

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO. 99 OF 2020 & IA No. 483 of 2020**

**&**

**O.P. No. 2 OF 2020 & IA No. 485 of 2020**

**Dated: 20<sup>th</sup> August , 2020**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**APPEAL NO. 99 OF 2020 & IA No. 483 of 2020**

**&**

**O.P. No. 2 OF 2020 & IA No. 485 of 2020**

**In the matter of:**

**Techno Electric & Engineering Company Limited**

Represented through its General Manager,  
Corporate Office: 1B, Park Plaza, South Block,  
71, Park Street, Kolkata- 700016.

**.....Appellant / Petitioner**

**Vs.**

**(i) Andhra Pradesh Electricity Regulatory Commission**

Having office at:  
5<sup>th</sup> floor, Singareni Bhavan,  
Red Hills, Hyderabad – 500 004  
Represented by its Secretary.

**(ii) Southern Power Distribution Company of AP Limited**

Having office at:  
19-13-65/A, Raghavendra Nagar, Kesavayana Gunta,  
Tiruchanoor Road, Tirupati – 517501  
Andhra Pradesh  
Represented by Chief General Manager (IPC&P&MM)

**(iii) National Load Despatch Centre**

Represented through its Executive Director  
B-9 (1<sup>st</sup> Floor), Qutab Institutional Area,  
Katwaria Sarai, New Delhi- 110016

**.....Respondent(s)**

**Counsel for the Appellant(s)** : Mr. Sajan Poovayya, Sr. Adv.  
Mr. Amit Kapur  
Ms. Poonam Verma  
Mr. Saunak Kumar Rajguru  
Mr. Adishree Chakraborty  
Ms. Sakshi Kapoor  
Ms. Aparajita Upadhyay

**Counsel for the Respondent(s)** : Mr. Sridhar Potaraju  
Ms. Ankita Sharma  
Ms. Shivani Tushir  
Ms. G. Usha Sri  
Mr. Vishnu Thulasi Menon  
for R-1

Mr. Basava Prabhu Patil, Sr. Adv.  
Mr. Ardhendumauli Kumar Prasad  
for R-2

Ms. Abiha Zaidi for R-3

## **J U D G M E N T**

### **(PER HON'BLE JUSTICE MANJULA CHELLUR, CHAIRPERSON)**

1. The Appellant/ Petitioner has filed the present Appeal No. 99 of 2020 under Section 111 of the Electricity Act, 2003 and O.P. No.2 of 2020 under Section 121 of the Electricity Act, 2003 challenging the Order/Direction of Andhra Pradesh Electricity Regulatory Commission ("APEREC") dated 04.01.2020 ("*Impugned Order*") recommending National Load Despatch Centre ("*NLDC*") to issue Renewable Energy Certificates ("*RECs*") to Andhra Pradesh Southern Power Corporation Ltd. ("*APSPDCL*") for FY 2018-19.

The Appellant submits that by this impugned Order APERC failed to perform its statutory functions by holding APSPDCL to be eligible for issuance of RECs for FY 2018-19 despite APSPDCL's non-fulfilment of its Renewable Purchase Obligation ("RPO") in FY 2017-18.

2. **Description of Parties:-**

- i) The Appellant, Techno Electric & Engineering Company Limited after the amalgamation, is a generating company in terms of Section 2(28) of the Electricity Act, 2003 and has set up wind power projects having installed capacity of 111.9 MW in Tamil Nadu and 18 MW in Karnataka.
- ii) Respondent No. 1, Andhra Pradesh Electricity Regulatory Commission is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998. The powers of the APERC, amongst others, include power to determine the tariff for generation, supply, transmission and wheeling of electricity, within the state and to adjudicate upon disputes between licensees and generating companies.
- iii) The Respondent No. 2, Andhra Pradesh Southern Distribution Company Ltd. is one of the distribution licensees in the state in terms of Section 2(17) of the Electricity Act, 2003.
- iv) The Respondent No. 3, National Load Despatch Centre as defined under Section 26 of the Electricity Act, 2003 is the nodal agency

for issuance of RECs as provided in Regulation 3 of the CERC REC Regulations.

3. **Facts of the Case:-**

The brief facts which led to filing the present Appeal/Petition are as under: -

- i) On 14.01.2010, Ld. CERC promulgated CERC REC Regulations, 2010 which *inter alia* allowed a generating company engaged in generation of electricity from renewable energy sources to apply for registration for issuance of and dealing in RECs.
- ii) On 30.12.2014, Ld. CERC introduced the 3<sup>rd</sup> Amendment to CERC REC Regulations, 2010 *inter alia* inserting Regulation 5(1A) allowing Discoms to apply for registration for issuance of and dealing in RECs.
- iii) On 22.07.2016, Ministry of Power (“MoP”) in exercise of powers conferred under Para 6.4(1) of the Tariff Policy 2016, notified “*long-term growth trajectory of RPOs for solar and non-solar for FY 2016-17 to 2018-19*”) and stipulated RPOs for all obligated entities. While the RPO for FY 2017-18 was set at 14.25%, whereas for FY 2018-19 was stipulated to be 17% of the total consumption.
- iv) On 31.03.2017, APERC promulgated APERC RPO Regulations. In terms of Regulation 3 therein, while the RPO for FY 2017-18 was set at 9%, whereas for FY 2018-19 was stipulated to be 11% of the total consumption. However, it is pertinent to note that as per the CERC REC Regulations, 2010 the obligated entities are mandated

to meet the higher RPO target as prescribed under the Tariff Policy or the RPO Regulations framed by the Appropriate Commission.

- v) On 16.03.2018, CERC issued modified REC procedures and *inter alia* amended the REC Issuance Guidelines therein.
- vi) On 25.01.2019, APERC recommended NLDC to issue RECs to APSPDCL for FY 2017-18. In the said recommendation, APERC certified that all statutory requirements are duly complied with for such issuance. Accordingly, APSPDCL, on 31.01.2019, applied to NLDC for issuance of RECs for FY 2017-18. Based on such recommendation by APERC, NLDC issued RECs to APSPDCL for FY 2017-18 and APSPDCL could sell the RECs by participating in the REC trading process.
- vii) On 05.11.2019, when APERC sought the RPO compliance status of APSPDCL for FY 2018-19 from AP State Load Despatch Centre ("AP SLDC"), in its response dated 26.11.2019, AP SLDC stated *inter alia* that in the immediate preceding year i.e. FY 2017-18, there is in fact a shortfall (RPO deficit) in procurement of power by APSPDCL from solar energy-based sources to the tune of 6,81,109 MWh.
- viii) Despite being aware of APSPDCL's RPO deficit in the previous year i.e. FY 2017-18, APERC issued its recommendation dated 04.01.2020 to NLDC for issuance of RECs to APSPDCL for FY 2018-19. Further, APERC recommended NLDC to issue RECs to the tune of Rs. 609.29 Cr at floor price value to APSPDCL for FY 2018-19.

- ix) In view of the afore-said, NLDC issued approx. 40 Lac non-solar RECs and 19 Lac solar RECs to APSPDCL in the month of February 2020.
4. Techno Electric is constrained to file the present Appeal on the following grounds:
- (a) There is violation of Regulation 5(1A)(a) of CERC (Terms and Conditions for Recognition and Issuance of RECs for Renewable Energy Generation) Regulations, 2010 ("*CERC REC Regulations*") and Regulation 3.1 of the CERC Regulation Guidelines, 2018 framed therein which mandate SERCs not to extend REC benefits to Discoms having RPO deficit/default in the previous financial year.
- (b) There is failure to comply with obligations entrusted by virtue of APERC RPO (Compliance by purchase of Renewable Energy/ RECs) Regulations, 2017 ("*APERC RPO Regulations*") since failed to take cognizance of APSPDCL's RPO deficit/ default in FY 2017-18 while recommending NLDC to issue RECs in favour of APSPDCL for FY 2018-19.
- (c) Central Agency has erroneously incentivized APSPDCL for its RPO default in FY 2017-18 instead of subjecting APSPDCL to punitive provisions under Regulation 7 of APERC RPO Regulations, 2017 and that under Section 142 of the Act.
- (d) There is violation of the statutory mandate under the Tariff Policy 2016 and National Action Plan on Climate Change ("*NAPCC*") of achieving equitable RPO target in all the states throughout the country since it allowed APSPDCL to purchase RECs to the tune

of Rs. 609.29 Cr at floor price value (an unprecedented quantum being more than 50% of the annual REC market size).

- (e) There is failure to appreciate the settled position of law that REC purchase ought to be based on sound economic principles without disturbing REC market equilibrium.

**5. Learned counsel on behalf of APERC/Respondent No.1 has filed following Reply/ Written Submissions:-**

- i) The Respondent no.1 has filed common written submissions in the Appeal No. 99/2020 & OP No. 2/2020 as the letter dated 4.01.2020 issued by Respondent No. 1 is subject of challenge in both the matters.
- ii) The submissions in opposition of the appeal/petition are broadly under the following grounds:
  - a) The letter dated 4.01.2020 is not amenable to the appellate jurisdiction either u/s 111 or u/s 121 under the Electricity Act, 2003. The following authorities are relied upon:
  - b) 'North Delhi Power Ltd vs. Delhi Electricity Regulatory Commission' 2009 SCC Online APTEL 44.
  - c) 'PTC India Ltd vs. Central Electricity Regulatory Commission' 2010 (4) SCC 603.
  - d) 'Maharashtra State Electricity Distribution Company Ltd vs. CERC and Others' 2011 SCC Online APTEL 119.
- iii) The Appellant/Petitioner while on one hand seeks to give a strict interpretation to the scope of appellate remedy under CERC

regulation 5(4) qua person aggrieved, however, seeks to persuade the Appellate Tribunal to give a wider meaning to the expression 'person aggrieved' under section 111 of the Electricity Act, 2003.

- iv) Once it is conceded that Appellate remedy is only as provided under the statute for the persons specified therein, a consistent interpretation shall have to be given to the expression "person aggrieved".
- v) Admittedly the Appellant is not contemplated to have any locus either under the Electricity Act 2003 or CERC REC Regulations 2010, being a generating company, in the process of assessing the eligibility of a distribution licensee for being considered for issuance of REC certificates.
- vi) The plain reading of Section 111 makes it evident that the person aggrieved by an Order made by an appropriate commission is a person against whom an order has been passed. In the present case, the Appellant admittedly is not within the jurisdiction of APERC/Respondent No.1, since it has a wind power project in Karnataka.
- vii) If the Appellant is treated as a person aggrieved by the Order passed by the State regulatory commission under whose jurisdiction he does not operate, it would effectively make every letter/communication/instruction apart from adjudicatory orders passed by every state regulatory commission amenable to appeal at the behest of "any person" irrespective of such person being clothed with any statutory locus to be heard or to be consulted by the state regulatory commissions. Such wide interpretation is not warranted either in law or in the facts of the above matters.

- viii) The Appellant/Petitioner's grievance is that as a consequence of issuance of RECs by R.3, increased supply of RECs and thereby altered the market dynamics in the free market. However, he chooses to challenge the letter dated 4.01.2020, which is merely recommendatory and not binding upon R.3 under CERC REC Regulations 2010. Such grievance has no direct or immediate nexus with the letter dated 4.01.2020 impugned in the present proceedings. The grievance pleaded by the Appellant/Petitioner is too remote from the impugned letter issued by Respondent No.1, hence no cause of action can arise against the said letter dated 4.1.2020, nor does he have *locus standi* to challenge.
- ix) In this regard, learned counsel for Respondent No.1 referred "**Grid Corpn of Orissa Ltd vs. Gajendra Haldea**" 2008 (13) SCC 414.
- x) The Appellant/Petitioner cannot be permitted to invoke jurisdiction u/s 111 and u/s 121 simultaneously, thereby requiring the appellate tribunal to determine which one of the two is maintainable.
- xi) The Doctrine of Election is attracted in view of their own averments in their pleadings. The specific contention of non-applicability of Doctrine of Election was on the premise that the said doctrine gets attracted only if both remedies are otherwise available.
- xii) Regulation 5(1A) is part of a scheme for giving incentives for meeting the Renewable Purchase Obligations. A complete scheme was framed for the said purpose. The objects sought to be achieved and the mechanism and procedures prescribed are integral part of the policy under the Electricity Act, 2003, i.e., to encourage generation of renewable energy in the country and to

ensure adequate market for such energy by imposing obligations on distribution licensees to purchase such energy.

