relevance now. **In view of the growing competition and induction of latest technologies, more and more generators are participating in the auctions/bids with considerable reduced cost of generation. Thus, the Central Commission in specifying REC prices, has shifted to bid discovered prices in place of earlier generic tariff fixed by it when the RE sector specially solar was in infancy stage. Similar is the case of Vintage Multiplier which was specified based on its necessity under the discretionary powers of the Central Commission. The Central Commission has adequately dealt with these matters in the impugned order with cogent reasoning and we do not find any infirmity or otherwise, unjustness in specifying the floor and forbearance prices of REC and discontinuation of the Vintage Multiplier.**

Issue No.3:-

12.10 The Appellants have further submitted that the Impugned Order benefits the defaulter as it gives incentive to a defaulting Obligated Entity who, in violation of mandatory regulations, is not buying RECs, at the price on which they were generated. Further, such defaulter can now buy RECs at a much lower price, at the cost of generators who have not recovered the cost of generation. The Appellants have pointed out that the Central Commission itself has admitted that since the generators had not recovered the cost of generation on account of inability to sell the RECs, extensions of the validity period of the RECs were given from time to time. The Appellants have alleged that the Central Commission has failed to analyse the end recovery of the cost for sale of electricity on account of stranded REC inventory. The Central Commission has, thus,

taken a stand in complete departure from its earlier stand / representation made to investors of RE projects. The Appellants have submitted that the Central Commission has now moved from the viability principles adapted by it to a principle allegedly linked to market/ground realities.

12.11 The Appellants have contended that the failure of Regulations to enforce compliance of RPO is now envisaged to be borne by RE generators for no fault of theirs. It has been pointed out by the Appellants that the benefit of price reduction is being given to the obligated entities who have repeatedly failed to follow the requirement of law to fulfil their RPO obligations. In fact, the Central Commission has acknowledged in the impugned order that there has been lack of RPO enforcement but took decisions otherwise. The Appellants have stated that the Central Commission arbitrarily discontinued the practice of using technology specific tariff as it was adopted under its previous orders for the purpose of determining the REC prices.

12.12 **Per Contra,** the learned counsel appearing for Central Commission, while being in agreement with the Appellants that the obligated entities have not fulfilled their RPOs, clarified that it is not liable for compliance of the obligations by State Commissions/obligated entities. The demand of renewable energy including that of RECs get generated through RPO compliances which is squarely in the realm of the State Commissions. The Central Commission has always played a pro-active role and has been persuading the State Commissions through Forum of Regulators (FoR) at regular intervals to enforce RPO compliance. It has further been submitted that the Central Commission is responsible for balancing the interest of consumers as well as the RE generators. The Central Commission cannot keep the prices of RECs artificially high and burden the consumers with high cost of electricity. It has further been contended

by the Commission that if the prices of RECs are kept artificially high without aligning them with the market reality and current cost of electricity, the obligated entities will not purchase the RECs and try to fulfil their RPOs by other means. This, in turn, defeats the mandate of Central Commission under Section 61 & Section 66 of the Electricity Act, 2003. The Central Commission is well aware of unsold inventory of RECs, market trend, cost of various RE technologies, etc. and has considered all these factors in the impugned order appropriately and made efforts to strike a balance between interest of the consumers as well as of RE generators.

Our Findings:

12.13 The Appellants have contended that the impugned order benefits the defaulters who in violation of mandatory regulations are not buying RECs to meet their RPO. As of now, the defaulting obligated entities can buy RECs at a much lower prices at the cost of RE generators who have not recovered their cost of generation. The Appellants have further submitted that the Central Commission has failed to analyse the end recovery of the cost for sale of electricity on account of stranded REC inventory. On the other hand, the Central Commission has acknowledged that the obligated entities are not fulfilling their RPOs strictly as per the Regulations but it is in no way responsible for such non-compliance as the matter lies in the jurisdiction of the State Commissions. In fact, CERC is responsible for balancing the interest of consumers on one hand and the RE generators on the other. Besides, the Central Commission is playing a proactive role and persuading the State Commissions through FOR, at regular intervals, to enforce RPO compliances. **We have carefully considered the contentions of all the parties and noted that under the prevailing market scenario, the prices of RECs cannot be kept artificially high to burden the end consumers. Further, if the**

