Small Hydro Power Developers' ... vs Transmission Corporation Of A.P. Ltd. ... on 8 May, 2008

JUDGMENT

Anil Dev Singh, J. (Chairperson)

1. These appeals have been filed by the appellants, who are generating power from non-conventional energy sources and moving the energy on the wires of the licensees. They are aggrieved by the wheeling charges fixed by the Commission by means of tariff orders dated March 23, 2004, March 22, 2005 and March 23, 2006 for the years 2004-05, 2005-06 and 2006-09 respectively. The facts reveal enterprise and entrepreneurship for setting up gas based generation plants and also saga of endeavour and effort of the Central Govt., State Govt., upto a particular stage, and the entrepreneurs to augment generation through non-conventional energy sources and also of road blocks to it. The relevant initiatives which need to be mentioned are re-counted below:

2. On October 17, 1988, a Memorandum of understanding was entered into between the Andhra Pradesh State Electricity Board [now Transmission Corporation of Andhra Pradesh (for short 'APTRANSCO')] on the one hand and The Andhra Sugars Ltd., Sri Vishnu Cement Ltd., Nava Bharat Ferro Alloys Limited, VBC Ferro Alloys Limited, Mishra Dhatu Nigam Limited and Panyam Cements & Mineral Industries Limited on the other hand, for the purpose of formation and registration of a new company under the name and style of Andhra Pradesh Gas Power Corporation Ltd. (for short APGCL) for the purpose of setting up a Natural Gas based power generation station in the State of Andhra Pradesh. Subsequently another MoU dated April 19, 1997 was entered into by the parties for adding a second stage of the project.

3. The parties to the above memorandum of understandings inter alia, agreed to share the electricity generated by APGPCL between the participating industries and APTRANSCO in proportion of their paid-up share capital. APTRANSCO agreed to transmit the power generated by APGPCL to the participating industries and for such transmission APTRANSCO agreed to receive wheeling charges from APGPCL in kind as a percentage of energy put into the AP system at the generating stations of APGPCL. Such wheeling charges were agreed to be charged in the following manner:

220 kV 10% 130 kV 12.50% 33 kV 20% 11 kV 25%

4. In order to boost generation and to bridge the yawning gap between demand and supply and at the same time to preserve ecology, the Government of India issued policy guidelines in respect of scheme of promotional and fiscal incentives meant to be implemented by the State Governments for power generation in the non-conventional sector. These policy guidelines were circulated by the Government of India, Ministry of Non-Conventional Energy Sources by its letter dated September 7, 1993 addressed to all the Chief Secretaries of the States (for short MNES policy) so that the State Governments could give requisite impetus to power generation from non-conventional energy sources. The letter recites that under the new strategy and Action Plan of the Ministry of

Non-Conventional Energy Sources special emphasis is to be given to generation of grid quality power from non-conventional energy sources. It also refers to the fact that the targets for 8th plan had been significantly enhanced and the new plan envisages generation of 2000 MW of power through wind, small hydro, bio energy, solar etc.

5. According to the MNES policy, certain facilities such as wheeling, banking, sale of power etc. were to be made available to those generating power from Non-conventional sources of energy such as wind, hydro, biomass and gas. In so far as facility of wheeling was concerned, the State Electricity Board (for short 'SEB') was required to transmit on its grid the power generated by plants run on Non- conventional sources of energy and make it available to the producers for captive use or to a third party within the State, at a uniform wheeling charge of 2% of the energy fed to the grid, irrespective of the distance from the generating station. In respect of banking facility, the SEB was required to permit the electricity generated to be banked for a period upto one year. As regards sale of power, the SEB was required to purchase electricity offered by such power producer at a minimum rate of Rs. 2.25/- per unit, with no restriction on time or quantum of electricity supplied for sale. This rate was mandated to be reviewed every year and was to be linked to standard criteria such as wholesale price index. The producer was also to be given an option to sell the electricity to a third party within the State at a rate to be mutually settled between them. Besides, some other incentives were also to be made available to the producer but it is not relevant to mention the same as they are of no significance in so far as the present appeals are concerned.

6. The Government of Andhra Pradesh issued an order dated November 29, 1995, which permitted private entrepreneurs to set up mini power plants of 30 MW capacity with residual fuel in industrial load centres in Andhra Pradesh. The order provided that wherever it became necessary for the power generated by Mini Power Plants to be wheeled using the Andhra Pradesh State Electricity Board (for short 'APSEB') transmission network, wheeling charges will be collected from the developers in kind and as a percentage of the energy delivered at inter-connection point at the following rates:

> i. 132 KV consumers 8% ii. 33 KV consumers 10% for a distance upto 50KM 11 KV consumers 12% for distance between 51 KM and 100 KM & LT consumers 15% beyond 100 KM

7. Thereafter, in order to encourage generation of electricity from non-conventional sources, the Government of Andhra Pradesh, after reviewing the incentives already made available to non-conventional energy sector and keeping in view the guidelines of the Government of India issued G.O.Ms. No. 93 dated November 18, 1997. According to the G.O.Ms. No. 93, the following uniform incentives were to be allowed to entrepreneurs setting up power plants for generation of electricity from renewable sources of energy:

> Sl. Description No.
>
> 1. Power Purchase price Rs. 2.25/-

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

3. Wheeling Charges 2%

4. Third party sales Allowed at a tariff not lower than H.T. tariff of A.P.S.E. Board.

5. Banking Allowed upto 12 months

(a) Captive consumption Allowed throughout the year on 2% banking charges

(b) Third Party Sale Allowed on 2% banking charges from August to March The order also records that the incentives envisaged are required to encourage power generation in the non- conventional sector. It further records that encouragement from the Government for the sector is necessary in view of fast depletion of fossil fuels.

8. With a view to encourage generation of power based on gas available from isolated fields of Oil and Natural Gas Commission, the State of Andhra Pradesh passed an order dated March 9, 1998, whereby the private power developers/ entrepreneurs, who were allotted a quantity of less than 1 lakh cubic meters of gas per day were permitted to set up the power stations subject to the following:

i. Power shall be utilised for captive use in HT services either for themselves or for their sister concerns anywhere in the State.

ii. No third party sale shall be allowed.

iii. No banking shall be allowed.

iv. Wheeling charges shall be collected as mentioned below:

8% for 132 KV consumers 10% for 33 KV, 11 KV consumers at a distance less Than 50 KM from the plant 12% 33 KV, 11 KV consumers at a distance between 51-100 KM from the plant 15% 33 KV, 11 KV consumers at a distance beyond 100 KM from the plant.

9. As per the aforesaid order, in the case of availability of one lakh or more cubic meters per day of natural gas, the APSEB was to be first offered the entire quantity of gas available to set up the power stations and in the event of APSEB's refusal, the private developers could be allocated gas with the condition that the entire resultant energy will be supplied to the APSEB at a mutually agreed price.

10. After about lapse of one year from the issue of GoMs No. 93, the Government issued another G.O.Ms., being No. 112 dated December 22, 1998, whereby it amended the earlier G.O. Ms. No. 93 dated November 18, 1997. The G.O.Ms. No. 112 to the extent relevant reads as follows:

1. The uniform incentives specified in G.O.Ms. No. 93, dated:18-11-1997 shall be available only to the power projects where fuel used is from non- conventional energy sources which are in the nature of renewable sources of energy.