- xiii) The incentive and disincentives for meeting the RPO are provided under the CERC Regulations 2010 and APERC Regulations 2017. The reckoning period under both regulations is a “year”, which has been defined as “financial year” under both regulations. The other expressions used in the regulations “previous financial year”, “previous year”, “a year” have not been defined.
- xiv) The understanding of the statutory authorities implementing the statutory policy has been that the requirement of Clause (a) of Regulation 5(1A) for the Previous Financial Year is with reference to the incentive stipulated under the higher value between the obligation to purchase renewable energy, solar/non-solar respectively as may be fixed by the state regulatory commission, the national tariff policy for the year under consideration. Once the said requirement of exceeding the higher of the two is met, the eligible entity qualifies for being considered, subject to the setoff qua deficit if any in the previous years as provided in the second proviso to Regulation 5(1A)(a).
- xv) On a plain reading of the CERC Regulations 2010, having regard to the stated objects for which they have been framed and the procedures prescribed, the interpretation of regulation 5(1A)(a) as canvassed by the Appellant/Petitioner is contrary to settled principles of interpretation of statutes.
- xvi) If the interpretation, canvassed by the appellant/petitioner is accepted, then it would result in introducing a new condition not contemplated by the framers of the regulation, namely that the

eligible entity will have to exceed the RPO determined under the Tariff Policy for 2 consecutive years before it can be considered for recommendation of REC. In other words, for the financial year in question i.e., 2018-19 as also previous financial year 2017-18 the Tariff Policy RPO has to be achieved under Regulation 5(1A)(a). This would amount to introducing a condition which was neither contemplated nor provided for by the framers of the regulation. In fact, such an interpretation runs contrary to the entire object of incentivising purchase of renewable energy for the financial year and be able to benefit by way of RECs which can be traded in open market as provided for under relevant statutory regime and thereby augment their finances.

- xvii) The interpretation resulting in creating a requirement of meeting the higher RPO for 2 consecutive years runs contrary to the Objects of the Electricity Act, 2003, more so the policy to encourage renewable energy generation in the country by guaranteeing purchase of such energy by distribution licensees, even though Renewal Energy may be more expensive than other sources of electricity thereby increasing the burden on public at large.
  
- xviii) The *bona fide* application of the regulations by Respondent no.1 on the basis of the advice of the state level agency and the consistent application of the regulations by Respondent no.3 for the past 5 years, are consistent with principles of interpretation on a harmonious reading of the various provisions and the scheme of the regulation.

- xix) Without prejudice, on facts, no undue advantage has been given to the Respondent No. 2 - APSPDCL vide the letter dated 4.1.2020 while recommending RECs for the year 2018-19. Necessary reduction on account of shortfall for the year 2017-18 has been made, thereby nullifying the advantage if any given in the year 2017-18 on the basis of letter dated 26.11.2019 issued by SLDC. Nor any prejudice is caused to the appellant/petitioner by the impugned letter, since the final act of issuance of REC was to be done independently by the NLDC (R3).
- xx) The Respondent No. 1 has acted *bona fide* in applying the regulations having regard to the stated objects sought to be achieved by giving the recommendation on the strength of actual purchase obligations having been met as confirmed by SLDC vide their letter dated 26.11.2019. Hence the present appeal/ petition may be dismissed.

**6. Learned counsel, on behalf of APSDCL/Respondent No.2 has filed following Reply/ Written Note:-**

- i) The present Appeal (Appeal No. 99 of 2020) and Original Petition (O.P. No. 02 of 2020) have been filed challenging the letter dated 04.01.2020, (hereinafter referred to as "Impugned Letter"), issued by the Andhra Pradesh Electricity Regulatory Commission. Vide the said letter, the APERC has issued its 'recommendation' for issuance of RECs to the Respondent No. 2/ APSPDCL for incentivising APSPDCL for surplus renewable energy procured beyond MoP target for FY 2018-19 in terms of the CERC (Terms

and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation Regulations, 2010) hereinafter referred to as 'REC Regulations of 2010/REC Regulations 2010'.

- ii) At the outset it is submitted that RECs are issued to Discom for incentivising them for procuring renewable energy in excess of RPO targets fixed for previous Financial Year by MOP (which is higher than State Commission). Thus, Discom is entitled to claim RECs in the current year, for its 'performance' in the 'previous Financial Year'. The stated objective has been elucidated in the Statement of Reasons and the same has also been the understanding of NLDC, SLDC's, State commission and Discoms. Till date all REC's have been issued to Discoms like Rinfra, HPSBL, Tata Power (Mumbai) on the very same understanding. Any other understanding will frustrate the state objective so also the well established procedure, which is being adopted by the implementing authorities.
- iii) It is important herein to highlight the relevant dates for issuance of RECs to APSPDCL for its performance in FY 2017-18 and 2018-19.

**Re: For FY 2017-18**

- a. APSPDCL procured surplus renewable energy during FY 2017-18 to the extent of 461014 MWh (Solar) and 1124035 MWh (Non-Solar) as against the MoP targets prescribed by virtue of Clause 6.4 of the National Tariff Policy.

- b.** In view of the surplus procurement of renewable energy during previous FY 2017-18, APSPDCL applied for recommendation to APERC vide its application on 23.01.2019 (i.e. Application for recommendation was made during the FY 2018-19). It is imperative to note herein that for issuance of RECs for the performance of APSPDCL in FY 2017-18, it can only file application after the FY 2017-18 gets over, i.e. after 31.03.2018, and not before that since the RECs are in the form of an incentive to the distribution licensees for its performance during the previous FY.
- c.** Pursuant to the above application filed by APSPDCL, APERC issued its recommendation on 25.01.2019 (i.e. during FY 2018-19) for issuance of RECs to APSPDCL towards the surplus renewable energy procured during the previous FY 2017-18. The said recommendation was issued after adjusting the shortfall/ deficit, if any, during the previous 3 years, i.e. 2016-2017, 2015-2016 and 2014-2015.
- d.** Thereafter, APSPDCL filed its application before NLDC/ Respondent No. 3 on 31.01.2019 (i.e. during FY 2018-19) for issuance of RECs in terms of the APERC's recommendation dated 25.01.2019. The said application was filed before NLDC during the FY 2018-19 for issuance of RECs towards the surplus renewable energy procured during the previous FY 2017-18.

e. Pursuant to the above application, NLDC after being satisfied with the statutory requirements, issued RECs in favour of APSPDCL on 15.02.2019(i.e. during the FY 2018-19). The said RECs were issued by NLDC as an incentive towards the performance (i.e. surplus procurement of renewable energy) of APSPDCL during the previous FY 2017-18. It is pertinent herein to mention that the Appellant/ Petitioner has not disputed the issuance of RECs for the FY 2017-18 and the details of FY 2017-18 have been furnished in the above paras demonstrating the procedure for issuance of RECs.

*iv)* **Re: For FY 2018-19**

a. APSPDCL procured surplus renewable energy during FY 2018-19 to the extent of 1960830 MWh (Solar) and 4035276 MWh (Non-Solar) as against the MoP targets prescribed by virtue of Clause 6.4 of the National Tariff Policy.

b. In view of the surplus procurement of renewable energy during previous FY 2018-19, APSPDCL applied for recommendation to APERC vide its application on 25.10.2019(i.e. Application for recommendation was made during the FY 2019-20).It is imperative to note herein that for issuance of RECs for the performance of APSPDCL in FY 2018-19, application for recommendation can only be made after the FY 2018-19 gets over i.e. after 31.03.2019, and not before that, since the RECs are in the form of an incentive to the distribution licensees for its performance during the previous FY.

- c.** Pursuant to the above application filed by APSPDCL, APERC issued its recommendation on 04.01.2020 (i.e. during FY 2019-20).
- d.** While issuing the said recommendation, the APERC, based on letter dated 26.11.2019 issued by AP SLDC, realised that although there is no shortfall/ deficit in the previous FY 2018-19 (i.e. year of performance), there is a shortfall of 681108 MWh of Solar energy during one of the previous 3 years i.e. during FY 2017-18. The said shortfall in procurement of solar energy in FY 2017-18 arose on account of the G.O. No. 116 dated 01.10.2019, which reallocated the procurement of renewable energy between APSDCL and APEDCL with retrospective effect.
- e.** Pertinently, it was due to retrospective revision of RE procurement achievement of APSPDCL, much after issuance of REC's to APSDCL, it was found that for FY 2017-18 , APSDCL has been issued solar REC's in excess and Non-solar REC's in deficit, of its entitlement after retrospective revision. It is submitted that such shortfall in solar procurement was only qua MoP target but not APERC's target. Thus, procurement of 2017-18 [which is one of the previous three years referred to in 2<sup>nd</sup> proviso to Regulation 5(1A)], was not in shortfall, since second proviso requires adjustment of shortfall/waiver/carry forward as against APERC's target and not MOP's target.

- f. As such, the APERC while issuing its recommendation dated 04.01.2020 for issuance of RECs towards the surplus renewable energy procured during the previous FY 2018-19, deducted the excess of REC's issued for FY 2017-18 for solar from the total entitlement for FY 2018-19. The APERC also added deficit REC's issued to APSPDCL in FY 2017-18 due to revision, to the entitlement in previous FY 2018-19.
- g. Thereafter, APSPDCL filed its application before NLDC/ Respondent No. 3 on 20.01.2020 (i.e. during FY 2019-20) for issuance of RECs. The said application was filed before NLDC during the FY 2019-20 for issuance of RECs towards the surplus renewable energy procured during the previous FY 2018-19.
- h. Pursuant to the above application, NLDC after being satisfied with the statutory requirements issued RECs in favour of APSPDCL on 24.02.2020(i.e. during the FY 2019-20). The said RECs were issued by NLDC as incentive towards the performance (i.e. surplus procurement of renewable energy) of APSPDCL during the previous FY 2018-19.
- v) In the above factual context, it is pertinent herein to mention the statutory mechanism for issuance of RECs to the eligible entities such as the Respondent No. 2/ APSPDCL.

**Re: Statutory Mechanism for issuance of RECs**

- vi) REC Regulations 2010 provides the mechanism for issuance of RECs to the eligible entities including the Distribution Licensees.

Regulation 5(1A) entitles Discoms to 'apply' for issuance of, and dealing in, REC's if following conditions are met:

- a) such licensee, in the previous FY (i.e. year of performance) has procured renewable power in excess of the RPO specified by the Appropriate Commission or in the National Action Plan on Climate Change or in the Tariff Policy (MoP), whichever is higher;
  - b) the RPO level as may be specified for a year, by the Appropriate Commission should not be lower than that for the previous financial year. Putting in factual context, the RPO target set by APERC for FY 2018-19 (previous year) should not be less than the RPO set for FY 2017-18 (year)
  - c) there is no shortfall in achieving the RPO level specified by the Appropriate Commission during the previous three years (i.e. 3 years prior to the year of performance).
- vii) It is submitted that the RPO level, specified by the Ministry of Power (MoP) in terms of the provisions of Tariff Policy, is higher than the RPO level specified by the Respondent Commission. Therefore, the Respondent No. 2 shall be eligible for issuance of RECs commensurate with the quantum of renewable energy procured over and above RPO level specified by the MoP.
- viii) In the above context, it is relevant herein to show the details as to whether the Respondent No. 2 has fulfilled the above requirements. *Firstly*, as per provisions contained under

Regulations 5(1A)(a), it is important to see whether the Respondent No. 2/ APSPDCL has procured renewable energy in excess of the RPO level specified by the MoP during the previous FY 2018-19 (i.e. year of performance). The said details are as follows:

S.No.	FY 2018-19	% Target for Non solar	%Target for Solar	%Target for total NCE Power
1	RPO level as per MoP	10.25	6.75	17
2	APSPDCL Achievements	21.44	12.58	34.03

From the above table, it is evident that the Respondent No. 2/ APSPDCL has procured renewable energy in excess of the RPO level specified by the MoP for the FY 2018-19.

- ix) *Secondly*, it is relevant herein to show that in terms of the 2<sup>nd</sup> proviso to Regulations 5(1A)(a), whether the requirements have been fulfilled. In this regard, the following is important.

S. N.	Financial Year	% of APERC RPPO Targets			% of APSPDCL Achievements			Whether RPPO achieved by APSPDCL or not
		Solar	Non Solar	Total	Solar	Non Solar	Total	
1	2015-16	0.25	4.75	5	0.24	7.32	7.56	Yes
2	2016-17	0.25	4.75	5	2.78	10.06	12.84	Yes
3	2017-18	3.0	6.0	9	4.07	15.36	19.43	Yes

From the above table, it is apparent that the Respondent No. 2 has fulfilled its RPO compliance in the previous three years, prior to the year of performance (i.e. previous FY 2018-19), thereby satisfying another requirement for issuance of the RECs.

- x) 2<sup>nd</sup> Respondent further states that although there was no shortfall in the previous 3 years, prior to the year of performance (i.e. previous FY 2018-19), however, due to the issuance of the G.O. No. 116 dated 01.10.2019, a shortfall accrued in procurement of solar energy in the FY 2017-18 as against the MoP targets, and not against the RPO targets specified by the APERC for that year. The adjustment of said shortfall was done for the FY 2017-18 as stated above.
- xi) According to 2<sup>nd</sup> Respondent, irrespective of the fact that there was no shortfall in any of the previous 3 years as per the RPO level specified by APERC, the shortfall which arose due to the issuance of G.O. No. 116 dated 01.10.2019 was only against the RPO level specified by MoP for FY 2017-18, and even such shortfall was duly adjusted from the surplus of solar energy procured during the previous FY 2018-19.
- xii) 2<sup>nd</sup> Respondent contends that the Appellant/ Petitioner is wrongly contending that the previous FY as provided under Regulation 5(1A)(a) of the CERC REC Regulations can mean the FY 2017-18 since the present matter relates to FY 2018-19. If the said interpretation of the Appellant is accepted by this Tribunal, then the renewable energy procured during the FY 2018-19 would be held

meaningless, even though the RECs have been issued based on the performance during the FY 2018-19.