prices of RECs are kept high without aligning them with the market reality and current cost of electricity, the obligated entities may not purchase the RECs and try to fulfil their RPOs by other means. It is also noteworthy that sufficient time has been given to RE generators to sell their RECs at the power exchange but perhaps in anticipation of selling them at better prices has resulted into unsold REC inventory.

Issue No.4:-

12.14 The Appellants have submitted that the impugned order has resulted into an adverse blow to the REC industries. The members of the Appellant Associations' are facing erosion of 70% of their network while some members are on the verge of being declared APA due to drastic reduction in REC prices. The Appellants have further submitted that the large number of pending RECs is not just a result of non-compliance by the obligated entities but also due to inaction of SERCs. For instance, SERCs' have allowed waiver as well as carry forward of the shortfall in RPO compliance by the obligated entities even though RECs were available in the market. It has been brought out by the Appellant that the REC market is already struggling to study afloat and such decisions by CERC will cumulatively obliterate the demand for RECs. In a nutshell, the RE developers who have opted for REC mechanism and in turn subsidised their power cost in the hope of recovering their cost through sale of REC will not be able to recover the costs. The Appellants have alleged that by passing the impugned order, the Central Commission has affected the vested rights of the generators. It has further been submitted by the Appellants that RE component was attributed a certain value on the date of sale of electricity and they have, therefore, a vested right to

recover for the floor price. The impugned order has, thus, a retrospective effect or which it wrong and required to be set aside.

12.15 The Appellants have pointed out that the Central Commission itself admitted that since the generators had not recovered the cost of generation on account of inability to sell the RECs, extension of validity period of the RECs were given from time to time. The Appellants have indicated that the right to recover tariff is a right protected under the Statute. Once the regulator recommends for tariff has not been recovered, he has a duty thereafter to ensure recovery of tariff from those projects who have participated in the REC scheme. The Appellants have also stated that the Central Commission has wrongly held that if a multiplier is provided, there would be sudden surge in the stock of the REC on the account and it may apply the existing inventory facing even greater difficulty in getting cleared.

12.16 **Per Contra,** the Central Commission has submitted that it is required to take a holistic view of the market and balance the interest of the stakeholders. In fact, REC is not issued with a fixed price on it, rather it is issued to an eligible entity on the basis of units of electricity generated/consumed from a RE source. The pricing is a market based instrument and governed by the cost, demand and supply of the electricity generated from RES. It would be evident on comparison of REC prices over the years since the inception of REC framework that there has been a consistent downward trend in the REC prices for both solar as well as non-solar. The pricing of RECs is, therefore, non-static and the Central Commission must take into account sector realities. Thus, the Appellants cannot claim a vested right to a fixed floor price. While referring to REC Regulations, it is clear that the Central Commission may provide from time to time the floor and forbearance price taking into account a progressive reflection of the cost of supply of electricity through solar

and non-solar sources of renewable energy. As such, the Appellants cannot claim vested right to get a specific floor price beyond the specified control period which ended on 31.03.2017. It has also been added by the Central Commission that suggestions to link the validity of RECs with the viability of the project i.e. to provide for control period for a total life of the projects to enable viability access of the project was rejected by the Commission as far back as in 2010. It is also submitted by the Central Commission that it has duly examined the viability of solar projects in 17 states by comparing the average bid tariff with the respective states APPC and it has emerged that majority of the States enlisted do not need any floor price support, as Minimum Project Viability Requirement (MVPR) is negative in those States. For example, Madhya Pradesh, the floor price based on MVPR is determined at Rs.0.44/unit and hence, there is sufficient buffer to account for large scale efficiencies.