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

3. Though there is a provision for banking and third party sale, in the absence of conferring the status of licensee under Section 3 of the Indian Electricity Act, the Entrepreneurs/ Developers of non-conventional energy power may be handicapped in effecting third party sales to the needy and contracted consumers. Therefore, it is hereby ordered that the Entrepreneurs/ Developers covered by G.O. Ms. No. 93, dt.18-11-1997 who made the third party sale of energy shall be deemed to be licensees for the purpose under Section 3 of the Electricity Duty Act, 1939 read with Section 28 of Indian Electricity Act, 1910.

11. In view of the encouraging initiatives of the Central Government and the State Government, the power units were set up based on gas and renewable sources of energy.

12. It needs be mentioned that in the year 1998, the Andhra Pradesh Electricity Reform Act was enacted, which came into effect on Feb., 1, 1999. The APTRANSCO in its tariff proposals for the Financial Year 2001-02 filed in December, 2000 requested the APERC for the revision of wheeling charges. The issue was deferred by the APERC on the ground that there was need for considering the data for losses and costs at different voltage levels.

13. On October 8, 2001, APTRANSCO and other Distribution Companies filed a joint application before Andhra Pradesh Electricity Regulatory Commission (for short 'APERC/Commission') again seeking revision of the wheeling charges.

14. APERC on March 24, 2002 in O.P. No. 510 of 2001 revised the wheeling charges for the Financial Year 2002-03. The determination of the APERC virtually had the effect of terminating the rates for wheeling of electricity by APTRANSCO specified in the existing agreements/arrangements in conformity with the policy of the State of Andhra Pradesh. The APERC fixed the wheeling charges at 28.4% in kind and 0.50 paise in cash. The power producers using gas and renewable sources of energy were required to enter into fresh agreements with the distribution licensee of the area of supply.

15. Aggrieved by the order passed by the APERC, the power producers filed appeals under Section 39 of the Andhra Pradesh Electricity Reform Act, 1998 before the High Court of Andhra Pradesh. Besides, some power producers also filed writ petitions.

16. On April 18, 2003, the appeals and the connected writ petitions were allowed by a common Judgment of the High Court of Andhra Pradesh and the Order of the APERC dated March 24, 2002 in O.P. No. 510 of 2001 was set aside. The High Court directed that the wheeling charges shall be payable in accordance with the policy directions of the State Government. While holding so, the High Court was also of the view that APERC had no jurisdiction to determine wheeling charges under the Andhra Pradesh Electricity Reform Act, 1998. Besides it was held that on the principles of Promissory Estoppel and Legitimate Expectation, the producers cannot be asked to pay wheeling charges at rates higher than the one contemplated in the policy decision.

17. Not satisfied with the order passed by the High Court, the APTRANSCO preferred a Special Leave Petition against the Judgment and order of the Andhra Pradesh High Court dated April 18, 2003. While granting leave, the Hon'ble Supreme Court did not stay the operation of the judgment and directed that transmission charges be paid as per the terms of the agreements subsisting between the parties.

18. On March 23, 2003, the APERC fixed the wheeling charges for the tariff period 2003-04 at 58 paise per unit in cash and 24.60% in kind. The order however, was made subject to the outcome of the appeals which were then pending before the High Court of Andhra Pradesh against the order of the APERC dated March 24, 2002.

19. Pursuant to the decision of the APERC, the APTRANSCO by its letter dated July 23, 2003 required some of the generating companies to pay wheeling charges in accordance with the orders of the APERC. It also informed them that the revised bills will be issued at the rates approved by the APERC from April 1,2002 to March 31, 2003 and further from April 1, 2003 onwards.

20. On receiving the letter, the generating companies initiated contempt proceedings against the APTRANSCO before the Andhra Pradesh High Court. The High Court of Andhra Pradesh stayed the operation of the letter of the APTRANSCO dated July 23, 2003. Even in the Writ Petitions filed by some of the power producers the Andhra Pradesh High Court passed interim orders directing APTRANSCO to desist from demanding and collecting wheeling charges in excess of the charges in kind specified in the respective agreements.

21. Dis-satisfied with interim orders passed by the Andhra Pradesh High Court, APTRANSCO filed Special Leave Petitions. The Supreme Court while granting the SLPs recorded an undertaking of the APTRANSCO to the effect that it will not enforce the demand in terms of the order of the APERC unless permitted by the Supreme Court.

22. The transmission companies for the year 2004-05 filed ARR/ERC and tariff proposals before the APERC. The APERC, on December 27, 2003, directed the APTRANSCO and four DISCOMS to notify the public through publication that the APTRANSCO for its transmission and bulk supply businesses and DISCOMS for their distribution retail supply businesses had filed their ARRs and Tariff proposals for the Financial Year 2004-05 before the APERC and the copies of the filings were available with the Chief Engineer/RAC, APTRANSCO and in the offices of the Chief General Manager, RAC, of the DISCOMS at Visakhapatnam, Hyderabad, Warrangal and Tirupathi and all

the Superintending Engineers incharge of Operation circles in Andhra Pradesh for inspection by interested persons. Accordingly publications were made and objections were required to be filed on the proposals with the Secretary, APERC by January 29, 2004. On March 23, 2004, the Commission inter alia, determined the wheeling charges of all the four DISCOMS, as per below:

> i) Weighted wheeling charges of all the four Distribution Companies was fixed as 51 paise per unit; and
>
> ii) The individual wheeling charges Discom wise:
>
> (paise/unit) NPDCL EPDCL SPDCL CPDCL Wheeling charges 58 49 60 45

23. Dis-satisfied with the order, two appeals, being Appeal Nos. 57 and 72 of 2005, have been preferred.

24. On November 30, 2004, APTRANSCO and DISCOMs presented their tariff proposals for the year 2005-2006 before the APERC. Objections/ comments were invited from the concerned parties and the public at large through publication. On March 22, 2005, APERC passed the impugned order in O.P. Nos. 30, 31, 32, 33 & 34 of 2004, whereby it enhanced the transmission charges of APTRANSCO and wheeling charges for the DISCOMs for the year 2005-06. The order passed by the APERC was made subject to the orders of the Supreme Court in appeals that were pending before it and the orders of the Andhra Pradesh High Court in Writ Petitions regarding wheeling charges pending before the High Court.

25. Not satisfied with the order passed by the APERC dated March 22, 2005 in O.P. Nos. 30 to 34 of 2004 for 2005-2006, appeals, being Appeal Nos. 51, 59 to 66, 68,69,70, 71 and 73 of 2005 have been filed before this Tribunal. By interim orders, the operation of the impugned order passed by the APERC, to the extent of wheeling charges, was stayed by this Tribunal subject to payment of wheeling charges by the appellants at the rates fixed by the respective agreements.

26. In January 2006, the transmission distribution licensees by means of separate applications requested the APERC to determine transmission tariff and wheeling charges as part of the distribution tariff for the years 2006-07 to 2008-09. The APERC on March 23, 2006 passed a distribution tariff order in OP 2 to 5 of 2006, whereby wheeling charges for the period of 2006 to 2009 have been determined. These charges were made subject to the outcome of the appeals pending before the Supreme Court. The appellant being aggrieved by the above order passed by the Commission have filed appeals, being Appeal Nos. 170 to 179 and 254 to 261 of 2006.

27. We will first take up Appeal Nos. 170, 171, 172,173, 174, 175,176,177, 178 and 179 of 2006 & Appeal Nos. 254,255, 256, 259, 260 & 261 of 2006 & 51, 59, 66, 68, 69, 70, 72 &73 of 2005 filed by the appellants, who have set up power plants based on renewable sources of energy.