- xiii) It is submitted that the term “previous FY” used in the said Regulation can only be understood in the sense that RECs shall be issued to the eligible distribution licensees based on their performance during a particular year after such year is completed. As such, the application for issuance of RECs can only be made in the year, subsequent to the year of performance for which RECs are being sought by the eligible entity. Therefore, the term “previous FY” has been used in Regulation 5(1A)(a) considering the fact and practical situation that any eligible entity will apply for issuance of RECs in the year subsequent to the year of its performance. Hence, in the present case, the term “previous FY” can only mean the FY 2018-19 since the Respondent No. 2 has sought for issuance of RECs in the FY 2019-20 which is subsequent to the year of its performance in the previous FY (i.e. 2018-19).
- xiv) In addition to the aforesaid, it is submitted that the above concept, of previous FY provided under Regulation 5(1A)(a) and previous three years as provided under 2<sup>nd</sup> proviso to the said Regulations, is further crystallized by the format approved by the Ld. Central Commission, which is required to be filled in by the eligible entities such as the Respondent No. 2 herein. As per the said format, if the eligible entity is applying for issuance of RECs towards its performance of FY 2018-19, then such eligible entity is required to provide the data of renewable energy procurement in the last 4 years, including the year 2018-19 for which RECs are being

sought. Further, if there was any shortfall in the previous three years (i.e. 2017-18, 2016-17 and 2015-16) prior to the year for which RECs are being sought (i.e. FY 2018-19 OR year of performance) then such shortfall has to be first adjusted from the surplus achieved in the FY 2018-19 before issuing the recommendation for issuance of RECs.

- xv) If, 'previous Financial Year' used in 5(1A) (a) is taken to be 2017-18, as argued by the Appellant, it will render the format 3.1.1, otiose (see pg. 155, Appeal paper book for format 3.1.1). Notably, format 3.1.1 requires details of following years:

Previous Financial Year referred to in 5(1A)(a)

Three previous years referred to in 2<sup>nd</sup> proviso.

- xvi) If, FY 2017-18 is taken to be previous Financial Year, there would be no column left in format 3.1.1 to fill RE procurement details for FY 2018-19, which is the year for which incentive is sought. This would be contrary to the purpose of RE incentive mechanism. The format 3.1.1 can only be given effect to if the expression 'previous Financial Year' is understood as FY 2018-19.
- xvii) However, if the interpretation given by the Appellant/ Petitioner is accepted then the performance of the eligible entity during the previous FY 2018-19, such as the Respondent No. 2, shall be of no importance and would be rendered as redundant. This cannot be the intention of the makers of the said Regulations. This is for the reason that the RECs, are issued in lieu of the incentive for excess procurement of renewable energy in a particular year and

not the year previous to the year in which excess procurement has been made. Hence, the “previous FY” can only mean the ‘year of performance’ (i.e. previous FY 2018-19) for which the eligible entity is entitled to be rewarded as soon as the said year of performance gets over.

xviii) It is submitted that Regulation 5(1A) must be read as a whole and the condition must be read in the light of other expressions used in the regulation. In addition to the argument that the interpretation suggested by Appellant that ‘previous Financial Year’ means FY 2017-18, frustrates the very objective of issuing REC’s to Discom, it also frustrates the very purpose for which REC application was made i.e. for taking incentive for procuring excess RE in FY 2018-19. Regulation 5(1A) incorporates the expression ‘distribution licensee shall be entitled to **‘apply for registration for issuance of and dealing** in RECs’. If the said expression ‘previous year’ has to be interpreted in light of the expression ‘entitled to apply’, it is an admitted position that a Discom can apply for REC’s only after the financial year for which REC’s is applied for, is over. Thus, the expression ‘previous year’ is used to mean the financial year prior to year of application. In the present case, the ‘previous Financial Year’ would necessarily mean FY 2018-19.

xix) In addition, and without prejudice to the above submissions, assuming without admitting that the interpretation of the Appellant is correct, then also this Tribunal may not interfere with the present procedure since the same have been followed till date by all the concerned authorities and other stakeholders. It is stated that if two views of the court are possible then the past practice cannot be found fault with, if it is based on one of the possible

constructions of rules. In this regard, reference can be made to the judgment of Hon'ble Supreme Court in **N. Suresh Nathan v. Union of India, 1992 Supp (1) SCC 584;**

- xx) Without prejudice to the submissions made herein above, it is submitted that the Regulations in question, which are being sought to be interpreted, have been framed and issued by the Central Electricity Regulatory Commission. However, the said Central Commission has not been impleaded as a party to the present proceedings. In all fairness, it is being humbly submitted that the makers of the law should be given an opportunity of being heard before any such interpretation is made by any court of law.

**Re: Maintainability of the Appeal and Petition**

- xxi) It is submitted that the instant proceedings initiated by the Appellant/ Petitioner are not maintainable in law. It is submitted that the Appellant has invoked the appellate jurisdiction of this Tribunal under Section 111 of the Act for the purpose of challenging the recommendation issued by the Respondent Commission vide the letter dated 04.01.2020. In this context, it is stated that the Appellant herein does not qualify to be an aggrieved person as provided under Section 111 of the Act. The Appellant has not established any 'legal injury' being caused to him or something he was legally entitled to has been taken away from the impugned letter. The entire locus of the Appellant rests on the ground that his RECs trade will not reap as much financial benefit as it would have reaped if RECs were not issued to APSDCL. It is submitted that '*locus*' must first be established,

notwithstanding the case on merits. Jurisdiction under Section 111 and 121 are not in nature of public interest. It is also relevant to note that the Appellant is an entity who has been issued RECs only under interim orders of this Tribunal. Even otherwise, the entire scheme of issuing RECs to the Discom is to incentivize them and the benefit which Discom realizes from the sale of RECs would finally benefit the consumers by bringing the tariff down. In this regard, reference may be made to the following judgments:

- **Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir, (1976) 1 SCC 671;** The appellant does not fulfill even a single test laid down by the apex court in para 38 and 39 of the decision to qualify as an aggrieved person.
- **Pushpendra Surana v. CERC, 2014 ELR (APTEL) 820;**
- **Green energy association v. Chhattisgarh State Commission- Appeal 106/26, Dated 21/08/2019 (APTEL);**. This judgment is squarely applicable to facts of the present case. It was held that merely because the appellant is expecting to lose future financial benefit it cannot be said to be an aggrieved person.
- **Wall Street Finance Ltd. v. Union of India, 2006 SCC OnLine Bom 472;**

- xxii) That apart, the appeal is not maintainable as the Appellant has challenged the recommendation issued by the Respondent Commission but such recommendation cannot be treated as an 'order' passed by the Respondent Commission as the said recommendation is only one of the component for issuance of RECs and the same is subject to satisfaction of NLDC as per Regulation 7(2) of the CERC REC Regulations read with para 2.4 and 4.2 of the CERC procedure. Only an order when it finally decides rights/ obligations of the party, can be appealed. The present recommendation in any manner does not confer any right on the Discom to be eligible for issuance of RECs. Pertinently, the prayer in the appeal is for setting aside RECs issued to APSDCL and not setting aside of impugned letter dated 04.01.2020. Thus, the Appellant in effect is seeking setting aside of NLDC's order, over which this Tribunal does not have jurisdiction.
- xxiii) There is no jurisdiction with this Tribunal over the order passed by NLDC whereas the prayer seeks setting aside of the same. This argument also equally applies to petition under Section 121 which also can only be exercised to issue appropriate directions to the appropriate commission and not to any other authority.
- xxiv) The said recommendation has been issued while performing a purely regulatory function as provided under the CERC REC Regulations and it can neither amount to an order for resolution of the disputes through the exercise of the adjudicatory power, nor it is related to the orders passed by the Respondent Commission for determination of tariff. In this context, reference can be made to

the judgment passed by this Tribunal on 28.07.2011 in Appeal No. 92 of 2011, wherein this Tribunal has held as follows:

*“29. In view of the above, we are to conclude that the impugned order is not as a result of the exercise of the normal Adjudicatory power but the same is the outcome of the exercise of the Regulatory power. Therefore, we are of the view that the Appeal is not maintainable. Accordingly, the, Appeal is dismissed. However, there is no order as to cost.”*

xxv) Further, assuming that the Appellant is aggrieved by issuance of the RECs by NLDC, then an alternate efficacious remedy is available to the said Appellant under Regulation 5(4) of the CERC REC Regulations. Hence, the present appeal cannot be entertained since the Appellant has not exhausted the efficacious alternate statutory remedy available to it. In this regard, reference can be made to the judgment of Hon’ble Supreme Court in **Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433.**

xxvi) The present appeal is also not maintainable as the Appellant/ Petitioner has invoked parallel remedies by filing the present appeal and original petition simultaneously seeking similar reliefs. As such, the present appeal and original petition cannot be held maintainable as it is a settled law that parallel remedies should not be invoked. In this regard, reference can be made to the judgment of Hon’ble Supreme Court in **Orissa Power Transmission Corporation Limited v. Asian School of Business Management Trust and Ors. MANU/SC/0827/2013; (2013) 8 SCC 73.**

xxvii) The instant appeal and petition are also liable to be dismissed as the Appellant/ Petitioner has suppressed the material facts. It is submitted that prior to filing of the present appeal and petition, the Appellant/ Petitioner in a separate proceedings pending before this Tribunal, being Appeal No. 57 of 2020, filed interlocutory applications, being I.A. Nos. 456 and 457/ 2020, and prayed for similar reliefs against the Respondent No. 2 as prayed in the present proceedings which was also based on the same cause of action i.e. issuance of RECs in favour of the Respondent No. 2. On this preposition, reference can be made to the judgment of Hon'ble Supreme Court in **Arunima Baruah vs. Union of India (UOI) and Ors.: MANU/SC/7366/2007; (2007) 6 SCC 120.**

xxviii) It is further submitted that the Original Petition filed by the Petitioner is not maintainable as the APERC has rightly carried out its statutory duties as provided under the REC Regulations of 2010. Further, assuming without admitting that the said recommendation is issued as an order, then it cannot be challenged under Section 121 of the Act. It is a settled position of law that this Tribunal by invoking its power under Section 121 cannot direct the Respondent Commission to pass an order in a particular way. In this regard, reference can be made to the judgment of this Tribunal in **Reliance gas transportation infrastructure ltd v. PNGRB in O.P. 2/15, Dated 28.04.2015).**

**Re: Alleged disturbance to the REC Market Equilibrium**

xxix) The Appellant/ Petitioner in the instant proceedings contends that due to the issuance of such huge quantum of RECs to the

Respondent No. 2, the REC market equilibrium has been disturbed. In this regard, it is submitted that the said contention is completely misplaced and without any basis. Firstly, under the CERC REC Regulations 2010, there is no restriction upon issuance of the number of RECs to a single eligible entity. Secondly, the price of RECs is also regulated by the Central Electricity Regulatory Commission (CERC) in terms of the provisions contained under Regulation 9 of REC Regulations 2010. The said provision for determination of REC price provides various factors to be considered while determining the floor price and forbearance price of the RECs, and it also includes viability of the renewable energy generators. Therefore, the contention of disturbing the REC market equilibrium is completely baseless and misconceived inasmuch as the entire REC market is regulated and supervised by the CERC.

xxx) In addition to the aforesaid, it is submitted that the Appellant/ Petitioner is drawing a comparison between itself and the Respondent No. 2 in the REC market without appreciating the stakes involved by the Respondent No. 2 for procurement of renewable power. The Appellant/ Petitioner is having the renewable generation capacity of approximately 130 MW, whereas the Respondent No. 2 has tied up for 7600 MW of renewable energy procurement which involves huge investment of approximately 40000 Crores. As such, the comparison made by the Appellant/ Petitioner with the business of the Respondent No. 2 is not at all sustainable.

xxxii) As such, the Appellant/ Petitioner by way of filing the present appeal and petition, has put the Respondent No. 2 to ransom,

which cannot be allowed in any manner whatsoever. Further, the Respondent No. 2 has been subjected to irreversible injury inasmuch as the Appellant by virtue of the interim order dated 24.04.2020 passed in the present matters, participated in the trading session of REC in the month of April 2020 at the cost of the Respondent No. 2.

xxxii) Further, it may also be appreciated that the amount which shall be recovered by the Respondent No. 2 towards the sale of RECs shall be adjusted from the power purchase cost of the Respondent No. 2, which will ultimately benefit the consumer in the State of Andhra Pradesh and at the same time it will also help APSPDCL in meeting its obligation amidst Covid-19 pandemic.

xxxiii) In view of the above submissions the 2<sup>nd</sup> Respondent submits that this Tribunal may kindly be pleased to dismiss the present appeal and petition.