Our Findings:

12.17 The Appellants have contended that the impugned order passed by the Central Commission is a serious blow to the RE generators and many of them may be on the verge of being declared NPA due to drastic reduction in REC prices. The impugned order has affected the vested rights of the generators and squarely falls under the Doctrine of Promissory Estoppel. They have further submitted that the right to recover tariff for supplied electricity is a right protected under the Statute, once the regulator admits for tariff having not been recovered. It is thus duty of the Regulator to ensure the recovery of tariff for the projects who have participated in the REC scheme. The Central Commission has clarified that it is required to take a holistic view of the market and strike a balance between the interests of various stakeholders. The REC pricing is a market driven instrument and governed by cost, demand and supply of electricity

generated from various RE sources. In fact, with this rationale only, the REC prices have undergone a consistent downward trend since the inception of REC framework. Accordingly, the pricing of RECs being dynamic in nature and aligned with sectoral realities cannot be claimed by the Appellants as a matter of vested right to have a fixed floor price. **We have gone through the facts and figures presented by the Appellants and the Respondent Commission and note that majority of States in the country do not need any floor price support as Minimum Project Viability Requirement is negative in those states. For instance, the State of Madhya Pradesh, the floor price based on MPVR is determined as Rs. 0.44/unit which has sufficient buffer as compared to the floor price of Rs.1.00/unit specified by the Central Commission. Another important fact is that among the three routes available for RE generators, the REC capacity is dominated by RE generators operating under CGP and OA route rendering APPC route as the last choice. It may be due to the fact that under the APPC route, the RE generator gets lower tariff than the reference price level under CGP & OA route. This issue of higher realisation of revenue by RE generators by sale/consumption of electricity under OA/CGP route has been raised by different State commissions/stakeholders from time to time. Keeping all these facts in view, we are of the opinion that REC prices being non-static and market driven cannot be claimed as a matter of vested rights by RE generators.**

Summary of our findings:-

12.18 After due consideration of oral and documentary evidence available in the file and after careful perusal of the impugned order passed by the Central Commission, we do not find any error or illegality nor the Appellants

have made out any case to interfere in the well considered impugned order passed by the Central Commission. It is undoubtedly clear that the generation from RE sources, in its all forms, being environment friendly, is required to be promoted to their fullest potential. The Government has accordingly provided enabling environment for development of RE sources so as to achieve the national commitment for achieving desired percent generation from non-fossil fuels by 2030. The statutory framework created by the Govt. from time to time including the Electricity Act, Electricity Policy, Tariff Policy etc. lays emphasis on the promotion of RE generation. With this background, Renewable Projects Obligation (RPO) has been prescribed to be complied with by all obligated entities in a time bound manner with reference to its growth trajectory in the future. CERC as facilitator has brought out REC Regulations from time to time stipulating the prices of REC i.e. floor and forbearance price. In earlier years of its regulations, the Central Commission used to determine the REC prices based on its own benchmark capital cost but with the growing competition and induction of efficient & cheaper technology, it has now switched over to the method of specifying REC prices based on the prices discovered from bids and / or auctions. The earlier REC prices used to be higher due to higher generic tariff and higher benchmark capital cost of RE projects. Now, the bid discovered prices of RE generation are lower because of more and more competition. The lower REC prices now stipulated to be applicable from 01.04.2017 is the case for which the RE generators are agitated. The various issues related with the RE generation such as stranded REC inventory, recovery of cost, RPO compliances, market realities, etc. have duly been analysed by the Central Commission in the impugned order with the rationale thereof. It is also relevant to mention that the RE generators have flexibility to sale their power through all the three routes

available i.e. OA/CGP/APPC. Keeping all the facts associated with the case in view, we are of the firm opinion that the impugned order passed by the Central Commission does not suffer from any legal infirmity or ambiguity.

ORDER

In view of the above, we are of the considered opinion that issues raised in the present Appeals bearing Nos. 95 of 2017, 105 of 2017 & 173 of 2017 are devoid of merit. Hence, these appeals are dismissed.

No order as to cost.

Pronounced in the Open Court on this **12th day of April, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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