28. We have heard learned Counsel for the parties in these appeals.

29. At the outset it was argued by learned Counsel for the appellants that each of the appellants who have set up plants for generation of electricity from renewable sources of energy have acquired a vested right to enjoy the benefits conferred by the policy of the Government of Andhra Pradesh issued vide GOMs No. 93. He contended that once the power plants were set up and PPAs were entered into fixing the wheeling charges as per the policy decision, it was beyond the competence of the Commission to vary the wheeling charges in purported exercise of the power under the AP Electricity Reform Act, 1998 or the Electricity Act, 2003, especially when the rights created by the policy decision and PPAs were not repealed or taken away by the two Acts. It was also canvassed that assuming without admitting, that the Commission was possessed of the requisite power to determine the wheeling charges, it still could not vary the rate as fixed in the policy decision of the Government of Andhra Pradesh on the principles of promissory estoppel and legitimate expectation. It was further argued that even otherwise the wheeling charges were determined by the Commission on erroneous basis. It was asserted by the learned Counsel for the appellants that arguments raised in respect of considerations which should go into for fixation of wheeling charges were completely ignored by the Commission.

30. On the other hand, it was argued by learned Counsel for the respondents that the incentive scheme (GOMS No. 93) was modified by GOMS No. 112 as a result of which the policy was to remain in force only for three years w.e.f. November 18, 1997 and thereafter wheeling charges were required to be reviewed. It was contended that the appellants who may have set up power projects based on non-conventional energy sources cannot complain of the fixation of wheeling charges by the Commission different from and higher than the wheeling charges specified in the PPAs based on G.O.Ms. No. 93. Learned Counsel for the respondents also canvassed that according to GOMS No. 112, the wheeling charges can be amended or modified. Therefore, there is no illegality attached to the fixation of fresh wheeling charges by the Commission. Learned Counsel for the respondents argued that the appellants do not have vested rights to keep on receiving the incentives and benefits which are subject matter of GOMS No. 93, GOMS No. 112 and PPAs', especially after the coming into force of the Electricity Act, 2003, particularly Section 62(1)(c) thereof, which confers power on the State Commission to fix the tariff for wheeling of electricity.

31. It was further argued that tariff for wheeling of electricity is required to be determined by the Commission as per the provisions of the Electricity Act and its statutory power cannot be controlled by any PPA or the policy of the Government. It was also urged that neither the principle of Promissory Estoppel nor the principle of Legitimate Expectation are attracted to the case in hand. According to learned Counsel Commission determined the wheeling charges on relevant considerations. They also contended that even under the Andhra Pradesh Electricity Reform Act it is the Commission which is empowered to determine the wheeling charges.

32. Learned Counsel for the respondents also submitted that the policy decision, GOMS 93, did not create any rights in the entrepreneurs and even if rights were created, they were not saved by Section 185 of the Electricity Act.

33. We have considered the submissions of learned Counsel for the parties.

34. The fact that the country needs power and that too clean power is beyond dispute. With a view to give fillip to generation, which has not caught up with demand for energy, and to incentivise the use of renewable sources of energy for generation of power, the Government of India issued the guidelines on September 17, 1993. This was followed by policy directives contained in the order of the Government of Andhra Pradesh, being GOMS Nos. 93. The policy directive of the Government of Andhra Pradesh is traceable to Section 78A of the Electricity (Supply) Act, 1948. Undoubtedly the State Government had the requisite competence to frame a policy to incentivise generation. Once the power plants were set up by entrepreneurs to generate power by use of renewable sources of energy, they acquired the rights conferred by the policy decision. These rights got crystallized and vested in the entrepreneurs once they acted on the representations found in the GOMs No. 93. It is also significant to note that PPAs in line with GOMs 93 were entered into by the licensee with the power producers under Section 15(4) of the Andhra Pradesh Electricity Reform Act, 1998.

35. We are clear in our minds that the rights created by the policy decision of 1997, which has a statutory flavour, have not been taken away by the Electricity Act, 2003. There is no mention of these rights in Section 185 of the Electricity Act, 2003, which deals with repeals and savings. The Section does not repeal these rights. It, inter alia, repeals certain enactments and at the same time saves some enactments that are placed in the schedule thereto. It also saves anything done or any action taken or purported to have been taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instruction executed or any direction given under the repealed laws in so far as it is not inconsistent with the provisions of the Act.

36. It is well-settled that whatever rights are expressly saved by the savings provision stand preserved. But from this it does not follow that rights that are not placed in the savings provision stand repealed or extinguished or terminated. Rather rights that accrue before the enactment of a statute are saved and are not taken away unless they are taken away by the statute expressly. Section 6 of the General Clauses Act comes to the rescue of such rights and preserves them in case the repealing enactment or the enactment substituting the earlier legislature does not repeal them expressly. Rights which have accrued are not effaced merely because there is no express provision salvaging those rights under the new statute.

37. In State of Punjab v. Mohar Singh AIR 1955 SC 84, it was held that whenever there is a repeal of an enactment; the consequences laid down in Section 6 of the General Clauses Act will follow unless a different intention appears from the fresh legislation. In the case of a simple repeal, there is scarcely any room for expression of a contrary opinion. In this regard it was observed by the Supreme Court as follows:

> The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests

> an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material....

38. Therefore, following the dictum, the line of enquiry would not be whether the Act expressly keeps alive old rights but it should be whether it manifests an intention to destroy these rights.

39. In Bansidhar and Ors. v. State of Rajasthan and Ors. , the Supreme Court held to the same effect while relying on its earlier decision in Commissioner of Income Tax v. Shah Sadiq & Sons AIR 1987 SCC 1217. In this regard, it observed as follows:

> 28. A saving provision in a repealing statute is not exhaustive of the rights and obligations so saved or the rights that survive the repeal. It is observed by this Court in I.T. Commissioner v. Shah Sadiq & Sons: (SCCp. 524, para 15) ...In other words whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6, General Clauses Act, 1897....

We agree with the High Court that the scheme of the 1973 Act does not manifest an intention contrary to, and inconsistent with, the saving of the repealed provisions of Section 5 (6-A) and Chapter III-B of '1955 Act' so far as pending cases are concerned and that the rights accrued and liabilities incurred under the old law are not effaced. Appellant's contention (a) is, in our opinion, insubstantial.

40. Thus, it appears to us that a saving provision in a repealing statute is not exhaustive of the rights and obligations so saved or the rights that survive the repeal. A vested right is not obliterated by a saving provision in a repealing statute unless it is specifically repealed or there is an indication in the repealing statute that the legislature intended extinguishment of the same.

41. In Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, where the Supreme Court was considering the question whether exemption from tax confers any right on the recipients or is it a mere concessions defeasible by the Government, it was held that exemption from tax given by a valid notification confers an accrued vested right to the recipient and this right continues to be vested in him until altered or taken away by Statute. In this regard the Supreme Court observed as follows:

> 100. We are also unable to agree with Mr. Andhyarujina that exemption from tax is a mere concession defeasible by the Government and does not confer any accrued right to the recipient. Right of exemption with a valid notification issued gives rise to an accrued right. It is a vested right. Such right had been granted to them permanently.

> "Permanence" would mean unless altered by statute. Thus, when a right is accrued or vested, the same can be taken away only by reason of a statute and not otherwise. Thus, a notification which was duly issued would continue to govern unless the same is repealed.

42. The above principle squarely applies to the instant case. The rights of the appellants to claim incentives were created by means of a valid notification of the Government of Andhra Pradesh having a statutory flavour, traceable to Section 78A of the Electricity Supply Act, 1948. These accrued rights of the appellants would continue till they are taken away by the Statute. It is significant to note that neither the Andhra Pradesh Reform Act, 1998, nor the Electricity Act, 2003 has repealed G.O.Ms. No. 93 or the rights of the entrepreneurs.