**7. Learned counsel on behalf of NLDC/Respondent No.3 has filed following Reply / Written Note:-**

- i) NLDC submitted that it has followed the due procedure in issuance of RECs to AP Discom. In this regard, NLDC submits as under:-
  - a) As per the Regulation 5(1A) of Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("*REC Regulations 2010*"), a Distribution Licensee shall be eligible for issuance of RECs under REC Mechanism.

- b) In order to give effect to the aforesaid requirement, the corresponding procedure (relevant for the present case) is provided under the '*Procedure for Issuance of a Renewable Energy Certificate to the Eligible Entity by Central Agency*' ('*REC Issuance Procedure*'). Clause 3, 4 and 5 of the REC Issuance Procedure lay down the specific requirement for the Application process by an eligible entity (RE Generator/Distribution Company). In case of an Application made by a Distribution Company ("*Discom*"), the Application is received along with Form 3.1.1 i.e. Recommendation of the State Electricity Regulatory Commission for issuance of Renewable Energy Certificates ("*RECs*") in terms of Regulation 5(1A) of the CERC REC Regulations.
- c) After following the aforesaid detailed procedure being satisfied and on duly compliance of the procedure (as mandated under Regulation 7(2) of the CERC REC Regulations), NLDC issues RE Certificates to the eligible entity.
- ii) According to NLDC, Andhra Pradesh Discom has satisfied with the procedure, and issuance of RECs has been done after due verification of the recommendation received under the seal of the APERC confirming that all conditions under Regulation 5(1A) have been met by AP Discom.
- iii) NLDC submits adjustment has been done on account of the Government of Andhra Pradesh GO Rt. No. 116 dated 01.10.2019. Further submits that RECs have only been issued in addition to the surplus procurement over the RPO compliance even after the said adjustment.

- iv) With the above submissions, they seek directions for and pass any other appropriate orders / directions as the Tribunal may deem fit and proper.

**Re. Interpretation of the term “previous financial year” in Regulation 5(1A) of the REC Regulations, 2010**

- v) Renewable Purchase Obligation (“RPO”) is a mechanism by which the obligated entities are required to purchase certain percentage of electricity from renewable energy sources, as a percentage of the total consumption of electricity. Renewable Purchase Obligation (RPO) for obligated entities i.e. distribution licensees (“Discoms”) is specified on an annual basis i.e. as a percentage of the total consumption of electricity in a given financial year. RPOs for obligated entities i.e. distribution licensees (“Discoms”) is specified on an annual basis i.e. as a percentage of the total consumption of electricity in a given financial year.

- vi) In order to ensure adherence to RPOs, a dual policy mechanism has been resorted to. The mechanism is simply applied:-

**A. Incentive Model - In case of excess over RPO** – The Discom is rewarded with RECs for the excess (subject to certain conditions). This is at the Central level, Renewable Energy Certificates are issued to entities in terms of the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (“REC Regulations”). [Regulation 5(1A) of REC Regulations.

B. Penalty Model - In case of falling short of compliance, the Discom faces consequences penalised in terms of the APERC Renewable Power Purchase Obligation (Compliance by purchase of Renewable Energy/Renewable Energy Certificates), Regulations 2017 (“*APERC RPO Obligations*”). This is done at the State level in terms of Regulation 7 of the APERC RPO Regulations.

Both the incentive and the default can only be assessed after the completion of the prescribed time period i.e. the relevant financial year. Therefore, procedure for assessment for default and/or for the application for incentives (RECs) starts at the conclusion of the relevant year.

- vii) Under the incentive model, Regulation 5(1A) of CERC prescribes the conditions for REC issuance. From Regulation 5(1A), it is clear that there is one qualifying criterion which is subject to two additional conditions.
- **Qualifying criterion** – Exceeding the RPO for the relevant year.
  - **Subject to** – (i) RPO target specified by State Commission in the **relevant year** has to be higher than that of the previous year; and (ii) adjustment of shortfall of the previous 3 years before issuance. These are the 3 years prior to the relevant year.
- viii) **Relevant year** in the present case is the year 2018-19 for which the aforesaid qualifying requirement and conditions shall be applied. The phrase “previous financial year” has to be read in the context of the process for application. In this regard, it is submitted that:-

(a) A Discom can make an application for issuance of RECs only after completion of the financial year for which it is being incentivised (i.e. the relevant year). RECs to Discoms are therefore issued on an **annual** basis unlike the case of Generators to whom RECs are being issued on monthly basis.

(b) This is because Discoms have to submit the yearly data to the Appropriate State Commission after completion of financial year. The State Commission then determines if Discoms have purchased renewable energy over and above the RPO target in that particular year (i.e. the relevant year). Subject to the aforesaid and verification of the other two conditions provided under Regulation 5(1A), the State Commission recommends the Central Agency i.e. NLDC for issuance of RECs.

(c) The application process provided under Regulation 7(1) mandates the Discoms to apply for certificates to the Central Agency *three months from the date of obtaining the certification* from the State Commission. This condition also clearly indicates that the application can only be made in the next financial year. It is also noteworthy that application process is time bound and has to take place in the next financial year.

(d) In view of the aforesaid, previous financial year referred to in Regulation 5(1A)(a) becomes the relevant year i.e. the year for the Discom seeks to avail the incentive. In the present case, AP Discoms applied for RECs in the FY 2019-20 for the previous financial year i.e. FY 2018-19. FY 2018-19 is therefore the relevant year.

(e) They further contend that an analogy may be drawn to years referred to during income tax filings – in which the year for which

tax liability is determined is referred to as the previous year and the year in which the liability is calculated/filed is referred to as the assessment year.

- ix) In terms of Regulation 5(1A) of the REC Regulations, data of RPO compliance has to be provided for 4 (four) years. These four years are inclusive of the relevant year. In the present case, the application for REC issuance for 2018-19 filed by AP Discoms as recommended by APERC included data for the following years:-

**2018-19** – Qualification requirement under Regulation 5(1A)(a).

**2017-18, 2016-17, 2015-16**– Condition requirement under proviso (ii) of Regulation 5(1A)(a).

If the argument of Techno is accepted that 2018-19 is not relevant for issuance of certificates for 2018-19, then the need for providing data for 2018-19 is completely redundant. Such an interpretation leads to an absurdity and cannot be accepted.

- x) **RECs are in the nature of performance linked incentive** – The issuance of RECs is directly linked to the excess/over RPO in a given year. An analogy may be drawn to an annual performance linked incentive which promises rewards for performance. It is only reasonable that the incentive is given effect to for the relevant period and not for a period gone by. There is no reason for the incentive to be linked to a previous year. The interpretation being offered by Techno may still have been accepted if:-

- There was a lag in assessing consumption by a Discom for the relevant year. i.e. Consumption data for a given year

could only be obtained after the passage of another extra year.

- There was an indication to this effect in Statement of Reasons of the CERC REC III Amendment Regulations. Neither of the two scenarios exists in the present case. The entire scheme of the REC Framework is consistent and there exists no such anomaly. The following may please be considered:-

(a) **GENCOS** are issued RECs for energy generated in a particular month as per the Energy Injection Report for that particular month and not for a previous month (*Relevant month*).

(b) **Penalty** for RPO Defaults are prescribed for default in that very relevant year and not for the default of the previous year.

Therefore, even when Discoms are being issued certificates, the basis for issuance has to be the relevant year itself and not the previous year. Therefore there exists no reason to accept a different classification would be provided by CERC when issuing RECs to Discoms. Any other interpretation would render this clause inexplicable.

- xi) **Arguendo** – Assuming and not admitting that CERC made an error and created the alleged erroneous perception by referring to the relevant year as the previous financial year, NLDC submits that:-

(i) This Tribunal may resort to a purposive interpretation of the Regulation and resolve the present impasse in the interest of a just resolution. Reliance is placed on the following authorities:-

- (a) **Energy Watchdog vs. CERC & Ors. 2017 (14) SCC 80 –** *“...The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized.”*
- (b) **Nothman vs. Barnet London Borough Council [1978] 1 WLR 220 (CA) (at p. 228) :** *“... In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the judges to wring their hands and say : There is nothing we can do about it. Whenever the strict interpretation of a statute gives rise to an absurd or unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind.”*

(ii) This interpretation has been applied by NLDC uniformly for all Discoms to which RECs have been issued since the year 2015 till date in terms of Regulation 5(1A) and there is no need for the same to be changed at this point. Resorting to a new interpretation is not in the interest of any party and it only results in disturbing the existing framework. It may also be noted that the interpretation resorted to till date, does not in any manner unfairly benefit an entity nor does it prejudice any other participating entity. In the absence of any compelling reason to disturb the status-quo, this Tribunal may accept the interpretation offered by the Appellant.

8. **Learned counsel on behalf of Appellant/Petitioner has filed following Rejoinder / Written Submissions:-**

i) The Appellant/ Petitioner has filed Appeal No. 99 of 2020 and Original Petition No. 02 of 2020 before this Tribunal:

(a)Challenging the Andhra Pradesh Electricity Regulatory Commission's ("APERC") decision dated 04.01.2020, whereby the APERC erroneously recommended that the National Load Despatch Centre ("NLDC") should issue Renewable Energy Certificates ("RECs") to Andhra Pradesh Southern Power Distribution Company Limited ("APSPDCL") for the relevant year i.e. FY 2018-19. This recommendation was made despite APSPDCL's RPO was deficit in the previous financial year i.e. FY 2017-18– which means that a mandatory precondition for the issuance of RECs was not followed.

(b)Therefore, seeking an order, instruction or direction to the APERC to revoke the recommendation which facilitated the erroneous issuance of RECs to APSPDCL for FY 2018-19.

ii) At the outset, learned counsel for the Appellant submitted that the Appeal and Original Petition were filed simultaneously as they are not inconsistent or repugnant to each other.

iii) The present *lis* raises the following issues for the kind consideration of this Tribunal:

(i) Whether Appeal No. 99 of 2020 and Original Petition No. 02 of 2020 are maintainable?

- (ii) Whether APSPDCL is entitled to the RECs for the relevant year i.e. FY 2018-19 when admittedly there was deficit in APSPDCL's RPO in the previous financial year i.e. FY 2017-18 as mandated under Ld. Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010?

iv) **Appellant's / Petitioner's submissions on Maintainability:**

Appeal No. 99 of 2020 and Original Petition No.2 of 2020 are maintainable in view of the following:

- (i) **APERC's recommendation dated 04.01.2020 is an 'order' in terms of Section 111 of the Electricity Act, 2003 ("Act")-** Since the recommendation of APERC is a pre-requisite for APSPDCL to receive RECs, issuance of recommendations thus constitutes a mandatory function of APERC. The recommendation made in exercise of mandatory function of APERC is in effect a 'decision' and it is settled that word 'order' under Section 111(1) of the Act includes 'decisions'. Accordingly, the Impugned Order being such an order, is amenable to the appellate jurisdiction of this Tribunal.
- (ii) **Techno Electric is not only an 'interested party' but also an 'person aggrieved'**- Due to the APERC's erroneous and statutorily non-compliant recommendation, APSPDCL was illegally issued 59 Lac RECs valued approximately at Rs.609.29 crores (at floor price); a number which correlates to 70% of annual market size of

all RECs in the country. It is to be noted that RECs issued to generating companies and distribution companies are traded in a common market on a common trading platform. Out of the illegally procured 59 Lac RECs, APSPDCL sold 6 lakhs RECs in March 2020 on the common platform, thereby saturating the demand for RECs and inundating the REC market with unsold RECs and directly impacting the rights of Techno Electric, which had legally procured RECs. Thus, the illegal issuance of 59 Lac RECs to APSPDCL has resulted in direct adverse civil, financial, and legal injury to Techno Electric. Accordingly, Techno Electric is aggrieved by the Impugned Order.

- (iii) **No alternative remedy before another forum is available to Techno Electric-** An order of the APERC recommending the issuance of RECs and the consequent issuance of RECs by NLDC are not appealable under Regulation 5(4) of REC Regulations, 2010). Regulation 5(4) only entitles a person aggrieved by the order under *proviso* to clause (3), *i.e.*, an order rejecting the application for issuance of REC, to appeal before the CERC. In the present case, the grievance of Techno Electric emanates from the APERC's illegal recommendation which enabled the consequential grant of RECs to APSPDCL - a grievance not contemplated, or covered by the appeal provision under Regulation 5(4) of the REC Regulations, 2010. It is settled law that if the statute does not create any right of appeal, no appeal can be filed. Therefore, Techno Electric could not have appealed against the Impugned

Order before the Ld. CERC under Regulation 5(4) of REC Regulations, 2010. Furthermore, independent of the above, and considering the statutory scheme of the Act, the question of filing an 'appeal' before Ld. CERC questioning an order of APERC does not arise.

- (iv) **Original Petition is maintainable-** Section 121 of the Act empowers this Tribunal to issue directions to the APERC for ensuring strict compliance of the statutory functions prescribed under the Act. The powers under Section 121 of the Act can be exercised by this Tribunal *suo moto* or on the filing of a petition by an interested party "who need not necessarily be an aggrieved party". Furthermore, direction under Section 121 can also be issued by this Tribunal while hearing an appeal under Section 111. The Hon'ble Supreme Court in *PTC India Ltd. vs. Central Electricity Regulatory Commission*, (2010) 4 SCC 603 [5J] (*Para Nos.27, 80 and 83*) has held that this Tribunal can invoke such power in a wide range of matters wherein there exists a failure by SERCs to perform their statutory functions. By ignoring APSPDCL's RPO default in the previous financial year i.e. FY 2017-18 and having allowed APSPDCL to obtain RECs in the relevant year i.e. FY 2018-19, the APERC has not acted in accordance with its statutory functions and obligations.
- (v) **Doctrine of election (relied upon by APERC) does not apply-** In the two proceedings initiated by Techno Electric, Techno Electric is not seeking inconsistent or repugnant

prayers. The relief claimed by Techno Electric is to rectify the error committed by the APERC in recommending issuance of RECs to APSPDCL for the relevant year i.e. FY 2018-19 despite APSPDCL not complying with the requirement of eligibility under Regulation 5(1A)(a) of the CERC REC Regulations, 2010. In any event, it is submitted that the filing of an Original Petition in addition to the Appeal does not attract the Doctrine of Election. For the said doctrine to apply, (i) there must be two or more remedies, (ii) such remedies must be inconsistent or repugnant to each other and (iii) there must be a choice available with the party to choose a particular remedy. Additionally, Techno Electric has not initiated parallel proceedings before different Fora. Notwithstanding the above, it is most respectfully submitted that once an illegality in terms of non-compliance of a statutory function by an Electricity Regulatory Commission is brought to the notice of this Tribunal, exercise of supervisory powers under Section 121 of the Act is plenary. Thus, Section 111 of the Act ought to be read in conjunction with Section 121 of the Act and these provisions are not inconsistent to each other.

- v) On the merits of the matter, Appellant's/Petitioner submits as under:
  - i) APERC has acted in violation of CERC REC Regulations, 2010 since it has ignored Regulation 5(1A)(a) of the CERC REC

Regulations, 2010, which requires the APERC to recommend issuance of RECs for the relevant year i.e. FY 2018-19. Admittedly, for the previous financial year, i.e. FY 2017-18, APSPDCL has not achieved the target. APSPDCL has a short fall in solar energy procurement for the previous financial year i.e. FY 2017-18.

- ii) On 26.11.2019, AP SLDC had informed APERC that APSPDCL had RPO deficit in the previous financial year i.e. FY 2017-18, which was overlooked by the APERC.
- iii) Learned counsel submits that APERC failed to implement its own Regulations effectively. It ought to have imposed penalties on APSPDCL for its RPO default in the previous financial year i.e. FY 2017-18. Instead, by the impugned order, APERC has incentivized APSPDCL for its RPO default in the previous financial year i.e. FY 2017-18. In this regard, it is submitted that the obligated entities ought not to be allowed incentives when there is a default on their part in fulfilling RPOs.
- iv) Pointing out the violation on the part of NLDC, it is submitted that NLDC ought to have undertaken detailed scrutiny of all applications before issuing RECs in terms of the letter of AP SLDC dated 26.11.2019 mentioning the RPO noncompliance on the part of APSPDCL in the previous financial year i.e. FY 2017-18. Instead, NLDC issued the RECs for FY 2018-19, thereby perpetuating the illegality.

vi) It is submitted that none of the judgments cited by APSPDCL are applicable to present case.

a) Respondent-APSPDCL contends that where a right or liability is created by a statute which gives a **special remedy** for enforcing it, the remedy provided by that statute only must be availed of. On this aspect, they cite the decision in “**Taugher Paper Mills Co. Ltd. v. State of Orissa,**” (1983) 2 SCC 433 (Para 11), which reads as under:

*“11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s. (1) of s. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-s. (3) of s. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under s. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Water Works Co. v. Hawkesford* (28 LJCP 242 : 141 ER 486: 7 WR 464) in the following passage:*

*“There are three classes of cases in which a liability may be established founded upon statute.....But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing*

*it.....the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

*The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd.(1919 AC 368 : 1919 All ER Rep 61 : 88 LJKB 282 : 120 LT 299) and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co.(1935 AC 532 : 104 LJ PC 82 : 153 LT 441 (PC)) and Secretary of State v. Mask & Co.(AIR 1940 PC 105 : 67 IA 222 : 188 IC 231) It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."*

As against **Taugher Paper Mills Co. Ltd's case**, the Appellant-TECHNO in response contends that a Writ Petition was filed under Article 226 of the Constitution challenging an Order of Assessment instead of filing an Appeal before the prescribed authority under Section 23(1) of the Orissa Sales Tax Act. The Hon'ble Supreme Court dismissed the Petition holding that the Petitioner had an 'equally efficacious alternative remedy' (**paras 6, 11 and 14**). However, in the instant case, there is no equally efficacious alternative remedy for Techno. Regulation 5(4) of the CERC REC Regulations, 2020 does not allow Techno to file an Appeal before Ld. CERC. The same is restricted to any person aggrieved of rejection of registration of RECs by NLDC. Techno could not have filed any Appeal under Regulation 5(4) for there is no authority of law allowing such Appeal to be filed. It is a settled position of law that *if the statute does not create any right of appeal, no appeal can be filed*. Appellant refers to **Gujarat Agro**

**Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad, (1999) 4 SCC 468**, para 8 in this regard: -

*“8...We, however, do not think that such a contention can be raised in view of the law laid down by this Court in Anant Mills case [(1975) 2 SCC 175]. This Court said that right of appeal is the creature of a statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. Right of appeal which is a statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. **If the statute does not create any right of appeal, no appeal can be filed.** There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature unless the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. **The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. When such a law authorises filing of appeal, it can impose conditions as well...**”*

- b) Respondent-APSPDCL contends that law doesn't allow a party to pursue two parallel remedies. On this point, they refer to "**Orissa Power Transco v. Asian School of Business Mgt. Trust and Ors.**" (2013) 8 SCC 738.

In response, the Appellant-Techno submits that the judgment in **Orissa Power Transco's case** is distinguishable on facts. In the said case, multifarious proceedings were filed by the parties. Moreover, the Trust had filed parallel proceedings before different courts and concealed facts pertaining to rejection of the very same

relief by the other court. In the instant case, it has already been clarified to this Tribunal that Techno had filed IA No. 457 of 2020 on **17.03.2020** seeking directions against NLDC to revoke the unprecedented large quantum of RECs issued to APSPDCL. Only when NLDC filed its Reply to I.A. No. 457 of 2020 on **20.03.2020**, Techno came across the documents i.e., APERC's recommendation dated 04.01.2020 and SLDC's letter dated 26.11.2019. Realizing the illegal conduct on part of APERC and considering the fact that necessary directions are required to be issued to APSPDCL, Techno had to file both an Appeal and also an Original Petition. Accordingly, IA No. 457 of 2020 and the present proceedings are premised on different cause of actions, thus do not tantamount to parallel proceedings.

- c) Relying on the decision in "**Arunima Baruah vs. Union of India (UOI) and Ors.**" (2007) 6 SCC 120, learned counsel for Respondent-APSPDCL contends that the Appellant-Techno has suppressed material facts, hence, the Petition/Appeal should be dismissed. **Para 18** of the said judgment reads as under:

*"There is another doctrine which cannot also be lost sight of. The court would not ordinarily permit a party to pursue two parallel remedies in respect of the same subject matter. [See Jai Singh v. Union of India and Others, (1977) 1 SCC 1] But, where one proceeding has been terminated without determination of the lis, can it be said that the disputant shall be without a remedy?"*

The Appellant-Techno, in response to **Arunima Baruah's case** contends that the Appellant therein had suppressed a material fact of writ petition being filed when no order of interim injunction was passed. In the present case, IA No. 457 of 2020 was listed on 23.03.2020 but it was not taken up due to Covid-19 induced court proceedings. When the Appeal and O.P. were filed and listed on 24.04.2020, it was specifically brought to the notice of the Tribunal regarding the previous I.A. No. 457 of 2020 (the same is also recorded in Order dated 24.04.2020). Accordingly, under no fragment of imagination of APSPDCL/Ld. APERC can Techno be alleged to have approached this Tribunal with unclean hands.

- d) Contending that this Tribunal cannot direct the Appropriate Commission to pass orders in a particular way, learned counsel for Respondent-APSPDCL places reliance on “**Gas Transportation Infrastructure Ltd v. PNGRB**” in O.P. 2 of 15, dated 28.04.2015. Relevant paras 34 and 41 reads as under:

*“34. In O.P. Nos.1 and 2 of 2012, the Petitioners therein had stated that they had suffered heavy losses on account of the Delhi Commission's acts and omissions. The allegations were very gross and disclosed that the Delhi Commission had shown utter disregard to the judgments of this Tribunal and had also exhibited inertia, indolence and indifference. It had consistently not performed its statutory functions. It was stated that in spite of lapse of nearly nine years since the enactment of the Electricity Act, there had been no effective implementation of an efficacious Fuel Price Adjustment. It was stated that till date, no Power Purchase Cost Adjustment Mechanism had been put in place. It was alleged that continuous*

*failure to determine the cost of the reflective tariff in a timely manner in terms of Part VII of the Electricity Act had resulted in an ever increasing accumulation of regulatory gap. It was contended that the Delhi Commission had refused to provide any recovery mechanism and amortization schedule along with carrying cost for the admitted revenue gap of nearly Rs.3658 crores accumulated over the years. The Delhi Commission had not followed the judgments of this Tribunal. It appears from the judgment that questions were even raised in Parliament about the Delhi Commission's conduct. It is in this background that this Tribunal held that the petitions filed by the Petitioners therein were maintainable under Section 121 of the Electricity Act and that the refusal by the Delhi Commission to implement the judgments of this Tribunal would amount to judicial indiscipline. Instead of taking any penal action against the Delhi Commission, this Tribunal directed the Delhi Commission to correct its mistakes committed earlier and follow the directions issued by the Tribunal, in future. This Tribunal directed the Delhi Commission to take immediate action in pursuance to the directions given in O.P. No.1 of 2011 dated 11/11/2011 wherein certain general directions have been given in suo motu petition to the Appropriate Commissions, inter alia, to file annual tariff revision petitions, in time. It is pertinent to note that in that case, the Petitioners therein were not seeking any direction at the interim stage in pending proceedings. Assuming that directions under Section 121 of the Electricity Act can be even issued in case of individual grievance, they ought not to be generally issued in cases where final tariff determination is pending such as the present case in such a manner that it will have impact on the final determination. That will amount to prejudging the issues involved in the pending proceedings and may bring pressure on the Appropriate Commission. The Appropriate Commission must be allowed to do its work independently. If the proceedings are concluded and it is found that the Appropriate Commission has not performed its statutory functions, this Tribunal can in an appeal carried from the order under Section 111 of Electricity Act always set*

*aside the said order and issue appropriate directions. In our opinion, directions contemplated under Section 121 are of general nature and must be issued sparingly with care and circumspection in cases where Appropriate Commission's failure to perform statutory functions is well established and which has a general wide-ranging adverse impact.*

*41. These judgments of the Supreme Court indicate that though the High Court's power of superintendence over subordinate courts under Article 227 of the Constitution is very wide, even the High Court cannot direct the subordinate courts to pass Appeal No.158 of 2014 orders in a particular way. It can only direct the subordinate courts to function within the limits of their authority and jurisdiction in the manner prescribed by law. We can take guidance from the above judgments. This Tribunal is undoubtedly, as contended by the Petitioner, a superior regulatory body having supervisory power but it cannot direct the Appropriate Commission to pass orders in a particular way. It can only ask the Appropriate Commission to act within the bounds of its jurisdiction and if it fails to exercise its jurisdiction which vests in it, this Tribunal can direct the Appropriate Commission to exercise it in the manner provided by law. But this power also cannot ordinarily be exercised in the midst of the proceedings pending before the Appropriate Commission."*

The Appellant-Techno in response to the contention of the Respondent-APSPDCL submits that in the case cited by APSPDCL i.e., **Gas Transportation Infrastructure Ltd's case**, wherein proceedings before Appropriate Commission were pending. Accordingly, this Tribunal had exercised self-restraint while issuing any directions under Section 121 of the Act. However, in the instant case, the performance of the statutory function on the part of APERC, stands completed. Such

performance is *dehors* the REC Regulations 2010 and APERC RPO Regulations 2017, thus ought to be construed as 'defective performance' of statutory functions. Secondly, paras 34 and 41 of the said judgment clearly state that this Tribunal "*If the proceedings are concluded and it is found that the **Appropriate Commission has not performed its statutory functions, this Tribunal can, in an appeal carried from the order under Section 111 of Electricity Act, always set aside the said order and issue appropriate directions.***"

- e) Learned counsel further contends that Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. In this regard, he places reliance on the decision in "**PTC India Ltd. v. Central Electricity Regulatory Commission**" (2010) 4 SCC 603. Relevant para at 92(iv) reads as under:

*"92 (iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity."*

On the other hand, the Appellant-Techno submits that by relying on **PTC India Ltd's case**, the Respondent-APSPDCL has misconstrued Techno's Appeal. The question is not whether this Tribunal can exercise judicial review qua validity of Regulations of

Appropriate Commission, but whether this Tribunal can intervene and issue directions wherein Ld. APERC is not acting in conformity with applicable Regulations. Further, APSPDCL is selectively reading PTC India Judgment. In this regard, Techno extracts the relevant paras from the said judgment: -

*“80. Before concluding on this topic, we still need to examine the scope of Section 121 of the 2003 Act. In this case, the appellant(s) have relied on Section 121 to locate the power of judicial review in the Tribunal. For that purpose, we must notice the salient features of Section 121. Under Section 121, there must be a failure by a Commission to perform its statutory function in which event the Tribunal is given authority to issue orders, instructions or directions to the Commission to perform its statutory functions...*

*83. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by the appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify the Grid Code having regard to the Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word “grid” is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-stations and generating plants. Basically, a grid is a network. Section 2(33) defines “Grid Code” to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines “Grid Standards” to mean standards specified under Section 73(d) by the Authority. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do*

*not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words orders, instructions or directions in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned Regulations 2006, as rightly held in the impugned judgment.”*

- f) Respondent-APSPDCL further contends that if the court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the said party to that forum, it should not grant any interim relief in favour of such a litigant for an interregnum period till the said party approaches the alternative forum and obtains interim relief. On this aspect, learned counsel refers to the decisions of the Hon'ble Supreme Court in **“Kalabharati Advertising v. Hemant Vimalnath Narichania”** (2010) 9 SCC 437 and **“Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd.”** (1983) 4 SCC 625.