43. Therefore, the upshot of the discussion is:

> (a) The policy decision (GOMS 93 read with GOMS 112) has a statutory flavour and is traceable to Section 78A of the Electricity Supply Act, 1948;
>
> (b) The policy has created vested rights in favour of the entrepreneurs, who have set up generating stations pursuant thereto, to enjoy the incentives enumerated therein;
>
> (c) These vested rights stand preserved by Section 6 of the General Clauses Act;
>
> (d) The rights created by the G.O.Ms. No. 93, which are reflected in the original PPAs, would continue to operate and govern the rights of the power producers till they are repealed or withdrawn in accordance with law.

44. It was next contended by the learned Counsel for the appellants that going by the policy decision of the Government (G.O.Ms 93) the appellants set up power generation plants, thereby altering their position. According to the counsel for the appellants, G.O.Ms. No. 93 did not restrict its operation for a fixed period of time. It was in the light of the G.O.Ms. No. 93 that the appellants and the licensees entered into PPAs fixing the wheeling charges. According to him, the rates prescribed in the PPAs bind the parties and cannot be varied by the Commission. It was submitted that the appellants, relying on the GOMs 93, have altered their position by setting up power plants at huge costs and therefore, are entitled to invoke the 'Doctrine of Promissory Estoppel'.

45. The learned Counsel for the respondents, however, submitted that the 'Doctrine of Promissory Estoppel' is not applicable as it cannot be invoked against the statute. They contended that the Electricity Act, 2003 confers power on the Commission to fix the wheeling charges and this being a statutory power it cannot be defeated by the 'Principle of Promissory Estoppel'.

46. We have pondered over the submissions of the learned Counsel for the parties. It is well settled that the 'Doctrine of Promissory Estoppel' applies where a person alters his position in view of the promise made by the State or its functionaries. It has been evolved by the courts on the principle of equity to avoid injustice and it operates even in the legislative field.

47. In Robertson v. Minister of Pensions (1949) IKB 227 Denning J while formulating the principle observed thus:

> ...If a man gives a promise or assurance which he intends to be binding on him and to be acted upon by the person to whom it is given, then once it is acted upon, he is bound by it.

48. In RCI Power Ltd., Chennai v. Union of India and Ors. , the Andhra Pradesh High Court while examining G.O.Ms. No. 93 dated November 18, 1997 held that PPAs entered into by the entrepreneurs setting up the plants based on renewable sources of energy on the one hand and the board on the other hand are binding on the successors of the Board. The decision was inter alia, rendered on the basis of the principle of promissory estoppel. In this regard, the Andhra Pradesh High Court observed as follows:

> Keeping the above principles, if we look at the facts of the case, way back in 1991 the Government for reasons which were already dealt with elaborately, while dealing with the issue "whether Regulatory Commission constituted under the State Act is having power to levy wheeling charges" decided to invite private enterprises to establish power generation units by offering several incentives, which are expected to sell the power generated by these companies to the State owned Electricity Boards initially. Subsequently, they were even allowed to sell the power to identified consumers with the consent of the State Government. In fact, the Government of India in Notification dated 30th March, 1992 issued under Section 43A(2) of the Electricity Supply Act, 1948 prescribing guidelines for fixation of tariff for sale of electrical energy by the Generating Companies either to the Board or to the other persons. Under this notification not only a two-part tariff structure was provided for recovery of the annual fixed charges with 16% return on equity and at 68.5% of the Plant Load Factor. Under Clause 3.1 of the said notification, the tariff for the sale of electricity by a Generating Company to a Board may also be determined in deviation of the norms, other than the norms regarding operation and Plant Load Factor. To give effect to the National Policy, both Electricity Act as well as Supply Act were amended by Act 50 of 1991, dated 27th September, 1991 specified in this notification subject to the conditions specified therein. Falling in line with the national policy of allowing private sector to establish power generation plants, the Government of Andhra Pradesh issued G.O.Ms. No. 116, Energy (Power-1) Department, dated 5.8.1995 for establishment of Mini Power Plants of capacity of 30 MW, in private sector in industrial load centres. As per the G.O. the Government opted for establishment of Mini Power Plants of 30 MW capacity to avoid delay in getting permissions from the Central Electricity Authority and nodal agency etc., and to see that the power plants comes into operation quickly without much delay. Clause 6 of the G.O. says that wheeling of power will be made through A.P. State Electricity Board at the request of the generator at a rate to be finalized on mutual agreement. Clause-9 says that this scheme will not be subject to any binding procedure. The policy of the Government will be published for the benefit of the prospective

generators and consumers. Subsequently in consultation with the then Electricity Board the Government issued G.O. Ms No. 152, Energy (Power-1) Department, dated 29.11.1995 whereunder they have categorically stated that the power plants have to pay wheeling charges in kind as per the rates specified in Clause-4. It is also made clear in Clause 8 of the G.O. the Mini Power Plant developers of the power shall necessarily sell power to the consumers above the Board's High Tension tariff rate. We have already held that these G.Os were issued under Section 78-A of the Supply Act and all the agreements entered into between the Board and Generating Companies are statutory agreements. In fact, under the agreements entered into the Board has given a warranty that it is having power and competence to enter into the memorandum of understanding. We have also extracted various provisions of the Act, the Transfer Rules relating to Transfer Schemes in favour of A.P. TRANSCO and DISCOMS and held that all the existing contracts entered into by the Electricity Board and the liabilities incurred by it are saved and the successor-in-interest (i.e.) A.P. TRANSCO as well as the Commission are bound to follow the same. In fact, it was not their case that there is any provision either in the Act or in the Rules made thereunder that the earlier agreements were annulled or the Commission was given power to annul the agreements. But unfortunately the Commission by holding that its powers are not only adjudicatory, but pro-active and it is not bound by the policy directions given by the Government as well as the agreements entered into by the then Electricity Board. From the above, it is seen that the Government as well as the Electricity Board made not only several promises, but also entered into agreements with the Generating Companies that giving effect to the promises made by them, whereunder the period of agreement was also mentioned in all the agreements. That apart, we have also held that the State Commission constituted under Electricity Regulatory Commission Act, 1998 is alone competent to fix the wheeling charges payable by the Generating Companies for using the transmission lines of the licensee. We have also held that under the provisions of the Reform Act, the Commission is not competent to reopen the concluded contracts and revise the wheeling charges as the same falls in the realm of policy matters on which the Government alone is competent to take decisions and the role of the Commission is only advisory. Hence, we have no hesitation in holding that the principle of promissory estoppel applies to the facts of the case with all the force and the Commission as well as the licensee or the State Government wherever it relates to general policy matters under Section 56(3) (I) and (V) of the Reform Act have stepped into the shoes of the Board are pinned down to the promise held out by them since the same do not contravene the provisions of any statute. On the other hand, the promise held out by the authorities is protected by the statute and they were made binding on the successors-in-interest under the provisions of the Reform Act and the Transfer Scheme Rules.

49. In A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala , which is also a decision in point, the Supreme Court held as follows:

> 15. Applicability of doctrine of promissory estoppel in a case where entrepreneur alters his position pursuant to or in furtherance of a promise made by the State to grant exemption from payment of charges on the basis of current tariff is not in dispute. The State made its policy decision.