Learned counsel for the Appellant Techno states that since Techno does not have any other remedy available to it under applicable law, judgments of the Hon'ble Supreme Court in **Kalabharati Advertising's case** and **Cotton Corpn. of India Ltd's case** relied on by the Respondent-APSPDCL have no relevance to the present case.

- g) Further, the Respondent-APSPDCL submits that the injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by

suitably commanding the party liable to do so. In support of this contention, learned counsel places reliance on the decision in **“SECL vs. State of MP”** (2003) 8 SCC 648, **Para 28** thereof reads as thus:

*“28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the set of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust*

*if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.”*

Learned counsel for the Appellant-Techno contends that the judgment in **SECL's case** is not applicable since the Appellant-Techno has clearly demonstrated the illegality on the part of APERC in recommending for issuance of RECs to APSPDCL for FY 2018-19 despite a shortfall in solar procurement based RPO compliance in the preceding year i.e. FY 2017-18. Further, the statutory intention is to have deterrence in cases of RPO defaults. Learned counsel refers to this Tribunal's judgment in *Indian Wind Energy Association vs. APERC*, O.P. No. 01 of 2013 (20.04.2015) wherein this Tribunal had specifically directed that **“In case of default in fulfilling of RPO by obligated entity, the penal provision as provided for in the Regulations should be exercised. [Para 29(iv)]”**. Learned counsel further contends that this is a case where APERC has incentivized RPO default by

facilitating APSPDCL to receive RECs. Accordingly, NLDC ought to be directed to **revoke RECs in terms of Regulation 6** of CERC REC Regulations, 2010. In view of the aforesaid, the question of Techno compensating APSPDCL does not arise at all.

- h) Placing reliance on the decisions in “**Green Energy Association vs. Chhattisgarh State Commission**” (Appeal No. 106/26, Dated 21.08.2019); “**Pushendra Surana vs. CERC**” (2014 ELR (APTEL) 820); “**JasbhaiMotibhai Desai v. Roshan Kumar, Haji Bashir Ahmed**”, (1976) 1 SCC 671 & “**Wall Street Finance Ltd. v. Union of India**”, (2006 SCC On Line Bom 472), learned counsel for Respondent-APSPDCL submits that Techno is not an aggrieved party since it has not suffered any legal injury except that the loss of possible financial gain by selling RECs.

The Appellant-Techno, in response, submits that the decisions in **Green Energy Association’s case; Pushendra Surana’s case; JasbhaiMotibhai Desai’s case and Wall Street Finance Ltd’s case** are not applicable to the present case inasmuch as the facts are not identical. It is a settled position of law that a judgment’s ratio operates as a precedent only where the facts are either similar or identical. Every judgment ought to be read in the context of its peculiar facts and cannot apply in rem. On this aspect, learned counsel relies on the judgment of the Hon’ble Supreme Court in “**Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors.**,” (2003) 2 SCC 111), para 59. Appellant contends that in the case on hand before this Tribunal, the following are the existing facts according to the Techno. They are:

- (a) Techno is an 'eligible entity' for issuance of RECs and is entitled to participate in REC trading process conducted each month.
- (b) APERC, through the Impugned Order, has erroneously facilitated issuance of RECs to APSPDCL due to which APSPDCL could participate in the REC trading session in March 2020 with 40 Lac non-solar RECs and 19 Lac solar RECs **illegally procured RECs**.
- (c) Of the said 59 Lac RECs (approx.), APSPDCL could sell about 6 Lac RECs in March 2020, thereby saturating the demand for RECs and also inundating the REC market with unsold RECs.
- (d) Resultantly, Techno's ability to sell the desired quantum of RECs in March 2020 was impaired.

Therefore, learned counsel contends that the Impugned Order, issued in contravention of applicable law, subjected the Appellant-Techno to adverse financial consequences. Techno is being unjustly deprived of its legitimate entitlement to the benefits of renewable energy generation i.e. RECs since January 2019 which has been causing grave financial losses. REC trading is the only way to create financial liquidity as the TN Discoms are also not making payments for the power supplied to them under the PPAs.

- i) Contending that the Court cannot go into merits, if it has no jurisdiction, learned counsel for Respondent-APSPDCL relies on "**Nusli Neville Wadia v. Ivory Properties and Others.**" (2019 SCC Online SC 1313).

According to the learned counsel for the Appellant the judgment in **Nusli Neville Wadia's case** has no relevance since the

Appellant-Techno has already proven that. APERC's recommendation dated 04.01.2020 qualifies as an 'order' or 'decision', thus appealable under Section 111 of the Act. Secondly, Techno qualifies as an 'aggrieved person' since the Impugned Order visits Techno with civil consequences. Thus, the Appeal is maintainable.

- j) Reliance is placed by Respondent-APSPDCL on the decision in "**N. Suresh Nathan v. Union of India**" (1992 Supp (1) SCC 584 [Para 4]) contending that if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. Para 4 of the said Judgment reads as under:

*"4. In our opinion, this appeal has to be allowed. There is sufficient material including the admission of respondents Diploma-holders that the practice followed in the Department for a long time was that in the case of Diploma-holder Junior Engineers who obtained the Degree during service, the period of three years' service in the grade for eligibility for promotion as Degree-holders commenced from the date of obtaining the Degree and the earlier period of service as Diploma-holders was not counted for this purpose. This earlier practice was clearly admitted by the respondents Diploma-holders in para 5 of their application made to the Tribunal at page 115 of the paper book. This also appears to be the view of the Union Public Service Commission contained in their letter dated December 6, 1968 extracted at pages 99-100 of the paper book in the counter affidavit of respondents 1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require upsetting it. If the past practice is based on one of the possible*

*constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined.”*

On the other hand, distinguishing the decision in **N. Suresh Nathan’s case**, learned counsel for the Appellant-Techno submits that there is only one possible construction of Regulation 5(1A) of CERC REC Regulations. “Previous year” refers to the year preceding to the specified year. No other interpretation is sustainable. Accordingly, this judgment is not applicable. Secondly, no wrong can be allowed to be perpetuated. This Tribunal in O.P. No. 01 of 2011 in its judgment dated 11.11.2011 held that:

*“If the Tribunal finds that those Regulations have not been followed by the State Commissions, then this Tribunal certainly has got the powers, to direct the Commissions to perform its statutory functions as per the Regulations. As a matter of fact, this Tribunal is duty-bound to give directions to the Commissions to strictly follow the Regulations to achieve the objective of the Act. The Tribunal can not simply keep quiet as a idle spectator. If the Tribunal has not given such directions through timely intervention, it would be a dereliction of duty on the part of this Tribunal (para 48)”.*

Learned counsel states that it is a settled position of law that a party cannot take the benefit of its own wrong. Accordingly,

APSPDCL ought not to be allowed to be incentivized with RECs in case of RPO not complied with.

vii) The Appellant/Petitioner prayed that the Impugned Order be set-aside as being illegal and NLDC be also directed to revoke RECs issued to APSPDCL in terms of Regulation 6 of REC Regulations, 2010. Consequently, it is also prayed that this Tribunal may be pleased to declare that the RECs traded by APSPDCL during the trading sessions held in February 2020 and March 2020 were illegally traded. Such a direction would enable appropriate reversals to be taken on trading platform.

### **ANALYSIS AND REASONING**

9) The relevant provisions required for consideration of these matters are RE Certificate Regulation of 2010 and so also RE/REC Regulations of 2017 i.e., APERC Renewable Power Purchase Obligation (Compliance by Purchase of Renewable Energy / Renewable Energy Certificates) Regulations 2017. Apparently, these Regulations of CERC and APERC are framed by virtue of powers conferred under Section 61, 66, 86 (1)(e) and Section 181 of the Electricity Act. CERC, REC Regulations of 2010 defines various definitions under Regulation 2. Following are the relevant definitions and Regulations 3(2), 4(2), 5(1A), (a), (b) and Regulation 5 (2), (3) and (4) which require to be referred to in our discussion.

#### **“Regulation 2:**

b) 'Central Agency' means the agency as may be designated by the Commission under clause (1) of Regulation 3;

- c) **'Certificate'** means the renewable energy certificate issued by the Central Agency in accordance with the procedures laid down by it and under the provisions specified in these regulations;
- e) **'eligible entity'** means the entity eligible to receive the certificates under these regulations;
- i) **'obligated entity'** means the entity mandated under clause (e) of sub-section (1) of Section 86 of the Act to fulfil the renewable purchase obligation;
- m) **'renewable purchase obligation'** means the requirement specified by the State Commissions under clause (e) of sub-section (1) of Section 86 of the Act, for the obligated entity to purchase electricity from renewable energy sources;
- n) **'State Agency'** means the agency in the concerned state as may be designated by the State Commission to act as the agency for accreditation and recommending the renewable energy projects for registration and to undertake such functions as may be specified under clause (e) of sub-section (1) of Section 86 of the Act;
- o) **'State Commission'** means the State Commission referred to in sub-section (64) of Section 2 of the Act and includes a Joint Commission referred to in sub-section (1) of Section 83 of the Act;
- p) **'Year'** means a financial year.

3. Central Agency and its functions:

.....

(2) The functions of the Central Agency will be to undertake:

.....

(ii) issuance of certificates,

.....

4. Categories of Certificates:

.....

*(2) The solar certificate shall be sold to the obligated entities to enable them to meet their renewable purchase obligation for solar, and non-solar certificate shall be sold to the obligated entities to enable them to meet their obligation for purchase from renewable energy sources other than solar.*

5. Eligibility and Registration for Certificates:

.....

*[(1A) A distribution licensee shall be eligible to apply for registration with the Central Agency for issuance of and dealing in Certificates if it fulfils the following conditions:*

*(a) It has procured renewable energy, in the previous financial year, at a tariff determined under Section 62 or adopted under Section 63 of the Act, in excess of the renewable purchase obligation as may be specified by the Appropriate Commission or in the National Action Plan on Climate Change or in the Tariff Policy, whichever is higher:*

*Provided that the renewable purchase obligation as may be specified for a year, by the Appropriate Commission should not be lower than that for the previous financial year.*

*Provided further that any shortfall in procurement against the non-solar or solar power procurement obligation set by the Appropriate Commission in the previous three years, including the shortfall waived or carried forward by the said Commission, shall be adjusted first and only the remaining additional procurement beyond the threshold renewable purchase obligation - being that specified by the Appropriate Commission or in the National Action Plan Climate Change or in the Tariff Policy, whichever is higher -*

*shall be considered for issuance of RECs to the distribution licensees.*

- b) It has obtained a certification from the Appropriate Commission, towards procurement of renewable energy as provided in sub - clause (a) of this regulation.*

.....

*(2) The generating company [or the distribution licensee, as the case may be] after fulfilling the eligibility criteria as provided in clause (1) of this regulation may apply for registration with the Central Agency in such manner as may be provided in the detailed procedure:*

*(3) The Central Agency shall accord registration to such applicant within fifteen days from the date of application for such registration.*

*Provided that an applicant shall be given a reasonable opportunity of being heard before his application is rejected with reasons to be recorded in writing.*

*(4) A person aggrieved by the order of the Central Agency under proviso to clause (3) of this regulation may appeal before the Commission within fifteen days from the date of such order, and the Commission may pass order, as deemed appropriate on such appeal.”*

APERC Regulations of 2017 defines various definitions under Regulation 2. Following are the relevant definitions and Regulations 3(1), 4(1), 5(1) (2) and 6(1), which require to be referred to in our discussion.