The said policy decision could be made by the State in exercise of its power under Section 78-A of the Electricity (Supply) Act, 1948. The Electricity Board framed tariff for supply of electrical energy in terms of Sections 46 and 49 of the 1948 Act. While framing its tariff, the Board could take into consideration the policy decision of the State.

16. It was, therefore, permissible both for the State to issue a policy decision and for the Board to adopt the same in exercise of their respective statutory powers under the 1948 Act.

17. When a beneficent scheme is made by the State, the doctrine of promissory estoppel would undoubtedly apply.

50. Again in Mahabir Vegatable Oils (P) Ltd. v. State of Haryana , the Supreme Court held that an entrepreneur, who sets up an industry in a backward area in furtherance of the promise made by the State, is entitled to receive the State sanctioned benefits and the doctrine of Promissory Estoppel operates even in the legislative field. In this regard it was observed as follows:

> 25. It is beyond any cavil that the doctrine of promissory estoppel operates even in the legislative field. Whereas in England the development and growth of promissory estoppel can be traced from Central London Property Trust Ltd. v. High Trees House Ltd. (1947) IKB 130 in India the same can be traced from the decision of this Court in Collector of Bombay v. Municipal Corpn. Of the City of Bombay . In that case the Government made a grant of land (which did not fulfil requisite statutory formalities) rent free. It, however, claimed rent after 70 years. The Government, it was opined, could not do so as they were estopped. It was further held therein that there was no overriding public interest which would make it inequitable to enforce estoppel against the State as it was well within the power of the State to grant such exemption.

51. In Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO (supra), it was, inter alia, held by the Supreme Court that where entrepreneur changes his position relying upon the promise or assurance of the State, it indisputably creates a right in him, which is preserved by the doctrine of Promissory Estoppel and resultantly gives rise to cause of action in his favour. On review of several decisions, the Supreme Court concluded as follows:

> We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved. In view of the application of doctrine of promissory estoppel in the case of the appellants, their right is not destroyed and in that view of the matter although the scheme under the impugned Act is different from the 1939 Act and the 1962 Act and furthermore in view of the phraseology used in Section

20(1) of the 2003 Act, right of the appellants cannot be said to have been destroyed. The legislature in fact has acknowledged that right to be existing in the appellants.

52. Applying the dictum laid down in the aforesaid decisions to the instant case, the rights of the appellants to avail the incentive in the form of fixation of wheeling charges in accordance with the policy decision of the Government of Andhra Pradesh, issued vide G.O.Ms. No. 93 of 1997, stand preserved and protected by the principle of promissory estoppel. The Commission failed to properly appreciate the following aspects of the matter:

(i) The policy decision of the Government of Andhra Pradesh, being GOMs 93, was meant to induce entrepreneurs to set up plants for generating electricity by utilizing renewable sources of energy;

(ii) Accordingly power plants were set up by entrepreneurs;

(iii) Rights conferred on the entrepreneurs under the policy decision have not been modified, repealed or taken away by the statute or the Government.

53. It was argued by the learned Counsel for the respondents that the parties had entered into contracts and in case of any breach of a contract by the licensees, the aggrieved parties can claim damages but in no case the principle of Promissory Estoppel can be invoked by them. Reliance was placed upon the Judgment of the Calcutta High Court in Smt. Kalpana v. Co-operative Bank Ltd. AIR 2005 Calcutta 1995.

54. We may notice that a similar plea was urged before the Supreme Court in the case of Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd. . In that case the appellant, Gujarat State Financial Corporation had entered into a contract with the respondent, Lotus Hotels Pvt. Ltd. whereby the appellant agreed to advance the loan of Rupees 30 lakhs to the respondent. The respondent acting on the undertaking of the appellant to advance the loan proceeded to set up a Four Star Hotel at Baroda. On the failure of the appellant to carry out its part of the obligation, the respondent successfully invoked the principle of promissory estoppel. Notwithstanding the fact that the parties had entered into an agreement, the Supreme Court held that the principle of promissory estoppel would come into play as the respondent had acted upon the solemn promise of the appellant to advance the loan. In this regard, the Supreme Court observed as follows:

8...It is too late in the day to contend that the instrumentality of the State which would be 'other authority' under Article 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. It was not disputed and in fairness to Mr. Bhatt, it must be said he did not dispute that the Corporation which is set up under Section 3 of the State Financial Corporations Act, 1951 is an instrumentality of the State and would be 'other authority' under Article 12 of the Constitution. By its letter of offer dated July 24,1978 and the subsequent agreement dated February 1, 1979 the appellant entered

into a solemn agreement in performance of its statutory duty to advance the loan of Rupees 30 lakhs to the respondent. Acting on the solemn undertaking, the respondent proceeded to undertake and execute the project of setting up a 4 Star Hotel at Baroda. The agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up.On its solemn promise evidenced by the aforementioned two documents, the respondent incurred expenses, suffered liabilities to set-up a hotel. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Acting on the promise of the appellant evidenced by documents, the respondent proceeded to suffer further liabilities to implement and execute the project. In the backdrop of this incontrovertible fact situation, the principle of promissory estoppel would come into play. In Motilal Padampat Sugar Mills Co. (P) Ltd. v. State of U.P. , this Court observed as under:

The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not.

9. Thus the principle of promissory estoppel would certainly estopped the Corporation from backing out of its obligation arising from a solemn promise by it to the respondent.

55. Keeping in view the aforesaid principle laid down by the Supreme Court, the plea of the respondents is not tenable. It must not be forgotten that the PPAs (agreements) executed by the parties were based on the policy directives of the Government contained in GOMS 93. The incentives made available to the power producers recorded in the PPAs were mirror images of incentives listed in the policy directives of the Government (GOMS 93). The dealings between the appellants and the licensees are controlled by and have taken place on the basis of the policy directives. Therefore, the incentives made available to the power producers in the PPAs have no separate existence from the incentives given in the policy directives. The incentives mentioned in the PPAs draw their life and breath from GOMS 93. The representations for giving incentives to entrepreneurs made in GOMS 93 create promises which the entrepreneurs can enforce on the principle of promissory estoppel even when the same incentives are repeated in the agreements. These PPAs cannot be re-opened by the Commission.

56. The protection of the doctrine of Promissory Estoppel must be extended to the appellants, otherwise no one will act on the policy decision of the State promising benefits and incentives to those setting up power plants, which are extremely vital for the country. The country needs quantum

jump in generation to maintain and sustain economic growth. The bogey that Promissory Estoppel does not apply in the statutory or legislative field also stands exploded by the decision of the Supreme Court in Mahabir Vegetable Oils (P) Ltd. Case (supra). Therefore, entrepreneurs who acted on the assurance of the State that they will receive incentives for setting up of a generation plants and ended up by installing the same at huge costs, must be allowed to successfully invoke the doctrine of Promissory Estoppel as otherwise it will not only be highly inequitable and unjust for them but it will also not be in the interest of the electricity sector as no one will invest in generation, distribution and transmission of electricity in furtherance of the promises of incentives extended by the Government.

57. It should, however, be clearly understood that we are not holding that the Government in exercise of its executive power, when not restricted by Statute cannot change its earlier policy on relevant grounds. It is well settled that the Government for discernable reasons can withdraw a policy and in its place frame a new policy. This position was explained by the Supreme Court in Mahabir Vegetable Oils (P) Ltd. v. State of Haryana (supra), wherein relying on the decision of the Supreme Court in State of Rajasthan v. J.K. Udaipur Udyog Ltd. , it was held as under:

> 35. The said decision itself is an authority for the proposition that what is granted can be withdrawn by the Government except in the case where the doctrine of promissory estoppel applies. The said decision is also an authority for the proposition that the promissory estoppel operates on equity and public interest.