**“ Regulation 2:**

(b) **‘Central Agency’** means the agency operating the National Load Dispatch Centre (NLDC) or such other agency as the Central Commission may designate from time to time;

(c) **‘Central Commission’** means the Central Electricity Regulatory Commission referred to in sub-section (1) of Section 76 of the Act;

(d) **‘Certificate’** means the Renewable Energy Certificate (REC) issued by the Central Agency in accordance with the procedures prescribed by it and under the provisions specified in the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, as amended from time to time;

(e) **‘Commission’** means the Andhra Pradesh Electricity Regulatory Commission as referred to in subsection (1) of section 82 of the Act.

(i) **‘Obligated entity’** means an entity obligated to purchase renewable power under clause (3) of these Regulations;

(n) **‘State Agency’** means the State Load Despatch Centre of the State of Andhra Pradesh as defined under section 2(66) of the Act or the agency so designated by the Commission under Clause (5.4) of these Regulations to act as the agency for accreditation and recommending the renewable energy projects for registration and to undertake functions under these regulations;

(o) **‘Year’** means a Financial Year;

(p) **‘RPPO’** means Renewable Power Purchase Obligation prescribed under clause (3) of this Regulation;

### 3. **Renewable Power Purchase Obligation (RPPO):**

3.1 Every distribution licensee shall purchase from renewable energy sources at the tariff determined by the Commission under Section 62 of the Act or at tariffs discovered through transparent process of bidding u/s 63 of the Act and adopted by the Commission, a minimum quantity of electricity expressed as a percentage of its consumption of energy, during FY2017-18 to FY 2021-22 as specified in TABLE-I.

**TABLE-I**

<b>Year</b>	<b>2017-18</b>	<b>2018-19</b>	<b>2019-20</b>	<b>2020-21</b>	<b>2021-22</b>
<i>Non-Solar</i>	6 %	7 %	8 %	9 %	10 %
<i>Solar</i>	3 %	4 %	5 %	6 %	7 %
<i>Total</i>	9 %	11 %	13 %	15 %	17 %

*Provided further that the obligation will be on total consumption of electricity by an obligated entity, excluding consumption met from hydro sources of power other than mini hydel sources of power;*

.....

**4. Certificates under the Regulations of the Central Commission:**

4.1 *The procurement, by the obligated entity(s) of Renewable Energy Certificates issued under the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 as amended from time to time, shall be subject to such directions as the Commission may issue from time to time.”*

.....

**5. State Agency:**

5.1 *The State Agency shall function in accordance with the directions issued by the Commission and shall act in consistence with the procedures / rules laid down by Central Agency for discharge of its functions under the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 as amended from time to time.*

5.2 *The State Agency shall submit quarterly status to the Commission in respect of compliance of Renewable Power Purchase Obligation by the obligated entities in the format as stipulated by the Commission and may suggest appropriate action to the Commission if required for compliance of the Renewable Power Purchase Obligation.”*

.....

**6. Eligibility and Registration for Certificates:**

6.1 *The eligibility and registration of certificates shall be governed by 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 as amended from time to time.*

.....”

- 10) According to the Respondents, the appeal is not maintainable since the recommendation of APERC is not a ‘decision’ or ‘order’ under Section 111(1) of the Electricity Act. It is also contended by the Respondents that since the Appellant Company is neither an

‘interested party’ nor ‘a person aggrieved’, it could not have filed this appeal.

- 11) They also contend that appeal deserves to be dismissed as the Appellant has approached the Tribunal concealing the pendency of Appeal No. 57 of 2020 filed by Appellant-Techno wherein the Appellant could have sought for the relief sought in the above matters.
- 12) We have heard both the Appellant and the Respondents at length on this aspect apart from going through the written submissions and the citations referred to by both the parties.
- 13) The challenge is against the recommendation of APERC dated 04.01.2020 recommending for issuance of RE Certificates in favour of APSPDCL. Admittedly, recommendation of the concerned Commission is a pre-requisite for issuance of RE Certificates, which shall be in accordance with the procedure contemplated under Central Commission’s Regulations and so also State Commission’s Regulations, if any. One cannot dispute the position that if on the same subject both the Central Commission and the State Commission have any Regulations, and if they are in conflict with each other, then the Regulations of the Central commission will have to be followed.
- 14) Admittedly, the State Commission must look into the concerned provisions applicable/required for its recommendation for issuance of RE Certificates. This process requires consideration of not only relevant facts but also requirement of compliance of procedure

contemplated to get such Certificates. This process of the decision making by the State Commission ultimately results in a final decision of the Commission either to recommend or not to recommend. The State Agency i.e., State Load Dispatch Centre will have all the details of renewable energy purchased by the distribution company and it has to inform the concerned Commission from time to time about the RPPO to the State Commission in terms of APERC Regulations, stated above. The State Commission can recommend for issuance of RECs only if the distribution company complies with the obligations as contemplated under the Regulations of CERC so also Regulations of the State, if any. If the distribution company has not complied with such obligation as contemplated under the above Regulations, it is not open to the State Commission to recommend issuance of RECs in favour of obligated entity i.e., APSPDCL in these matters.

- 15) It is also seen from the above Regulations that Central Agency i.e., NLDC cannot act as a mere post office to blindly proceed on the recommendation of the State Commission since it has the responsibility of verifying whether the obligated entity has complied with the statutory requirement for issuance of Certificates in terms of Regulations and then issue Certificates only if the Central Agency is satisfied that the obligated entity (here APSPDCL) has complied with the statutory requirements contemplated under the above Regulations.

- 16) Sub-Regulation (2) of Regulation 5 of REC Regulations of 2010 provides procedure how a distribution licensee can apply for registration with the Central Agency only after the Applicant fulfilling eligibility criteria as provided under Clause(1) of the above Regulation. A detailed procedure is contemplated which includes submission of not only the recommendation of the State Commission but also all the relevant information pertaining to consumption of renewable energy by an obligated entity as provided by State Agency i.e., SLDC. Sub-Regulation (3) of Regulation 5 contemplates that NLDC shall accord registration to such Applicant within 15 days from the date of application for registration. Proviso to Sub-Regulation (3) envisages that a reasonable opportunity of being heard must be given to the Applicant if the NLDC i.e., Central Agency is of the opinion that application of the obligated entity deserves to be rejected. Such rejection has to be with reasons in writing. This procedure definitely indicates that the Central Agency is not merely an authority to affix/accord its approval for registration for issuance of the RECs. It has an obligation to say why it is rejecting the application for registration. However, it does not mean that if it accords registration, it need not verify the compliance of conditions imposed on the obligated entity in terms of appropriate Regulations.
- 17) Therefore, the procedure contemplated both in the State Regulations and CERC Regulations imposes responsibility on the appropriate Commission i.e., State Commission to recommend the case of obligated entity only if it is satisfied that obligated entity

has discharged its responsibility in complying with the obligation under the Regulations. Thereafter, it is incumbent upon the Central Agency to satisfy itself before according registration for issuance of RECs that the obligated entity has complied with the requirement for such registration and State Commission has properly assessed the case of the obligated entity while recommending for issuance of Certificates. In case, the Central Agency rejects the application of the obligated entity, such aggrieved applicant can appeal against the order of the Central Agency before the CERC within 15 days from the date of such order.

- 18) Section 5 (1A) (b) of the same Regulations refers to a pre-requisite that the entity i.e, distribution licensee has to get a Certificate from the appropriate Commission i.e., the State Commission certifying that the entity/Applicant has procured renewable energy in excess of the renewable purchase obligation as specified by the appropriate Commission or as provided in the National Action Plan on Climate Change or in the Tariff policy whichever is higher. An entity is entitled for issuance of RECs only if there is a recommendation certifying that the procedure contemplated for obtaining such Certificates is complied with. This involves, as stated above, several factors to be taken into consideration before coming to a conclusion/decision i.e., either to recommend or not to recommend. Therefore, it is crystal clear that the State Commission has statutory obligation to discharge functions mandated under the Regulations. In effect, APERC has to make a decision after due verification of the compliance by the

Discoms concerned. It is well settled that the word 'order' under Section 111(1) of the Electricity Act includes decisions. Coming to the facts of the present case, the recommendation of APERC for issuance of Certificate is a condition precedent before the applicant can ask for registration before the Central Agency on the recommendation of the State Commission. Therefore, we are inclined to accept the contention of the Appellant that the recommendation dated 04.01.2020 by APERC is an order in terms of Section 111(1) of the Act.

- 19) Next challenge raised by the Respondent is with regard to the status of the Appellant as an 'aggrieved party'. Appellant's contention is that since APERC failed to comply with the procedure contemplated, therefore, it erroneously discharged its function of recommendation recommending APSPDCL to have RECs for FY 2018-19, which has resulted in the illegal issuance of 59 lakhs of RECs, which is approximately valued at Rs.609.29 Crores (at floor price) and the same covers almost 70% of annual market size of entire RECs in the country.
  
- 20) Since the distribution companies and generating companies trade on a common platform for trading in the RECs, the chances of many entities who intend to trade on their RECs on the common platform gets disturbed, rather makes their RECs unsold, therefore the interest of several other entities including companies like Appellant Company would be hampered. We totally agree with the contention of the Appellant that there is direct adverse civil, financial and legal injury to the Appellant-Techno Electric on

account of trading of such illegally obtained RECs if found to be illegal. Therefore, it would be apt to opine that the Appellant is not only an 'interested person' but also an 'aggrieved party'.

- 21) Regarding contention of suppression of IA No. 457 of 2020 in Appeal No. 57 of 2020, the said appeal is filed altogether for a different relief based on different cause of action as claimed by the Appellant. Even otherwise, when the above matters came up before the Tribunal on the first day of listing of the matter, Appellant's counsel did mention about the pendency of said IA No. 457 of 2020 in Appeal No. 57 of 2020. Since we accepted said submission of the Appellant, we listed the above matters for further proceedings. Therefore, there is no concealment of any fact by the Appellant before this Tribunal.
- 22) Respondents have also contended that the present appeal is not maintainable since there is alternative remedy i.e., appeal provision under Regulation 5 (4) of REC Regulations of 2010. Reading of this Regulation, as discussed above, would clearly establish that the Appellant could not have approached as 'aggrieved party' for rejecting the application for registration as contemplated under Sub-Regulation (4) of Regulation 5 of 2010 Regulations. Therefore, it is clear that the Appellant could not have approached the appropriate Commission questioning the recommendation and so also registration for issuance of RECs under Regulation 5 (4). The reading of entire Regulation 5 (1A)(a) and (b) along with its provisos and Regulation 5(2), (3), with its

provisos and Sub-Regulation (4), makes it crystal clear that the 'person aggrieved', referred to in the said Regulation, do not cover the Appellant in its ambit. It refers to an obligated entity rather distribution licensee here, who applies for registration with Central Agency for the issuance of RECs, and only such Applicant becomes 'aggrieved person', in case Central Agency rejects application of the distribution licensee for registration and issuance of certificates. Therefore, the contention of the Respondents that the Appellant could have approached the Central Commission challenging the issuance of Certificates based on the recommendation of State Commission cannot be sustained.

- 23) The Respondent-Commission has also raised an objection that the Appellant has adopted two proceedings simultaneously, one in Appeal No. 99 of 2020 and another Original Petition - OP 2 of 2020. The stand of the Appellant on this objection of the Respondents is that by virtue of section 121 of the Electricity Act, the Tribunal has ample powers to issue directions to State Commissions if they adopt erroneous or illegal procedure. In the present case since APERC failed to discharge its statutory function totally by adopting erroneous procedure, one could approach the Tribunal under Section 121. Section 121 of the Act reads as under:

**“Section 121 (Power of Appellate Tribunal):**

**The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to**

any Appropriate Commission for the performance of its statutory functions under this Act.”

- 24) Since we have already opined that the appeal is maintainable and Appellant is an ‘aggrieved party’, we are of the opinion that we need not ponder much over the said argument that Appellant has simultaneously approached in two different proceedings before this Tribunal. We are of the opinion we need not consider OP No. 2 of 2020 since non-compliance of procedure by State Commission and Central Agency, as complained by the Appellant, can be dealt adequately in the above Appeal.
- 25) Then coming to merits of the above two matters, the Appellant contends on various aspects as detailed below:

(i) **Violation by the APERC-**

- (a) **APERC is in violation of CERC REC Regulations, 2010**: The APERC ignored Regulation 5(1A)(a) of the CERC REC Regulations, 2010 which requires the APERC whilst recommending issuance of RECs for the relevant year i.e. FY 2018-19; to certify that the distribution company i.e. APSPDCL has procured renewable energy, in the previous financial year i.e. FY 2017-18 in excess of the RPO specified in the Tariff Policy, 2016-i.e. Non-Solar target @ 9.50% and Solar target @ 4.75%. Admittedly, for the previous financial year, i.e. FY 2017-18, APSPDCL has not achieved the

target. APSPDCL has achieved RPO compliance of solar energy only to the extent of 4.07% as against the Tariff Policy target of 4.75%. In other words, APSPDCL has a short fall in solar energy procurement for the previous financial year i.e. FY 2017-18 to the extent of 6,81,109 MWh. The same is also forthcoming from the APERC's pleadings and APSPDCL's own admission. In light of these categorical admissions, it is abundantly clear that APSPDCL has not procured renewable energy in the previous financial year i.e. FY 2017-18 in excess of the RPO specified in the Tariff Policy and consequently fails the eligibility criteria as specified under Regulation 5(1A)(a) of the CERC REC Regulations, 2010.