58. Thus, the State has discretion to alter its policy. The courts cannot interfere with the policy decision unless it is found that the decision to change the policy is arbitrary, unreasonable and unfair. In the instant case, the State Government has not changed or withdrawn its policy of incentivising the generation through renewable sources of energy. The policy directives contained in GOMs are also not inconsistent with the expressed or implied provisions of any statute. Rather the policy is in conformity with the preamble to the Electricity Act, 2003 and Article 48A of the Constitution.

59. Learned Counsel for the respondents have also relied on the decision of the Supreme Court in Union of India and Anr. v. International Trading Co. and Anr. for the proposition that promissory estoppel does not apply where the earlier policy has been changed by the Government. In the cited case, the respondents were granted permits under the provisions of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 and the Maritime Zones of India (Regulation of Fishing by Foreign Vessles) Rules, 1982 in the Exclusive Economic Zone of India. According to the permit, the respondents were authorized to obtain on lease and operate foreign deep-sea fishing vessels as per the terms of the Act and the Rules for a fixed period of time. After the expiry of the permits, the respondents applied for their renewal but the same were not renewed by the Government of India. The decision of the Government of India was successfully challenged by the licensee before the Delhi High Court inter alia, on the principle of promissory estoppel and legitimate expectation. The Supreme Court in appeal by the Union of India held that the doctrine of promissory estoppel and legitimate expectation cannot come in the way of public interest as it prevails over the private interest. The Supreme Court found that the permits were not renewed in

view of the conscious policy decision taken by the Government pursuant to the Murari Committee Report, which inter alia, recommended prohibition of renewal, extension of existing licences and issue of permits in future for fishing to jointventure/charter/lease/test fishing vessels. In this regard, the Supreme Court held as follows:

> 12. Doctrines of promissory estoppel and legitimate expectation cannot come in the way of public interest. Indisputably, public interest has to prevail over private interest. The case at hand shows that a conscious policy decision has been taken and there is no statutory compulsion to act contrary. In that context, it cannot be said that the respondents have acquired any right of renewal. The High Court was not justified in observing that the policy decision was contrary to statute and for that reason direction for consideration of the application for renewablewas necessary. Had the High Court not recorded any finding on the merits of respective stands, direction for consideration in accordance with law would have been proper and there would not have been any difficulty in accepting the plea of the learned Counsel for the respondents. But having practically foreclosed any consideration by the findings recorded, consideration of the application would have been a mere formality and grant of renewablewould have been the inevitable result, though it may be against the policy decision. That renders the High Court judgment indefensible.

60. It is obvious that the aforesaid decision was rendered by the Supreme Court in view of the fact that there was a policy decision on the basis of which the permits were not renewed and legitimacy of policy was not questioned. This being so, principle of promissory estoppel was held to be inapplicable. In the instant case, the State Government has not resiled and withdrawn from the policy to incentivise setting up of the power plants based on renewable sources of energy. Therefore, the appellants who had set up the plants as per the policy of the Government have rightly claimed that the incentives promised by the Government are required to be made available on the principle of doctrine of promissory estoppel.

61. Our attention was drawn by the learned Counsel for the respondents to a letter dated June 25, 2002 of the Principal Secretary to the Government of Andhra Pradesh, Energy Department to its counsel in connection with the writ petition filed before the Andhra Pradesh High Court to the effect that it is open to the APERC to review the wheeling charges after coming into force of the Andhra Pradesh Electricity Reform Act, 1998. It was urged that the Government of Andhra Pradesh has changed its earlier policy. We cannot subscribe to this view. This privileged communication between the client and the counsel cannot be construed as a policy decision of the Government, withdrawing its earlier policy (GOMS 93). The communication at best can be treated as the view of a particular officer of the Government.

62. Learned Counsel also relied upon the decision of the Supreme Court in Arvind Industries and Ors. v. State of Gujarat and Ors. . It was claimed by the industry that the Government having given concession to new industry, cannot be allowed to withdraw the same on the principle of promissory estoppel. It was found by the Court that there was nothing in the original notification to show that any promise or assurance was given to the industry. This being so, the decision on facts is

distinguishable from the case in hand.

63. It is not necessary to refer the other decisions cited by the learned Counsel for the respondents as they do not advance the case of the respondents.

64. It also needs to be highlighted that the MNES Policy of the Government of India was framed keeping in view the concerns of the world community for environment and sustainable development and other related topics. This concern of the World Community is reflected in several treaties and conventions. The 1992 United Nations Framework Convention on Climate Change at the Earth Summit at Rio related to the ultimate objective of stabilizing the atmosphere. This was followed by Kyoto Protocol, a treaty intended to implement the objectives and principles agreed in the 1992 United Nations Framework Convention on Climate Change.

65. It is well known that unsustainable practices all over the world in the production of energy have led to degradation of environment. For a long time attention was not paid to the effect of energy production and consumption on environment. The methods of production of energy were not seen to be of much significance for the advancement of sustainable development. But fortunately it has dawned upon the world community that conventional sources of energy have led to global warming.

66. The Parliament being conscious of the importance of sustainable development, highlighted in the preamble to the Electricity Act, 2003 the fundamental idea of pursuing environmentally benign policies in developing the electricity sector. The echo of this thought is also reflected in Section 61 (h) of the Electricity Act, 2003, which inter alia, mandates that the tariff regulations are to be framed in such a manner that generation of electricity from renewable sources of energy receive the requisite fillip.

67. The concern of the Government of India is also reflected in the National Electricity Policy notified on Feb., 12, 2005, in compliance with Section 3 of the Electricity Act, 2003. Paras 5.2.20 and 5.12.1 of the policy address the issue relating to non-conventional energy sources. Para 5.2.20 of the National Electricity Policy states that feasible potential of non- conventional energy resources, mainly small hydro, wind and bio-mass would also need to be exploited fully to create additional power generation capacity. It also states that with a view to increase the overall share of non-conventional energy sources in the electricity mix, efforts will be made to encourage private sector participation through suitable promotional measures. Similarly, para 5.12.1 of the National Electricity Policy states to the effect that non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy and for this purpose, efforts need to be made to reduce the capital cost of projects based on nonconventional and renewable sources of energy. It also points out that the cost of energy can be reduced by promoting competition within such projects. At the same time, it emphasises that adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

68. As seen from above the thrust of the National Electricity Policy is upon the use of non-conventional sources of energy to augment generation and for production of green energy. In

fact the electricity policy as also the MNES policy, the preamble to the Electricity Act, 2003 and Section 61(h) thereof and GOMS 93 are in tune with the provisions of Article 48A and 51A (g) of the Constitution and treaties, conventions and protocols on the issues relating to environment.

69. In order to support conservation of environment, Constitution was amended by 42nd Amendment Act, 1976. By virtue of the amendment, Articles 48A and Article 51A(g) were inserted in the Constitution. Article 48A, interalia, provides that the State shall endeavour to protect and improve the environment. Similarly Article 51A(g), inter alia, casts a duty on every citizen of India to protect and improve the natural environment. Articles 48A, Article 51 A(g), the Preamble to the Electricity Act, National Electricity Policy, MNES policy and GOMS 93 reflect the concern for ecology. This concern stems from the ill effects of pollution and global warming. Since the environment needs to be protected, adequate and pre-empting measures are required to be taken to incentivise the generation of power through renewable sources of energy. But in case the original PPAs are re-opened for fixing higher wheeling charges than what is provided in the G.O.Ms. No. 93., there is bound to be a set back to the generation of power through renewable sources of energy.

70. It was contended by learned Counsel for the respondents that after a period of 3 years from the date of issue of G.O.Ms. No. 93, the incentives could be modified, varied & even done away with as per GOMs 112. We cannot accept the construction placed by the counsel for the respondents on GOMs 93 and 112.

71. According to GOMs 112, the operation of the incentive scheme was required to be supervised for a period of 3 years by the State Government and at the end of 3 years period, the Electricity Board was to come up with suitable proposals for review for further continuance of the incentives in a suitably modified manner to achieve the objectives of promotion of power generation through non-conventional sources. The words "to achieve the objectives of promotion of power generation through non-conventional sources" contained in GOMs No. 112 are important. Before tinkering with the incentives, the APERC ought to have considered whether objectives of production of generation through non- conventional sources has been achieved or not. The APERC has failed to address the issue. While increasing the wheeling charges it proceeded on grounds which were not germane to the MNES policy of the Government of India, National Electricity Policy and GOMS 93. The APERC ought to have looked at the nature and objective of the MNES policy, National Electricity Policy and the policy directives of the Government of Andhra Pradesh (GOMs No. 93). It seems to us that the whole object and purpose of the incentives scheme including GOMs No. 93 and 112 was to promote generation of power by utilization of renewable sources of energy. The policy serves the following purpose:

i) Production of clean energy;

ii) Augmentation of generation;

iii) Conservation of conventional sources of energy; and

iv) Conservation of environment.

72. The purpose of achieving the objectives of promotion of power generation through non-conventional sources cannot be achieved by taking away the incentives which were granted to the entrepreneurs for inducing them to set up the plants. The incentives could be modified only for giving impetus to or for achieving the objectives of promotion of power generation by means of renewable/non-conventional sources of energy. There is nothing on record to show that the Commission applied its mind to the question whether the objectives of promotion of power generation through non-conventional sources has been achieved. APERC fixed the wheeling charges dehors such considerations. The basic requirements of the G.O.M. No. 93 read with GOMS No. 112 have been ignored by the Commission.

73. Therefore, when the GOMs No. 112 provides for review of the incentive scheme at the end of three years period for further continuance of the incentives or for suitable modification thereof to achieve the objectives of promotion of power through non-conventional sources, it does not mean that the incentives could be done away with or diluted before the objectives are fulfilled. The objective of the GOMs Nos. 93 and 112, National Electricity Policy, MNES directives, Preamble of the Act of 2003 read with Section 61(h) require promotion of power generation through non-conventional sources. In the context of the overall policy and the constitutional requirements, doing away or dilution of the incentives cannot be countenanced in law without coming to the conclusion that the purpose for which GOMs 93 was issued has been achieved.

74. The hike in the wheeling charges of power generated by plants based on renewable sources of energy does not serve the purpose of promotion of power generation through non- conventional sources. Setting up of power plant requires heavy investment and it has a long gestation period. It is also well known that till the technologies are improved, the cost of production of power through renewable sources of energy could be higher than the production of power through conventional sources of energy. The impugned increase in wheeling charges of energy produced by renewable sources is against the preamble and Sections 61(h) of the Electricity Act, the National Electricity Policy, GOMs 93 & 112 of the Government of Andhra Pradesh, MNES policy and thrust of Article 48A of the Constitution.

75. In Rithwik Energy Systems Ltd. etc. v. Transmission Corporation of Andhra Pradesh Ltd. etc. (Appeal Nos. 90,91,92,93,108,109,110 and 111 of 2006, decided on September 28, 2006), it was held by this Tribunal that it was the bounden duty of the Regulatory Commissions to incentivise the generation of power through renewable sources of energy. It was further held that PPAs can be re-opened only for the purpose of giving boost to non-conventional energy projects and not for curtailing the incentives. Similarly in the same context, it was held in Small Hydro Power Developers Association and Ors. etc. v. APERC and Ors. etc.(Appeal Nos. 1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 48, 49, 50, 52, 58, 67 and 80 of 2005, decided on June 2, 2006) that the Regulatory Commission cannot over reach the policy directions issued by the State.

76. In Chhattisgarh Biomass Energy Developers Association and Ors. v. Chhattisgarh S.E.R.C. and Ors. 2007 APTEL 711, it was observed that where Power Purchase Agreements between distribution licensees and the generating companies utilizing renewable sources of energy are in conformity with MNES guidelines or various policy guidelines, the agreements are not to be tinkered with.

77. The Commission has not considered the impact of the aforesaid decisions, the preamble and Section 61(h) of the Electricity Act, 2003, the National Electricity Policy, MNES guidelines, Article 48A and 51A(g) of the Constitution and the aspect relating to protection of environment, which has been the subject matter of various treaties and conventions.

78. It must be emphasized that initially in order to attract investment in setting up generation stations based on renewable sources of energy, some incentives need to be given to entrepreneurs so that more and more power plants are set up and generation is augmented. Large scale production of green energy would be a significant step towards reducing the green house gas emissions which are responsible for Global warming. Global warming is a huge challenge. One single largest factor contributing to Global warming is burning of hydro carbons. This is threatening the very existence of mankind. This is a matter of common concern. Every being has an equal stake in the environment of this Planet. Everyone shares a common destiny and need to face the reality of steady deterioration of ecology due to senseless and harmful activities of human beings that have caused grievous injuries to the environment. These inflictions of injuries still go unabated. War against such abominable activities must be fought and won. It is mother of wars and there cannot be a bigger fight than the one for survival of life, saving of costal areas, agricultural fields and health of the people and stability of world economy. According to one estimate, if we have to contain global warming, about 25 billion tones of carbon emissions over the next 50 years need to be eliminated. The reports of the Intergovernmental Panel on Climate Change (IPCC), which was set up in the year 1988 by the World Meteorological Organisation and the United Nations Environment Programme, to evaluate the risk of climate changes, in no uncertain terms point out that Emissions of erosols and green house gases: Co2, methane, CFCS and nitrous Oxide have continued to increase due to human activity resulting in warming of climate system. Fourth Assessment report estimates that world temperature could rise between 1.1 and 6.4oc during the 21st Century. In case this happens the effect would be catastrophic. In this scenario there is urgent need to stimulate generation of electricity through renewable sources of energy. The Regulators must do their bit by ensuring that at least the incentives which were promised by the policy directives of the Government of Andhra Pradesh (GOMS 93) are made available to the generators so that large number of power plants for generating electricity by the use of renewable sources can come up. This shall serve the objectives of sustainable development and will be a step, may be a small one, towards the right direction.

79. The APERC in its written submissions filed before us has felt more concerned with slightly higher tariff which a consumer may have to pay in case wheeling charges as reflected in the policy decision of the Andhra Pradesh Government (GOMs 93) are adhered to. Perhaps it may be correct that any cap on wheeling charges as fixed in the policy decision will marginally increase the electricity cost for the consumers. But in the long run when more and more plants based on renewable sources are set up because of the incentives, the price of electricity is liable to come down due to competition amongst the generators and enhanced availability of power. Besides tariff hike, which may result from keeping the wheeling charges at the rate prescribed in the PPAs for incentivising production of green energy will be too insignificant as compared to environmental and health costs which are incurred by burning hydro carbons for producing power, when power could be generated by use of renewable source of energy.