- (b) **APERC overlooked the deficit in previous financial year as submitted by AP SLDC:** On 26.11.2019, AP SLDC had specifically informed APERC that APSPDCL had RPO deficit in the previous financial year i.e. FY 2017-18.
- (c) **APERC's failure to effectively implement its own Regulations:** The APERC ought to have had taken cognizance of APSPDCL's RPO default in the previous financial year i.e. FY 2017-18 and ought to have subjected APSPDCL to penalties as prescribed under Regulation 7 of APERC Renewable Power Purchase Obligation (Compliance by Purchase of

Renewable Energy/ Renewable Energy Certificates) Regulations, 2017 ("APEREC RPO Regulations, 2017"). Instead, the APERC, by the Impugned Order, has incentivized APSPDCL for its RPO default in the previous financial year i.e. FY 2017-18. Obligated entities ought not to be allowed incentives when there is a default on their part in fulfilling RPOs. Regulation 5(1A)(a) must be strictly applied as the CERC REC Regulations, 2010 themselves provide incentive for compliance and disincentive for noncompliance.

(ii) **Violation by the NLDC.**

- a. **Failure on the part of NLDC:** In terms of Regulations 3.2 to 3.7 of the REC Issuance Guidelines, 2018, NLDC is obligated to undertake detailed scrutiny of all applications before issuing RECs. AP SLDC's letter dated 26.11.2019 highlighting the RPO noncompliance of APSPDCL in the previous financial year i.e. FY 2017-18 was sent to NLDC as part of APSPDCL's clarificatory letter dated 07.02.2020. Despite being aware of APSPDCL's RPO deficit in the previous financial year i.e. FY 2017-18, NLDC issued the RECs for FY 2018-19, thereby perpetuating the illegality. NLDC is not merely a stamping authority.

- 26) In order to understand whether there is compliance of statutory requirement to obtain RECs by the Respondent/Discom, at the

cost of repetition, we again refer to Regulation 5(1A) which contemplates as under:

*“5 (1A) A distribution licensee shall be eligible to apply for registration with the Central Agency for issuance of and dealing in Certificates if it fulfils the following conditions:*

*(a) It has procured renewable energy, in the previous financial year, at a tariff determined under Section 62 or adopted under Section 63 of the Act, in excess of the renewable purchase obligation as may be specified by the Appropriate Commission or in the National Action Plan on Climate Change or in the Tariff Policy, whichever is higher:*

*Provided that the renewable purchase obligation as may be specified for a year, by the Appropriate Commission should not be lower than that for the previous financial year.*

*Provided further that any shortfall in procurement against the non-solar or solar power procurement obligation set by the Appropriate Commission in the previous three years, including the shortfall waived or carried forward by the said Commission, shall be adjusted first and only the remaining additional procurement beyond the threshold renewable purchase obligation - being that specified by the Appropriate Commission or in the National Action Plan Climate Change or in the Tariff Policy, whichever is higher -shall be considered for issuance of RECs to the distribution licensees.”*

- 27) The definition of ‘year’ in both the Regulations means it is a Financial Year. Therefore, ‘year’ and ‘financial year’ in both the Regulations mean one and the same.
- 28) In neither of the Regulations nowhere it says definition of Financial Year would be as provided in the Income Tax. Therefore, Financial Year in the common parlance would mean from 1<sup>st</sup> of April of a year ending with 31<sup>st</sup> of March of the next year. The complaint of the Appellant is that the APSPDCL had short fall in

the consumption of renewable energy (solar) for FY 2017-18 as against prescription under the Regulations. However, State Commission and Central Agency totally ignored the letter dated 26.11.2019 of SLDC informing the State Commission that there is shortfall or deficit in the RPO compliance by APSPDCL for the FY 2017-18. Therefore, according to them, the very issuance of recommendation of the State Commission, which is the foundation for an action by the Central Agency is in total defiance of the procedure contemplated.

Reading of the Regulations of 2010 makes it clear that if an obligated entity seeks RECs for a relevant year/performance year i.e., FY 2018-19 in terms of Regulation 5(1A)(a), the distribution licensee must establish that it had procured renewable energy in the previous Financial Year i.e., FY 2017-18 in excess of its purchase obligation at a tariff determined under Section 62 or adopted under Section 63 of the Act. Apparently, the Tariff Policy of 2016 specified non-solar target at 9.50% and solar target at 4.75 %. This is not in dispute. The records clearly indicate that for the FY 2017-18, APSPDCL had achieved its RPO obligation of solar energy only to an extent of 4.07% as against tariff policy target of 4.75%. The shortfall in solar energy procurement is about 6,81,109 MWh in the FY 2017-18. Therefore, the first condition is, in the previous financial year to the performance year the purchase of RE Certificates must be in excess of RPO in terms of sub-Regulation (a) of Regulation 5(1A). The first proviso to this sub-regulation says such RPO specified for the performance year cannot be lower than the RPO fixed for the previous year.

- 29) Second proviso to sub-regulation (a) of 5(1A) further imposes a duty on the recommending authority and so also Central Agency to take note of any shortfall in procurement of non-solar or solar procurement obligation in the three previous years to the performance year including any shortfall which was either waived or carried forward by the Commission in those three years. If such shortfall is noticed, such shortfall must be first adjusted and only the balance excess/additional procurement beyond the threshold RPO can be taken into consideration for issuance of RE Certificates. **Therefore, it is clear that the obligated entity must not only comply with sub-regulation (a) but also the conditions provided in both provisos thereunder.**
- 30) According to Respondents, the obligated entity can apply for RECs only after completion of the performance year i.e., FY 2018-19. According to them, they could apply any time after 31.03.2019 and not earlier. Therefore, according to them, since the application for RECs was made in 2019, previous Financial Year has to be taken as FY 2018-19. We fail to understand the logic or rationale behind said stand of the Respondent/Discom, State Commission and Central Agency. The understanding of the Financial Year in terms of definition would mean the year of performance for which RECs are sought. Even if application is made subsequent to 31.03.2019, the relevant performance year cannot be different than the year in which the consumption of renewable energy has to be seen in terms of Regulation 5(1A)(a) of 2010 Regulations. In other words, even if the distribution licensee seeks RE Certificates subsequent to 31.03.2019, one has to assess or consider the compliance of renewable energy

purchase obligation only for the year 2018-19. The reference to previous Financial Year in Sub-Regulation (a) would mean previous Financial Year to the performance year. In this case, performance year is Financial Year 2018-19 and one has to see whether Respondent/Discom has purchased RE Certificates in excess of RPO between 01.04.2017 to 31.03.2018. Therefore, the year of performance or financial year for which RECs sought for by the Discom cannot be anything but 2018-19. In terms of Regulation (a) of 5(1A), previous Financial Year would mean FY 2017-18. We are of the opinion that on the controversy so far as interpretation of Regulation 5(1A) and the meaning of previous financial year, there is no possibility of having two different views.

- 31) First proviso to Sub-Regulation (a) clearly indicates that the described or specified RPO by an appropriate Commission can never be lower than RPO specified for the previous financial year. This means, if the case of Respondent-Discom is considered for the performance year of 2018-19, the RPO for 2018-19 cannot be less than the RPO specified for 2017-18.
  
- 32) The second proviso makes in fact some concession that while considering or calculating procurement of renewable energy, one has to verify whether there was shortfall in procurement of solar and non-solar power procurement in the previous three years to the performance year including the shortfall waived or carried forward by the appropriate commission. After ascertaining such shortfall in the previous three years to the year of performance i.e., 2018-19, the concerned authority first must adjust such shortfall

found, if any, from the excess procurement of renewable energy specified for the year of performance and then consider whether the remaining additional procurement is in excess of RPO obligation specified for that year as contemplated under Sub-Regulation (a) of Regulation 5(1A).

33) From the facts of the present case, it is seen that on account of Government Order dated 01.10.2019 there was change so far as entitlement of RECs for FY 2017-18. This change resulted in re-adjustment of solar energy. If there was no such variation, RECs for FY 2017-18 so far as solar, it was not deficit. But with the re-adjustment on account of Government Order dated 01.10.2019 there was deficit of solar procurement. The following table reflects the adjustment carried out by the Commission in the impugned letter.

<b>Particulars</b>	<b>Non-Solar</b>	<b>Solar</b>
<b>REC's Issued for 2017-18</b>	1124035 (A)	461014 (A)
<b>Changed entitlement of REC's for FY 2017-18 pursuant to G.O. dt. 1.10.2019</b>	1901965(B)	-220096(B)
<b>REC issued in excess/ deficit</b>	777930 (B-A)	-681109 (B-A)
<b>REC's entitlement for FY 2018-19 without taking into account variation of REC's for FY 2017-18</b>	4037276	1960830
<b>REC's recommended in the impugned letter for FY 2018-19, duly adjusting variation of REC's for FY 2017-18</b>	4813206 (4037276+777930)	1279721 (1960830 – 681109)

- 34) The Andhra Pradesh SLDC i.e., State Agency in its letter dated 26.11.2019 after above referred GO dated 01.10.2019 specifically informed State Commission-APERC that APSPDCL had RPO deficit in the previous Financial Year i.e., FY 2017-18. APERC totally ignoring this letter of State Agency proceeded to recommend for issuance of RECs in favour of APSPDCL. Now the stand of the Respondent-Commission, Discom and Central Agency is that Central Agency was always considering the previous financial year to the year of application. In other words, according to them, till now they were considering previous financial year which in fact is the performance year since their stand seems to be that financial year in which application for RECs is made has to be the criteria to arrive at previous financial year. We fail to understand, the understanding of the Respondents under which Regulation such reading is possible. Irrespective of in which year they apply for RECs, the relevant year for consideration would be performance year for which certificates are sought.
- 35) According to Respondent No.2- APSPDCL since it has tied up for 7600 MWh of renewable energy procurement involving huge investment, the Appellant who is having 130 MWh cannot compare itself with Respondent No.2-APSPDCL in the REC market. We fail to understand said contention of Respondent No.2. The issue before us is whether procedure contemplated in the Regulations is followed or not for issuance of RE Certificates.

The issue is not pertaining to financial capacity or quantum of renewable energy procurement whether it is 1 MWh or 1 lakh MWh procurement. If there is any procedure contemplated for issuance of RE Certificates, the same has to be followed. It is well settled that if a procedure is contemplated to do a particular thing in a particular manner, it shall be done in that manner or not at all. Otherwise, it cannot be done in different manner.

- 36) The facts presented before us clearly goes to show that APERC rather granted incentive to AP Discom in spite of RPO deficit in the previous FY 2017-18. Regulations are contemplated to encourage purchase of RE Certificates provided requisite conditions are complied with. Since strict compliance is contemplated, one cannot surpass / overlook non-compliance. Therefore, we are of the opinion, in the first place APERC ought not to have recommended the case of APSPDCL for issuance of RE Certificates for the performance year i.e., FY 2018-19.
- 37) Then coming to the role played by Central Agency/NLDC, it is seen it has not done scrutiny of the application as well as the necessary information supplied to it, especially SLDC's letter dated 26.11.2019 indicating non-compliance of RPO obligation by APSPDCL in the previous FY 2017-18. This letter was sent as part of clarificatory letter of APSPDCL dated 07.02.2020. In spite of such deficit, NLDC proceeded to legalise the recommendation of APERC, therefore, the Central Agency also failed to perform its statutory duties mandatorily as contemplated in the Regulations.

38) In the light of our discussion and reasoning, we are of the opinion that Appeal No. 99 of 2020 deserves to be allowed. For the reasons mentioned in the discussion, OP No. 2 of 2020 is disposed of opining that there is no need to consider the said petition since appeal is considered on merits. Accordingly, we pass the following order:

- a) We are of the opinion the Certificates already sold by APSPDCL which were obtained for the performance financial year 2018-2019 need not be disturbed.
- b) So far as balance disputed RECs issued and unsold for the financial year of 2018-19, the Central Agency shall initiate revocation proceedings and cancel/revoke the registration accordingly in terms of Regulations of 2010.

39. There shall be no order as to costs.

40. Pronounced in the Virtual Court on this the **20<sup>th</sup> day of August, 2020.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

✓  
**REPORTABLE / NON-REPORTABLE**

*Pr/ts*