80. The APERC and the Transmission & Distribution companies have relied upon the provisions of Sections 26, 57, 58 read with VI Schedule and Section 59 of the Electricity (Supply) Act, 1948 as also Section 62(1)(c) of the Electricity Act, 2003 in support of the submission that APERC is empowered to regulate wheeling charges. But does it mean that MNES policy, policy decision of the Government of Andhra Pradesh (GOMs 93), the environmental concerns or the principles of promissory estoppel are not required to be adhered to by the Commission while considering the issue relating to wheeling charges? The answer is clear that it is bound to. Though the Commission has the power to regulate wheeling charges under Section 61(1)(c) of the Electricity Act, 2003, it is not obliged to fix wheeling charges at rates different than the policy decision. The Commission ought to have appreciated that the Government for promotion of generation of green energy had fixed the wheeling charges for giving fillip to generation of power based on renewable sources of energy. The Commission does not enjoy unguided and arbitrary power to regulate wheeling charges without appreciating the above aspect of the matter, the PPAs executed by the parties in accordance with GOMs 93 and the environmental concerns. It cannot be disputed that the threat of green house gases has not reduced. Therefore, so far the object of GOMs 93 has not been fulfilled. In the circumstances, the Regulatory Commission needs to encourage generation based on renewable sources of energy in the interest of environment and conservation of conventional sources of energy. It is time to act now for everyone, more so for Regulators. Otherwise it may be too late as there is a chance of environment being damaged irreversibly. It must be appreciated that burning of hydro carbons at the present rate may cripple the nature's capacity to maintain ecological balance, which may disturb the peace in the various aspects of nature. As long as man maintains peace with nature, he can survive. Our seers were conscious of the fact that desecration and pollution of environment will be destructive of man himself. Therefore, Aatharvaveda carries a prayer for maintaining peace in the various aspects of nature:

(i) Let there be peace in all directions;

(ii) Let there be peace in ether ('Antriksha');

(iii) Let there be peace in region of earth ('Prithvi');

(iv) Let there be peace in water ('Jal');

(v) Let there be peace in medicinal herbs; (vi) Let there be peace in vegetation;

(vii) Let there be peace in God;

(viii) Let there be peace in places;

(ix) Let there be peace in creations;

(x) Let there be peace - uninterrupted, only peace and ever lasting peace and profound peace.

81. In order to establish peace with the nature, various countries, of which Germany is in the forefront, are setting up plants based on renewable and non-conventional sources of energy. Between 1990 and 2005, Germany's total green house emissions have declined by 18%. This great performance is, inter alia, due to setting up plants based on renewable sources of energy. It has also set up the largest bio-gas plant in the world. It is also in the process of setting up wind mills of the size of foot ball fields. It is also producing solar power in a big way. Since it is difficult to store electricity, it is storing bio-gas. In the event of the sky being overcast and the sun not being strong, supply of electricity is maintained by burning stored bio-gas. About 2, 50,000 Germans are employed in the generation of green energy. Germany has proved that protection of ecology and economic prosperity are not opposing concepts and by and large are dependent on each other. We can replicate this example by giving adequate incentives for generation through renewable sources of energy.

82. The outcome of the aforesaid discussion may be summed up as follows:

(1) the principle of Promissory Estoppel applies to the cases of the appellants who have set up power plants in line with the policy of the Government;

(2) The doctrines of Promissory Estoppel has been rightly invoked by such appellants;

(3) Though the Commission has the power to regulate wheeling charges, it was necessary for it to address the question whether it was necessary to regulate the wheeling charges. This question was required to be answered with reference to yet another question whether or not the objectives of GOMs 93 have been achieved. Since these objectives have not been fulfilled, the wheeling charges fixed by the GOMs 93 cannot be altered;

(4) The Commission lost sight of the spirit behind GOMs 93 and 112 while interpreting them;

(5) It could not have been the intention of GOMS 112 to review the incentives after expiry of the period of three years with a view to dilute or withdraw the incentives before the objectives of GOMs 93 are satisfied;

(6) GOMs 112 when examined in the context of sustainable development, which was the basic reason for the issuance of GOMs 93, clearly indicates that the incentives can be reviewed only with a view to give further impetus to generation of power through renewable sources of energy;

(7) By increasing the wheeling charges surely generation through renewable sources of energy shall suffer and the Commission ought to have given due weight to this aspect of the matter.

83. It was submitted by the learned Counsel for the respondents that in certain cases original PPAs were modified by the execution of fresh PPAs, which allowed wheeling charges to be modified, altered or revised by the Commission and therefore appellants are not right in contending that the Commission did not have the jurisdiction to modify, alter or revise the wheeling charges. We have considered the submission of the learned Counsel for the respondents. We have already held that policy directions issued by GOMs 93 cannot be altered or modified even after a period of three years till the objectives of GOMs 93 are realized. Licensees are placed in a dominant position and can easily prevail upon small power producers utilizing renewable sources of energy to agree to the modification of the PPAs. These entrepreneurs have no real say in the matter and in case they fail to sign on the dotted lines, the licensees will not purchase the power produced by them resulting in unpalatable consequences which will effect the viability of their plants.

84. It was argued by the learned Counsel for the appellant that even if it is held that the wheeling charges can be altered, modified or revised by the Commission, the impugned order is still liable to be set aside as the Commission has not considered the various relevant points, such as:

(i) The generating plants using renewable sources of energy are required to be viewed as separate generation systems for local area of consumption as and when connected to the grid. The energy is consumed primarily in the respective local area leading to reduction in T&D losses;

(ii) The inter-state transmission cost is required to be taken as part of power purchase cost and not part of the cost of intra-state transmission for the years 2004-2005 and 2005-2006;

(iii) The network cost for the years 2004-2005 and 2005-2006 is not to be determined by treating entire distribution system as a integrated one and the cost of the network not utilized for wheeling purposes ought not to be included;

(iv) The generation of electricity By-mini-hydel projects is neither firm nor constant and varies from season to season, therefore, it should not to be calculated on the basis of kVA per month etc. We agree with learned Counsel for the appellants that these submissions and other relevant submissions are required to be considered by the Commission.

85. In the circumstances, the appeals filed by the appellants who have set up power plants using renewable sources, being appeal Nos. 170, 171, 172,173, 174, 175,176,177, 178 and 179 of 2006 & Appeal Nos. 254,255, 256, 259, 260 & 261 of 2006 & 51, 59, 66, 68, 69, 70, 72 &73 of 2005 have to be allowed. Appeal Nos. 257, 258/06 & Appeal Nos. 60,61, 62, 63,64, 65 and 71/05

86. The appellants in these appeals are using gas for generating electricity. Incentives including wheeling charges in respect of gas based plants and mini power plants using gas as a fuel are basically governed by the policy decision of the Government of Andhra Pradesh dated March 9, 1998 and March 29, 1995 respectively. These will apply to those of the appellants who have set up power

plants pursuant to the aforesaid policy directives of the Government. Such of the appellants would sail in the same boat as the appellants of the other set of appeals, as the principles of promissory estoppel will apply. It appears to us that the appellants in Appeal Nos. 60, 61 and 64 of 2005 may be using gas for production of electricity but plants don't seem to have been set up before the aforesaid policy decision. But it is for the Commission to determine whether the plants based on gas were set up before the policy decision of March 29, 1995 and March 9, 1998. The Commission also needs to consider the submissions detailed at para 84 of this Judgment. Accordingly, these appeals are also liable to be allowed.

87. Accordingly, appeals are hereby allowed and the impugned orders passed by the Commission are set aside. The matters are remitted to the Commission for being considered and decided afresh in the light of the observations made by us. It will be open to the parties to raise before the Regulatory Commission such submissions as may be permissible in law.

88. No costs

89. Appeals and IA disposed of.